United States Department of Justice
Attorney General's Manual on the Administrative Procedure Act (1947)

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VI

SECTION 7--HEARINGS

The provisions of section 7 govern the conduct of hearings in those cases of rule making and adjudication which are required by sections 4 and 5 to be conducted in accordance with sections 7 and 8. The requirements of section 7 are closely integrated with those of sections 5(c) (as to certain types of adjudication) and 8. Section 7, together with sections 5 (c) and 8, became effective on December 11, 1946, and is applicable to proceedings commenced on and after that date. See section 12.

SECTION 7 (a)--PRESIDING OFFICERS

The first sentence of section 7 (a) provides that "There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Inasmuch as the provisions of section 11 relating to the selection and status of hearing examiners did not become effective until June 11, 1947 (see section 12), it is obvious that until then the agencies could continue to utilize their usual hearing examiners or officers, in compliance, of course, with the other requirements of sections 5(c), 7 and 8.

The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards "specially provided for by or designated pursuant to statute." An earlier draft referred to "other officers specially designated by statute." See Senate Comparative Print, June 1945 pp. 12-13 (Sen. Doc. p. 28). Under the original language, it might have been necessary for such an officer to be designated specifically by a statute to conduct a particular hearing, e.g., in the manner that 19 U.S.C. 1641 requires that hearings to determine whether a customhouse broker's license should be suspended or

revoked must be held by the collector or chief officer of the customs. Under the present broader language, the exception will also apply if a statute authorizes the agency to designate a specific officer or employee or one of a specific class of officers or employees to conduct the

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hearing. Examples of statutory provisions for hearing officers who may be utilized without regard to section 11 are: (1) joint hearings before officers of Federal agencies and persons designated by one or more States (e.g., section 13(3) of the Interstate Commerce Act, 49 U.S.C. 13(3)), as well as hearings before joint State boards under section 209(a) of the Federal Power Act (16 U.S.C. 824h), (2) where officers of more than one agency sit, as joint boards composed of members of the Interstate Commerce Commission and the Civil Aeronautics Board pursuant to section 1003 of the Civil Aeronautics Act (49 U.S.C. 643), (3) quota review committees under the Agricultural Adjustment Act of 1938 (7 U.S.C. 1363), and (4) boards of employees under the Interstate Commerce Act (49 U.S.C. 17(2)). Sen. Rep. pp. 41-42, (Sen. Doc. pp. 227-228). A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exception so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H.R. Rep. p. 34 (Sen. Doc. p. 268).

Generally, whoever presides at the hearing (whether an examiner appointed pursuant to section 11, a member of the agency or a special statutory board or hearing officer) is subject to the remaining provisions of the Act. Sen. Rep. p. 21; H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case. Similarly, a statute requiring or authorizing a hearing to be conducted by a particular board or officer may have the further effect of requiring such board or officer to participate in the investigation or prosecution or of placing the board or officer under the supervision or direction of investigating or prosecuting officials. See 19 U.S.C. 1641. In the latter case, it would seem that to the extent the general requirements of section 5(c) are inconsistent they are inapplicable.

The second sentence of section 7(a) provides that "The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner." This means, of course, that "They must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority, but

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this does not mean that they do not have the authority and dutyas a court does-to make sure that all necessary evidence is adduced and to keep the hearing orderly and efficient." Sen. Rep. p. 21, H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). This is not intended to prohibit a hearing officer from questioning witnesses and otherwise encouraging the making of a complete record.

The third sentence of section 7 (a) provides that "Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." This provision authorizes any presiding officer to withdraw from a proceeding if he considers himself disqualified, for example, as being related to a party. In addition, a party may, by the "filing in good faith of a timely and sufficient affidavit", present to the agency the issue of the "personal bias or disqualification of any such officer"; thereupon "the agency shall determine the matter as a part of the record and decision in the case". Hearings are not required on every charge of bias or disqualification of a presiding officer.[1] If the affidavit is insufficient upon its face, it may be dismissed summarily. In other cases, the agency may consider it appropriate to investigate the charge itself or by another hearing officer. In any event, the agency's decision and the proceedings upon such an affidavit must be made a part of the record of the case in which the affidavit is filed. Sen. Rep. pp. 21, 42, H.R. Rep.

p. 35 (Sen. Doc. pp. 207, 228, 269).

