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## AGENCY FACT FINDING

Walter J. Kendall III <sup>1/</sup>

This presentation is not about how the agency fact determination process is structured either internally or externally. In other words, it is not concerned with whether the decision is made by an ALJ, an expert panel or the agency itself; nor is it concerned with which court reviews agency determination or how much deference is given. It is also not about process itself; neither due process nor such things as ex parte communication. It is most certainly not a presentation on the rules of evidence a la Wigmore.

It is about determining facts in an agency context. The focus is on how agency fact determination is different than court or legislative fact determination. What is the significance of the kinds of facts agencies need to determine? What is the significance of the pre-knowledge gained by experience or expertise?

In my opinion there really is no such thing as administrative law. There is workers comp. law and welfare law and public utility law, and occupational safety and health law. A dozen years of teaching and ten more of agency practice convinces me that all an administrative law person can do is present the "problems" faced by regulators and those regulated, and types of solutions developed. The key to this, it seems to me, is to identify the policies or values the system has brought to bear on recognizing and solving the problems.

This presentation owes much to the continuing inspiration of Gellhorn and Byse's casebook. First published 47 years ago, it is now in its 8th edition and is the work of Gellhorn, Byse, Strause, Raskoff, and Schotland. Yet it is forever new.

I'd like to give you 6 hypos and ask you to write down on a piece of paper whether you would affirm the agency or remand. Don't cheat. Write it down. Then we'll try to develop some sense of why your lives are so difficult, by seeing how agency determinations are different than court's. Then we'll return to these hypos and see what we think.

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<sup>1/</sup> Professor of Law, The John Marshall Law School.

1. In Cower v. Bunting Glider Co., 159 Pa. Super 573, 19 A.2d 270 (1945) the claimant was injured during working hours when his sweater caught fire while he was lighting a cigarette. He was awarded workmen's compensation, and his employer appealed. "[T]he case presents only one controverted question: Was the act of smoking such a violation of the employer's direct and positive order as to take claimant out of the course of his employment and thereby preclude him from compensation?" The record shows that defendant had promulgated a general rule forbidding smoking and had placed 'No Smoking' signs at various points in the plant. However, it does not appear that such a sign was continuously displayed in the men's room during claimant's term of employment . . . There is evidence to the effect that claimant and others used the men's room for smoking and that this practice was known to supervisory officials. On the rehearing the board deemed it advisable to make a personal visit to the plant in order to further familiarize itself with the plant's physical layout. While there, it observed that the floor of the men's room was littered with cigarette butts, and, partly, perhaps mainly, on that ground, the board found that the company had condoned smoking, at least in the men's room. The company objected. What is your ruling?

2. Matter of State Bank Charter Application of the Security Bank, Buffalo, 606 P.2d 296 (Wyo. 1980). Following a hearing on an application to charter what would be Buffalo's third bank, the examiner visited town, to the knowledge of all parties, to learn informally about a variety of community matters important to the application; e.g., other bank practices and general business conditions. Again, the company objected. What ruling?

3. Hunter v. Zenith Dredge Co., 19 N.W. 2d 795 (Minn. 1945) involved review of the Industrial Commission holding the employee ineligible for compensation under the workmen's compensation act. The employee had asked compensation for disability due to an accident arising out of and in the course of his employment as a slagger at the Zenith Dredge Company or for disability due to an occupational disease arising out of such employment. The employer denied these allegations. At the close of the hearing, the referee determined that the employee had not sustained an accidental injury and ordered that a medical board be appointed to determine whether the employee had been afflicted with an occupational disease within the provisions and definitions of the act. The medical board made its report determining that employee was affected with synovitis of the right knee and that synovitis was not an occupational disease within the provisions of the act.

