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THE OFFICE OF ADMINISTRATIVE HEARINGS

ARTHUR L. BROWN†

In January, 1941, in less turbulent days, the Attorney General's Committee on Administrative Procedure, after nearly two years of investigation, submitted a well-considered report recommending certain changes looking toward improvement in federal administrative procedure.¹ One of the important recommendations of that committee was that the adjudicating function be separated from other administrative activities.² The administrative method of dealing with controversies had been sharply criticized on the ground that it merged the functions of prosecutor, judge, and jury, thereby disregarding the familiar principle that no man should be a judge in his own cause. Although the allegations were far more sweeping than the actual facts warranted,³ it was felt by the committee that the creation of separate hearing commissioners within an agency, insulated from the rest of the agency, would insure that impartiality which is, and should be, the keystone of the administration of justice.

The Office of Price Administration was the first federal agency to put into operation on a large scale many of the improvements suggested by the Attorney General's Committee. On February 8, 1943, there was created in that agency an Office of Administrative Hearings empowered to determine whether a person had violated the rationing regulations, and, in proper cases, to issue suspension orders for such violations.⁴ This office is headed by a hearing administrator in Washington, who has a small staff to assist him. In addition, in each of the eight regional offices throughout the United States there is a chief hearing commissioner with one or more associate hearing commissioners. The chief function of the Office of Administrative Hearings is to maintain an efficient and impartial administrative mechanism for the orderly determination of charges of violations of rationing regulations and to insure a complete separation of prosecution from adjudication. In all suspension order proceedings, the Office of Administrative Hearings

†The expressions of opinion herein contained are those of the author, and may not therefore be represented as necessarily reflecting either official Office of Price Administration opinion or the opinion of the Board of Editors of the QUARTERLY.

*All references to administrative decisions, unless otherwise noted, are to the decisions of the hearing administrator.

¹*Final Report of the Attorney General's Committee on Administrative Procedure* (1941) United States Government Printing Office, Washington, D. C.

²*Id.* at 55 *et seq.*

³GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* (1941) 16 *et seq.*

⁴General Order No. 46, 8 *FED. REG.* 1771 (1943).

preserves this complete separation of functions and authority from the Enforcement Division of the Office of Price Administration. When this organization was set up, it was believed that by its operation suspension order proceedings would be conducted by competent officials, acting in as impartial a manner as human nature would permit. Such an organization, it was felt, divorcing adjudication from prosecution, in *fact* as well as in *theory*, would allay the fear that suspension orders were issued by those who had an interest in the investigation and in the institution of the proceedings.

Criticism of this experiment in administrative justice was to have been expected and criticism there has been. The nature and source of the criticism require scrutiny. A congressional committee, the so-called Smith Committee, charges that the organizational set-up is such that "the Office of Price Administration has established its own judiciary along with prosecuting attorneys and a constabulary." It refers to the hearing commissioners as "courts" and a "pseudo judiciary."⁵ It adds that, "The establishment of a system of 'courts' within the Office of Price Administration was all that was necessary to make of it a complete government, inasmuch as it already exercised executive and legislative powers. The agency recognizes this to be true as may be readily seen from its efforts to achieve a separation of powers along constitutional lines."⁶ This criticism takes a strange turn. Had there been no separation of adjudicatory and prosecuting functions, the ominous spectre of judge-jury-prosecutor, rolled into one, would have been trotted out. Instead, when a federal agency seeks to remove all doubt as to a combination or blending of functions of prosecution and adjudication to the end of guaranteeing, so far as possible, impartiality in decisions, it is criticized for attempting to create a system of "courts." It may be inferred that this frontal attack on the Office of Administrative Hearings is merely the prelude to a major assault by opponents of the administrative process.

In a well-considered opinion in *Perkins v. Brown*,⁷ it was said:

The Hearing Commissioner and Hearing Administrator have not presumed to act as judges in the sense of the Constitution but have conducted themselves as delegates of the Administrator in determining whether an allocation away from a violator on the conditions imposed upon dealers in a war-scarce commodity is necessary or appropriate in the public interest and to promote the national defense. The Administrator has delegated to officers, divorced, as I understand it, from the

⁵*Second Intermediate Report of the Select Committee to Investigate Executive Agencies*, H. R. REP. No. 862, 78th Cong., 1st Sess. (1943) 14.

⁶*Id.* at 15.

⁷*Perkins v. Brown*, 53 F. Supp. 176, OPA SERVICE 621:61 (S. D. Ga. 1943).

customary enforcement functions of his agency, his duty to withdraw allocations from persons who have shown themselves to be irresponsible or untrustworthy. . . . He has likewise set up an administrative procedure to accord a full and fair hearing for persons charged with violations of the conditions of their eligibility to continue dealing in rationed goods. This he has done so that an equitable system of allocation shall not work inequitably as to a particular individual. In the exercise of this function there is no exercise of the "judicial" powers of the United States.

Contrast the approach of the Smith Committee with that employed by Roscoe Pound, former Dean of the Harvard Law School, whose expressed views on administrative justice do not display the dispassionate, objective approach of his writings on the history of jurisprudence. Says Dean Pound:

Yet the regime in which complaint is made to an administrative agency which takes it up, investigates it, orders a hearing before itself on the complaint it has made its own, advocates it at the hearing by its own counsel before one of its staff as a trial examiner or hearing commissioner, and renders an order depriving some individual of a valuable right, amounts in practice to the agency judging its own case. Emotional interest in the result precludes objective and impartial action as surely as the pecuniary interest which has always been held to disqualify. The procedure of the OPA, as set forth in the San Francisco report, is but one more illustration of the vice of combining the functions of investigation, prosecuting, and judging in one administrative organization.⁸

It would seem that Dean Pound failed to go to original sources, basing his conclusions on a committee report of the San Francisco Bar Association to which further reference will be made. His conclusions apparently result also from the mistaken belief that Hearing Commissioners "are appointees of the OPA and must take their orders from it, whereas judges are made independent, subject only to review of their judgments and orders."⁹

I can state without equivocation that since the Office of Administrative Hearings was set up an order has never been received by a hearing commissioner of Region I, either from the hearing administrator or from anyone connected with the Office of Price Administration, concerning the disposition of any case brought before a hearing commissioner for determination. I am confident that no order has ever been issued to any other hearing commissioner throughout the United States. That the hearing commissioners have succeeded in being impartial is illustrated by the fact that they have not

⁸Pound, *The Challenge of the Administrative Process* (1944) 30 A. B. A. J. 121, 124.

⁹*Id.* at 122.

infrequently been criticized by attorneys in the Office of Price Administration for dismissing cases on the ground that the government had not sustained the burden of proof. They have been charged by various enforcement attorneys with an over-zealous regard for the rights of the respondent in subjecting the Government to what appeared to them to be too exacting standards and requirements.

Another basis of attack indulged in by the San Francisco Bar Association Committee, and presumably endorsed by Dean Pound, is that the Office of Administrative Hearings is not a legally constituted agency, and that therefore the orders of hearing commissioners suspending violators of the rationing regulations are unconstitutional.¹⁰

The suspension power of the Office of Price Administration originates in the Second War Powers Act which provides:

Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.¹¹

The power of allocation has positive and negative aspects. What is allocated to some is allocated away from others. An order is equally an allocation whether it prescribes what *A* shall receive, or, as in the case of a suspension order, what *B* shall not receive.¹² By successive executive orders and directives the President has lodged in the Office of Price Administration the power granted to him by the Second War Powers Act to allocate vital materials necessary in the war effort, upon the conditions and to the extent deemed necessary. On May 22, 1944, the Supreme Court of the United States held, in *L. P. Stewart & Bro., Inc. v. Bowles, et al.*,¹³ that the power to allocate, vested in the President by the Second War Powers Act, includes the power to reallocate or, put an end to allocations and the power to suspend the right of a violator of the rationing regulations to deal in the

¹⁰San Francisco Bar Association, *Committee Report on the Office of Administrative Hearings of the Office of Price Administration* (December 1943) 6-8; 27-29. An effective and documented answer to the criticism of the San Francisco Bar Association Report was made in the report of the San Francisco Chapter of the National Lawyers Guild, on the Office of Administrative Hearings of the Office of Price Administration.

¹¹56 STAT. 178, 50 U. S. C. (Appendix) § 633 [2(a)(2)] (Supp. 1942).

¹²*L. P. Stewart & Bro., Inc. v. Bowles*, 140 F. (2d) 703, OPA SERVICE 621:103 (App. D. C. 1944).