If a court in reviewing the agency's final action finds, contrary to the agency, that the hearing officer was biased or disqualified, the agency action based upon the recommended or initial decision made by such officer is not thereby automatically void; rather, the question is whether the private party was prejudiced by such error. See last sentence of section 10(e). The consequences of such bias or disqualification on the part of a presiding officer are alluded to in the reports of the Senate and House Committees on the Judiciary as follows: "The effect which bias or disqualification shown upon the record might have would be determined by the ordinary rules of law and the other provisions of this bill. If it appeared or were discovered late, it would have the effect--where issues of fact or discretion were important and the con-

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duct and demeanor of witnesses relevant in determining themof rendering the recommended decisions or initial decisions of such officers invalid." Sen. Rep. p. 21, H.R. Rep. p. 35 (Sen. Doc. pp. 207, 269).

SECTION 7(b)--HEARING POWERS

Section 7(b) provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act."

The quoted language automatically vests[2] in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., "within its powers." In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, "shall have authority", but from the general statutory purpose of enhancing the status and role of hearing officers. Thus, in the Senate Comparative Print of June 1945, p. 14 (Sen. Doc. p. 29), it is stated that "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (Final Report, pp. 43-53 particularly at pp. 45-46 and 50)." See also Sen. Rep. p. 21, H.R. Rep. p. 35, 92 Cong. Rec. 2157 (Sen. Doc. pp. 207, 269, 319-320) ; cf. Sen. Rep. p. 42 (Sen. Doc. p. 228).

As noted above, the subsection vests in hearing officers only such of the enumerated powers as the agency itself possesses. if an agency lacks the authority to issue subpenas, subsection 7(b) does not grant the subpena power to that agency's hearing

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officers. Senate Comparative Print, June 1945, p. 14 (Sen. Doc. pp. 29-30). The phrase "subject to the published rules of the agency" is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers. Senate Hearings (1941) pp. 653, 1457-1458. For example, if an agency provides by rule that the fact of citizenship must be established in a prescribed manner, the hearing officer must conform to such rule in exercising his power to "rule upon offers of proof and receive relevant evidence". Similarly, if an agency provides that subpenas duces tecum shall be issued only upon written application specifying the documents desired and their relevance, the hearing officer is bound to comply.

Agencies remain free to provide for appeals to the agency heads from rulings of hearing officers in the exercise of the powers enumerated in section 7 (b). For example, when a

ruling excluding certain evidence, if reversed by the agency, would necessitate reopening of the hearing and recalling witnesses, it may be desirable to permit an immediate appeal from the ruling.

SECTION 7(c)--EVIDENCE

Burden of proof. The first sentence of section 7 (c) provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." In the Senate Comparative Print, June 1945, p. 15 (Sen. Doc. p. 31), it is stated that "The provision relating to burden of proof is the standard rule." There is some indication that the term "burden of proof" was not employed in any strict sense, but rather as synonymous with the "burden of going forward".[3] In either case, it is clear from the introductory clause that this general statement was not intended to repeal specific provisions of other statutes which, as by establishing presumptions, alter what would otherwise be the "burden of proof" or the "burden of going forward". Sen. Rep. p. 42 (Sen. Doc. p. 228).

Evidence. The second sentence of section 7(c) provides that "Any oral or documentary evidence may be received, but every

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agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

Under section 7 (c) it is clear that, as heretofore, the technical rules of evidence will not be applicable to administrative hearings. See also Final Report, p. 70. Thus, it is stated that "the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice." H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). To carry out this policy, it is advisable that each agency direct its hearing officers to exclude from the record so far as practicable irrelevant, immaterial or unduly repetitious evidence.

Agency action must be supported by "reliable, probative, and substantial evidence." It is said that "These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand." H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). This restates the present law. H.R. Rep. p. 53, fn. 18 (Sen. Doc. p. 287); *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 230 (1938); Senate Comparative Print, p. 14 (Sen. Doc. p. 31). It is clear that nothing in section 7(c) is intended to change the standard or scope of judicial review; section 10(e) (5) specifically restates the "substantial evidence rule", as developed by the Congress and the courts, under which the reviewing court ascertains whether the agency's findings of fact are supported by substantial evidence.