The referee . . . adopted such report as part of his findings and disallowed claimant's claim. Claimant thereupon appealed to the industrial commission, which duly affirmed and adopted the findings of the referee. In the memorandum attached to the commission's decision it was stated:

. . . If the law had made this commission the arbiter of the facts in occupational disease cases we would have had no hesitancy upon the record before us in holding that the petitioner was disabled as a result of an occupational disease. We would not even have thought it necessary to appoint a neutral physician, who would have been subject to cross-examination. However, the law does not make us the judges of controverted medical questions involving occupational disease. That becomes the exclusive function of the medical board, and the medical board is not required to determine that question upon the testimony taken before the referee at a hearing prior to the appointment of the medical board. The statute directed that the medical board's findings and conclusions about controverted medical questions were to be automatically adopted by the commission as its decision.

Three witnesses testified before the referee as to the nature and cause of claimant's disability. These were claimant, Dr. F. J. Lepak, called on his behalf, and Dr. S. S. Houkom [sic], called on behalf of the employer and its insurer. All three testified, at length and in detail, in ways that connected the relator's conceded synovitis with this employment. Thus, the claimant testified that "he worked on steel plates in the open air, raising his right knee thereon as he applied an air gun to such plates to remove particles of slag . . .; that he moved about on the plates by raising his knee, alternatively with his left foot and walking ahead in that manner, applying the air gun as he moved; that he first observed difficulty with his right knee about two weeks before he was forced to quit his employment on November 26, 1943." . . .

Dr. Lepak . . . "testified that working on cold steel plates or on cold surfaces and floors frequently led to bursitis, and that in the shipyards where relator was working they had similar, although not identical, difficulties with other workers". Dr. Houkom's testimony was to the effect, that trauma caused by jerking of the air gun and constant contact with the cold steel plates contributed to relator's disability.

Counsel for claimant appealed from the Industrial Commissioner's finding for the employer. What ruling?

4. Commonwealth Unemployment Compensation Board of Review v. Ceja, 427 A.2d 631 (Penn. 1981) arose from an administrative decision that a former state employee should be denied unemployment benefits because she had been discharged for willful misconduct. All the evidence of that misconduct had been presented in the form of memoranda and letters about the claimant Ceja's employment history. Appearing pro se, she had denied the truth of what they said but had not objected to their admission.

When employer's representative began reading the exhibits into the record, claimant attempted to interrupt the presentation, but was stopped by the referee.

At the end of the submissions, when claimant again asked, "May I say something?," the referee replied, "Yes, but briefly". Then claimant launched into a confused and convoluted account of the episodes detailed in the exhibits in an attempt to answer all at once the myriad accusations therein. The employer's documents were unsworn, subjective statements. Would you affirm a denial?

5. Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission, 678 F.2d 327, 337-342 (D.C. Cir. 1982). One issue in this rate-setting proceeding for intercoastal carriers serving Puerto Rico and the Virgin Islands was the likely price of fuel during the period the proposed rates would be in effect. One carrier submitted a forecast of rising prices based on a statistical analysis of recent past experience and industry projections. The commission rejected the forecast as a deficient statistical analysis and it determined that the proper course was a "pragmatic adjustment of the carrier's projections". Therefore, it accepted as a base fuel cost to be applied . . . the last known price actually paid by PRMSA at the beginning of the test year:

. . . (a) PRMSA's last known fuel cost approximates the test year projections of the other carriers, and (b) all of the petroleum "trade intelligence" entered into the record in this proceeding support [sic] the conclusion that petroleum prices are likely to level off the remainder of 1981.

PRMSA urges that it was improper for the agency to take "official notice" of any leveling off of fuel prices not contained in the submission of the parties. Is this a proper use of official notice?

6. Carter-Wallace, Inc. v. Gardner, 417 F.2d 1086 (4th Cir. 1969), a proceeding to subject meprobamate, a tranquilizer, to special controls under the Food, Drug, and Cosmetic Act. One issue was whether the drug had a "potential for abuse" because supplies were readily available outside legitimate drug channels. If this were so, individuals, on their own initiative rather than on the basis of medical advice, might consume the drug hazardously. "Carter-Wallace objected to government exhibit 202, which is a summary purporting to show, among other things, that an audit of 99 pharmacies disclosed a shortage of 796,000 tablets of meprobamate. The shortage represented 77% of the total amount of the drug received by the pharmacies on a one-year period. The witness through whom the summary was introduced was not familiar with all of the underlying data, and some of the underlying documents were not available for use in cross-examination." Is this admissible? Can it be used to support a finding against the company?

