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## Power of Administrative Agencies to Grant Rehearings

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## STUDENT NOTE

POWER OF ADMINISTRATIVE AGENCIES TO GRANT REHEARINGS.—  
Fundamental in the field of administrative law is the proposition that an administrative agency has no inherent powers but only such powers as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted.<sup>1</sup>

For the purpose of this note it will be assumed that the power of an administrative agency to grant rehearings is not hampered by the principles of stare decisis, res judicata or estoppel to reconsider

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<sup>1</sup> Gallagher's Steak House v. Bowles, 142 F.2d 530 (2d Cir. 1944), cert. denied, 322 U. S. 764 (1944); Northern States Power Co. v. Federal Power Comm'n, 118 F.2d 141 (7th Cir. 1941); *In re* Electric Bond & Share Co., 80 F. Supp. 795 (S. D. N. Y. 1948); Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., 80 F. Supp. 27 (E. D. Mich. 1948); Wheeler v. Santa Ana, 81 Cal. App.2d 811, 185 P.2d 273 (1947); State v. Atlantic Coast L. R. R., 56 Fla. 617, 47 So. 969 (1908); Portsmouth v. Virginia Ry. & Power Co., 141 Va. 54, 126 S. E. 362 (1925); State v. Dep't of Public Service, 21 Wash.2d 201, 150 P.2d 709 (1944).

and redetermine a previous decision,<sup>2</sup> although some courts have denied to the agency the power to grant rehearings upon such principles.<sup>3</sup>

It must be conceded at the outset that a generalization with respect to the powers of administrative bodies to grant rehearings, in the absence of express statutory authority, cannot be made.

Statutes creating administrative agencies and defining their scope of power often provide for a procedure whereby a party aggrieved, or any party to the order, may petition for rehearing.<sup>4</sup> But in many instances statutes are silent as to this power.<sup>5</sup>

It is usually said that a petition for rehearing is addressed to the sound discretion of the agency<sup>6</sup> and all that is required of the agency is that it consider and dispose of the petition.<sup>7</sup> The petition is not addressed to the discretion of a reviewing court.<sup>8</sup> An abuse of the agency's discretion, however, may result in a remand for rehearing when the matter is presented to a reviewing court.<sup>9</sup> Even this doctrine is strictly limited, and an agency's action on a petition will be reversed only upon the clearest showing of an abuse of discretion.<sup>10</sup>

<sup>2</sup> As to this problem, see generally: Davis, *Res Judicata in Administrative Law*, 25 TEX. L. REV. 199 (1947); Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 5 and 198; *Administrative Law—Res Judicata—Binding Effect of Prior Ruling on Commission*, 22 B. U. L. REV. 100 (1942); *Res Judicata in Administrative Law*, 49 YALE L. J. 1250 (1940).

<sup>3</sup> E.g., *Johnson v. Betts*, 21 Ariz. 365, 188 Pac. 271 (1920); *Centralia Coal Co. v. Industrial Comm'n*, 297 Ill. 451, 130 N. E. 727 (1921); *Happy Coal Co. v. Hartbarger*, 251 Ky. 779, 65 S. W.2d 977 (1934); *Sioux County v. Jameson*, 43 Nebr. 265, 61 N. W. 596 (1895).

<sup>4</sup> E.g., COMMUNICATIONS ACT, 48 STAT. 1095 (1934), 47 U. S. C. §405 (1946); FEDERAL POWER ACT, 49 STAT. 860 (1935), 16 U. S. C. §825 (1) (1946); INTERSTATE COMMERCE ACT, 54 STAT. 913 (1940), 49 U. S. C. §17 (1946).

<sup>5</sup> E.g., SECURITY ACT, 48 STAT. 74 (1933), 15 U. S. C. §77a *et seq.* (1946); SECURITIES EXCHANGE ACT, 48 STAT. 881 (1934), 15 U. S. C. §7 *et seq.* (1946); BITUMINOUS COAL ACT, 50 STAT. 72 (1937), 15 U. S. C. §828 *et seq.* (1946).