Nothing in section 7(c) is intended to preclude an agency from imposing reasonable requirements as to how particular facts must be established-such as age, citizenship, marital status, etc. Nor is an agency forbidden to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.

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Furthermore, section 7 (c) does not repeal provisions of other statutes which establish certain presumptions of fact.[4]

Presentation of evidence. Section 7 (c) provides further that "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." It is concluded that the provision is intended to emphasize the right of parties in cases of adjudication (other than determining claims for money or benefits or applications for initial licenses) to present their evidence orally, and in addition to present such "documentary evidence" as would be admissible in judicial proceedings, such as writings and records made in regular course of business. 28 U.S.C. 695. As here used "documentary evidence" does not mean affidavits and written evidence of any kind. Such a construction would flood agency proceedings with hearsay evidence. In the last sentence of the subsection, there appears the phrase "evidence in written form," thus indicating that the Congress distinguished between "written evidence" and "documentary evidence." See also section 203 (c) of the Emergency Price Control Act. Again, the subsection expressly states the right to adequate cross-examination. Against this background, it is clear that the "right to present his case or defense by oral or documentary evidence" does not extend to presenting evidence in affidavit or other written form so as to deprive the agency or opposing parties of opportunity for cross-examination, nor so as to force them to assume the expense of calling the affiants for cross-examination. See *Powhatan Mining Co. v. Ickes,* 118 F. 2d 105, 109 (C.C.A. 6, 1941).

Of course, the agency may, if it desires, receive such written evidence as it determines would tend to be reliable and probative and the admission of which would not prejudicially deprive other parties or the agency of opportunity for cross-examination. Thus, technical and statistical data may be introduced in convenient written form subject to adequate opportunity for cross-examination and rebuttal. Sen. Rep. p. 42, H.R. Rep. p. 37 (Sen. Doc. pp. 228, 271). Any evidence may be admitted by agreement or if no

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objection is made. *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 155 (1941).

The provision for "such cross-examination as may be required for a full and true disclosure of the facts" does not, according to the House Committee Report, "confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is-as the section states-whether it is required 'for a full and true disclosure of the facts! In many rule making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings." H.R. Rep. p. 37 (Sen. Doc. p. 271).

In proceedings involving rule making or determining claims for money or benefits or applications for initial licenses, an agency may adopt procedures for the submission of all or part of the evidence in written form. Thus, in rate making and licensing proceedings, which frequently involve extensive technical or statistical data, the agency may require that the mass of such material be submitted in orderly exhibit form rather than be read into the record by witnesses. Similarly, in determining claims for money or benefits, the agency may require that the papers filed in support of the application contain the factual material. Such procedures may be required only "where the interest of any party will not be prejudiced thereby." Typically, in these cases, the veracity and demeanor of witnesses are not important. It is difficult to see how any party's interests would be prejudiced by such procedures where sufficient opportunity for rebuttal exists. However, "To the extent that cross-examination is necessary to bring out the truth, the party should have it." Sen. Rep. p. 23, H.R. Rep. p. 37 (Sen. Doc. pp. 209, 271). Such is the present practice of such agencies as the Civil Aeronautics Board, which has made extensive use of written evidence procedures to simplify records and shorten formal hearings.

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SECTION 7 (d)--RECORD

Record. The first sentence of section 7 (d) provides that "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance wit section 8 an , upon payment of lawfully prescribed costs, shall be made available to the parties." The record must include any agency proceedings upon an affidavit of personal bias or disqualification of a hearing officer pursuant to section 7 (a). All decisions (initial, recommended or tentative) are required by section 8 (b) to be made a part of the record. It is believed, by analogy to judicial practice, that the subsection does not require the transcription of oral arguments for inclusion in the record.

In the interests of economy, certain agencies have followed the practice of not transcribing the stenographic record of the hearing unless there is an appeal from the decision of the officer presiding at the hearing. Section 7 (d) does not require an agency to have the record transcribed automatically in every case, but it does require transcription in any case where a party demands a copy of the record, so that it will be available to him "upon payment of lawfully prescribed costs." This requirement is satisfied by the present agency practice of contracting with private stenographic agencies for reporting service on terms that enable parties to obtain copies at a reasonable price.

