PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 2 | Issue 1 Article 7

3-15-1982

Recent Cases and Developments in State Administrative Law

Paul Wyler

IN RE CONNER.
VIRGINIA EMPLOYMENT COMMISSION
Dec. No. 15879-C, June 19, 1981
Excerpt From Opinion

Regulation XI(B) of the Rules and Regulations Affecting Unemployment Compensation (in Virginia) provided that:

> "A challenge to the interest of the Commission may be made orally during the hearing or in writing before or after a hearing, but, if after, only prior to the date the Commission decision becomes final. The Commission shall promptly hear the challenge and proceedings with respect to the matter at issue shall not continue until the challenge is decided. In case of a written challenge, the challenge should be addressed to Director of Appeals, at the Commission's Central Office, in Richmond, Virginia."

The research of this Hearing Officer has failed to reveal any prior Commission cases where the interest of the Commission was challenged. Accordingly, there are no Commission decisions available for guidance setting forth the criteria and considerations that must be reviewed. Therefore, it is necessary to seek out other sources of authority on the particular issues at bar.

After carefully researching the available cases regarding the disqualification of administrative hearing officers and law judges, the Commission hereby adopts the following standards for the recusal of its hearing officers. These standards are stated in the disjunctive and it is necessary for only one to be proven in order to require recusal.

Recusal will be proper and will be required if:

1. A disinterested observer may conclude that the hearing officer has in some measure judged the facts as well as the law of a particular case in advance of hearing it; Cinderella Career & Finishing Schools v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970); or,

2. There has been a clear and convincing showing that the agency hearing officer, based upon prior conduct and comments, has an unalterably

closed mind on matters critical to the disposition of the proceeding; Association of National Advertisers v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 3011 (1980); or,

3. There has been a clear showing that the hearing officer, based upon prior conduct and comments, has made up his mind concerning the facts and is impervious to contrary evidence; United Steelworkers of America v. Marshall, D.C. Cir. No. 79-1048, Slip op. at 21-22, August 15, 1980; or,

4. If the impartiality of the hearing officer in any proceeding might reasonably be questioned: 28 U.S.C. Sec. 455; or,

5. If a hearing officer has reached and issued a decision after improper political, administrative, or legislative pressure; 28 U.S.C. Sec. 455(b) and (d); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966); American Public Gas Association v. FPC, 567 F.2d 1016, 1067-1070 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); or,

6. The administrative Hearing Officer has a financial or pecuniary interest in one of the litigants or has some interest in the outcome of the controversy before; 28 U.S.C. Sec. 455; 49 C.F.R. Sec. 1000.735 et seq.; or,

7. The Hearing Officer has exercised investigative, prosecutive and/or adjudicative functions in the same case; In re Murchison, 349 U.S. 133 (1955); 5 U.S.C. Sec. 554(d); Grolier, Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980).

In any case involving a challenge to the interest of an administrative agency, whether it is the Virginia Employment Commission or another agency, the burden of proof is upon the petitioner to establish by clear and convincing evidence that there is some conflict or improper conduct which would require the recusal of the Hearing Officer....

* * *

Comment: Are the seven grounds for recusal cited by the Hearing Officer consistent and compatible?

In recent years, the issue of recusal of administrative law judges and rulemakers has attracted a substantial volume of scholarly opinion. See, e.g. Allen, Disqualification of Agency Decision Makers 7 Litigation 15 (1981); Note, Standards of Disqualification for Federal Trade Commissioners in "Hybrid" Proceedings, 37 Wash. & Lee L. Rev. 1359 (1980); Strauss, Disqualifcations of Decisional Officials in Rulemaking, 80 Col. L. Rev. 990 (1980); Reed, Recusal of Rulemakers for Prejudice and Bias, 1 Am. Bus. L. J. 19 (1981); Anno.- Disqualification for Bias or Interest (Zoning), 10 ALR3d 694.

M. Coleman Walsh, Jr., the Special Examiner who wrote the foregoing decision, is a former Vice President of this Association.

HERALD COMPANY, INC.
v.
WEISENBERG

S. Ct., N.Y.
Onondaga Co.,
Sept. 8, 1981 (unpub'l.).

ROY, J.

In this Article 78 Proceeding (a statutory equivalent of certiorari and mandamus) petitioner, The Herald Company, Inc., seeks an order of this court vacating and annuling an oral order of the respondent, David Weisenberg, Administrative Law Judge for the New York State Department of Labor, which excluded the public and all members of the press from hearings held and to be held by respondents regarding the unemployment insurance claims made by Guido Visioni and Edward Fineberg, former Special Assistant Attorneys General. Petitioner seeks a further order of this court compelling the respondents to furnish a transcript of a hearing previously held in connection with the above claims.

