ESSENTIAL QUALITIES LOOKED FOR BY AGENCY HEADS IN A HEARING EXAMINER'S DECISION

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I am happy to have this opportunity to participate in this Federal Trial Examiners' Conference Seminar Program and to talk to you briefly about the essential qualities which agency heads look for in the decisions submitted by hearing examiners in administrative proceedings.

An agency's quasi-judicial function is a vital aspect of its activities. It is not only the means through which the conduct and rights of persons engaged in the areas covered by the statutes administered by the agency are adjudicated in the light of the policies of those statutes and the agency's specialized experience under them. It also serves as one of the agency's principal tools, along with rule-making and the issuance of statements of policy of general application, for the agency's continuing development and delineation of the legal principles and policy considerations under the statutes. Those objectives can often be best achieved through the adjudicatory route, on a case-by-case basis in the context of a particular factual setting. To the hearing examiner has been delegated a major role in the adjudicatory process. That role finds its culmination in the hearing examiner's decision, and the agency places considerable reliance on that decision.

Perhaps the best and most specific source of guidance to the hearing examiner as to what his decisions should achieve, is provided by the agency's own decision in those cases where it reviews the action of the examiner. Aside from the agency's affirmance or reversal of the examiner's

findings and conclusions, the organization and content of the agency's decision reflects its agreement or disagreement with the manner in which the hearing examiner has analyzed the issues and the evidence and organized and presented the case. Even though the agency's decision does not normally address itself to the nature of the hearing examiner's decision as such, the examiner can usually discern in it a meaningful reflection of the extent to which his own decision has given the agency the assistance that it has looked for from him. In this sense the examiner receives continuing messages from the agency about the sufficiency and value of his decisions.

However, some general observations by one agency head may nevertheless be helpful. Of course there is considerable diversity in the types of proceedings in which hearing examiners are called upon to submit decisions, not only as between different agencies but even within a single agency.

Observations that might apply to an examiner's decision in a complex rate-fixing or reorganization proceeding would not necessarily be pertinent to a decision on a disability claim based on an injury sustained in the course of duty. But since the role of the hearing examiner is essentially the same throughout all the agencies, the similarities are more significant than the differences.

Because my own principal familiarity is with the proceedings and procedures of the Securities and Exchange Commission they constitute the point of reference on which my remarks are based, and I would expect that they are on the whole representative of those in most other agencies. At the Securities and Exchange Commission the hearing examiners' decisions were formerly recommended decisions, with the Commission itself undertaking a review whether or not exceptions were filed by the parties. Recently, however, our practice has been modified so as to provide that the examiners' decisions be initial decisions which in the absence of exceptions by the parties or review by the Commission on its own motion become the final agency decision. The cases to which the examiner is assigned vary as to complexity and size and cover a rather wide range of issues under the statutes administered by the Commission which as you know deal with the offer and sale of securities of issuers in all but a few regulated industries and cover a broad spectrum of financial and securities transactions and activities.

The decisional function performed by agency hearing examiners is in many respects similar to that performed by the agency itself. An agency decision must give the parties, the public and the appellate court a clear and reasoned presentation of the facts, law, and policy underlying its action. Just as the appellate court looks to the decision of the agency to assist and lighten the performance of its own decisional functions by giving it the benefit of an objective, quasi-judicial judgment on the issues which the briefs of the adversary parties do not necessarily contain, so does the agency look to the decisions of the hearing examiners to enhance the efficiency and wisdom with which it discharges its adjudicatory functions.

However, the hearing examiner's decision is generally expected to present a fuller treatment of the underlying factual material in a case than the agency is called upon to provide. A comparison might be made with the report of a master appointed by an equity court, which supplies the court with a thorough analysis of the evidence and detailed findings, whereas the opinion of the court itself is confined to the principal aspects of the case in the light of the master's report. A hearing examiner who has presided over a case and participated in the shaping of the record is in a position to perform the vital task of preparing a careful and useful analysis of all the substantial issues in the case in the light of the record. The issuance of a

comprehensive and well-reasoned decision by a hearing examiner can be a prime source of enlightment to the agency.