¹³12 U. S. L. Week 4406 (U. S. 1944).

rationed commodity. Two circuit court of appeals and the Court of Appeals for the District of Columbia,¹⁴ as well as numerous federal district courts, had previously rendered decisions of similar tenor and effect.¹⁵

It has been charged that, as a suspension is a penalty or punishment, the suspension order proceeding is a penal proceeding and as such is not authorized by law. The Smith Committee, throughout its report, uses the traditional vocabulary of criminal law: "crime," "penalty," "punishment," "double jeopardy," "conviction," "sentence," and "guilt." This mistaken attitude towards suspension order proceedings springs from a basic misconception of their purpose. In suspending an allocation, the administrator is carrying out his duty to allocate scarce materials. In holding hearings before he takes such action, he is taking a praiseworthy precaution against hasty or ill-founded administrative action. The primary purpose of the suspension order is not to penalize, but to remedy a disruption in the allocation program and to correct an improper diversion in the flow of scarce commodities occasioned by the violator's misuse. As stated by the court in *Brown v. Wilemon*:¹⁶

Punishment or penalty in America consists in taking life, liberty or property. A suspension order takes neither. The dealer's personal liberty is untouched. Nothing that is really his is taken from him. His filling station is unmolested and may be used to sell things other than gasoline, and to service cars. Even his gasoline is not taken from him. He is prohibited for a brief period from distributing it or from getting any more. There is damage by the interruption of his business, but *damnum*

¹⁴*Brown v. Wilemon*, 139 F. (2d) 730 (C. C. A. 5th, 1944), *rev'g* *Wilemon v. Brown*, 51 F. Supp. 978 (D. C. N. D. Texas, 1943); *L. P. Steuart & Bro., Inc. v. Bowles*, 140 F. (2d) 703, OPA SERVICE 621:102 (App. D. C. 1944), *aff'g* *L. P. Steuart & Bro., Inc. v. Bowles*, — F. Supp. —, OPA SERVICE 621:93 (D. C. 1944); *The Country Garden Market, Inc. v. Bowles*, — F. (2d) —, OPA SERVICE 621:113 (App. D. C. 1944), *aff'g* *The Country Garden Market Inc. v. Bowles*, — F. Supp. —, OPA SERVICE 621:111 (D. C. 1944); *Gallagher's Steak House, Inc. v. Bowles, et al.*, — F. (2d) —, OPA SERVICE 621:128 (C. C. A. 2d, 1944).

¹⁵*Perkins v. Brown*, 53 F. Supp. 176, OPA SERVICE 621:56 (S. D. Ga. 1943); *Panteleo v. Brown*, 53 F. Supp. 209 (S. D. N. Y. 1943); *Joliet Oil Corporation v. Brown*, — F. Supp. —, OPA SERVICE 621:68 (N. D. Ill. 1943); *Gallagher's Steak House v. Bowles*, — F. Supp. —, OPA SERVICE 621:81 (S. D. N. Y. 1943); *Means v. Nelson, Bowles et al.*, — F. Supp. —, OPA SERVICE 621:95 (R. I. 1944); *Kotsos v. Ivins et al.*, OPA SERVICE 621:114 (D. Utah 1944); *Central West Oil Co. et al. v. Bowles*, — F. Supp. —, OPA SERVICE 621:121 (W. D. Mich. 1944); *LaPorte et al. v. Bitker et al.*, — F. Supp. —, OPA SERVICE 621:122 (E. D. Wis. 1944). *See also* *Schwarzmann v. Brown*, — F. Supp. —, OPA SERVICE 621:43 (D. C. 1943). *Contra*: *Sims v. Talbert*, 52 F. Supp. 688 (E. D. S. C. 1943); *Jacobson et al. v. Bowles et al.*, 53 F. Supp. 532 (N. D. Tex. 1944); *Frank v. Bowles*, — F. Supp. — (S. D. N. Y. 1944), OPA SERVICE 621:134.

¹⁶139 F. (2d) 730, 732 (C. C. A. 5th, 1944).

absque injuria. His private interest has merely come into collision with a public interest, and has had to yield.

Another court has stated:

A penalty is a punishment, an injury inflicted for punitive purposes. Appellant's suspension is undoubtedly an injury, but is not imposed for punitive purposes. It is a direct means to a fairer distribution of the limited supply of oil in accordance with the allocation program. . . . But instead of seeking to punish, the government sought to prevent. The suspension order is intended to limit, and does limit, appellant's temptation and opportunity to violate the rationing program. The order therefore tends, in a most direct way, to promote the program. No doubt it tends also to promote the program in an indirect way by indicating that violation may not pay. But an incidental minatory effect does not turn a remedial order into a penal one. The fact that the suspension order protects the public directly, by allocating oil away from a dealer who is disposed to violate the rationing program and toward other dealers, sharply distinguishes it from fines and penalties.¹⁷

In sustaining a fuel oil suspension order, the Supreme Court of the United States in *L. P. Stewart & Bro., Inc. v. Bowles, et al.*, said:^{17a}

The suspension order rests on findings of serious violations repeatedly made. These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of the violations thus negatives the charge that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation.

No power is given to hearing commissioners to punish violators by imposi-

¹⁷*L. P. Stewart & Bro., Inc. v. Bowles*, 140 F. (2d) 703, 704. OPA SERVICE 621:104 (App. D. C. 1944). *Accord*: *Joliet Oil Corporation v. Brown*, — F. Supp. —, OPA SERVICE 621:70 (N. D. Ill. 1943); *Brown v. Wilemon*, 139 F. (2d) 730 (C. C. A. 5th, 1944); *Means v. Nelson, Bowles et al.*, — F. Supp. —, OPA SERVICE 621:96 (R. I. 1944); *The Country Garden Market, Inc. v. Bowles*, — F. Supp. —, OPA SERVICE 621:112 (D. C. 1944); *Central West Oil Co. et al. v. Bowles*, — F. Supp. —, OPA SERVICE 621:121 (W. D. Mich. 1944). The hearing administrator consistently held that suspension proceedings were not criminal in nature and that a suspension order was not punishment or a penalty. *Matter of Vittoria Castle, Inc.*, Docket No. 17 SG 5 N. Y. (June 24, 1943); *Matter of Oyster Bay, Incorporated*, Docket No. 2-32 A (August 2, 1943); *Matter of Salkin and Linoff*, Docket No. 6-56 A (October 8, 1943); *Matter of Manfredi*, Docket No. 2-329 A (October 18, 1943); *Matter of Montesi*, Docket No. 4-111 A (October 25, 1943); *Matter of Lingo*, Docket No. 8-119 A (November 1, 1943); *Matter of Schubert*, Docket No. 6-147 A (December 15, 1943); *Matter of Ginn*, Docket No. 2-1265 A (December 18, 1943); *Matter of Montgomery Ward and Company*, Docket No. 7-80 A (January 4, 1944); *Matter of Passell*, Docket No. 2-1212 A (March 7, 1944).

^{17a}12 U. S. L. Week 4406 (U. S. 1944).

tion of fines or sentences. Such punitive action is reserved to the courts.¹⁸ Another fact demonstrating that suspension orders are not issued as punishment, but rather to withhold allocations of scarce commodities from untrustworthy dealers, is that such orders do not remain effective when a commodity ceases to be rationed. Thus, when coffee became a nonrationed commodity, coffee suspension orders were lifted. No necessity remained for the continuance of a nonallocation order.

The fact that a suspension order may cause financial loss does not convert it into a penalty.¹⁹ Merely because a remedial order has penalizing consequences does not change the essential character of the order. For example, administrative orders expelling individuals from a securities exchange²⁰ or prohibiting trading on a commodity exchange²¹ are not deemed penalties but a means of protecting investors. Likewise, revocations of licenses have been deemed remedial measures to protect the public interest, although they may have collateral penalizing consequences.²²

As was said by the Supreme Court of the United States:

From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. If the needs of consumers are to be met and the consumer allocations are to be filled, prudence might well dictate the avoidance or discard of such inefficient and unreliable means of distribution of a scarce and vital commodity. Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus

¹⁸Second War Powers Act, 56 STAT. 178, 50 U. S. C. (Appendix) § 633 [2(a) (5) (6)] (Supp. 1942).

¹⁹*Perkins v. Brown*, 53 F. Supp. 176, OPA SERVICE 621:59 (S. D. Ga. 1943); *The Country Garden Market, Inc. v. Bowles*, — F. Supp. —, OPA SERVICE 621:113 (D. C. 1944); *LaPorte et al. v. Bitker et al.*, — F. Supp. —, OPA SERVICE 621:122 (E. D. Wis. 1944); *Gallagher's Steak House, Inc. v. Bowles, et al.*, — F. (2d) — (C. C. A. 2d, 1944), OPA SERVICE 621:128.

²⁰*Wright v. Securities & Exchange Commission*, 112 F. (2d) 89 (C. C. A. 2d, 1940).

²¹*Board of Trade of City of Chicago v. Wallace*, 67 F. (2d) 402 (C. C. A. 7th, 1933); *Nichols & Co. v. Secretary of Agriculture*, 131 F. (2d) 651 (C. C. A. 1st, 1942).

²²*Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573 (1898).

save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil.^{22*}

PROCEDURE OF THE OFFICE OF ADMINISTRATIVE HEARINGS

The other charge levelled against the Office of Administrative Hearings is that the hearings lack adequate procedural safeguards to protect the rights of citizens. Some of such criticism displays an abysmal ignorance of the governing regulation; some discloses a lack of appreciation of the actual practice of the Office. A review of the procedure of the Office of Administrative Hearings will demonstrate that the Office, mindful of the serious consequences of the issuance of a suspension order, has surrounded its hearings and the issuance of such orders with safeguards which go far beyond the mere requirements of due process of law and which guarantee to party litigants the real essence of fairness.

All suspension proceedings are governed by a procedural regulation.²³

Notice of Hearing: Contents.—Suspension order proceedings are commenced by the service of a notice of hearing upon a violator not less than seven days before the date set for hearing.²⁴ This provision was inserted as a reasonable protection to the respondent, to give him sufficient time to obtain counsel, marshal his facts for defense, obtain his witnesses and make necessary arrangements to be present at the hearing. A respondent is entitled to that protection unless, for some reason, he desires a more expeditious hearing. The appearance of a respondent without counsel at the time set for hearing on less than the requisite notice is not deemed to be an implied waiver of the procedural requirements.²⁵ The notice sets forth the time and place of hearing, a clear statement of the charges against the respondent with reference to the particular section of the regulation or order alleged to have been violated, and a statement of the purpose or purposes for which the hearing is to be held.²⁶ The San Francisco Bar Association Committee charges that the notice does not give sufficient information about the nature of the charge.²⁷ Dean Pound adds, "This is very characteristic of administrative justice."²⁸ No such laxity is permitted, however, by the Office of

^{22*}L. P. Steuart & Bro., Inc. v. Bowles, *et al.*, 12 U. S. L. Week 4406 (U. S. 1944).