<sup>6</sup> *United States v. Pierce Auto Freight Lines*, 327 U. S. 515 (1946); *Interstate Commerce Comm'n v. Jersey City*, 322 U. S. 503 (1944); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936); *United States ex rel. Maine Potato Shippers Ass'n v. Interstate Commerce Comm'n*, 88 F.2d 780 (D. C. Cir. 1936), *cert. denied*, 300 U. S. 684 (1937); *Mississippi Valley Barge Line Co. v. United States*, 4 F. Supp. 745 (E. D. Mo. 1933).

<sup>7</sup> *Carolina Aluminum Co. v. Federal Power Comm'n*, 97 F.2d 435 (4th Cir. 1938); *N. L. R. B. v. Westinghouse Air Brake Co.*, 120 F.2d 1004 (3d Cir. 1941); *Maniglia v. Commander of The Guiseppe Verdi*, 5 F.2d 680 (D. Mass. 1925).

<sup>8</sup> *Interstate Commerce Comm'n v. Jersey City*, 322 U. S. 503 (1944).

<sup>9</sup> *Atchison, Topeka & S. F. Ry. v. United States*, 284 U. S. 248 (1932) (refusal to grant rehearing because of radically changed conditions considered an abuse of discretion and a denial of due process); Comment, 6 ST. JOHN'S L. REV. 390 (1932).

<sup>10</sup> *United States v. Northern Pacific Ry.*, 288 U. S. 490 (1933); *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 389 (1936) (Justice Brandeis stated:

The West Virginia Supreme Court of Appeals as early as 1915 implicitly recognized the power of an administrative agency to grant a rehearing<sup>11</sup> although the agency was not by statute expressly authorized to do so.<sup>12</sup> More recently, in *Atlantic Greyhound Corp. v. Public Service Comm'n*,<sup>13</sup> the West Virginia court explicitly held valid a rule of the public service commission permitting a rehearing upon petition,<sup>14</sup> although there is no statutory provision which in express terms confers authority upon the commission to grant a rehearing.<sup>15</sup> The authority to promulgate such a rule was held to be vested in the agency by virtue of the statutory provision authorizing it, in general terms, to prescribe rules of practice and procedure.<sup>16</sup>

The view of the West Virginia court in the *Atlantic Greyhound* case<sup>17</sup> is by no means unanimous. Authority exists in support of the dissent in that case, the essence of which was: "Regulatory bodies, similar to the public service commission of this State, have no power to grant rehearings in a proceeding which has been disposed of by final order, in the absence of statute conferring such power upon them." In *Aylward v. State Board of Chiropractic*

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"The Atchison case [*supra* note 8] rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting or refusing to reopen a hearing"; *United States v. Pierce Auto Freight Lines*, 327 U. S. 515 (1946); *Lang Transp. Corp. v. United States*, 75 F. Supp. 915 (S. D. Cal. 1948).

<sup>11</sup> *Poccardi v. Public Service Comm'n*, 75 W. Va. 542, 548, 84 S. E. 242, 245 (1915).

<sup>12</sup> W. VA. CODE ANN. c. 15p, §1 *et seq.* (Hogg, 1913). Although not expressly providing for rehearing §40 stated: "The power and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modifications or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified." Chapter 15p dealt with workmen's compensation, which was at that time administered by the public service commission. On looking to the chapter relating to the public service commission, *id.* at c. 150, §1 *et seq.*, no provisions are found relating to rehearings, although §2 of c. 150 provided generally that "the commission shall prescribe the rules of procedure and for taking evidence in all matters that may come before it, and enter such final orders as may be just and lawful."

<sup>13</sup> 54 S. E.2d 169 (W. Va. 1949).

<sup>14</sup> Rules of Practice and Procedure of the Public Service Commission, Rule 19, Par. (a).

<sup>15</sup> W. VA. REV. CODE c. 24 and 24A (Michie, 1943).