This application arises out of the following facts and circumstances:

Messrs. Visioni and Fineberg were Special Assistant Attorneys General employed by the then Attorney General, Louis Lefkowitz, to assist Special Deputy Attorney General Peter Andreoli in an investigation into alleged political corruption in the County of Onondaga.

During the period of their employment a dispute arose between Visioni and Fineberg and Mr. Andreoli and the current Attorney General of the State, Hon. Robert P. Abrams. The dispute appears to center about claims by Visioni and Fineberg that their continued participation in the probe and continued employment in this atmosphere was a violation of the Canons of Professional Ethics. Visioni and Fineberg claim that the actions, statements and inactions of their superiors, Mr. Andreoli and Mr. Abrams amount to conduct detrimental to the administration of justice and their continued participation in the probe would violate the Canons of Professional Ethics.

As a result of this alleged, but as yet unspecified conduct, Visioni and Fineberg resigned their positions as Deputy Assistant Attorneys General and made application for unemployment insurance benefits. Their applications were denied upon the ground that they resigned for personal, non-compelling reasons. Both filed for and were granted a hearing pursuant to Sec. 620 of the Labor Law, before David Weisenberg, an Administrative Law Judge of the New York State Department of Labor. A hearing was scheduled for May 4, 1981, to take proof on the denial of unemployment benefits. At that

hearing Visioni and Fineberg appeared before Judge Weisenberg with counsel, Benjamin Ferrara, Esq. The Industrial Commissioner was represented by Mr. Albert Singer and the Attorney General was represented by Lawrence Zimmerman, an Assistant Attorney General. Also present at the initial stage of the hearing were several members of the press and electronic media.

After a brief statement by the Administrative Law Judge, as to the conduct of the hearing, Mr. Ferrara, on behalf of both his clients, requested that the Administrative Law Judge specifically exclude members of the press from the hearing. Petitioner's reporter, among other members of the media, objected to the closure of the hearing and requested that the proceeding be delayed to allow petitioner's attorneys time to appear and present legal arguments in opposition to the request for closure. This request was denied, however, Judge Weisenberg accepted a "form statement" from petitioner's reporter which requested an adjournment and this was made part of the record. All members of the media were then excluded. A subsequent request for a copy of the transcript of the hearing was also denied and petitioner commenced this proceeding immediately thereafter.

Petitioner contends that the actions of the Administrative Law Judge in excluding the press and public and refusing to grant its request for a transcript of the proceedings were improper. It submits that his actions were contrary to the provisions of Sec. 4 of the Judiciary Law; that no authority exists in law for exclusion of the press and public from such hearings; that such action violated the Freedom of Information Law and that petitioner was denied due process of law.

The Attorney General of the State of New York, appearing on behalf of respondent New York State Department of Labor, submitted an answer to the petition which stated that the Department of Labor had no objections to the presence of the press at the unemployment insurance hearing. The Attorney General himself (who, incidentally, is not a party to this proceeding) stated in the answer that he welcomed an opportunity in a public forum to refute any allegations by Visioni and Fineberg as to alleged violations of the Canons of Professional Ethics by Mr. Andreoli and the Attorney General's Office. Because of an apparent conflict of interest, the Attorney General did not appear on behalf of Administrative Law Judge Weisenberg.

The Administrative Law Judge, by his counsel, Mr. Weinstein,* in his verified answer to the petition denies certain of the allegations of the petition in this proceeding and sets up two affirmative defenses as follows: First, that the information obtained from employees and employers under

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* Judge Theodore Weinstein, President of the New York State Administrative Law Judges Association — Ed.

Article 18 of the Labor Law (Unemployment Insurance Law) is not subject to disclosure and secondly, that Visioni and Fineberg are under a court order not to disclose any information that they had learned as a result of their participation in the probe of alleged political corruption in Onondaga County.

Although they were not named as respondents in this proceeding, Visioni and Fineberg have retained counsel to represent their interests and have objected to the opening of the hearing to the public or the release of the transcript thereof. Their position is that they are under a court order not to disclose any information obtained in the course of their employment with Mr. Andreoli's probe; that such disclosure would violate Sec. 532 of the Labor Law and that in any event, any public disclosure of such information would violate Sec. 215.70 of the Penal Law. They contend that if the hearing was public or the transcript released, there is a possibility that both may be subject to contempt of court or criminal prosecution.

For the following reasons the court is of the opinion that petitioner's application should in this instance be denied.

This court is ever mindful of the rights of the press and public to have access to information of genuine public interest. The Freedom of Information Act and the Open Meetings Law (Public Officers Law Sec. 84 et seq., and Sec. 96 et seq.,) specifically provide for the public's right to know the process of governmental decision making. Court decisions have also promulgated certain rights of access to the public and press in criminal and civil matters. Matter of Gannett Co. v De Pasquale, 43 N.Y. 2d 370; 443 U.S. 368. Westchester Rockland Newspapers v Leggett, 48 N.Y. 2d 430; Oliver v Postel, 30 N.Y. 2d 171. Of course, these rights are not absolute and are subject to well defined limitations.