Official notice. The second sentence of section 7(d) provides that "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary," In the Senate Comparative Print, June 1945, p. 15 (Sen. Doc. p. 32), it is stated that "The rule of official notice is that recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an 'opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed.' (Final Report pp. 71-73)." The recommendation of the Attorney General's Committee, which is thus apparently adopted was that "the permissible area of official notice be extended" so as to avoid "laborious proof of what is obvious and notorious," subject to opportunity for rebuttal or explanation, as provided in section 7 (d). See the excellent discussion in Final Report, pp. 71-73, pointing out that the process of

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official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge. Cf. H.R. Rep. p. 38 (Sen. Doc. p. 272).

Agencies may take official notice of facts at any stage in a proceeding even in the final decision[5] --but the matters thus noticed should be specified and "any party shall on timely request be afforded an opportunity to show the contrary." The matters thus noticed become a part of the record and, unless successfully controverted, furnish the same basis for findings of fact as does "evidence" in the usual sense.

[ENDNOTES]

[1]This is emphasized by the fact that an earlier draft of the bill required such hearings. See Senate Comparative Print, June 1945, P. 13 (Sen. Doc. p. 158).

[2]Since section 7(b) itself vests these powers (including the subpena power) in in hearing officers. *Cudahy Packing Co. v. Holland,* 315 U.S. 367 (1942), and *Fleming v. Mohawk Co..* 331 U.S. 111 (1947), dealing with the authority of agencies to delegate such powers, have no application here.

[3]Thus, in Sen. Rep. p. 22 (Sen. Doc. p. 208), it is stated: "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prime facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." See also H.R. Rep. p. 36 (Sen. Doc. p. 270).

[4]For example. section 20(d) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 920(d)). provides that "in any proceedings for the enforcement of a claim for compensation it shall be presumed, in the absence of substantial evidence to the contrary-- (d) that the injury was not occasioned by the wilful intention of the injured employee to injure or kill himself or another." See *Del Vecchio v. Bowers,* 296, U.S. 280 (1935). See also section 2(a)9 of the Investment Company Act of 1940 (15 U.S.C. 80a-2 (9)).

[5]"Where agencies take such notice they must so state on the record or in their decisions and then afford the parties an opportunity to show the contrary." Sen. Rep. P. 23. H.R. Rep. pp. 37-38 (Sen. Doc. pp. 209. 271). If official notice is taken of facts in the course of the final decision, the proceeding need not be reopened automatically. but the parties will be entitled to request reopening for the purpose of contesting the facts thus officially noticed by the agency.

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VII
SECTION 8--DECISIONS

The provisions of section 8, together with those of section 5(c), govern the procedure subsequent to hearing. Section 8 applies to cases of rule making and adjudication which are required by sections 4 and 5 to be conducted in accordance with sections 7 and 8. It became effective on December 11, 1946, and is applicable to proceedings commenced on and after that date. See section 12.

SECTION 8 (a)--WHO DECIDES

Section 8 (a) provides for intermediate and final decisions, prescribes who shall make them, and defines the decisional relationship between the agency heads and presiding officers.[1] The subsection reads as follows:

> *Action by subordinates.* In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure -may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

At the outset, it should be noted that section 8 (a) has no application to cases in which the agency itself has presided at the reception of the evidence. The procedures required by this subsection are intended "to bridge the gap between the officials who hear and those who decide cases." H.R. Rep. p. 38 (Sen. Doc. p. 272). If the agency itself, e.g., the Interstate Commerce Commission, bears the evidence, it may decide the case without the use of any intermediate decision. In such cases, however, the agency may, if it desires, preface its final decision with a tentative decision to which the parties may file exceptions.

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In cases of adjudication subject to section 5(c) and in which the agency itself has not presided at the reception of evidence, the presiding officer[2] must "initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision." It is further provided that "Whenever the agency makes the initial decision without having presided at the reception of the evidence [the presiding officer] shall first recommend a decision." That is, in cases of adjudication subject to section 5(c), the presiding officer must make either (a) an "initial" decision which will become the agency's final decision in the absence of an appeal to or review by the agency, or (b) a "recommended" decision which will be followed by an "initial" decision by the agency.

Under the terms of the subsection, the presiding officer's decision will constitute an initial decision unless the agency provides otherwise either by general rule published in the Federal Register or by order in the particular case. Accordingly, each agency should determine whether it desires the decisions of its presiding officers to be "initial" decisions or recommended decisions.