Let's begin the analysis with the question of how agency proceedings, and I'm including both adjudication and rule making, differ from courtroom proceedings. Professor Chayes in a seminal article "The Role of the Judge in Public Law Litigation," 89 Harv. L. Rev. 1281 (1976), identified five basic characteristics of a traditional private law; i.e., tort or contract, lawsuit. He said the lawsuit is 1) bipolar, that is, there are two competing parties engaged in a zero-sum activity; 2) a lawsuit is retrospective, that is, the basic factual focus is on the past, what happened, who did what to whom; 3) there is an interdependence between the right/wrong and the remedy; that is, the relief is typically compensatory or specifically injunctive; 4) a lawsuit is self-contained. While the holding is precedential, the situation between the parties is entire unto itself and is not, or at least not treated as, relational or ongoing; and, finally 5) a lawsuit is party initiated and controlled.

Most agency proceedings have none of these characteristics. Let me go back -- which of these is characteristic of your agency? Generally, there is a third party, the public, and the matter not a zero-sum situation; the factual focus tends to be future oriented; and the remedy tends to be generic and legislative. Clearly the relationship between an agency and the regulated entity is more like a marriage than a one-night stand. And, finally, once an agency starts, the parties lose control. They can want to dismiss or settle, but such decisions are now controlled by the agency.

Thus, the agency process is profoundly different from a court. If the courtroom is not the correct model to pattern

after for guidance, what is? Professor Mashaw, in his provocative study of the Social Security Disability Program Bureaucratic Justice, sets out three models of justice and elaborates their legitimating values, summary goals and organizational structure. <sup>2/</sup>

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<sup>2/</sup> Other models have been elaborated. Professors Cass and Diver, in their new casebook, build on the distinction of Professor Michelman between public interest and public choice explanations of governmental actions.

"In the economic or public choice model, all substantive values or ends are regarded as strictly private and subjective. The legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange. The rule of majority rule arises strictly in the guise of a technical device for prudently controlling the transaction costs of individualistic exchanges. Legislative intercourse is not public-spirited, but self-interested. Legislators do not deliberate towards goals, they dicker towards terms. There is no right answer, there are only struck bargains. There is no public or general or social interest, there are only concatenations of particular interests or private preferences . . .

The opposed, public-interest model depends at bottom on a belief in the reality -- or at least the possibility -- of public or objective values and ends for human action. In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force. Majority rule is experienced as the natural way of taking action as and for a group -- or as a device for filtering the reasonable from the unreasonable, the persuasive from the unpersuasive, the right from the wrong and the good from the bad.

Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Ind. L.J. 145 (1977).

## Features of the Justice Models

Dimension/ Model	Legitimizing Values	Primary Goal	Structure or Organization
Bureaucratic Rationality	Accuracy & Rationality	Program Implementation	Hierarchical
Professional Treatment	Service	Client Satisfaction	Interpersonal
Moral Judgment	Fairness	Conflict Resolution	Independent

Most of what follows on these models is in Mashaw's own words.

### Bureaucratic Rationality

Given the democratically (legislatively) approved task, any task -- the administrative goal is to develop, at the least possible cost, a system for distinguishing between true and false claims. Adjudicating should be both accurate (the legislatively specified goal) and cost-effective. This approach can be stated more broadly by introducing trade-offs between error, administrative, and other "process" costs such that the goal becomes "minimize the sum of error and other associated costs".