The hearing examiner's decision should strive to present an organized and unified treatment of the case which will place the principal issues in focus and reduce them to manageable proportions. The necessary preliminary description of the nature and background of the proceedings and the parties involved, which must be set forth at the outset in order to orient the reader to the nature of the principal issues that are presented, should be recited in a succinct manner, stripped of excess detail or verbiage that so often finds its way into the parties' papers. Indeed, succinctness is a virtue applicable to all aspects of the decision. It is entirely consistent with clarity and adequacy of treatment and yet it relieves everyone of the burden of plowing through a bulky document. While it may entail some extra effort, pains taken to tighten a decision are generally most rewarding.

After the main posture of the case has thus been indicated, a sound organization normally calls for an exposition of the facts as derived from the evidence in the record. Here, the hearing examiner is of perhaps the greatest help to the agency. The evidence in the record should be marshalled, with the examiner culling the probative from the irrelevant and unessential evidence which may have come into the record. It is not necessary, and indeed often results in a cumbersome and disjointed opinion, to detail the testimony of individual

witnesses, particularly where a conflict of testimony is not involved, and usually a statement setting forth the gist of the testimony serve most adequately. The examiner's findings of fact should be accompanied by an evaluation of the evidence on which they are based, with a discussion sufficient to demonstrate their validity.

In a real sense the hearing examiner begins to shape his decision as to the facts from the time he undertakes his assignment to the case. In his pre-hearing conferences in which he explores with the parties the scope of the evidence to be adduced and the issues to be developed, and throughout the hearing by his rulings on the admissibility of evidence, he anticipates what his decision in the case will properly encompass. The hearing examiner has the authority and the responsibility to further the establishing of the pertinent facts on the one hand and excluding the irrelevant and immaterial on the other hand.

Under the liberal rules of admissibility applicable to administrative proceedings the record should include all relevant and probative evidence, whether hearsay or subject to exclusion under rules applicable to jury trials. And in the course of the hearings he should himself elicit evidence which counsel has not thought to explore but which in his role as a potential deciding officer rather than a mere presiding functionary, the examiner has recognized to be useful in the interests of an adequate development of the truth. Moreover, when as so frequently happens a vital

question is asked of a witness but becomes sidetracked before it is answered, the examiner should make certain that the question is again put to the witness and that it is answered.

The examiner's control over the record also permits him to keep out evidence which he can anticipate will not be of value to the decision and to avoid an aimless and diffused hearing which results in a massive record that nevertheless fails to provide an adequate basis for an informed decision. The rules and procedures governing hearings should be utilized to further the accurate selection and determination of relevant facts and issues, rather than to demonstrate the agility and quick wits of counsel. The hearing examiner can exercise imaginative leadership in reasonably restricting the record to an intelligent effort to develop the facts. In this connection, in our experience records have sometimes been unduly extended by what takes the guise of prolonged cross-examination but which is really argument and is often repetitious and captious. Where the full and true disclosure of the facts does not require lengthy cross-examination, the hearing examiner should not hesitate to limit it. Another type of situation where we have found that insufficient control over a hearing has resulted in an unnecessarily long record is that where extended argument is permitted with respect to the admissibility of evidence alleged to be immaterial or irrelevant.

It makes little sense to encumber the record and the hearing with lengthy disputes over the admissibility of evidence when the principal alleged objective in keeping the evidence out is to avoid unnecessarily extending the record. In such situations, in view of the nature of administrative proceedings, the admission of allegedly irrelevant matter for whatever it may be worth may sometimes be the more efficient and wiser technique.

Where there is a conflict of testimony and the examiner bases his findings on the credibility of certain of the witnesses, the grounds for his belief or disbelief of particular witnesses should be clearly stated.