I think it a fair statement of the law that all civil or criminal proceedings are presumptively open to the press and public, absent compelling reasons to close such proceedings. Hearst Corp. v Glyne, 50 N.Y. 2d 707. I further believe it a fair statement that the press and public have, with certain exceptions, a presumptive right of access to governmental records and the governmental decision making process. (Freedom of Information Law and Open Meetings Law - Public Officers Law (supra)). This is so since in the absence of specific statutory protection the burden of proof is on the agency resisting disclosure to establish that the requested material is exempt from such disclosure. Westchester Rockland Newspapers v Kimball, 50 N.Y. 2d 575.

However, in the case before this court, no such presumption exists and there are three reasons why the proceeding before the Administrative Law Judge should remain closed to the press and public.

The first deals with Sec. 215.70 of the Penal Law which prohibits Unlawful Grand Jury Disclosure. This section, a Class E Felony, prohibits the intentional public disclosure of grand jury testimony or proceedings by a public servant involved in such proceedings without a court order. It is a contention of Visioni and Fineberg that their resignation was as a result of alleged improprieties on the part of Messrs. Andreoli and Abrams in the conduct of the special prosecutor's probe of alleged political corruption in Onondaga County. Their testimony would, of necessity, involve matters that were or had been pending before the Special Grand Jury. Without a court order, the public disclosure of such material would subject both to possible prosecution for a violation of Sec. 215.70 of the Penal Law. This court is not asked to, nor does it make, any determination as to whether such disclosure before the Administrative Law Judge would result in the possibility of similar criminal liability. However, it has generally been held that records of an unemployment hearing in matters in which the Commissioner is not involved are not subject to disclosure for either civil matters or criminal proceedings. Andrews v Cacchio, 264 App. Div. 791; Graham v Seaway Radio, Inc. 28 Misc. 2d 706; Coyne v O'Connor, 204 Misc. 465; Brewer v Bo-Craft Enterprises, 8 Misc. 2d 736 (all civil actions). See also People v Marzullo, an unreported decision of the Warren County Court, quashing a subpoena issued by the District Attorney of Warren County for labor department records.

The second obstacle to petitioner's application is Section 537 of the Labor Law. That section, with certain exceptions not relevant here, provides that the records of the Department of Labor with respect to Unemployment Insurance "...shall not be open to the public nor be used in any court in any actions or proceeding pending therein unless the Commissioner is a party to such proceeding, notwithstanding any other provisions of law." (Emphasis ours). It is difficult to find a clearer expression of legislative intention to withhold public access to such proceedings regardless of the opinion of the Attorney General to the contrary. See 1959 Op. Attorney General 80. This section of the Labor Law has been uniformly held to prohibit such disclosure. See Andrews v Cacchio, (supra); Graham v Seaway Radio, (supra); Coyne v O'Connor, (supra); Brewer v Bo-Craft Enterprises (supra); People v Marzullo (supra), and Simpson v Oil Transfer Corp., 75 F. Supp. 819. I see no compelling reason to deviate from the holdings in those cases.

Thirdly, both Visioni and Fineberg are currently under an order of Hon. Lyman J. Smith, J.S.C., dated March 1, 1977, not to disclose, for all time, "...the nature or substance of any testimony or other evidence considered by the...Grand Jury, or any discussion, decision, result or other matter...or the identity of any witness appearing before the Grand Jury." Judge Smith provided that in addition to Penal Law sanctions under Sec. 215.70 anyone who violated the order would also be subject to prosecution for Criminal Contempt 2d Degree pursuant to Sec. 215.50 of the

Penal Law. Judge Smith could modify his own order, upon application by a proper person. This court is without such power under any circumstance here present. See C.P.L.R. Sec. 2221.

Finally, assuming arguendo that the Freedom of Information Law applies to unemployment compensation hearings, two sections of that law specifically exempt the hearing in this case from disclosure. Sec. 87.2(a) of the Public Officers Law provides that agency records need not be disclosed if they "...are specifically exempted from disclosure by State or Federal Statute." Section 537 Labor Law, as previously held in this decision, specifically excepts unemployment insurance hearings from public disclosure. Furthermore, so long as Justice Smith's order is outstanding and unmodified by him, this court is of the opinion that subsection 2(c)i of Section 87 of the Public Officers Law would similarly prohibit disclosure since such disclosure would interfere with a law enforcement investigation and judicial proceedings.

In view of the above, the application of petitioner is denied and the petition dismissed.