A system focused on correctness defines the questions presented to it by implementing decisions in essentially factual and technocratic terms. Individual adjudicators must be concerned about the facts in the real world that relate to the truth or falsity of the claimed disability. At a managerial level the question becomes technocratic: What is the least cost methodology for collecting and combining those facts about claims that will reveal the proper decision? To illustrate by contrast, this model would exclude questions of value or preference as obviously irrelevant to the administrative task, and it would view reliance on nonreplicable, nonreviewable judgment or intuition as a singularly unattractive methodology for decision. The legislature should have previously decided the value questions; and decision on the basis of intuition would cause authority to devolve from the bureau to individuals, thereby preventing

a supervisory determination of whether any adjudicative action taken corresponded to a true state of the world. The general decisional technique, then, is information retrieval and processing.

### Professional Treatment

The goal of the professional is to serve the client. The service delivery goal or ideal is most obvious, perhaps, in the queen of the professions, medicine; but it is also a defining characteristic of law and the ministry and of newer professions such as social work. Although one might view medicine, for example, as principally oriented toward science and therefore knowledge, such a view is fundamentally mistaken. The value to be served by the professional is the elimination of the health complaints presented to him or her by patients. Curing a patient by eliminating a physically identifiable pathology may be good science, but if the patient still feels sick it is not good medicine. The objective is to wield the science so that it produces good as defined by the patient. This entails interpersonal and diagnostic intuition -- clinical intelligence -- as well as scientific knowledge.

An administrative system for decision making based on professional treatment would, therefore, be client-oriented.

Like bureaucratic rationality, professional judgment requires the collection of information that may be manipulated in accordance with standardized procedures. But in the professional treatment model the incompleteness of facts, the singularity of individual contexts, and the ultimately intuitive nature of judgment are recognized, if not exalted. Disability decisions would be viewed not as attempts to establish the truth or falsity of some state of the world, but rather as prognoses of the likely effects of disease or trauma on functioning, and as efforts to support the client while pursuing therapeutic and vocational prospects.

### Moral Judgment

The traditional goal of the adjudicatory process is to resolve disputes about rights, about the allocation of benefits and burdens. The paradigm adjudicatory situations are those of civil and criminal trial. The goal in individual adjudication is to decide who deserves what.

To some degree these traditional notions of justice in adjudicatory process imply merely getting the facts right in order to apply existing legal rules. So conceived, the goal

of a moral judgment model of justice is the same as that of a bureaucratic rationality model -- factually correct realization of previously validated legal norms. But there is more to it than that.

The moral judgment model views decision making as value defining. The question is not just who did what, but who is to be preferred, all things considered, when interests and the values to which they can be relevantly connected conflict.

This entitlement-awarding goal of the moral judgment model gives an obvious and distinctive cast to the basic issue for adjudicatory resolution. The issue is the deservingness of some or all of the parties in the context of certain events, transactions, or relationships that give rise to a claim. This issue, in turn, seems to imply certain things about a just process of proof and decision. For example, given the generally threatening nature of an inquiry into moral desert, parties should be able to exclude from the decisional context information not directly related to the entitlement issue that gives rise to the disputed claim. This power of exclusion may take the form of pleading rules, of notions of standing or proper parties, and, more importantly, may permit total exclusion of directive judgment where claims are abandoned or disputants come to some mutually satisfactory agreement concerning the relevant allocation. The goal is limited: to resolve particular claims or entitlement in a way that fairly allocates certain benefits and burdens, not to allocate benefits and burdens in general in accordance with the relative deservingness of individuals or groups. The decider is to a degree passive. The parties control how much of their lives or relationships is put at issue and what factual and normative arguments are brought to bear on the resolution of the dispute.

Which model most accurately describes your agency: bureaucratic rationality, professional treatment, or moral judgment?

Now that we have a framework for analysis, let's look at the ACUS recommendation 86-2 made just over a year ago -- that the Federal Rules of Evidence not be controlling in federal agency adjudication but more precise guidelines be adopted on the question of admissibility, specifically Rule 403 of the Federal Rules. Professor Richard Pierce was the consultant on this, and his views have been published in the Administrative Law Review, volume 39, at pages 1 through 26. The same basic question, the applicability of the rules of evidence for civil trials to agency proceedings, can be asked about state and local agencies.