²³Procedural Regulation No. 4, '8 FED. REG. 1744 (1943) has now been superseded by Revised Procedural Regulation No. 4, 9 FED. REG. 2558 (1944), hereinafter cited REV. P. R. 4.

²⁴REV. P. R. 4, § 2.1.

²⁵Matter of DeSpain, Docket No. 5-199 A (December 11, 1943).

²⁶REV. P. R. 4, § 2.2(a).

²⁷Committee Report on the Office of Administrative Hearings, *supra* note 10, at 9.

²⁸Pound, *supra* note 8, at 121, 122.

Administrative Hearings. The hearing administrator has held:²⁹

A notice of hearing should set forth the nature of the charges with clearness and particularity. The details of the offense charged should not be left to conjecture. The norm governing the contents of complaints found in Rule No. 8 of the Rules of Civil Procedure in the District Courts of the United States, would undoubtedly be a safe guide for the Enforcement Attorney. Our views in this respect in no sense imply that the notice must be framed with such particularization or technical language as would meet the test of a demurrer under canons of pleading in the Courts, but we do mean . . . that the charge should be definite, specific and particular, and sufficiently factual to bring the person charged within the ambit of the appropriate regulation. Every respondent has the fundamental right to know the charges which have been made against him and to prepare adequately his defense thereto. . . .

It is sufficient to say, we believe, that a notice of hearing which merely sets forth the language of a general prohibition section of a ration order, is fatally defective because it does not sufficiently apprise a respondent of the nature of the charges made against him. In concept of law such a notice fails "to state a cause of action." The fact that respondent, in her ignorance of the law, admitted two of these three charges does not alter our view of the improper form of the notice of hearing.³⁰

A respondent may request specifications or particulars.³¹ Amendments to a notice of hearing may be made. If, however, a respondent claims surprise by an amended charge, he is entitled to a continuance to give him adequate opportunity to prepare his defense.³² Of course new parties cannot be added by amendment without giving the requisite notice to such parties, unless they voluntarily appear and waive notice.³³

Dean Pound says in addition, "It is not uncommon for these agencies to have a hearing on one point and to make an order on another."³⁴ The decisions of the hearing administrator reveal that the settled rule and practice of the Office of Administrative Hearings is entirely contrary to such a practice.³⁵

Default for Failure to Appear.—The notice also states that a suspension

²⁹Matter of Venzler, Docket No. 2-234 A (September 17, 1943).

³⁰Where the respondent, represented by counsel, proceeds without objection, the defective form of notice is deemed waived. Matter of Falloon, Docket No. 7-26 A (October 5, 1943); Matter of Glick Brothers, Docket No. 2-461 A (October 29, 1943); Matter of Schull, Docket No. 2-860 A (December 2, 1943). This is familiar practice in courts of law.

³¹Matter of Yellow Cab Transit Company, Inc., Docket No. 5-149 A (January 12, 1944).

³²*Ibid.*

³³Matter of Kaplan's Meat Market, Docket No. 2-274 A (October 28, 1943).

³⁴See note 28 *supra*.

³⁵Matter of Crabtree, Docket No. 4-495 A (January 8, 1944).

order may be entered by default should the respondent fail to appear at the hearing.³⁶ In the event of such a failure to appear, the charges are deemed to have been admitted by default, and a hearing need not be held. The enforcement attorney of the Office of Price Administration, however, presents evidence relevant to the determination of the effective period of any suspension order.³⁷ At any time within ten days after service of an order issued after a default, the respondent may file a petition to reopen the proceedings, setting forth the ground on which he believes his default should be excused. If the hearing commissioner grants this petition, he enters an order setting aside the default order and stating the time and place for a hearing on the original notice of hearing.³⁸

Alternative Form of Notice.—Formerly, it was provided that if the notice of hearing was served at least ten days before the date set for the hearing, the notice could provide that such hearing would be held only if the respondent requested a hearing and made a statement of the general nature of his defense to the charges.³⁹ The notice in such cases provided that the time for making the request and statement should be not less than five days after service of the notice.⁴⁰ Dean Pound, commenting on this section, says:

It will be noted that this procedure assumes that the case against the respondent is established by one-sided investigation made in advance and the hearing is merely an opportunity to disprove or avoid it. Here we have the common lay idea, generally held by administrative agencies, that charges are to be disproved by the respondent instead of proved by the complainant.⁴¹

It has been held consistently by the Office of Administrative Hearings that the burden of proof is on the government and that it is not the duty of a respondent to prove his innocence of violations.⁴²

To every notice of hearing served upon a violator, a copy of the procedural regulation governing the Office's procedure is attached.⁴³ Thus, both the respondent and his counsel are fully apprised of all the means available for the protection of his rights.

³⁶Rev. P. R. 4, § 2.2(a).

³⁷Rev. P. R. 4, § 2.7(a).

³⁸Rev. P. R. 4, § 2.7(b). *Matter of Johnson*, Docket No. 5-1 A (July 26, 1943); *Matter of Frelison*, Docket No. 4-36 A (August 3, 1943).

³⁹Rev. P. R. 4, § 2.2(b). This section was repealed by Amendment 1 to Rev. P. R. 4, 9 FED. REG. 5426 (1944).

⁴⁰Rev. P. R. 4, § 2.2(b).

⁴¹Pound, *supra* note 8 at 121, 123.

⁴²*Matter of Schwartz*, Docket No. 2-1140 A (December 17, 1943); *Matter of Chick*, Docket No. 2-1296 A (March 6, 1944).

⁴³Rev. P. R. 4, § 2.2(c).

The Hearing: The Argument.—A hearing held pursuant to such notice is conducted by a hearing commissioner or a presiding officer designated by the chief hearing commissioner of the region. The hearing commissioner presides at the hearing, administers oaths and affirmations, and rules on the admission or exclusion of evidence.⁴⁴ The regulation provides that the hearing shall be so conducted as to permit the presentation of evidence and argument to the fullest extent compatible with fair and expeditious determination of the issues raised.⁴⁵ The respondent has the right to be represented by counsel of his own choosing.⁴⁶ Reasonable opportunity for cross-examination of witnesses is provided.⁴⁷ In this latter connection the hearing administrator has said:

The right of cross-examination of opposing witnesses is one of the basic elements of due process. Its complete denial to any party to a proceeding, whether judicial or administrative, is repugnant to our entire conception of Anglo-American jurisprudence. In the case before us, respondent did not cross-examine the Government's witnesses, was never given an opportunity to do so, and was not advised of her right in this respect. Since she was not represented by counsel, there was an affirmative duty upon the Hearing Commissioner and the Enforcement Attorney to specifically ask her whether she had any questions for the witnesses, and further to assist her in formulating and presenting any question she might wish to propound. Their failure to do so is clearly incompatible with the standard of conduct not only expected but demanded of representatives of the Government.⁴⁸

The Hearing: Rules of Evidence.—The rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United

⁴⁴REV. P. R. 4, § 2.3(a).

⁴⁵REV. P. R. 4, § 2.3(b).

⁴⁶REV. P. R. 4, § 2.3(b)(1); Matter of Lander, Docket No. 5 S 17 N. Y. (June 22, 1943).

⁴⁷REV. P. R. 4, § 2.3(b)(2). In Matter of Blumberg, Docket No. 8-86 A (January 8, 1944), it was said, "Our procedures do not authorize the taking of testimony by deposition, and, therefore, any testimony by a third party must be given, we think, at the hearing with a reasonable opportunity afforded for cross-examination. The individual is no less a witness when his testimony is offered in the form of a sworn statement than when he is present and testifies in person. In many instances such statement is not written by him and often contains conclusions and opinions formed or entertained by the person actually preparing the same. Under such circumstances it possibly would not give a correct and accurate statement of the facts. Cross-examination would reveal any weaknesses or inaccuracies and better enable the Commissioner to properly determine to what extent he could rely thereon. In our opinion, the right of reasonable cross-examination afforded the respondent by the procedural regulations cannot be enforced and protected in any other way than by excluding the testimony unless the person giving the same is available for cross-examination at the hearing."

⁴⁸Matter of Venzer, Docket No. 2-234 A (September 17, 1943).

States govern all hearings, but such rules may be relaxed by the hearing commissioner or presiding officer where the ends of justice will be better served by so doing.⁴⁹ This rule permitting relaxation of the technical rules of evidence when the ends of justice will be met is one common to nearly every administrative tribunal. It is designed both to expedite and simplify the proceedings⁵⁰ and to protect respondents, particularly those who are not represented by counsel and are not familiar with these technical rules. Considerable latitude is permitted such respondents in deviating from the strict rules of evidence. Hearing commissioners require the government to establish a *prima facie* case by legally competent evidence. Thus, the criticism of the Smith Committee that "a defendant there tried is denied the protection afforded by the legal rules of evidence"⁵¹ is not justified.