* * *

From Unrebutted Evidence (p. 31)

Finished files are the result of years of scientific study combined with the experience of many years.

ALASKA TRANSPORTATION COMMISSION

v.

GANDIA

Supreme Court of the State of Alaska

November 9, 1979

Burke, Justice.

This is an appeal by the Alaska Transportation Commission (ATC) from an order of the superior court requiring a rehearing of certain of its proceedings, for alleged violations of the Administrative Procedure Act ... and due process requirements of the Alaska and United States Constitution. We hold that the Commission's use of a hearing officer, without the presence of the individual commissioners, violates neither the applicable state statutes nor constitutional due process.

Lloyd Franklin Hardy, d/b/a Seward Peninsula Flying Service,* filed with the ATC an application for original air taxi authority with a base of operations at Nome. Ramon Gandia, Neil Foster, and several others representing various airline companies protested the application. A hearing was held in Nome before ATC hearing officer William Bedsworth. None of the individual commissioners were present at the hearing.

On December 15, 1975, the Commission, in a 3-0 decision, granted Hardy's application. The Commission's deliberative process included a review of all documentary evidence, consideration of draft findings of fact and conclusions of law prepared by the hearing officer, and consideration of oral comments made by the hearing officer, who did not prepare a proposed final order because he was unable to make up his mind. No transcript of the hearing before the hearing officer had been prepared, nor did the commissioners listen to the hearing tapes. The hearing officer's draft findings of fact and conclusions of law were not submitted to the parties.

Subsequent to the order granting the application, Gandia and Foster filed motions for reconsideration with the Commission. The motions were denied, and Gandia and Foster appealed to the superior court. Superior Court Judge Victor D. Carlson remanded the matter for a new hearing, requiring that the ATC comply with the following procedures:

> 1. The hearing officer may not sit without a quorum of the Commissioners who must hear, consider and decide the case;
>
> 2. Only Commissioners who have heard both the factual presentation and the oral arguments or considered the written briefs may consider and decide the case;

* (Footnotes omitted).

3. The hearing officer, if one is utilized who is not a Commissioner, is to rule on admissibility of evidence, administer oaths, and control the presentation of the case at the hearing; and

4. The hearing officer may be requested to prepare a proposed decision to assist the Commissioners who have heard and are deciding the case but such decision must be circulated to the parties for their comments and arguments with a reasonable opportunity being given for responses to the arguments of adverse parties.

The Commission filed a motion for a rehearing, together with a request for a clarification of the decision. The superior court denied the motion. Both the ATC and applicant Hardy filed appeals with this court....

The superior court found that the procedures used by the ATC at its hearing violated (the Alaska Administrative Procedure Act), as well as procedural due process requirements of the state and federal constitutions. (The APA) forbids the delegation of the hearing power absent express statutory authorization, and requires the hearing officer to prepare a proposed decision and forbids members of the applicable government agency from voting on the decision if they have not heard the evidence. (The Court found, however, that "the ATC is specifically exempted" from the procedural sections of the APA, except as to judicial review, and is governed instead by another section which "gives the Commission considerable flexibility in choosing its own procedure, but all the while requiring the procedures to meet due process of law." The Court continued:)

The due process requirements of an administrative hearing were established long ago in the Morgan cases: Morgan v. United States, 298 U.S. 468, 80 L.Ed. 1288 (1936) (Morgan I); and Morgan v. United States, 304 U.S. 1, 82 L.Ed. 1129, rehearing denied, 304 U.S. 23, 82 L.Ed. 1135 (1937) (Morgan II). Justice Hughe's doctrine, "The one who decides must hear," is often erroneously interpreted to mean that the ultimate decision maker must be present, but the Court rejected this construction:

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for

> the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.

Morgan I, 298 U.S. at 481-82, 80 L.Ed. at 1295. The procedural defect in the Morgan cases was not the utilization of a hearing officer and non-attendance of the decision maker, but rather that in an adversary proceeding the Bureau of Animal Industry presented to the decision maker private studies and statistics which affected the substance of the final order, without being required to furnish this information to the opposing party. Since the opposing party had been unable to see and, therefore, had no opportunity to rebut this evidence, the Court concluded that it had not been afforded a fair hearing. Morgan II, 304 U.S. at 18-19, 82 L.Ed. at 1132-33.

The hearing afforded in this case was a full and fair one. None of the parties has alleged that evidence was presented ex parte to the Commission or otherwise concealed from it. All evidence bearing on the Commission's ultimate decision was presented at the hearing, and the parties had an opportunity to rebut it. Under these circumstances, it cannot be said that the hearing violated due process.