The current federal APA rule is Section 556(d). It says in relevant part, "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence".

The most recent Model State APA, I'm sure more than ably discussed yesterday by my former colleague on the Governor's Administrative Rules Commission, Howard Swiebel, says in Section 4-212 in relevant position, "the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state . . . Evidence may not be excluded solely because it is hearsay".

Each agency's organic or enabling act may also have a provision on the applicability of the Rules of Evidence and that, of course, would be controlling.

The ACUS and Professor Pierce found 280 different sets of evidentiary rules at the federal level ranging from no references to evidentiary rules at all to mandatory incorporation of the FRE. The number of variations in the states is no doubt larger, but the range is likely the same.

Assuming a statute makes the rules of evidence in civil trials applicable, and it should be remembered that the prior MSAPA required use of such rules of evidence unless not reasonably possible, how have the courts responded?

Most courts recognize that despite the seemingly clear requirements, the civil trial rules need be applied only "so far as practicable". Professor Pierce finds the courts "confused" in applying these requirements. Since it has been recognized by the Supreme Court for over 80 years that the technical rules of evidence should not apply in agency proceedings (see Chgo. B. & Q. Rwy. v. Babcock, 204 U.S. 585 (1907)), it is not surprising that the courts have difficulty with legislatively imposed requirements that such rules be applied. What is surprising is why legislatures and even more surprisingly why agencies would voluntarily make such rules applicable to agency proceedings.

However, when such rules are mandated, how should the ALJ or other decision makers proceed? Each agency has developed and had developed for it, a jurisprudence on this

issue. That is controlling. <sup>3/</sup> But it seems desirable for groups such as yours and its affiliates to lobby the legislatures to eliminate requirements that court truth-seeking rules be required in agency proceedings. I am aware that Professor Pierce's survey data indicates that most of you who are bound by court rules in fact are satisfied. Even more of you use such rules for guidance in making rulings. Nevertheless, isn't it sufficiently established that in a paraphrase of Professor Davis by Professor Pierce "formal rules of evidence have no place in agency proceedings because of the many differences between agencies and courts"?

What should courts do in the meanwhile in cases raising the applicability of such court evidentiary rules? Application of such rules tends to exclude evidence that might otherwise be considered reliable and probative. If an agency admits such evidence, the court should affirm unless it can be shown that the "so far as practicable" determination of the agency was unreasonable and in fact prejudicial to the appealing party. Such an approach permits the agency to assess its own informational needs and at the same time makes sure that parties are not unduly prejudiced thereby.

How have federal agencies responded to the ACUS recommendation? Review of the Federal Register uncovered no direct reference to it. However, the NRC has incorporated the following evidentiary standard in its new Informal Hearing Procedures for Materials Licensing Adjudications (52 F.R. 20089, May 29, 1987). "Strict rules of evidence will not apply . . . but the presiding officer may . . . strike any portions of a . . . presentation, or a response . . . that is cumulative, irrelevant, immaterial or unreliable." There are over 30 agencies with the FRE "so far as practicable" standard. They should eliminate it.

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<sup>3/</sup> For instance, in Illinois in a case involving the Department of Revenue, the Supreme Court recognized that the controlling statute made the technical rules of evidence inapplicable, but held that the rule against hearsay "is a basic and not a technical rule" Grand Liquor Co. v. Dept. of Revenue, 367 N.E. 2d 1238 (Ill. 1977). In subsequent cases involving hearsay before other agencies the Court has not even cited this case, and allowed the use of such evidence. Eq. Union Elec. Co. v. Industrial Comm., 444 N.E. 2d 115 (Ill. 1983).