You are doubtless familiar with Justice Frankfurter's decision in Unversal Camera Corp. v. National Labor Relations Board that appropriate weight should be given to a hearing examiner's decision, particularly with respect to his resolution of conflicting testimony based on his determination of credibility of the witnesses as shown by their demeanor or conduct at the hearing. However, as Justice Frankfurter recognized, the findings of the examiner are to be considered "along with the consistency and inherent probability of testimony."

Nevertheless, because the courts have been inclined to require agencies to give considerable weight to the findings of a hearing examiner whenever demeanor evidence is a significant factor in the process of fact-finding, it behooves the hearing examiner to be particularly careful

in reaching his judgments as to the credibility of witnesses. Certainly such judgments should wherever possible be buttressed by other consistent evidence in the record. I think that an agency head tends to feel less comfortable about a finding based on demeanor of the witness alone than one fortified by a tangible demonstration of reliability or credibility such as corroboration or contradiction by other circumstances, testimony or documents. Demeanor may be an imprecise measure of credibility. As one lawyer wrote in the Journal of the American Judicature Society:

> ". . . modern science regards seeing the witnesses and hearing them as very little, if any, help in determining their veracity. That expert criminologist, William Shakespeare, makes Duncan say, 'There is no art to tell the mind's construction in the face.' And the phychologists agree with him. A 'shifty eye' usually means nothing but shyness. A restless manner is simply a restless manner. Hesitation indicates, as often as not, an effort to be accurate. An 'evil look' is what you see on the faces of Socrates, Darwin, and allarge proportion of myopic or cross-eyed professors of law and other subjects who are relatively harmless."

One case that came before the Commission is particularly apt in this connection. The respondent broker-dealer was charged with defrauding in securities dealings elderly customers whose confidence he had won through many personal attentions. In his testimony before the hearing examiner he displayed what the examiner considered a sincere and convincing manner which led the examiner to accept his version of the facts that he had not made any false or misleading

statements to the customers. However, when the Commission reviewed the record upon exceptions to the examiner's decision by the Commission's staff, it found that the respondent had written conflicting letters with respect to the same securities to different customers. He wrote to one customer owning these securities that he doubted that he could get a buyer for them except at a sacrifice price because the issuer had been in bankruptcy and the stock was a drug on the market. But to another customer he wrote that the securities were a desirable purchase but that they were in short supply and their price was high. He then paid the first customer a low price for the securities and sold them to the second customer at a much higher price. On the basis of this contradictory documentary evidence establishing the untrustworthiness of the respondent's testimony the Commission rejected the examiner's appraisal of the respondent's demeanor which,because of the smooth and charming scoundrel that respondent was, had induced the examiner to accept his story. It reversed the hearing examiner's findings and revoked the respondent's registration as a broker-dealer and he was subsequently convicted and imprisoned for his misconduct.

In dealing with the legal issues in the case, the hearing examiner should strive to treat in a well-reasoned manner not only the various contentions presented to him, but any other legal questions that he recognizes to be relevant to the sound determination of the case. In this area

he should keep abreast of recent decisions and public statements of agency policy. His decision will more readily command the confidence and respect of the agency if it reflects his awareness and consideration of such precedents and applicable standards. Where there is no directly applicable precedent, his development and articulation of a legal rationale in the light of any analogous legal principles or pertinent legislative history or policy will be particularly valuable to the agency in its review in the event exceptions are taken.

The hearing examiner thus serves to identify the matters upon which he considers the case turns and directs attention to them so that the parties can single out through the means of their exceptions the questions they wish to contest further before the agency itself. The agency is in this manner enabled to direct its own efforts at once to the heart of the case. By an adequate treatment and disposition of factual and legal issues the hearing examiner's decision serves to eliminate or forestall questions that the agency will have to pass on and hopefully discourage any exceptions so that the hearing examiner's initial decision can become final. In many cases this is a realistic and attainable objective, and often the agency is spared the burden of having to review the case at all. But even where it is clear that a party will carry the controversy to the agency, its scope can be effectively and helpfully narrowed to the really

essential questions. Where the hearing examiner's decision convincingly puts to rest - or to shame - secondary or fringe contentions that have been presented to him the party may realize the futility of pursuing them before the agency. And even if the party persists in including exceptions based on those contentions, the hearing examiner's treatment can then be adopted by the agency as dispositive of them.