We turn now to that portion of the superior court's order concerning the preparation and presentation of a proposed decision to the parties.... (T)he Commission has adopted a rule, which provides: "Briefs may be filed in any proceeding by any party within 20 days after mailing of the proposed decision by the hearing officer. Any party desiring to respond to a brief will do so within 10 days of mailing of brief . . . ." We believe this regulation mandates the issuance of a proposed decision. Once the proposed decision has been prepared, the regulation clearly requires that it be issued to the parties who are to have an opportunity to respond. We therefore affirm that part of the superior court's order concerning the issuance of proposed decision.

AFFIRMED in part, REVERSED in part.

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DISCOVERY IN ADMINISTRATIVE RULEMAKING: THE COLORADO EXPERIMENT

By Gregory J. Hobbs, Jr.*

Administrative Practice, A Perspective

Administrative practice in Colorado, as elsewhere in the United States, is rooted in three significant and intertwined products of Twentieth Century law -- the doctrine of reasonable police power over the exercise of private property rights, the expansion of the commerce clause for regulatory purposes, and the growth of the administrative agency as law-maker, law-enforcer, and law-interpreter. Because of its genesis -- reaction by the public to the impact of the entrepreneurial system upon the human, social and physical environment -- administrative practice often has a peculiarly political cast. The Legislature and the Courts function essentially as overseers to an heterogeneous group of appointed policy makers; a combination of lay men and women, professional planners, technicians, engineers, scientists, managers and government lawyers who, in the context of broadly stated goals and a varying sense of mission, have sought and obtained the power to influence, alter or determine the fate of private and governmental decision-making.

Counsel's task in this milieu, whether government or private counsel, is to understand the intersts of the client, to determine if and how these interests can be forwarded, to counsel accommodation and/or behavior modification where appropriate, and generally to pursue a resolution favorable to the client, diligently and ethically.

The context in which the practitioner of administrative law works is, like any other, the law, the facts, and the forum. The law determines what arguments should be made; the facts determine what argument can be made; the forum determines what argument will be made. The goal is to argue persuasively for the exercise of decision-making power in the client's favor. Normally, persuasive argument is that which appeals to the policy of the law, the equities of the client's presentation and the decision makers'

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* Gregory Hobbs is a partner with the Denver firm of Davis, Graham & Stubbs, and was Chairman of the Colorado Bar Association Subcommittee on the State Administrative Procedure Act which developed recommendations for legislation contained in House Bill 1476.

The article from which the excerpt is taken first appeared in the Colorado Lawyer, Vol. 10, No. 10, October, 1981, a publication of the Colorado Bar Association, and is reprinted here by permission. Footnotes omitted.

sense of rightness and importance. Preparation and presentation -- with enthusiasm and conviction -- is the heart of persuasive argument. The effective use of expert witnesses can be indispensable.

The practice of administrative law is both challenging and frustrating because of the large measure of discretion given to administrative agencies and the general absence of evidentiary rules. The building of the record to protect a decision in the client's favor is extremely important, but the protection of the record against whatever another party might wish to adduce is very difficult. The introduction of every conceivable assertion, document, diagram, letter, photograph, memorandum or statement is generally allowed.

Hence, constitutional and statutory procedural protections found in the APA and in individual agency Acts have assumed great importance. Of primary importance, however, is the manner in which the agency views the substance of the presentation. The task, therefore, is to educate the decision-maker about the legal parameters of the case or proposed rule, through motions, briefs and oral argument, and the substantive issues, through written and oral presentation by witnesses. Tools for accomplishing this task are present in the State Administrative Procedure Act.

Since special statutory procedures control over general statutory procedures, such as the State Administrative Procedure Act, agency enabling Acts should always be consulted. Some agencies have adopted rules of practice before the agency, including discovery procedures, which are in addition to the State Administrative Procedure Act and these should be closely read....

The Policy Behind Discovery And Compulsory Process In Rulemaking

Discovery and compulsory process for witness testimony and document production are significant aids to the presentation of a fair and well-considered rulemaking proceeding, particularly from the standpoint of those who may be regulated by the agency or by persons interested in having the agency enforce its laws, because: 1) rulemaking may often involve complex social, economic, scientific and technical issues, 2) rules are most often proposed by the same staff and agency which interprets and enforces the rules, 3) the agency's interpretation, particularly contemporaneous construction regarding its rules and enabling Act, is entitled to deference, 4) rules are entitled to presumptive validity and the burden is on the challenging party to establish invalidity beyond a reasonable doubt, 5) judicial review is highly deferential to the agency, 6) rulemaking involves the formulation of policy upon a hearing record which is not subject to evidentiary review to the extent of an adjudicatory record, 7) it is presumed that those regulated are aware of the regulations which govern

their actions, 8) violation of rules may result in severe civil or criminal sanctions or both, and 9) rules can be extremely costly or prohibitive for the regulated sector to implement. With rules having such a potentially serious effect, careful attention must be paid to formulation of the rule itself.