Because suspension proceedings are civil in nature, rather than criminal, the quantum of proof is a preponderance of the evidence.⁵² Mere speculation cannot take the place of proof.⁵³ Hearsay evidence, though admissible,⁵⁴ is not favored.⁵⁵ In no event can a finding be based on uncorroborated hearsay⁵⁶ or on evidence not of "the kind . . . on which responsible persons are accustomed to rely in serious affairs."⁵⁷

Again Dean Pound says:

In administrative adjudication there is an obstinate tendency to decide

⁴⁹REV. P. R. 4, § 2.4. The wording of this section of the procedural regulation is identical with the phraseology employed in the Rules of Practice and Procedure of the Federal Communications Commission, § 1.211. PIKE & FISCHER, ADMINISTRATIVE LAW (1941) vol. I. See also Report of the Attorney General's Committee, *supra* note 1, at 70.

⁵⁰Report of the Attorney General's Committee, *supra* note 1, at 70.

⁵¹See note 5 *supra*.

⁵²Matter of Cordes, Docket No. 2-1291 A (January 22, 1944).

⁵³Matter of Goldman, Docket No. 2-380 A (November 8, 1943); Matter of Howells, Docket No. 7-67 A (March 10, 1944).

⁵⁴Matter of Ressler, Docket No. 2-17 A (July 26, 1943); Matter of Wolfe Smith Co., Inc., Docket No. 2-21 A (August 20, 1943); Matter of K. & J. Markets, Inc., Docket No. 2-10 A (November 20, 1943).

⁵⁵Matter of Esposito, Docket No. RI-S 122 (May 3, 1943); Matter of Morris Loew, Inc., Docket No. 5 S 3 N. Y. (May 20, 1943).

⁵⁶Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 Sup. Ct. 206 (1938). It was said in Matter of Blumberg, Docket No. 8-86 A (January 8, 1944), "The courts have considered and discussed the admissibility of hearsay evidence in administrative proceedings such as this and the probative effect thereof and have held that the mere reception in evidence of hearsay testimony does not necessitate a reversal if the record contains other substantial unobjectionable testimony supporting the facts found by the Commissioner. However, hearsay testimony consisting solely of *ex parte* sworn statements of third parties does not afford a sound evidentiary basis for finding a violation because same does not constitute substantial evidence."

⁵⁷National Labor Relations Board v. Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938), *cert. den.* 304 U. S. 576, 585, 58 Sup. Ct. 1045 (1938).

without a hearing, or without hearing one of the parties, or after conference with one of the parties in the absence of the other, whose interests are adversely affected, or to treat the statutory requirement of a hearing as a mere formality and act upon preformed opinions as to the order to be made. Another closely related tendency is to make determinations on the basis of reports not divulged, giving the party affected no opportunity to refute or explain. Another is to make determinations seriously affecting individual rights without a basis in evidence of rational probative force.⁵⁸

A glance at the record will disclose that such charges are unfounded as far as the Office of Administrative Hearings is concerned. A respondent has a right to be confronted with the witnesses for the government.⁵⁹ *Ex parte* statements cannot be received in evidence.⁶⁰ If such statements are made to a hearing commissioner in the form of a letter after hearing has been concluded, they must either be disregarded or a rehearing ordered, giving all parties a right to be present and to participate.⁶¹ Secret evidence cannot be considered, nor can a hearing commissioner make personal inquiries or individual observations and substitute them for factual evidence adduced at the hearing.⁶²

The Hearing: Who May Appear for Respondent.—Any individual respondent may appear for himself; any partner may appear for a partnership if expressly or impliedly authorized to do so; and a corporation may be represented by an officer thereof. Any respondent may appear by an attorney.⁶³ No other person may appear for a respondent unless specifically authorized in writing by such respondent.⁶⁴ Former employees of the Office of Price Administration are not permitted to represent a respondent within a period of one year after termination of their employment with that agency.⁶⁵

⁵⁸Pound, *supra* note 8, at 121, 123.

⁵⁹See Matter of Hosti, Docket No. 4-410 A (December 9, 1943).

⁶⁰"We are not unaware that the rule of evidence here set forth may vary somewhat from the rule sometimes followed in other administrative proceedings. Irrespective of this, however, we think the rule here enunciated is the proper one to be followed in suspension order proceedings and we are unwilling to put the stamp of administrative approval upon a suspension order with all its collateral economic consequences upon a respondent, when same is based upon no more substantial or probative evidence than *ex parte* statements of third parties who were not present at the hearing and as to whom no right of cross-examination was afforded." Matter of Blumberg, Docket No. 8-86 A (January 8, 1944).

⁶¹Matter of Koceja, Docket No. 6-22 A (November 20, 1943); Matter of Kunlansky, Docket No. 6-162 A (January 18, 1944).

⁶²Matter of Tramor Cafeteria, Docket No. 4-18 A (July 27, 1943).

⁶³REV. P. R. 4, § 2.5. Matter of Archers, Inc., Docket No. 3-260 A (November 12, 1943).

⁶⁴REV. P. R. 4, § 2.5. An employee, merely on his own assertion, cannot appear for his employer. Matter of Celli, Docket No. 2-75 A (October 9, 1943).

⁶⁵PROC. REG. No. 14, § 1300.701 (b).

The Hearing: Time and Place.—The hearing is held at a time and place specified in the notice of hearing. The hearing commissioner or presiding officer, however, may continue or adjourn the hearing to a later date or to a different place; and notice of such adjournment or continuance is given either prior to or at the hearing.⁶⁶

The Hearing: Disciplinary Powers of Commissioner.—Any hearing commissioner may issue subpoenas compelling the attendance and testimony of witnesses and the production of evidence at a hearing.⁶⁷

Although administrative tribunals do not possess the power to punish for contempt, the procedural regulation provides that contemptuous conduct at any hearing shall be ground for exclusion from the hearing.⁶⁸

Report of the Hearing.—All hearings are reported stenographically. The report is transcribed only if such transcription is requested by a party to the proceeding or by a hearing commissioner. Any party may obtain a copy of the transcript, the cost being borne by the requesting party. If the stenographic report is transcribed at the request of the hearing commissioner, or the enforcement attorney of the Office of Price Administration, a copy of such transcribed report is available for inspection without charge by the respondent.⁶⁹

Qualifications of Commissioners.—Both the San Francisco Bar Association Committee⁷⁰ and Dean Pound complain that there is "nothing in the orders or regulations which requires the Hearing Commissioners . . . to be lawyers or to have any particular qualifications."⁷¹ From this premise Dean Pound concludes, "When it is remembered that neither the hearing commissioner nor the presiding officer need be a lawyer, and that questions are frequently asked as to which there may be a legal or constitutional privilege, as well as that the only available witness may be a hostile witness over

⁶⁶REV. P. R. 4, § 2.6. Matter of Sears Roebuck & Company, Docket No. 4-355 A (February 17, 1944); Matter of Jacobson, Docket No. 2-379 A (October 19, 1943).

⁶⁷REV. P. R. 4, § 2.8(a). Matter of Sears Roebuck and Company, Docket No. 4-355 A (February 17, 1944). The applicant for a subpoena specifies the name and address of the witness and the nature of the facts to be proved by him, and, if calling for the production of evidence, specifies the same with such particularity as will enable it to be identified for purposes of production. REV. P. R. 4, § 2.8(b). Subpoenas are served by delivering a copy to the person subpoenaed and tendering to him the same fees and mileage as are paid witnesses in the district courts of the United States. REV. P. R. 4, § 2.8(c), 2.9. Witnesses' fees and mileage are paid by the party at whose instance the witness appears. REV. P. R. 4, § 2.9.

⁶⁸REV. P. R. 4, § 2.10.

⁶⁹REV. P. R. 4, § 2.11. Matter of Byrne and Central Oil Co., Docket No. 1-125 A (November 9, 1943).

⁷⁰Committee Report on Office of Administrative Hearings, *supra* note 10, at 8.

⁷¹Pound, *supra* note 8, at 121, 122.

whose willingness to answer the respondent has no control, it will be seen that the right of the respondent to make a defense may be in effect wholly denied."⁷²

The fact is that every hearing commissioner is required to be a member of the bar and must meet the qualifications of the Board of Legal Examiners of the United States Civil Service Commission.⁷³ Contrast this with the absence of a requirement that a member of the federal judiciary be a lawyer or even pass the requirements of the Board of Legal Examiners.

Protection of Respondent's Rights.—More important is the charge that constitutional or legal rights of a respondent may be invaded and that he may be denied a right to make a defense. The hearing administrator in many decisions has held that there is an affirmative duty on the part of a hearing commissioner to advise an unrepresented respondent of his constitutional rights; the privilege against giving testimony that might be the basis of a subsequent criminal action against him, the right to be represented by counsel, the right to produce witnesses in his own behalf, and the right of cross-examination of the government's witnesses.⁷⁴ Indeed, it has been held that there is an affirmative duty on the part of a hearing commissioner to assist an unrepresented respondent in examining and cross-examining witnesses in his behalf. It was said in *Matter of Foster*:⁷⁵

Hearing Commissioners must, at all times, conduct these proceedings in strict accordance with the established principles of due process bearing in mind that it is their duty to see that all facts pertinent to a proper and just determination of the matter are fully and fairly developed; going

⁷²*Id.* at 123.

⁷³The minimum qualifications for hearing commissioners established by the Civil Service Commission require that they (1) must be members in good standing of the bar of some state, District of Columbia or territory, preferably within the region; (2) must have at least three years experience in the trial and argument of cases and conduct of proceedings in the courts or before administrative agencies or have experience as a judge, hearing commissioner, trial examiner, referee or special master; (3) must be attorneys of maturity and active in legal affairs in their community or state, and through experience, personal standing, and reputation in the profession and community command the respect of the profession and general public; (4) have a combination of academic background and experience which enable them to understand the complexities of problems of commodity control and rationing at all levels of production and distribution. Hearing commissioners are nominated by the hearing administrator and are approved by the Board of Legal Examiners of the Civil Service Commission. A convenient summary of these qualifications is set forth in the *Report on the Office of Administrative Hearings of the Office of Price Administration*, National Lawyers' Guild, San Francisco Chapter, 32-33.