In cases not subject to section 5 (c), the agency may provide for the making of initial decisions by "any other officer or officers qualified to preside at hearings pursuant to section V' That is, in rule making, in "determining applications for initial licenses," and in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers," an "initial" decision may be made, for example, by a hearing examiner other than the one who heard the evidence. Further, the fourth sent- ence of section 8 (a) provides that in rule making and in determining 'applications for initial licenses the agency may issue a tentative decision or any of its responsible officers may recommend a decision in lieu of a recommended decision by the hearing examiner who conducted the hearing. This last clause permits, in rule making and determining applications for initial licenses, "the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency report, a report prepared by the staff of specialists and technicians normally engaged in that portion of

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the agency's operations to which the proceeding in question relates." Sen. Rep. p. 43[3] (Sen. Doc. p. 229).

Finally, in rule making or determining applications for initial licenses, the agency may itself decide the case without any prior initial, recommended or tentative decision, even though it has not presided at the reception of the evidence, "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

Appeals and review. Where the agency permits a hearing officer to make an "initial" decision, "in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency." Parties may appeal from the hearing officer's initial decision to the agency, which must thereupon itself consider and decide the case. Also, the agency may review the hearing officer's initial decision even though the parties fail to appeal. Each agency should publish a rule prescribing the time within which parties may appeal or the agency may call up the case for review.[4] Where the hearing examiner (or other officer where permitted by the subsection) makes a recommended decision, the agency must always make an "initial" or final decision.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision--as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co., 114* F. 2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705. Similarly, the third sentence of section 8(a) provides that "On appeal from or review of the initial decisions of such [hearing] officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." This is not to say that hearing

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examiners' initial or recommended decisions are without effect. "They become a part of the record [as required by subsection 8(b)] and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." Sen. Rep. p. 24, H.R. Rep. p. 38 (Sen. Doc. pp. 210, 272). In such cases, it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses. However, in cases where the credibility of witnesses is not a material factor, or cases where the recommended or initial decision is made by an officer other than the one who heard the evidence, the function of such decision will be, rather, the sharpening of the issues for subsequent proceedings.

Section 8(a) empowers agencies to "limit the issues upon notice or by rule" on appeal from or review of the initial decisions of hearing officers. That is, an agency may limit the issues which it will consider in such cases by notice in a particular case or by a general rule published in the Federal Register. It may restrict its review to questions of law and policy or, where it is alleged that erroneous findings of fact have been made by the hearing officer, to determining whether cited portions of the record disclose that the findings are clearly wrong. Final Report, p. 51. See also Sen. Rep. p. 43 (Sen. Doc. p. 229).

Where the hearing officer makes a recommended decision, the agency must itself consider and determine all issues properly presented. However, it may provide that it will consider only such objections to its subordinates' decisions (recommended or initial) as are presented to it as exceptions to such decisions. See *Marshall Field & Co. v. National Labor Relations Board,* 318 U.S. 253, 255 (1943); *National Labor Relations Board v. Cheney California Lumber Co.*, 327 U.S. 385, 387-88 (1946). It may also require that exceptions be precise and supported by specific citations to the record.[5] The agency in reviewing either initial or recommended decisions may adopt in whole or in part the findings, conclusions and basis therefor stated by the presiding

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officer. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. Also, it may remand the case to the hearing officer for any appropriate further proceedings. Sen. Rep. p. 43, H.R. Rep. pp. 38-39 (Sen. Doc. pp. 229, 272-273).

SECTION 8(b)--SUBMITTALS AND DECISIONS

Submittals. The first sentence of section 8(b) provides that "Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, *or* (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions." [Italics supplied]. The procedure thus prescribed for the focusing of issues and arguments is a codification of the present general practice. Senate Comparative Print, June 1945, p. 16 (Sen. Doc. p. 33). "Ordinarily proposed findings and conclusions are submitted only to the officers making the initial (or recommended) decision, and the parties present exceptions thereafter if they contest the result. However, such exceptions may in form or effect include proposed findings or conclusions for the

reviewing authority to consider as part of the exceptions." Sen. Rep. pp. 24, 43 (Sen. Doc. pp. 210, 229).