In addition to its treatment of the facts and legal issues the hearing examiner's decision can aid the agency importantly in many administrative proceedings when he reaches the point of selecting the agency action he considers appropriate in the light of his findings. The type of action to be taken does not always mathematically follow from adverse findings, ~~but often various choices may be available~~. A wide range of possible results may be available depending on the nature and gravity of conduct found by the examiner. One of the principal assets of the administrative process is flexibility of remedy. Terms and conditions may be tailored to fit the particular situation. The examiner by virtue of his intimate familiarity with the record, the parties and the witnesses is uniquely able to provide the agency with an assessment of the case and devise an appropriate form of agency action. For example, the Securities and Exchange Commission institutes proceedings to determine whether the registration of a securities broker-dealer should be revoked for alleged violations of the securities laws. In such a

case the examiner might conclude that, although he finds the broker-dealer to have committed the violations charged, in view of mitigating factors the protection of investors would not require revocation of the registration on condition that the dealer will undertake appropriate internal controls and secure accounting and legal assistance to prevent a recurrence of the violations; or that suspension of the dealer from membership in a national securities association would be a suitable sanction; or that revocation of the firm should be directed but the individuals concerned should not, because of his evaluation that their misconduct was not of a type that would occur under proper supervision, be barred from future employment in an adequately supervised capacity.

With further reference to format and style, while I have described one organizational pattern which is fitting in most cases, I of course do not mean to imply that there should be a rigid or slavish adherence to it in all cases. The particular nature of the case and the objective of focusing upon the salient issues may well call for a different manner of presentation. Where one legal question dominates the case, for example, an effective method may be to present the question at the very outset and note its determinative character. I have found that the narrative form of decision is usually more conducive to a readable and intelligible presentation than the use of short numbered

paragraphs each containing single findings. The latter can result in a stilted and disjointed presentation that will disperse rather than synthesize the issues. The paragraphs can still be numbered, if that seems desirable in the interests of providing easier reference.

The agency does not necessarily require or look for a colorful and stylistic presentation, although the polished sentence and the well-turned phrase are always welcome and satisfying in any writing where they facilitate the expression of the thought to be conveyed and do not distort the appropriate emphasis. But the need for clarity and exactness of fact findings and legal reasoning is paramount. A literary flight that sacrifices even a modicum of precision, or hyperbole indulged in for the sake of emphasis, can mislead the agency and create a basis for a claim of error on review. On occasion the principal attack upon a hearing examiner's decision has centered on a few stray eye-catching but somewhat exaggerated characterizations which he was unable to resist penning, although the substance of his decision was otherwise entirely sound.

I might add a word with respect to the importance of promptness of submission of the hearing examiner's decision. Giving due recognition of course to the size of the record and the complexity of the issues in a particular case, an agency always values and appreciates a prompt decision. The

agency is always striving to reduce the time lapse between the inception and the determination of its cases. Moreover, the timeliness of the hearing examiner's decision, and in turn the decision of the agency which comes later, often has considerable substantive impact. A prompt disposition of an adjudicatory proceeding is always impostant to the individuals or companies directly involved - in some cases the private parties may suffer real injury or dislocation until the questions concerning them are resolved. In others the private parties may be well content to have action deferred as long as possible but the protection of the public interest calls for the early imposition of the sanctions or restraints that are in issue in the proceedings.

In addition, as I have previously observed, each adjudicatory decision represents a delineation of the law and policy under the statutes administered by the agency. The industry or other segment of the public affected by those statutes is guided by each of those decisions, and should have them available at an early date following the agency's institution of the proceedings. The hearing examiner need have no concern that a quick decision will be regarded as reflecting inadequate consideration; the merit of his decision will speak for itself, and his promptness will be viewed as a virtue by the agency if not also by the parties.