ADMINISTRATIVE PROCEEDINGS

Hearsay Evidence in Administrative Proceedings[1]

Except when required by statute, formal rules of evidence do not strictly apply in administrative proceedings. The basic construct for evidentiary evaluation in administrative proceedings was established by the U.S. Supreme Court in *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904), and *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913).[2] In *Baird*, the Supreme Court held that broad concepts govern admission of evidence in administrative proceedings, reasoning their investigative function should not be hampered by narrow technical common law rules. In *Louisville & Nashville R.R. Co*, the Supreme Court addressed the applicable standard of review of administrative determinations. The Supreme Court again noted the permissiveness in admission of evidence, but noted that such proceedings must still meet basic evidentiary requirements and that it would review an agency's conclusions to determine if they were supported by "substantial evidence." The Supreme Court later defined "substantial evidence" as relevant "evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). The Supreme Court added that mere uncorroborated hearsay or rumor does not constitute substantial evidence. The fundamental underlying standard for conducting administrative hearings is that the hearing be fair and be supported by substantial evidence. *Spiller v. Atchison, Topeka & Santa Fe Ry. Co.* 253 U.S. 117 (1920).

These basic standards are contained in 5 U.S.C. § 556(d) of the Administrative Procedures Act (APA), which provides in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. 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. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *** A party is entitled to … conduct such cross-examination as may be required for a full and true disclosure of the facts.

These standards are premised on procedural due process principles. For example, in *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court addressed the claimant's

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[1] This opinion is limited to hearsay evidence otherwise not admissible at a judicial proceeding. Hearsay exceptions under formal rules of evidence are premised on their reliability and, by virtue of their admissibility in judicial proceedings, should likewise generally be admissible in administrative proceedings.

[2] For a comprehensive discussion of the evolution and application of evidentiary standards in administrative proceedings, see *Standards of Evidence in Administrative Proceedings*, William H. Kuehnle, 49 N.Y.L. Sch. L. Rev. 829 (2004).

argument that the use of hearsay medical reports at a Social Security Administration hearing deprived him of due process in derogation of the APA. With respect to *admissibility*, the Supreme Court held that hearsay is "admissible up to the point of relevancy." *Id*. at 410. In determining that the hearsay reports constituted "substantial evidence," the Supreme Court held that the use of hearsay as a decisional basis, meets due process if it has underlying reliability and probative value. The Supreme Court explained, "the matter comes down to the question of the procedure's integrity and fundamental fairness." *Id*. at 410. In so holding, the Supreme Court noted nine factors that "assure underlying reliability and probative value": (1) three of the five physicians were retained by an independent agency unconcerned with the proceeding's outcome; (2) the federal agency's vastness and non-adversarial role "make for reliability and impartiality in the consultant reports;" (3) the doctors had all independently examined the claimant; (4) the examinations were by specialists in various related fields; (5) all five doctors reached the same conclusions; (6) the claimant could have subpoenaed and cross-examined the doctors; (7) written medical reports of examinations are often admissible even in court; (8) "the decisions ... demonstrate traditional and ready acceptance of the written medical report in social security disability cases"; and (9) live medical testimony at hearings, where unnecessary, would drain limited administrative resources. 402 U.S. at 402–06.

Procedural due process concerns are invariably implicated with the introduction of hearsay evidence because of the inability to confront and cross-examine the declarant.[3] This point was articulated in *Capobianco v United States*, 394 F2d 515 (Ct.Cl. 1968), reasoning that where the particular hearsay constitutes a major area of support for the administrative decision, the situation may possibly verge on a deprivation of due process. Consequently, hearsay use is evaluated in terms of *procedural due process* and the additional value to the integrity of the proceedings by requiring live testimony. This concept is embodied in § 556(d) of the APA permitting cross-examination "as may be required for a full and fair disclosure of the facts." In the context of a deportation hearing, the court, in *Felzcerek v. I.N.S.*, 75 F.3d 112, 115 (2d Cir. 1996), observed that due process requires that hearsay be "probative" and that "its use be fundamentally fair." *Id*. Fundamental fairness, in turn, "is closely related to the reliability and trustworthiness of the evidence." *Id*. Thus, an opponent to hearsay bears the burden to demonstrate there are serious issues with respect to its reliability such that cross-examination is crucial to the truth finding function.