⁷⁴*Matter of Johnson*, Docket No. 5-1 A (July 26, 1943); *Matter of Venzer*, Docket No. 2-234 A (September 17, 1943); *Matter of Arkin*, Docket No. 2-227 A (October 9, 1943); *Matter of Weinziner*, Docket No. 2-89 A (November 18, 1943).

⁷⁵Docket No. 2-103 A (October 4, 1943).

to the extent where necessary and respondent is not represented by counsel, of questioning or cross-examining the witnesses or even calling for additional witnesses or evidence. The Commissioner, as evidenced by the record in this case, did not comply with these standards and where such is the case, we are unwilling to permit a suspension order for even three days to stand.

Presiding Officers.—Provision is made in the procedural regulation for the appointment of a presiding officer. Such presiding officers are used only when the load of work of a particular office is such that proceedings cannot be speedily determined by the regular personnel, or in cases where a hearing commissioner is not otherwise available. In cases heard before presiding officers, the presiding officer conducts the hearing and prepares an advisory report which contains findings of fact and conclusions of law and may contain recommendations for disposition.⁷⁶ The presiding officer files this report with the hearing commissioner and serves a copy on both the respondent and the enforcement attorney.⁷⁷

Any party may submit a brief in opposition to or in support of the report of the presiding officer within five days after service of the presiding officer's report,⁷⁸ and at a later time with the permission of the hearing commissioner.⁷⁹ When cases are heard by a hearing commissioner, he may permit the filing of briefs or written argument and specify the time within which such brief may be filed.⁸⁰

The Suspension Order: Contents.—If the hearing commissioner determines that a respondent has violated a rationing regulation or order, he may issue a suspension order against him.⁸¹ A suspension order must set forth the findings of fact and conclusions of law upon which it is based and must contain a statement of the reasons why such an order should be issued, unless these findings of fact, conclusions of law, and statement of reasons are set forth in a separate opinion accompanying the order.⁸² In the event that a hearing commissioner determines that no suspension order should issue, he may issue either an order dismissing the proceedings or an admonitory order.⁸³ Once again, if such an order is issued by him, the findings of fact,

⁷⁶REV. P. R. 4, § 2.12(a).

⁷⁷REV. P. R. 4, § 2.12(b).

⁷⁸REV. P. R. 4, § 2.13(a) (b).

⁷⁹REV. P. R. 4, § 2.13(c).

⁸⁰REV. P. R. 4, § 2.14.

⁸¹REV. P. R. 4, § 3.1(a).

⁸²REV. P. R. 4, § 3.1(b).

⁸³REV. P. R. 4, § 3.1(c). Under former Procedural Regulation No. 4, it was held that a hearing commissioner could not issue admonitory letters. Matter of Lassareschi, Docket No. 8-162 A (November 25, 1943); Matter of Bonaccorsi, Docket No. 8-158 A (November 25, 1943).

conclusions of law, and the statement of reasons for such disposition must be set forth in the order or in an opinion accompanying it.⁸⁴

The requirement that a hearing commissioner must include in a suspension order his findings of fact, conclusions of law, and reasons for his decision⁸⁵ is not met by a mere recital of the testimony of the witnesses. Even when there is no material conflict in the evidence, a hearing commissioner must make findings of fact and conclusions of law, for the reason that the hearing administrator, on an appeal, is entitled to know the commissioner's view of the evidence when rendering his decision.⁸⁶ When the required findings of fact and conclusions of law are not made, the proceeding will be remanded for the purpose of preparing such findings and conclusions.⁸⁷

The procedural regulation provides that a suspension order may contain such provisions as may be deemed appropriate to make it effective.⁸⁸ Frequently, under this section, provisions are inserted in suspension orders requiring the posting of the suspension order at the respondent's business establishment during the effective suspension period.⁸⁹ This provision is not inserted, as charged by the Smith Committee, to "require the merchant during the period of the suspension to display his 'guilt' to the public at large in the same fashion as convicts in mediæval times were branded or mutilated for the purpose of drawing public ridicule and contempt."⁹⁰ Its purpose is two-fold: first, to notify the suppliers so that they will not unwittingly transfer commodities in violation of the suspension order; and second, to deter potential customers from making offers to purchase, by the acceptance of which the respondent would violate the order.⁹¹

⁸⁴Rev. P. R. 4, § 3.1(c).

⁸⁵Rev. P. R. 4, § 3.1(b). Matter of Mohican Company, Docket No. 1-3 A (July 20, 1943); Matter of Hart, Docket No. 2-378 A (October 9, 1943); Matter of Jacobson, Docket No. 2-379 A (October 19, 1943); Matter of Siegel and Fried, Inc., Docket No. 2-374 A; Matter of Crabtree, Docket No. 4-495 A (January 8, 1944). It is not necessary that the opinion or order be subdivided into findings of facts and conclusions of law if clear findings and conclusions are set forth. Matter of Rowe, Docket No. 5-245 A (March 15, 1944).

⁸⁶Matter of Schwartz, Docket No. 2-1140 A (December 17, 1943).

⁸⁷Matter of Arkin, Docket No. 2-227 A (October 9, 1943); Matter of LaPorte, Docket No. 1-144 A (October 18, 1943); Matter of Horvit, Docket No. 2-863 A (November 19, 1943).

⁸⁸Rev. P. R. 4, § 3.1(d).

⁸⁹See Matter of Hill, Docket No. 4-8 A (July 27, 1943); Matter of Horvit, Docket No. 2-863 A (November 19, 1943); Matter of Kocaja, Docket No. 6-22 A (November 20, 1943); Matter of National Shoe Stores, Docket No. 2-833 A (November 25, 1943); Matter of Engetram, Docket No. 6-181 A (December 7, 1943).

⁹⁰H. R. REP. No. 862, 78th Cong., 1st Sess. (1943) 14, 16.

⁹¹Matter of Smith, Docket No. 7-94 A (March 28, 1944). In Matter of Fraley, Docket No. 2-1373 A (February 1944), it was said, "This provision as to posting obviously is intended to apply only to the premises in which the respondent operates his

The Suspension Order: Economic Consequences.—A suspension order is an economic sanction and therefore economic factors may play an important part in determining whether such an order should be issued and for what length of time. The resultant economic hardship, if any, on the community must be considered and the public interest weighed in the balance. An affirmative duty rests on a hearing commissioner to elicit facts bearing upon the economic consequences of any order, if such facts are not presented adequately by an enforcement attorney or the respondent.⁹² Such an order may be a severe sanction and should not be used in cases of trivial violations.⁹³ As I expressed it on another occasion, "Heavy artillery should not be rolled out to kill a mosquito."⁹⁴

Distributors of Rationed Goods Strictly Accountable.—Since the purpose of a suspension order is to allocate away from a violator critical and scarce commodities, an order can be issued even though the violations were not wilful or deliberate. Waste or diversion of rationed commodities may result as readily from gross carelessness, laxity or indifference as from design.⁹⁵ A mere assertion by a respondent of lack of knowledge of the regulations will not excuse his violations,⁹⁶ although such ignorance may have a bearing on the length of suspension.⁹⁷ Because those who are entrusted with the distribution of a rationed commodity have a positive nondelegable duty to distribute

business. If he ceases to rent the premises and does not conduct his business elsewhere there is no necessity of posting the notice thereafter." See also *Gallagher's Steak House, Inc. v. Bowles, et al.*, — F. (2d) — (C. C. A. 2d, 1944), OPA SERVICE 621:128.

⁹²Matter of Villa, Docket No. 8-3 A (July 29, 1943); Matter of Da Silva, Docket No. 8-38 A (September 11, 1943); Matter of Tramor Cafeteria, Docket No. 4-18 A (October 6, 1943); Matter of Glosser, Docket No. 2-65 A (October 23, 1943); Matter of Hosti, Docket No. 4-410 A (December 9, 1943); Matter of Dossett, Docket No. 4-461 A (December 1943); Matter of Herrin, Docket No. 4-617 A (January 14, 1944).

⁹³Matter of Weinziner, Docket No. 2-89 A (November 18, 1943); Matter of Leff, Docket No. 2-617 A (November 19, 1943); Matter of National Shoe Stores, Docket No. 2-833 A (November 25, 1943); Matter of Schull, Docket No. 2-860 A (December 2, 1943); Matter of Schwartz, Docket No. 2-1140 A (December 17, 1943).

⁹⁴Matter of Le Pantis, Regional Docket No. RI-S 100 (Decision of Chief Hearing Commissioner, Region I, April 2, 1943).

⁹⁵Matter of Firstman, Docket No. 8-41 A (October 8, 1943); Matter of Sgriccia, Docket No. 2-100 A (October 13, 1943); Matter of Petrol Corporation, Docket No. 2-58 A (October 14, 1943); Matter of Dixon, Docket No. 4-352 A (November 25, 1943); Matter of Hosti, Docket No. 4-410 A (December 9, 1943); Matter of Marcus, Docket No. 4-572 A (December 15, 1943); Matter of Kravitz, Docket No. 1-258 A (December 17, 1943); Matter of Kruger, Docket No. 4-607 A (December 20, 1943); Matter of Newnam, Docket No. 2-402 A (December 30, 1943).