The most important factor to consider in this regard is that rule-making agencies in Colorado are normally composed of citizens who may need, depending on the circumstances, a great deal of education in the subject matter and the ramifications of the proposal they are considering. Pre-hearing discovery can significantly narrow the need for oral testimony. The rulemaking agency can choose to accept depositions and other written material in lieu of oral presentations in order to shorten the proceedings. As in the court context, perceived issues and concerns about the proposed rule may disappear or be ameliorated as a result of discovery. Interested persons begin to see how best to prepare and make their presentation to the rulemaking agency. In sum, the rulemaking proceeding begins to assume known outlines before the free-for-all, which has characterized many of these proceedings in the past, commences.

* * *

BROWN v. RISTICH
36 N.Y. 2d 183
366 N.Y.S. 2d 116
325 N.E. 2d 533
(1975)

The following case, no longer recent, is included, not only for the rule of law it enunciates, but for its value as a model of judicial draftsmanship.

GABRIELLI, J.

The question presented is whether unsworn testimony may be received and given effect in an administrative disciplinary proceeding under section 75 of the Civil Service Law. The problem arises out of the dismissal of the petitioner, an attendant at Willowbrook State Hospital for the Mentally Retarded, found to have struck a patient. The evidence against petitioner consisted in large part of the eyewitness testimony of the victim and another patient, both of whom were found by the hearing examiner to be incapable of understanding the nature of the oath.

Petitioner, a ward attendant with 17 years experience at the Willowbrook facility, was charged with striking a 22-year-old female resident, Beverly Cash, "with a scrub or broom handle while (the resident) was sitting in a chair in the dayroom of Ward 234 and caus(ing) her to have a laceration of the scalp and forehead necessitating 13 sutures." At the hearing it was established that a group of patients, including Beverly Cash, were proceeding from the dayroom down the back stairs to the outdoors shortly after 9:30 a.m. An attendant at the back door testified that Beverly came out holding a towel on her head and went around to the front of the building. Another attendant testified to seeing Beverly pass by on her way around the building and that she had blood on her head. Beverly went to the supervising attendant in her office at the front of the building. The supervisor testified that Beverly had a bloody towel on her head and that she took her to the treatment room where a physician treated the wound and closed it with some 13 stitches. The physician described the wound and testified that it could easily have been made by the handle later found and identified as the weapon. The physician further testified that a patient, one Eileen Cassels, told him that morning that she had seen the incident and that petitioner had hit Beverly while Beverly was seated in a chair. This witness to the event, in fact, brought to the physician a broom handle three and a half to four feet long which she asserted was the weapon used by petitioner. Eileen Cassels was, however, unavailable to testify at the hearing. The physician's hearsay testimony as to what Eileen saw was buttressed by his observation that when she related these events to him she was in good form at the time and functioning at a high level.

There was further testimony to the effect that 10 minutes prior to the time Beverly emerged from the building she was seen sitting in the dayroom and that she was then perfectly all right. The supervisor and the physician both testified that when asked what happened Beverly said that petitioner had hit her in the head with a stick. These statements were made when Beverly came for help within minutes after the attack.

Preparatory to putting Beverly and the other patient eyewitness, Louise Gruzo, on the stand, the school psychologist testified that Beverly's I.Q. was 43, that she had a mental age of a four to six year old, and that she knew the difference between telling the truth and telling a lie. He stated that "Beverly does relate to reality. She does know certain things. What is going on around her and she can relate to them. I didn't find her to be psychotic or irrational. On a very concrete level, she can explain to you she's at Willowbrook and she has been here for a long time. She is capable of knowing what is going on in a particular setting on a very minimal basis, and the same thing with Louise Gruzo." Additionally, with respect to Louise Gruzo, 25 years of age, the psychologist testified that she had an I.Q. of 50, a mental age slightly higher than Beverly's, and that she knew what it was to tell a lie.

When Beverly was called to the stand the hearing examiner conducted a voir dire and concluded that it would be "senseless" to administer an oath. Over objection by petitioner's counsel, however, the hearing examiner allowed Beverly to testify unsworn. In response to direct questioning she stated that she remembered when she was hit on the head, where and how she was hurt, the object that caused her injury, and that petitioner was the person who struck her. When asked why petitioner struck her, she retorted, "I cursed her out." She further testified that an eyewitness was present at the time of the assault. Beverly's testimony remained unshaken after cross-examination.

The attendant at the rear door who testified to having seen Beverly emerge from the building holding a towel to her head also testified that at that time petitioner was upstairs sending the patients down to her and that petitioner's duties included getting the patients downstairs and to see that everyone got out. Petitioner testified in her own defense and said she did not know how Beverly was injured; and that she, petitioner, was in the bathroom trying to dress three other patients at the time of the injury. She asserted that she was unaware of Beverly's injury until Beverly had left the building, and denied that she had struck Beverly in response to being called a name.