<sup>16</sup> W. VA. REV. CODE c. 24, art. 1, §7 (Michie, 1943), reads: "The commission shall prescribe rules of procedure and for taking evidence in all matters that may come before it, and enter such orders as may be just and lawful." *Id.* at c. 24A (regulation of motor carriers), art. 5, §5 provides: The commission may: (a) prescribe rules of practice and procedure, the method and manner of holding hearings, and for taking evidence on all matters that may come before it, and enter such orders as may be just and lawful."

<sup>17</sup> *Atlantic Greyhound Corp. v. Public Service Comm'n*, 54 S. E.2d 169 (W. Va. 1949).

## STUDENT NOTE

*Examiners*,<sup>18</sup> it was held that upon making a final determination of a question of fact, the administrative agency exhausted its authority, and could not grant a rehearing as no statute specifically provided for one. It seems that *North Carolina Utilities Comm'n v. Norfolk So. Ry.*<sup>19</sup> supports this view. In that case, however, there were statutory provisions relating to rehearings and the precise holding was that an administrative agency (specifically the utilities commission of North Carolina) could not grant rehearings other than in the manner provided by statute. Without citation of authority to sustain it, it was said by the court in the *North Carolina Utilities Commission* case,<sup>20</sup> "The Interstate Commerce Commission apparently did not have the authority to grant a rehearing until the enactment of the Hepburn Act<sup>21</sup> in 1906, expressly empowering it to do so." No cases have been found confirming this dictum but, on the contrary, the Interstate Commerce Commission from its inception<sup>22</sup> assumed that it was authorized to rehear proceedings on their merits, and *a fortiori*, acted upon that assumption long before the passage of the Hepburn Act.<sup>23</sup> An agency's construction of its own powers should be given great weight where the construction adopted does not contravene any prohibitions expressed or implied in the statute creating it.<sup>24</sup> As was stated in *Froerber*

<sup>18</sup> 31 Cal. 833, 192 P.2d 929 (1948).

<sup>19</sup> 224 N. C. 762, 32 S. E.2d 346 (1944).

<sup>20</sup> *Id.* at 764, 32 S. E.2d at 347.

<sup>21</sup> 34 STAT. 592 (1906), 49 U. S. C. §16a (1946). Section 16a was repealed, however, by 54 STAT. 913 (1940), 49 U. S. C. §17 (1946), and the rehearing provision may now be found in 49 U. S. C. §17 (1946).

<sup>22</sup> 24 STAT. 379, 49 U. S. C. §1 *et seq.* (1946) (Interstate Commerce Act).

<sup>23</sup> *Riddle, Dean & Co. v. Pittsburgh & Lake Erie R. R.*, 1 I. C. C. 773 (1888); *Rice v. Western New York & P. R. R.*, 2 I. C. C. 496 (1889); *Bates v. Pennsylvania R. R.*, 3 I. C. C. 296 (1890); *Independent Refiners' Ass'n v. Pennsylvania R. R.*, 4 I. C. C. 369 (1893); *Rice v. Western N. Y. N. P. R. R.*, 6 I. C. C. 455 (1895); *Richmond Elevator Co. v. Pere Marquette R. R.*, 10 I. C. C. 629 (1905). The Interstate Commerce Commission in 1905, in its Nineteenth Annual Report to Congress, requested an express provision be made for rehearings by the commission. The report stated: A new section is here added, to be known as section 16a [of the Hepburn Act of 1906, note 21, *supra*], which expressly authorizes the Commission to review and modify its own decisions. *It may be that this right now exists by implication, but it ought not to be open to doubt or question.*" (Emphasis added). ANN. REP. I. C. C. 12 (1905).

<sup>24</sup> *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209 (1942); *United States v. American Trucking Ass'ns*, 310 U. S. 534 (1940); *United States v. Madigan*, 300 U. S. 500 (1937); *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294 (1933); *Magnolia Petroleum Co. v. New Process Production Co.*, 129 Tex. 617, 104 S. W.2d 1106 (1937); *Neubert v. Chicago, R. I. & G. Ry.*, 116 Tex. 644, 296 S. W. 1090 (1927); *Daniel v. Simms*, 49 W. Va. 544, 39 S. E. 690 (1901); *State ex rel. Brandon v. Board of Control*, 84 W. Va. 417, 100 S. E. 215 (1919).