⁹⁶Matter of Vermont Service Stations, Inc., Docket No. RI-S 53 (May 22, 1943); Matter of Wilemon, Docket No. 5-2 A (July 20, 1943); Matter of Harvey, Docket No. 3-56 A (August 31, 1943); Matter of Da Silva, Docket No. 8-38 A (September 11, 1943).

⁹⁷Matter of Vermont Service Stations, Inc., Docket No. RI-S 53 (May 22, 1943); see text *infra* at note 113.

such commodity in strict compliance with the rationing regulations, it has been held that an employer cannot divest himself of that responsibility by delegating the operation and management of his business to an employee. It is the employer, not the employee, to whom is entrusted the rationed commodity. Although the employer may permit an agent to act as his *alter ego* in the administration of his trust, in so doing, he cannot absolve himself of strict accountability for the performance of his duties.⁹⁸ This rule is particularly applicable to a corporate respondent, which if not liable for the acts of its agents would in most cases be able to avoid responsibility.⁹⁹ Of course, the untrustworthy employee may likewise be suspended.¹⁰⁰

Suspension Order: Scope.—Since a suspension order allocates away rationed commodities from unfit persons, it operates *in personam* and not *in rem*. It cannot issue against successors and assigns in the absence of evidence of a scheme or device calculated to evade or circumvent the provisions of a suspension order.¹⁰¹ No order may be issued against a party not named and served,¹⁰² nor against a principal stockholder of a corporation merely as such.¹⁰³ A suspension order must be in strict conformity to the rationing regulations. A hearing commissioner cannot substitute his sense of fitness or preference for established regulations. He does not “have the jurisdiction

⁹⁸Matter of Morris Loew, Inc., Docket No. 5 S 3 N. Y. (May 20, 1943); Matter of Schwartz, Docket No. 3-317 N. Y. (June 25, 1943); Matter of Magic Oil Company, Docket No. 4-20 A (August 13, 1943); Matter of Karaty, Docket No. 2-99 A (August 19, 1943); Matter of Tarolongo and Schlomshug, Docket No. 2-25 A (August 19, 1943); Matter of Shiland, Docket No. 4-15 A (August 31, 1943); Matter of Beaty's Service Company, Inc., Docket No. 4-47 A (August 31, 1943); Matter of Carolina Transfer & Storage Co., Inc., Docket No. 4-94 A (September 1, 1943); Matter of Star Oil Company, Docket No. 4-21 A (September 11, 1943); Matter of Fazio, Docket No. 3-11 A (September 11, 1943); Matter of Dunkel Oil Corporation, Docket No. 6-16 A (September 22, 1943); Matter of Perkins, Docket No. 4-45 A (October 18, 1943); Matter of Binghamton Giant Markets, Inc., Docket No. 2-832 A (November 6, 1943); Matter of Herrington Oil Company, Docket No. 3-262 A (November 2, 1943); Matter of K & J Markets, Inc., Docket No. 2-10 A (November 20, 1943); Matter of Merit Oil Company, Docket Nos. 1-135 A, 1-165 A (December 31, 1943).

⁹⁹Matter of Grand Cash Market, Inc., Docket No. 2-5 A (July 22, 1943); Matter of Esterman, Docket No. 2-4 A (July 29, 1943); Matter of Merit Oil Company, Docket Nos. 1-135 A, 1-165 A (December 31, 1943); Matter of Spur Distribution Co., Inc., Docket No. 3-448 A (March 18, 1944); Matter of Ruiter, Docket No. 3-540 A (March 22, 1944).

¹⁰⁰Matter of Baltimore Markets, Inc., Docket No. 2-1186 A (December 8, 1943).

¹⁰¹Matter of McCraney, Docket No. 4-197 A (November 29, 1943); Matter of Hollingsworth, Docket No. 4-411 A (December 8, 1943); Matter of Kramer, Docket No. 4-644 A (December 23, 1943); Matter of Rountree, Docket No. 4-641 A (December 23, 1943); Matter of Schubert, Docket No. 6-147 A (December 15, 1943); Matter of Crabtree, Docket No. 4-495 A (January 8, 1944); Matter of Sears, Roebuck & Company, Docket No. 4-355 A (February 17, 1944).

¹⁰²Matter of Moore, Docket No. 4-10 A (August 2, 1943).

¹⁰³Matter of Three Boro Service Station, Inc., Docket No. 36 S 5 C N. Y. (May 24, 1943).

or power to make a selection on the merits between competing ration plans. That is a function reserved for the administrative branch of the office."¹⁰⁴ The suspension order must be definite and specific in its provisions as to time, place, and commodities to which it applies.¹⁰⁵ It should permit a respondent to dispose of his stock of rationed commodities on hand, particularly if they are perishable.¹⁰⁶ No suspension order can be issued for failing to furnish information required by the Office of Price Administration unless the allocation is legally conditioned on facts which would be revealed by the information requested.¹⁰⁷

Length of Suspension Period.—The fact that the length of the suspension period is not provided for in the regulation has evoked criticism.¹⁰⁸ In the first instance the length of the suspension period is within the discretion of a hearing commissioner, who hears the testimony, observes the attitude of the respondent towards the rationing program, has the benefit of argument of counsel, and is in a position to appraise more carefully the demands of the public welfare in a particular community.¹⁰⁹ Where, however, the period decreed is excessively severe, it will be modified on appeal.¹¹⁰ There are certain norms governing the length of suspension periods. Long periods of suspension are entered against those whose past conduct demonstrates such wilfulness or gross carelessness or indifference as to indicate a likelihood of future and continuing violations with the consequent deleterious effect upon the whole rationing program.¹¹¹ Thus, suspension orders for the duration of the Second War Powers Act are issued for proven black market violations of a flagrant character.¹¹² Although a suspension order is not issued

¹⁰⁴Matter of Toots Shor Restaurant, Docket No. 2-26 A (August 6, 1943).

¹⁰⁵Beverage Products Co. et al. v. Zweedyke et al., — F. Supp. —, OPA SERVICE 621:119 (W. D. Mich. 1944); Matter of Islon, Docket No. 2-729 A (October 18, 1943); Matter of Binghamton Giant Markets, Inc., Docket No. 2-832 A (November 6, 1943).

¹⁰⁶Matter of McCraney, Docket No. 4-197 A (November 29, 1943).

¹⁰⁷56 STAT. 1078, 5 U. S. C. § 139 f (Supp. 1942); Matter of Parrish, Docket No. 7-45 A (October 23, 1943).

¹⁰⁸Pound, *The Challenge of the Administrative Process* (1944) 30 A. B. A. J. 121, 123; *Committee Report on Office of Administrative Hearings*, supra note 10, at 12.

¹⁰⁹Matter of Richards, Docket No. 2-18 A (December 30, 1943); Matter of Opalenik, Docket No. 1-387 A (January 5, 1944); Matter of Bousquet, Docket No. 1-380 A (January 5, 1944); Matter of Menard, Docket No. 1-373 A (January 5, 1944); Matter of Cordes, Docket No. 2-1291 A (January 22, 1944); Matter of Gaudio, Docket No. 6-276 A (January 22, 1944).

¹¹⁰Matter of Great Atlantic and Pacific Tea Company, Docket No. 4-657 A (January 18, 1944).

¹¹¹Matter of Basse, Docket Nos. 6-132 A, 6-245 A (January 14, 1944).

¹¹²Matter of Schramm, Docket No. 2-34 A (August 2, 1943). It was said in Matter of Williamson, Docket No. 1-97 A (December 24, 1943), "Duration suspension orders such as the one issued in this case are reserved as a general rule for black market

to punish but to withhold allocations of rationed commodities from those whose past conduct has proved them to be untrustworthy, it does not follow that allocations in every case should be withheld for the duration of the Act. Often where the violations are unintentional, unwitting, or the result of carelessness or laxity, or because of carelessness of employees, a short period of suspension is decreed. In such cases a suspension period is decreed to enable the respondent to put his house in order, to indoctrinate his employees, and to institute a proper and effective system of rationing controls at his business establishment to prevent a repetition of the violations.¹¹³ Moreover, equality of participation on equal terms should be denied violators as a matter of simple justice to the law-abiding. Merchants who have obtained more than their proper share quite properly should be required for a time to forego their allocations, and mark time while their law-abiding competitors catch up.¹¹⁴ Often the proper length of time can be ascertained with approximate mathematical exactness, as, for example, where a restaurant owner has overdrawn his ration banking account. A comparison of the amount of the overdraft with the amount of his weekly allotment will indicate the number of weeks by which the violator has outstripped his competitors. The responsibility for the length of the suspension order lies with the hearing commissioner. Although recommendations for disposition may be made by enforcement attorneys or by respondent's counsel, they are not binding on the commissioner.¹¹⁵

It has been previously noted that the rationing powers and the power to suspend stem from the Second War Powers Act. No jurisdiction exists

operations, and we perceive no reason why it was not properly used in this case. When dealers in rationed commodities so far ignore their duties and responsibilities under the rationing regulations as to engage in black market operations, under whatever guise, their past reputation cannot justify such conduct or render them immune from the results of the course of conduct which they deliberately chose to pursue. Such conduct has no place among dealers permitted to deal in rationed commodities and cannot be tolerated. Any other holding would tend to wreck the entire rationing program which is necessary for the continuing successful prosecution of the war, and the fair and equitable distribution of scarce and critical commodities among the citizens of this country."