It is clear that ALJ's prefer guidance in areas as troublesome, recurring and essential as evidentiary rulings. However, it is not clear why ACUS and Professor Pierce would opt for FRE 403 as the proper guiding and evaluative standard. The federal APA may not be sufficient support in that it merely says irrelevant and immaterial evidence be excluded. Clearly there is much that is relevant (FRE 401 -- evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence) that is not reliable and probative and should be excluded even if it is not prejudicial, or would lead to confusion or be a waste of time as is required by 403. For instance, Judge Deese's article on Relevancy of Evidence in your most recent journal (7 J. NAALJ 38 (1987) discusses; e.g., character evidence, habit and custom, compromise and repairs.

However and regardless, isn't it implicit in 556(d) that exclusion is not limited to the mandated grounds?

Whatever you think of the Supreme Court's opinion in Richardson v. Perales, it seems to me, it says that reliable and probative evidence is allowed regardless of the technical rules and thereby, if evidence is not reliable and probative it need not be admitted. Of course, exclusion of evidence is riskier than "letting it in for what it's worth," but the ALJ should be able to rely on counsel to make an offer of proof if she or he strongly disagrees (FRE 103.5) and reassess the initial ruling as the proceeding unfolds.

Just so it's clear that Richardson v. Perales is not carte blanche, let me remind you of the nine reliability assurances that were present in that case:

1. the doctors' examination of Perales was personal;
2. their apparent lack of bias (e.g., Douglas dissent referring to a stable of Defense Doctors);
3. the routine and standard nature of the medical tests and procedures;
4. the range of examinations (five different specialists);
5. the consistency of result;
6. the possibility of subpoena and cross was available in the statute;

7. courts admit it; i.e., it's o.k. under FRE;
8. the courts have lots of experience with agency use of such data; and
9. necessity (i.e., the sheer volume of cases) requires flexibility. (Whenever I hear such an argument I am reminded of William Pitt's speech in the House of Commons on November 18, 1783: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves".)

Notice only one is the FRE and most are common sense based on your experience as ALJ's.

Finally, what were your rulings in each of the cases?

1. Cowan v. Bunting Glider -- the no-smoking sign, visit to the factory case.

Affirm \_\_\_\_\_  
 Remand \_\_\_\_\_  
 Held: Remand

2. State Bank Charter -- the visit to the town to gossip case.

Affirm \_\_\_\_\_  
 Remand \_\_\_\_\_  
 Held: Affirm -- if error, harmless;  
 burden on bank to show how  
 harmed.

3. Zenith Dredge -- the Medical Board -- agency disagreement case, synovitis of the knee.

Affirm \_\_\_\_\_  
 Remand \_\_\_\_\_  
 Held: Unconst. Medical Board not  
 required to set out its findings  
 and reasons deprives plaintiff of  
 J.R.

4. CEJA -- the unemployment -- dismissed for willful misconduct--case.

Affirm \_\_\_\_\_

Remand \_\_\_\_\_

Held: For claimant ALJ cut her off (and didn't help her), and documents were unreliable.

5. Maritime Shipping -- official notice of fuel price case.

Affirm \_\_\_\_\_

Remand \_\_\_\_\_

Held: Affirmed

6. Carter-Wallace -- the meprobamate case.

Affirm \_\_\_\_\_

Remand \_\_\_\_\_

Held: Should not have admitted, but lots of other evidence affirmed.

Based on your show of hands and the discussion, I take it that most of you would describe your agencies as "moral judgment" agencies. In my opinion, a review of the statutory purposes behind most agencies shows that they were created to replace the courts and its case law. Clearly that is true of, among others, workers comp. agencies, the National Labor Relations Board, and public utility commissions. A more appropriate model for such reform agencies is the professional treatment model. It empowers the agency (and Administrative Law Judge) to make a record so that it comes up with the best policy answer and is not tied to the alternatives presented by the parties. See, e.g., Echevarria v. Secretary, 685 F.2d 751 (2d Cir. 1982). Under no circumstances should an agency go to either the extreme of bureaucratic rationality; i.e., just processing bodies (cf. Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984)) or that of purely ad hoc decision making (cf. Auerbach, Justice Without Law (1983)). In any event, how you or the courts see your agency in large measure determines how you approach an evidence question.

Thanks. It's been fun. I hope it's been helpful.