*Norfleet, Inc. v. Southern Ry.*,<sup>25</sup> "The wisdom of such power in [the agency] is for Congress and not the courts." An expression by Congress confirming the agency's interpretation of this procedural power should not be taken to mean that the agency's action was ultra vires prior to such affirmance.

A state tax commission was denied the power to grant a rehearing, there being no specific authorization for it to do so, where the commission had, after hearing, previously entered an order affirming an assessment and denying protest.<sup>26</sup> The statute involved placed no restrictions upon the commission as to when or how many corrections it might make in assessments, but rather provided that corrections or additional assessments of income could be made within three years after the close of the period covered by a report of income.<sup>27</sup> It would seem, then, that additional hearings could have been properly granted to allow corrections; however, the jurisdiction of the agency was held to be exhausted, especially in view of the fact that provision was made for judicial review of the agency's determinations, and resort to such judicial review was not made within the required period of time.

Undoubtedly the reluctance of some courts to recognize a continuing jurisdiction in the administrative agency, absent specific statutory authorization, has been motivated by the traditional jealousy of administrative tribunals by the courts. The untenability of the view which restricts an agency to the precise bounds of statutory language and prohibits an agency to promulgate rules whereby rehearings may be held upon petition of an interested party or, for that matter, by the agency on its own motion, may be best illustrated by the cases adhering to a contrary rule.<sup>28</sup>

In *Southwestern Bell Telephone Co. v. State*,<sup>29</sup> a corporation commission was held to have implied powers to entertain applications for rehearing and to set aside a previous order as to reasonableness of rates, assuming no appeal had been lodged in the appellate court. In *Ellard v. Finkelstein*<sup>30</sup> and *Rosenblatt v. Finkelstein*<sup>31</sup>

<sup>25</sup> 9 F. Supp. 409 (N. D. Ga. 1934).

<sup>26</sup> *Magma Copper Co. v. Arizona Tax Comm'n*, 67 Ariz. 77, 191 P.2d 169 (1948).

<sup>27</sup> ARIZ. CODE §§73-1536 (1939).

<sup>28</sup> This is not to say that sheer weight of authority is of itself a reason for the rule, but rather that an examination of cases permitting an administrative body to grant a rehearing as a necessary incident to the exercise of powers expressly granted makes the rationale of the rule less difficult.

<sup>29</sup> 181 Okla. 246, 71 P.2d 747 (1937).

<sup>30</sup> 84 N. Y. S.2d 220 (1948).

<sup>31</sup> 84 N. Y. S.2d 193 (1948).

the power of a rent commission to grant rehearing was taken for granted, although "nowhere in the statute or local laws [was] the commission given express authority to grant rehearings."

Arguments advanced against the power of an administrative agency to review its prior determinations (and, if the agency has the power to review and alter its prior "final" determinations, ancillary thereto should be the power to grant a rehearing) in the absence of express statutory authorization were refuted by the Supreme Court of the United States in *Lane v. United States*,<sup>32</sup> and in *Michigan Land & Lumber Co. v. Rust*.<sup>33</sup> The *Lane* case involved a statute containing a provision to the effect that the decision of the Secretary of Interior upon notice and hearing under such rules as he might prescribe, "shall be final and conclusive."<sup>34</sup> This provision was contended to cause a prior order of the Secretary to completely exhaust his power, therefore giving a character of absolute finality to such order. In the *Lane* case<sup>35</sup> the court said, "The words 'final and conclusive' describing the power given to the Secretary must be taken as conferring, and not limiting or destroying, that authority. Such right to review by the administrative agency on the ground of newly discovered evidence or fraud is of the very essence of administrative authority. The opposite construction would indeed render the administrative power conferred wholly inadequate for the purpose intended by the statute."<sup>36</sup> In the *Michigan Land & Lumber Co.* case<sup>37</sup> the court held that the Secretary of Interior had the general power to recall and rectify mistakes of survey made in prior certifications of land granted to states under the Swamp Land Act.<sup>38</sup>

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<sup>32</sup> 241 U. S. 201 (1916) (former determination by the Secretary of Interior as to the heir of a deceased Indian allottee reopened and redetermined).