The hearing examiner inferentially discredited petitioner's testimony in his findings where he stated: "I am quite convinced after reading the testimony that both of these patients, one of whom is the patient who was assaulted, have full knowledge of what they were saying and what they saw,

and they were able, satisfactorily to me, to indicate that the respondent did in fact strike this Beverly Cash child." He went on to note the medical foundation as to the competency of these witnesses and concluded that the two patient witnesses had the mental ability to put into words what they saw.

The Appellate Division summarily annulled the determination dismissing petitioner and relied on the following passage from Matter of Sowa v. Looney (23 NY 2d 329,333): "Compliance with the technical rules of evidence is not required in disciplinary proceedings before a Police Commissioner or other administrative officer. (Civil Service Law, Sec. 75; subd. 2; Matter of Roge v. Valentine, 280 N.Y. 268, 278-280; cf. 1 N.Y. Jur., Administrative Law, Sec. 121.) Generally, all relevant, material and reliable evidence which will contribute to an informed result should be admissible in disciplinary proceedings for there is a public interest in ascertaining the truth of charges brought against public employees. (Cf. 1 Benjamin, Administrative Adjudication in the State of New York (1942), pp. 171-181; cf. 2 Davis, Administrative Law Treatise, Secs. 14.01-14.07 (1958). Nevertheless, no essential element of a fair trial can be dispensed with unless waived without rendering the administrative determination subject to reversal upon review."

We think the Appellate Division misapplied those salutary rules to the facts in this case. Relying, apparently, on only the last sentence above quoted, the court held that reliance on the unsworn testimony of the two patient witnesses deprived petitioner of a fair hearing.

All adults are presumed competent to testify, and commitment to a mental institution does not automatically render a witness incompetent (People v. Rensing, 14 NY 2d 210,213; Barker v. Washburn, 200 N.Y. 280; Richardson, Evidence (10th ed.), Sec. 389). Certainly, an adverse party may put competency in issue and in such a case the matter is addressed solely to the discretion of the hearing officer who may examine the witness about to testify and any other person who can establish the mental capacity of the witness (Aquilar v. State of New York, 279 App. Div. 103, 105; cf. District of Columbia v. Armes, 107 U.S. 519, 522). Petitioner argues that the inability of a witness to understand the nature of the oath goes to the essence of his competency to testify, thus rendering his testimony inherently unreliable. There is, however, a clear distinction between the formalistic oath, on the one hand, and the concept of testimonial capacity on the other. A witness is said to be capable when he has the ability to observe, recall and narrate, i.e., events that he sees must be impressed in his mind; they must be retained in his memory; and he must be able to recount them with sufficient ability such that the presiding official is satisfied that the witness understands the nature of the questions put to him and can respond accordingly, and that he understands his moral responsibility to speak the truth (2 Wigmore, Evidence (3rd ed.), Sec. 492 et seq.)

An oath, on the other hand, has to some, become formalistic; and also to some has become a perfunctory, ritualistic statement made prior to testifying, its purpose having been questioned (see 6 Wigmore, Evidence (3rd ed), Sec. 1827 and authorities therein cited). The practice, nevertheless, has been carried on in civil and criminal cases to serve two functions: (1) to awaken the witness to his moral duty to tell the truth, and (2) to defer false testimony by providing a legal ground for perjury prosecutions (see Matter of Hecht v. Monaghan, 307 N.Y. 461, 474; Matter of Greenbaum v. Bingham, 201 N.Y. 343,347). However, it has long been realized that the absence of the oath need not necessarily mean that the unsworn witness could not be expected to speak the truth. Hence, the presumption is indulged that an oath was properly taken unless the record showed otherwise (People ex rel. Ballard v. Moss, 34 App. Div. 475) and it has also been held that a litigant cannot complain that his own witnesses were not sworn (People ex rel. Ballard v. Moss, 38 App. Div. 630), or that a recalled witness was not resworn (People ex rel. Niebuhr v. McAdoo, 184 N.Y. 304). In fact, the failure to object to unsworn testimony serves to waive any argument that the testimony was not properly admitted (2A Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 2309.05) Speaking of unsworn witnesses in a zoning variance case, Judge Cardozo stated: "It is enough that reasonable men could view them as entitled to probative effect." (People ex rel. Fordham M. R. Church v. Walsh, 244 N.Y. 280,287.)