¹¹³Matter of Country Gardens, Inc., Docket No. 4-172 A (October 19, 1943); Matter of Basse, Docket Nos. 6-132 A, 6-245 A (January 14, 1944); Matter of Thames, Docket No. 4-240 A (October 18, 1943); Matter of Pure Food Market, Inc., Docket No. 1-134 A (November 25, 1943); Matter of Sunrise Honey Company, Inc., Docket No. 2-1442 A (February 5, 1944).

¹¹⁴Matter of Bloome, Docket No. 8-196 A (December 1, 1943); Matter of Sears, Roebuck & Company, Docket No. 4-355 A (February 17, 1944); Matter of Crystall Sugar Company, Docket No. 3-68 A (February 24, 1944).

¹¹⁵Matter of Mangiaracina, Docket No. 2-330 A (November 25, 1943); Matter of Great Atlantic & Pacific Tea Co., Docket No. 3-447 A (March 9, 1944).

to suspend for violations in dealing in nonrationed commodities.¹¹⁶ Unlike the Emergency Price Control Act of 1942,¹¹⁷ the Second War Powers Act does not prescribe as a condition to the maintenance of a suspension proceeding that a violator be allowed a "first bite" and a warning to desist. Therefore, a previous warning has been held not to be a prerequisite to the issuance of a suspension order.¹¹⁸

Stay of Suspension Order.—For good cause shown, a hearing commissioner may provide in a suspension order that the operation or execution of such order shall be stayed in whole or in part for so long as the respondent shall comply with the rationing orders or the conditions set forth in the suspension order.¹¹⁹ In the event of future violations by the respondent at a time when the execution of the order has been stayed and he is on probation, power is granted to a hearing commissioner, after the submission of proof of such violation, to vacate the stay in whole or in part.¹²⁰

Consent Orders.—If the respondent and the enforcement attorney enter into a stipulation or agreement for the issuance of a consent order, the hearing commissioner has power to approve such agreement and to issue an order in accordance with its terms.¹²¹ Each agreement for the issuance of a consent order is scrutinized with care by the hearing commissioner who determines whether the agreed order is necessary for and fully protects the public interest. The issuance of an order based upon such consent agreement is by no means a mechanical task,¹²² but involves the same scrutiny and analysis of facts and law as is involved in the issuance of an order after hearing. No appeal lies from an order issued upon such a consent agreement.¹²³

Review of Order by Commissioner: Original Jurisdiction.—At any time after an order has been issued by a hearing commissioner from which no appeal is then pending, either the Government or the respondent may file an application for modification, vacation, or further hearing.¹²⁴ The appli-

¹¹⁶Matter of Griffin, Docket No. 5-150 A (December 18, 1943).

¹¹⁷56 STAT. 35, 50 U. S. C. § 925(f)(2) (Supp. 1942).

¹¹⁸Matter of Jacobson, Docket No. 2-379 A (October 19, 1943); Matter of Cordes, Docket No. 2-1291 A (January 22, 1944); Matter of Perlin, Docket No. 4-640 A (January 24, 1944); Matter of Taylor, Docket No. 4-730 A (January 26, 1944); Matter of Wodman, Docket No. 4-655 A (February 17, 1944).

¹¹⁹REV. P. R. 4, § 3.2(a).

¹²⁰REV. P. R. 4, § 3.2(c).

¹²¹REV. P. R. 4, § 3.3; Matter of Jay Dee Shoes, Inc., Docket No. 2-1716 A (December 30, 1943).

¹²²Matter of Great Atlantic & Pacific Tea Co., Docket No. 3-447 A (March 9, 1944).

¹²³REV. P. R. 4, § 3.3.

¹²⁴REV. P. R. 4, § 3.4(a).

cation may include affidavits or a brief in support thereof and must state in detail the grounds upon which the order should be modified or vacated.¹²⁵ This application must be served on the opposing party, who, within three days from receipt of service or such longer period as may be allowed in the discretion of the hearing commissioner, must file a brief and affidavit in opposition to the applicants.¹²⁶ After an application for modification is filed, the hearing commissioner, in his discretion, may stay the execution of the suspension order pending the determination of the application for modification.¹²⁷

At any time, except when an appeal is pending or an order has been entered on appeal by the hearing administrator, a hearing commissioner may modify or vacate an order previously issued to correct errors of fact or law disclosed by the record.¹²⁸ A hearing is granted on a petition for modification upon a showing that the applicant will produce additional material evidence which could not have been produced at the original hearing by the exercise of reasonable diligence,¹²⁹ or that changes in conditions or circumstances cause the suspension order to be detrimental to the public interest.¹³⁰

Where a respondent was represented at the hearing by counsel, and the evidence was known and available to the respondent at the time of the original hearing, a rehearing will not be granted.¹³¹ Considerably more latitude is granted where the respondent was not represented by counsel at the original hearing,¹³² although rehearings will not be granted merely because a respondent, after the issuance of a suspension order, decides he wants to be represented by counsel.¹³³ When the newly-discovered evidence is relevant

¹²⁵REV. P. R. 4, § 3.4(b).

¹²⁶REV. P. R. 4, § 3.4(c).

¹²⁷REV. P. R. 4, § 3.4(d).

¹²⁸REV. P. R. 4, § 3.5(a).

¹²⁹REV. P. R. 4, § 3.5(b)(1).

¹³⁰REV. P. R. 4, § 3.5(b)(2). Matter of Security Oil Company, Inc., Docket No. 2-426 A (February 25, 1944).

¹³¹Matter of Mohican Company, Docket No. 1-3 A (August 12, 1943); Matter of Jacobson, Docket No. 2-379 A (October 19, 1943); Matter of Perlín, Docket No. 4-640 A (January 24, 1944).

¹³²Matter of Figone, Docket No. 8-1 A (July 20, 1943); Matter of Barth, Docket No. 8-3 A (July 29, 1943); Matter of Moore, Docket No. 4-10 A (August 2, 1943).

¹³³Matter of Polasky, Docket No. 3-276 A (December 16, 1943). In that case it was said by the hearing administrator, "The record shows that respondent was given a fair and impartial hearing although he was not represented thereat by counsel. The Hearing Commissioner himself questioned the complaining witness and the respondent both at length. It is not urged in either the motion for a rehearing or in the notice of appeal that respondent has any newly discovered evidence or other defense to offer. Rehearings cannot be granted just because a respondent, after a fair hearing resulting in a suspension order against him, then decides that he wants to be represented by counsel. The notice of hearing advised respondent that he could be represented by

to the issues in the proceeding, a rehearing will be granted.¹³⁴ A petition for rehearing should state the specific nature of the newly-discovered evidence and its materiality.¹³⁵ A hearing commissioner may likewise modify an order where the refusal to take such action would be wholly inconsistent with the just and proper disposition of the proceedings.¹³⁶

Review of Order by Commissioner: Appellate Jurisdiction.—In addition to this original jurisdiction, hearing commissioners have a minor appellate jurisdiction. A hearing commissioner can hear an appeal from an order issued by a Local War Price and Rationing Board or a special hearing officer suspending consumer rations.¹³⁷ The appeal is heard in the same manner as if it were an original proceeding.¹³⁸ In other words, the hearing is a trial *de novo*.¹³⁹ Pending the hearing on appeal, the hearing commissioner may stay or suspend the operation of an order issued by the War Price and Rationing Board or the special hearing officer.¹⁴⁰ The order issued by a hearing commissioner upon determination of an appeal supersedes the order from which the appeal is taken. No further administrative appeal is available from the order of the hearing commissioner in cases of appeals from such subordinate officers.¹⁴¹

At any time after the service of the notice of hearing and before the service of the order of a hearing commissioner, the hearing administrator, after notice to both parties, may direct that the proceedings be brought before him and conducted in the same manner as if brought before a hearing commissioner.¹⁴² This power, used very infrequently, is designed for the protection of respondents whose activities cut across regional lines and where the alleged violation by the respondent affects not only his activities in the region where the proceeding was commenced, but in other locations as well. Justice in such cases would seem to require that the whole matter be adjudicated in one forum so as to avoid subjecting a respondent to numerous

counsel of his own choice at the hearing. He made the election to defend himself without benefit of counsel."

¹³⁴Matter of Bailey, Docket No. 19 SI-AT (April 24, 1943); Matter of Culpepper, Docket No. 4-6 A (July 20, 1943).

¹³⁵Matter of Linderman, Docket No. 37 SG 5 N. Y. (June 25, 1943); Matter of Polulach, Docket No. 6-101 A (November 30, 1943); Matter of Portneuf Co-operative Association, Inc., Docket No. 7-72 A (December 22, 1943).

¹³⁶Rev. P. R. 4, § 3.5(d).

¹³⁷Rev. P. R. 4, § 4.1(a).

¹³⁸Rev. P. R. 4, § 4.1(b).

¹³⁹Matter of Coyle, Docket No. 2-421 A (October 18, 1943). See *Wood v. Stewart*, — F. Supp. —, OPA SERVICE 621:127 (D. C. S. D. Fla. 1943).

¹⁴⁰Rev. P. R. 4, § 4.1(c).

¹⁴¹Rev. P. R. 4, § 4.1(d).