<sup>33</sup> 168 U. S. 589 (1897).

<sup>34</sup> 36 STAT. 855 (1910), as amended, 25 U. S. C. §372 (1946).

<sup>35</sup> 241 U. S. 201, 209 (1916).

<sup>36</sup> 36 STAT. 855 (1910), as amended 25 U. S. C. §372 (1946), gave the Secretary of Interior the exclusive authority and jurisdiction to determine the heir or heirs of any decedent Indian who had been granted allotments of land under former acts, and to determine the competency of such heir or heirs to manage their own affairs, and then to issue to such heir or heirs found competent a patent for the allotment of such decedent.

<sup>37</sup> 168 U. S. 589 (1897).

<sup>38</sup> 9 STAT. 519 (1850), as amended, 43 U. S. C. §983 (1946). This view was taken by the Court notwithstanding a later act, 11 STAT. 251 (1857), as amended, 43 U. S. C. §986 (1946), which provided that the selection of swamp lands theretofore made under the Swamp Land Act should be approved and patented to the states. The later act was said not intended to apply to and confirm old lists founded on erroneous surveys which had been superseded by new lists, nor to override the general power of the Secretary of Interior to correct mistakes.

Administrative agencies have conferred upon them by the legislature, jurisdiction over complex fields and often of necessity a jurisdiction so vast is covered in general terms by the legislature.<sup>39</sup> If the agency is not permitted by implication to fashion its own procedure so as to achieve the purposes of the legislation creating the body and defining its substantive powers, then those rights intended to be safeguarded through the medium of administrative action may receive hampered and inadequate treatment by the agency.<sup>40</sup>

Most administrative action is subject to some type of judicial review but administrative determination of facts is ordinarily conclusive if supported by substantial evidence.<sup>41</sup> It would seem, therefore, that in justice both to the parties concerned and to the agency, the agency, as a procedural matter, should be permitted to reopen the proceeding and conduct a rehearing to correct mistakes and to hear any newly discovered evidence before appeal. Petition for rehearing "should not be discouraged, but instead should be encouraged, not to supplant, but to supplement appellate review."<sup>42</sup> In this connection, it may be noted that a petition for rehearing may sometimes be regarded as a necessary step to the exhaustion of administrative remedy<sup>43</sup> which is a prerequisite to judicial review.<sup>44</sup> Unquestionably, if the statute expressly requires an application for rehearing as a condition precedent to judicial review, then the legislative mandate must prevail.<sup>45</sup> A provision that "No objection to the order of the Commission shall be considered

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<sup>39</sup> *State ex rel. State Railroad Comm'n v. Great Northern Ry.*, 168 Wash. 257, 123 Pac. 8 (1912).

<sup>40</sup> In *Wallace Corp. v. N. L. R. B.*, 323 U. S. 248 (1944), the original charge of an unfair labor practice was lost or stolen, thus preventing the issuance of an intermediate report of the trial examiner and requiring a hearing de novo, although statute did not expressly provide for such procedure.

<sup>41</sup> *Helvering v. Kehoe*, 309 U. S. 277 (1940); *Keesler v. Strecker*, 307 U. S. 22 (1939); *Shields v. Utah Idaho C. R. Co.*, 305 U. S. 177 (1938); *Federal Trade Comm'n v. Standard Education Society*, 302 U. S. 112 (1937); *Ohio Utilities Co. v. Public Utility Comm'n*, 267 U. S. 359 (1925); *United States v. Clark*, 96 U. S. 37 (1877).

<sup>42</sup> *Southland Industries v. Federal Communications Comm'n*, 99 F.2d 117, 121 (D. C. Cir. 1938).