Agencies may require that proposed findings and conclusions and exceptions be supported by precise citation of the record or legal authorities as the case may be. Reasonable time limits for the submission of such materials may be imposed. The opportunity to submit supporting reasons means that briefs on the law and facts which are filed by parties in support of their proposed findings and conclusions and exceptions must be received and considered, Sen. Rep. p. 24, H.R. Rep. p. 39 (Sen. Doc. pp. 210, 273). Section 8 (b) does not purport to prescribe opportunities for oral argument. Accordingly, subject to the provisions of particular statutes, each agency must itself determine in what cases oral argument before hearing officers or the agency is necessary or appropriate.6

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Decisions. Section 8(b) further provides: "The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Since all decisions, whether made by the agency or by a subordinate officer, become a part of the record, the requirement of the first quoted sentence will be satisfied if such decisions in some way indicate the ruling of the agency or such officer upon each requested finding or conclusion or exception presented to the agency or to such officer. The purpose of this requirement is "to preclude later controversy as to what the agency had done." H.R. Rep. p. 54, fn. 19 (Sen. Doc. p. 288).

The form and content of decisions, as prescribed in the last sentence of section 8(b), are discussed in the Committee reports as follows:

> The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be suf- ficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.
>
> Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material. It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often determine whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions. Sen. Rep. pp. 24-26, H.R. Rep. p. 39. (Sen. Doc. pp. 210-211, 273).

An agency which issues opinions in narrative and expository form may continue to do so without making separate findings of fact and conclusions of law. However, such opinions must indicate the agency's findings and conclusions on material issues of fact, law or discretion with such specificity "as to advise the parties and any reviewing court of their record and legal basis."7 The

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requirement that such decisions indicate the reasons for the exercise of discretionary power is a codification of existing good practice. See *Phelps Dodge Corp. v. National Labor*

Relations Board, 313 U.S. 177, 194-197 (1941).

Nothing in the Act is intended to preclude agency heads from utilizing the services of agency employees as assistants for analysis and drafting. *Morgan v. United States,* 298 U.S. 468, 481 (1936). Of course, in adjudicatory cases subject to section 5(c), such assistants could not have performed investigative or prosecuting functions in the cases (or in factually related cases) in which they are so employed. Also, the agency heads are free to employ the hearing officer who heard a particular case as the draftsman of their final decision and otherwise to assist in its formulation. Compare generally section 4(a) of the National Labor Relations Act, as amended.

Appeals to superior agency. Nothing in section 8 is intended to cut off any rights which parties may have for appeal to or review by a superior agency. Sen. Rep. p. 23 (Sen. Doc. p. 209). The requirements of subsection 8(b) as to the form and content of decisions do not apply to decisions of a superior agency upon such appeal from or review of the agency's decision.

[ENDNOTES]

[1]Any of the requirements of section 8 may be waived by the parties. Sen. Rep. p. 28 (Sen. Doc. p. 209).

[2]As here used, presiding officer means the member of the agency, the examiner appointed pursuant to section 11, or the special statutory board or hearing officer who conducted the hearing. See section 7(a). Where the presiding officer become, unavailable as by illness or leaving the agency. the agency may direct another hearing officer to make an initial or recommended decision, or it may issue a tentative decision, or it may order a rehearing.

[3]It is to be noted that in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers" (if they do not constitute either rule making or the determination of an application for an initial license), an Intermediate (i.e., "initial" or "recommended") decision must be made by the hearing examiner who conducted the hearing or by some other officer or officer. qualified to preside at hearings pursuant to section 7(a).

[4]It is important to note that section 10(c) permits an agency to require parties to appeal from hearing officers' initial decisions to the agency as a prerequisite to obtaining judicial review. Such a requirement must be set forth in a published rule which must further provide that the hearing officer's Initial decision shall be inoperative pending the agency's review of the case. Sen. Rep. p. 27, H.R. Rep. pp. 43, 56, fn. 21 (Sen. Doc. pp. 218, 277, 289).

[5]See Final Report, p. 52: "The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified In the appeal."

[6]See *Morgan v. United States,* 298 U.S. 468, 481 (1936): "Argument may be oral or written."

[7]Agencies should keep in mind that pursuant to section 3(b) they may cite as precedents only such previous orders and opinions as have been published or made available for public inspection.

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