Judicial standards, consistent with the APA, favor the *admission* of hearsay in administrative proceedings. See *United States Steel Mining Co., v. Director Office of Workers' Compensation Programs*, 187 F.3d. 384 (4th Cir. 1999)(observing that agencies are empowered to admit all relevant evidence, erring on the side of inclusion). Consequently, the overriding issue is typically not whether hearsay evidence is *admissible*, but whether its receipt in an administrative proceeding is *sufficient to support the decision* on judicial review. However, courts frequently conflate the question of *admissibility* with that of *legal sufficiency*. See *Evosevich v. Consolidated Coal Vo.*, 789 F2d 1021, 1025 (3d Cir. 1986), observing, "[t]he Supreme Court in *Perales* and this court

[3] *Id*., generally.

in *Republic Steel*[4] conflated the questions whether medical reports were admissible and whether they could constitute substantial evidence." Likewise, in *Calhoun v. Bailar*, 626 F.2d 145 (1980), a case frequently cited as synthesizing the approach to the admission of hearsay in administrative proceedings, the court likewise conflated admissibility, procedural due process and judicial review standards; nonetheless, the case is instructive. In terms of *admissibility*, it held, "the only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability. We have stated the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair." *Id*. at 148. Noting the factors articulated by the Supreme Court in *Perales*, the court articulated similar criteria in determining whether hearsay evidence is probative and bears indicia of reliability such that it's use is fundamentally fair, including (1) the independence or bias of the declarant; (2) the type of hearsay submitted, *i.e*., independent and routinely prepared reports; (3) whether the statements are signed or sworn as opposed to anonymous, oral, or unsworn; (4) whether the statement is contradicted by direct testimony; (5) whether or not the declarant is available to testify and, if so, whether or not the party objecting to the hearsay statements subpoenaed the declarant; (6) whether the declarant is unavailable and no other evidence is available; (7) the credibility of the declarant if a witness, or of the witness testifying to the hearsay; (8) whether the hearsay is corroborated.[5]

Courts have relied on the *Calhoun* factors in assessing whether hearsay evidence constitutes *substantial evidence* on review and, in some cases, determined that hearsay evidence did not meet the standard. For example, in *Hoska v. U.S. Dept. of the Army*, 677 F.2d 131 (D.C.Cir.1982), the Army revoked a civilian employee's clearance, based on security violations and other misconduct, resulting in his dismissal. The government's case relied largely on hearsay evidence. The D.C. Circuit Court set aside the dismissal, reasoning that uncorroborated hearsay lacked sufficient assurance of truthfulness and was not overcome by the employee's testimony. The opinion also suggested the hearsay evidence was inconsistent, the declarants not disinterested and the employee was not given access to the statements before the hearing. Similarly, in *Cooper v. United States*, 639 F.2d 727 (Ct.Cl.1980), a Navy employee was discharged for "disgraceful conduct." The Court of Claims reversed for lack of substantial evidence, as the police reports relied upon amounted to multiple hearsay, admitted without some assurance of its reliability and credibility.

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[4] This is a reference to *Republic Steel Corp. v. Leonard*, 635 F.2d 206 (3d Cir.1980).

[5] See also *Industrial Claims Appeals Office v. Flower Stop Marketing Corp*., 782 P.2d 13, 18 (Colo. 1989), identifying similar factors: (1) whether the [hearsay] statement was written and signed; (2) whether the statement was sworn to by the declarant; (3) whether the declarant was a disinterested witness or had a potential bias; (4) whether the hearsay statement is denied or contradicted by other evidence; (5) whether the declarant is credible; (6) whether there is corroboration for the hearsay statement; (7) whether the case turns on the credibility of witnesses; (8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and, finally, (9) whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant.

Given the interrelationship--and often conflation--of standards governing the (1) admissibility, (2) variable due process considerations, and (3) judicial review of hearsay use at administrative proceedings, the construct for its admission can be complicated. The analysis is further complicated by the fact that the findings of administrative proceedings in the Air Force are determined by board members as opposed to an administrative judge experienced in applying legal standards at the decisional stage after liberal admission of hearsay. However, a workable linear analysis can be drawn from the above authorities: (1) *admissibility* is constrained only by relevance, favoring liberal admission of hearsay; however, (2) proceedings must comport with the requirements of procedural *due process* and its attendant focus on fundamental fairness premised on notions of reliability and trustworthiness as determined by application of the factors noted in *Perales* and *Calhoun*. These factors, in turn, inform the analysis as to whether the findings of an administrative proceeding are (3) supported by *substantial evidence* as reliable and trustworthy evidence should adequately support the conclusions of the proceeding.

Consequently, to ensure fairness and an outcome consistent with the above scheme, litigants and legal advisors in administrative proceedings must be prepared to articulate appropriate standards of admissibility, not only in terms of relevance, but constitutional due process norms given the inherent lack of cross-examination. Reference to the factors articulated in *Perales* and *Calhoun* are instructive in this regard. Finally, recorders should consider whether the evidence will justify a conclusion that "substantial evidence" exists to support the administrative action to withstand further review.

OpJAGAF 2015/4 24 April 2015