¹⁴²Rev. P. R. 4, § 5.1.

suspension proceedings involving the same issue. A right is given to any party to file with the hearing administrator a petition for reconsideration of any order issued by him in a case brought before him on the party's own motion.¹⁴³

Review by Hearing Administrator: Appeal.—Proceedings are reviewed by the hearing administrator in Washington by two methods. The usual method of review is by appeal. Both the respondent and the enforcement attorney may appeal to the Office of the Hearing Administrator from any order issued by a hearing commissioner except a consent order.¹⁴⁴ The Government has no right of appeal on an order issued after default, although the respondent has the right of appeal from an order of a hearing commissioner denying a petition to reopen a defaulted proceeding.¹⁴⁵

An appeal is taken by serving a notice of appeal on the hearing commissioner and on the other party to the proceeding within ten days after the service of the order appealed from.¹⁴⁶ The time within which an appeal may be taken may, for good cause shown, be extended by the hearing administrator.¹⁴⁷ This notice of appeal must contain a reference to the findings of fact, conclusions of law, if any, to which exception is taken, a brief statement of the grounds for such exception, the modifications proposed with respect to the order appealed from, and a brief statement of the reasons supporting such proposed modifications.¹⁴⁸ Unless the notice of appeal contains such specifications, the hearing administrator may dismiss the appeal.¹⁴⁹ An intolerable burden would be cast upon the hearing administrator if either of the parties were permitted to enter a blanket appeal and cause the hearing administrator to examine a long stenographic record, and often a large number of exhibits. It is not unreasonable to require an appealing party to set forth the grounds upon which the appeal is taken. Within ten days after the appeal, or such longer period as may be allowed, the appealing party must file a transcript of the stenographic report of the hearing with the hearing commissioner.¹⁵⁰

¹⁴³REV. P. R. 4, § 5.2.

¹⁴⁴REV. P. R. 4, § 5.3(a).

¹⁴⁵REV. P. R. 4, § 5.3(a).

¹⁴⁶REV. P. R. 4, § 5.4(a). A copy of this notice of appeal must be forwarded to the Office of the Hearing Administrator in Washington, D. C., within five days after taking the appeal. *Ibid.*

¹⁴⁷REV. P. R. 4, § 5.4(a).

¹⁴⁸REV. P. R. 4, § 5.4(b); *Matter of Levine*, Docket No. 2-29 A (August 17, 1943); *Matter of Meville*, Docket No. 3-335 A (January 18, 1944).

¹⁴⁹REV. P. R. 4, § 5.4(b).

¹⁵⁰REV. P. R. 4, § 5.4(c).

The taking of an appeal does not automatically stay the operation of the order appealed from. A hearing commissioner, for good cause, however, may upon application of any party, stay or suspend the operation of an order pending the determination of the appeal. If the hearing commissioner does not act upon such application within three days, or denies such application, the requesting party may apply to the Office of the Hearing Administrator for a stay.¹⁵¹

Within three days after the receipt of the notice of appeal or the stenographic transcript, whichever is later, the chief hearing commissioner must send to the Office of the Hearing Administrator the complete record of the proceedings, including: The notice of hearing and proof of service thereof; the request for hearing, if any; the transcript of testimony and all exhibits; the presiding officer's report and briefs in support or opposition thereto, if any; the order of the hearing commissioner with proof of service thereof and the accompanying opinion, if any; the stay order and all petitions, applications or motions filed and orders issued in the proceeding.¹⁵² Thus, the entire record of the proceeding is forwarded to the hearing administrator.

Any party to an appeal may submit to the hearing administrator a brief in support of or in opposition to the order of the hearing commissioner.¹⁵³ The hearing administrator, either upon application or upon his own motion, may order that oral argument be heard before him, the deputy hearing

¹⁵¹Rev. P. R. 4, § 5.5. Dean Pound comments, "Stay pending appeal, without which it would be of no use, may be had only on order of the Hearing Administrator whose office is in Washington. After the committee called attention to this, the regional administrator in one region (embracing Washington, Oregon, California, Nevada, Arizona, and part of Idaho) was given permission to grant a stay. It is much easier to get supersedeas in case of a judgment of a federal district court than a stay pending appeal from the order of a Hearing Commissioner of the OPA." (1944) 30 A. B. A. J. 121, 123. Had Dean Pound relied on the old Procedural Regulation No. 4, his mistake would have been excusable, since Section 1300.172 of that regulation did provide that stays should be issued by the hearing administrator. Authority was granted by the hearing administrator to all hearing commissioners (not to the regional administrator of one region, as stated by Dean Pound) to grant stays pending appeal. From external evidence it would seem that Dean Pound relied almost entirely on the San Francisco Bar Association Committee Report. Had he examined that report more carefully, he would have discovered such delegation of authority. *Committee Report on the Office of Administrative Hearings*, *supra* note 10, at 26. In all events, the revised procedural regulation expressly decentralizes the authority to grant stays.

¹⁵²Rev. P. R. 4, § 5.6.

¹⁵³Rev. P. R. 4, § 5.7(a). Matter of Campbell, Docket No. 5-22 A (August 24, 1943); Matter of Altfest & Isaacs, Docket No. 2-693 A (February 9, 1944). Within ten days after taking the appeal, the appealing party must file his brief with the hearing administrator. He must serve a copy of the brief on the opposing party. Within five days after receiving the appealing party's brief, the opposing party may file a counter brief with the hearing administrator, serving a copy of this counter brief on the other party also. Rev. P. R. 4, § 5.7(b).

administrator or any assistant hearing administrator.¹⁵⁴

The hearing administrator may affirm, reverse, or modify the order of the hearing commissioner or remand the proceeding with directions.¹⁵⁵ In passing upon an appeal, the hearing administrator will not ordinarily disturb a finding of fact based upon the credibility of witnesses. The hearing commissioner who sees the witnesses, observes their demeanor on the stand, and hears their testimony is in a better position to evaluate their credibility and to accord to their testimony the weight it merits.¹⁵⁶ Where, however, an order is based upon confused, indefinite, or questionable testimony, it will not be allowed to stand.¹⁵⁷ When the order of the hearing commissioner is based on a record and report of a presiding officer, the former's conclusions do not carry so much weight and the hearing administrator may more readily substitute his own judgment, for he is in the same position to decide as the hearing commissioner was.¹⁵⁸

On appeal the hearing administrator is limited to the facts disclosed by the record and may not base his decision on information obtained from other sources.¹⁵⁹ A respondent is not permitted to make piece-meal appeals. All alleged errors must be raised in a single appeal.¹⁶⁰ It is not the function of the hearing administrator in a decision on appeal to render advisory opinions. Questions of law that are not in issue in the proceeding will not be determined.¹⁶¹

Review of Proceedings by Hearing Administrator: On His Own Motion.—So as to prevent a denial of justice by a failure to perfect an appeal within the prescribed time, the hearing administrator is empowered to review any case on his own motion,¹⁶² even including an order issued by a hearing commissioner from which an appeal does not lie.¹⁶³ A review proceeding of this nature is conducted in the same manner as an appeal, except that the

¹⁵⁴Rev. P. R. 4, § 5.8.

¹⁵⁵Rev. P. R. 4, § 5.9(a).

¹⁵⁶Matter of Carlos, Docket No. 4-201 A (October 18, 1943); Matter of Baron, Docket No. 2-710 A (October 30, 1943); Matter of Yorkville Food Shop, Inc., Docket No. 2-44 A (November 18, 1943); Matter of Hollingsworth, Docket No. 4-411 A (December 8, 1943); Matter of Alfrest & Isaacs, Docket No. 2-693 A (January 19, 1944); Matter of Cordes, Docket No. 2-1291 A (January 22, 1944); Matter of Swerdlin, Docket No. 2-1444 A (February 5, 1944).

¹⁵⁷Matter of Glick Brothers, Docket No. 2-461 A (October 29, 1943).

¹⁵⁸Matter of Gridland, Docket No. 86-85 A N. Y. (April 16, 1943).

¹⁵⁹Matter of Piehovich, Docket No. 8-299 A (March 16, 1944).

¹⁶⁰Matter of Vesely, Docket No. 6-228 A (January 20, 1944).

¹⁶¹Matter of Basse, Docket Nos. 6-132 A, 6-245 A (January 14, 1944).

¹⁶²Rev. P. R. 4, § 5.10(a). Matter of Conte, Docket No. 2-96 A (August 4, 1943).

¹⁶³Rev. P. R. 4, § 5.10(a).

time for filing briefs is computed from the time of service of the notice of intention to review.¹⁶⁴

Appeal to Courts.—After the respondent has exhausted his administrative remedies, he may resort to the courts in a civil action to restrain the enforcement of a suspension order.¹⁶⁵

Conclusion.—This resume, perhaps tedious, of the procedure and practice of the Office of Administrative Hearings demonstrates, I believe, that not only are the animadversions directed against it unfounded and unwarranted, but also that the office has guarded sedulously what Mr. Chief Justice Hughes has described as “those fundamental requirements of fairness which are the essence of due process.”¹⁶⁶

I submit, in conclusion, that the creation of the Office of Administrative Hearings, separating functions of adjudication from those of investigation and prosecution, was a distinct step forward and that its procedure, going far beyond the bare necessities of due process of law, preserves in fact, as well as in theory, the basic rights of the citizenry, and at the same time permits expeditious determinations in a war-time economy.

¹⁶⁴Rev. P. R. 4, § 5.10(c).

¹⁶⁵*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 53 Sup. Ct. 459, 463 (1938); *Walbrick v. Brown*, — F. Supp. —, OPA SERVICE 621:66 (D. C. N. D. Texas 1943); *Beverage Products Co. et al. v. Zweedyke et al.*, — F. Supp. —, OPA SERVICE 621:119 (D. C. W. D. Mich. 1944); *Frank v. Bowles*, — F. Supp. —, OPA SERVICE 621:134 (D. C. S. D. N. Y. 1944).

¹⁶⁶*Morgan v. United States*, 304 U. S. 1, 58 Sup. Ct. 773 (1938).