<sup>43</sup> As to this problem, see generally: Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981-1006 (1939).

<sup>44</sup> *United States v. Sing Tuck*, 194 U. S. 161 (1904); *Myers v. Bethlehem Ship Building Corp.*, 303 U. S. 41 (1938); *Federal Power Comm'n v. Metropolitan Edison Co.*, 304 U. S. 375 (1938); Seeako, *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts*, 51 HARV. L. REV. 1251 (1938); *The Necessity of Exhausting Administrative Remedies before Resorting to Judicial Review*, 27 COL. L. REV. 450 (1927).

<sup>45</sup> FEDERAL POWER ACT, 49 STAT. 860 (1935), 16 U. S. C. §825 (1) (1946); *Federal Power Comm'n v. Metropolitan Edison Co.*, 304 U. S. 375 (1938).



by the court unless such objection shall have been urged below,"<sup>46</sup> has been held to require a petition for rehearing as a prerequisite to judicial review.<sup>47</sup> The Federal Communications Act has a provision, seemingly permissive in character, allowing rehearings,<sup>48</sup> but this provision has been held to require an application for rehearing as a prerequisite to judicial review.<sup>49</sup> It has been held that where, by statute, a party to an order "shall" have the right to apply for a rehearing then such application is a condition precedent to judicial review.<sup>50</sup> The tenor of these decisions, though statutes expressly provided for rehearings, is that the power of an agency to grant a rehearing is an integral and essential procedural function of the agency, and is in fact an aid to the courts.<sup>51</sup> Whether the power is spelled out by the statute, or is implied from the discretionary powers to promulgate rules of practice and procedure would seem immaterial.

Apropos of the problem of an agency's powers to grant rehearing on petition is the question of such agency's power to order rehearings on its own motion. Where a statute expressly gives the agency power to grant rehearing on petition it has been held that the agency is by implication authorized to order a rehearing on its own motion.<sup>52</sup> It would seem to follow that where there is no explicit authorization to grant a rehearing on petition but the recognition of an implied power to do so, the implication should include the agency's authority to reopen proceedings and grant rehearings on its own motion.

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<sup>46</sup> BITUMINOUS COAL ACT, 50 STAT. 72 (1937), 15 U. S. C. §836(b) (1946).

<sup>47</sup> *Mallory Coal Co. v. National Bituminous Coal Comm'n*, 99 F.2d 399 (D. C. Cir. 1938).

<sup>48</sup> 48 STAT. 1095 (1934), 47 U. S. C. §405 (1946).

<sup>49</sup> *Red River Broadcasting Co. v. Federal Communications Comm'n*, 98 F.2d 554 (D. C. Cir. 1938), *cert. denied*, 305 U. S. 625 (1938); *Saginaw Broadcasting Co. v. Federal Communications Comm'n*, 96 F.2d 554 (D. C. Cir. 1938).

<sup>50</sup> *Consumers' Co. v. Public Utilities Comm'n of Idaho*, 40 Idaho 772, 236 Pac. 732 (1925). IDAHO COMP. STATS. §2503 (1919) provided: "After an order has been made by the commission, any corporation . . . or person interested therein shall have the right to apply for a rehearing . . . , and the commission shall grant such rehearing if in its judgment sufficient reason be made to appear."

<sup>51</sup> But the rehearing device should not be used as a subterfuge for needlessly delaying or unnecessarily prolonging the administrative process. Whether a petition for rehearing should be considered as a prerequisite to judicial review under the exhaustion doctrine (where the statute does not so require) is for the reviewing court, in its sound discretion, to determine. *Livers v. Anderson*, 326 U. S. 219 (1945), noted in 44 MICH. L. REV. 1045 (1946).

<sup>52</sup> *Sprague v. Woll*, 122 F.2d 128 (7th Cir. 1941), *cert. denied*, 314 U. S. 669 (1941); *Froeber-Norfleet v. Southern Ry.*, 9 F. Supp. 409 (N. D. Ga. 1934).