Since we are considering the testimony of witnesses said to have the mental capacity of children, it is interesting to note that in criminal proceedings the court, if he is not satisfied that a child under the age of 12 understands the oath, may nevertheless allow in the child's unsworn testimony if he is satisfied that the child possesses sufficient intelligence and capacity (CPL 60.20, subd. 2). That a conviction may not rest solely on such testimony (subd. 3) does nothing to lessen the fact that such evidence is admissible, and the analogy has added force when we apply it to an administrative proceeding where it is specifically provided that "(c)ompliance with technical rules of evidence shall not be required" (Civil Service Law, Sec. 75, subd. 2).

We today hold that in an administrative proceeding such as this where the administration of an oath would be unavailing for the purpose for which an oath is normally administered, unsworn testimony may be received provided a sufficient foundation exists to support the hearing officer's determination that the witness possesses rudimentary testimonial capacity. In Fleury v. Edwards (14 NY 2d 334) it was held that the exclusion from a civil case of certain testimony given at a motor vehicle hearing on hearsay grounds was error. In a concurring opinion, joined in by the whole court, then Judge Fuld wrote: "despite their responsibility to come as close as possible to the truth, the courts in civil cases are required to deny themselves the best availabie hearway evidence * * * The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation * * * Absent

some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts" (pp. 340-341; citations omitted). In light of this holding in a civil action, there ought not be and, indeed, there is no justification in imposing a more rigid standard in administrative disciplinary cases in the face of legislative direction that there is no necessity for the imposition of the technical rules of evidence. We note also a recent holding by the United States Supreme Court that the admission of hearsay evidence, unsworn and unavailable to cross-examination, was not violative of due process and constituted substantial evidence in a Social Security Act disability benefits hearing (Richardson v. Perales, 402 U.S. 389).

Having concluded that unsworn testimony is admissible in administrative proceedings, given a proper foundation, we hasten to add that by so doing we intend no departure from the substantial evidence test. It may well be that in some cases unsworn testimony, either alone or in context with all the other evidence, may not amount to substantial evidence when considered in light of the whole record. Here, however, there is no such deficiency in the evidence. A foundation was laid by an expert witness who gave his opinion that both patient witnesses were capable of relating experiences happening to them, and there was no proof to the contrary. There was also hearsay testimony, admissible in this proceeding, that Beverly named petitioner as her assailant immediately after the occurrence and that another patient, who did not testify, reported the incident to the physician and named petitioner as Beverly's assailant. There is, also, considerable circumstantial evidence in support of the challenged testimony. It was established by competent witnesses that Beverly was in her ward and uninjured at approximately 9:30 a.m.; that a short time later she was injured; that the sole attendant in the ward was petitioner; and, that although petitioner was in charge and responsible for the activities of the patients at that time, she could not explain how Beverly was injured. Evidence indicated that Beverly's injury resulted from a blow by a hard object and the broom handle was found at the scene and produced for the physician that morning. Also, Beverly did not turn to petitioner for help, she ran out of the building and around to the front to seek aid from others. In addition the fact finder could, in light of all the facts, conclude that it would be hardly feasible that Beverly and Louise could have conspired to blame petitioner for an accident. The time periods involved militate against such conjecture. As Judge Bergan said in People v. Wachowicz (22 NY 2d 369,371): "It is an accepted rule that the corpus delicti may be established by circumstantial evidence (citations)." Finally, it need hardly be noted that the hearing examiner saw and heard the witnesses, observed their intelligence range and their comprehension of the questions and the nature of their responses. His assessment of these matters is entitled to considerable deference.

As a subordinate and valid motivation for our holding, we observe that policy considerations indicate the direction we should take. The right of petitioner to a fair hearing is undeniable. However, we cannot overlook the rights of institutional residents, especially those incapable of eloquent expression and abstract thought. These people also deserve a fair hearing. To deny them the right to complain of their treatment because they lack the ability to conceptualize the nature of an oath would be blinding ourselves to reality.*

The judgment of the Appellate Division should be reversed and the administrative determination reinstated.

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* Courts have become increasingly concerned over conditions in mental institutions such as Willowbrook. (See New York State Assn. for Retarded Children v. Rockefeller, 357 F. Supp. 752; Wyatt v. Stickney, 344 F. Supp. 387: Herr, Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded,23 Syracuse L. Rev. 995; Murdock, Civil Rights of the Mentally Retarded — Some Critical Issues, 7 Family L. Q. 1.) Careful attention has been paid to cases involving employees who have been charged with assaulting institutional residents. (Matter of Smart v. Francis, 43 AD 2d 623, revd. 35 NY 2d 872; Matter of Merchant v. New York State Dept. of Mental Hygiene, 41 AD 2d 588; Matter of Reid v. Greenberg, 40 AD 2d 1078; Matter of Traber v. Feinstein, 39 AD 2d 643, affd. 32 NY 2d 860; Matter of Blackmon v. Feinstein, 39 AD 2d 642.)