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Administrative Law -- Evidence -- Hearsay and the Right of Confrontation in Administrative Hearings

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NOTES

Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings

The United States Court of Claims in *Peters v. United States*[1] recently rendered an opinion that significantly affects the character of administrative evidence and the right of cross-examination in a federal hearing. If the decision is widely accepted, the result will be that hearsay evidence can form the sole basis of an administrative adjudication, and the right of cross-examination will be reduced, at most, to a limited privilege.

Sergeant Peters was a placement assistant in the United States Air Force with the responsibility for placing applicants in the Air Force Reserve program. Upon notification that he was being removed for accepting bribes for preferential placements, Peters appealed to the Civil Service Commission, an administrative right available to him as a career airman.[2] Prior to the hearing, the Commission made available to Peters the affidavits of the four persons charging him with bribery and certain other correspondence between the Air Force and the accusers. Several weeks before the hearing Peters' counsel requested that the Air Force produce the four affiants at the hearing, but the Air Force refused because it had no jurisdiction over these men except on training weekends.

At the hearing the Government introduced the four apparent affidavits[3] of the four declarants over Peters' objection and also produced two officers as witnesses. One had taken the four statements, and the other had talked to three of the men. Both corroborated the taking of the statements

[1] 408 F.2d 719 (Ct. Cl. 1969).

[2] Veterans' Preference Act § 14, 5 U.S.C. § 863 (1964). This act provides such special procedural protections for veterans as thirty days advance notice of proposed discharge, information about the reasons for proposed discharge, a reasonable time for answering charges, and the right to appeal to the full Civil Service Commission.

[3] There is some question whether these four typed statements were actually affidavits in the formal sense. The officer before whom the statements were taken testified that because his stenographer was having difficulty, he supplemented her work with his own notes. The two products were later typed together as the formal statements made by the four declarants. 408 F.2d at 722. This procedure raises some doubt as to the accuracy of the statements. The affidavits were written in the third person rather than in the usual first person form, bore no jurat or seal, and were not signed by anyone authorized to administer an oath.

contained in the affidavits. These corroborated statements were the full extent of the Government's evidence presented to the Commission. Peters himself testified as to his innocence and directly contradicted the Government's evidence. On the basis of the four corroborated affidavits, the Commission upheld the Government's action in removing Peters. Alleging that his procedural rights had been violated and that the Commission's decision was contrary to law,[4] Peters brought an action for back pay.

The Court of Claims in a four-to-one decision affirmed the Commission's actions in dismissing Peters. The court held that because the affidavits were corroborated and were declarations against interest, they were reliable, probative, and substantial evidence upon which the decision could rest.[5] The court also held that Peters' procedural rights in regard to cross-examination of the four declarants had not been violated because the burden was upon him to produce them for cross-examination.[6] Each of these determinations appears to be contrary to precedent and raises serious questions regarding the sufficiency of evidence and the right to confront accusers before a federal administrative agency.

Under the Administrative Procedure Act (APA), decisions of federal agencies must be based upon reliable, probative, and substantial evidence;[7] however, rules of evidence need not be strictly followed.[8] It has been consistently recognized that the hearsay rule is not applicable to bar the introduction of statements or testimony before a federal agency.[9] Even with this liberal policy of admission of evidence, a safeguard against arbitrary and capricious decisions was established by the substantial-evidence test.

This test was formulated by the United States Supreme Court over thirty years ago, before the passage of the APA, in *Consolidated Edison Co. v. NLRB*.[10] The Court held that a federal administrative agency must base its decisions on substantial evidence and said: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reason-

[4] *Id.* at 721.
[5] *Id.* at 724-25.
[6] *Id.* at 725.
[7] 5 U.S.C. § 556(d) (1968).
[8] *See, e.g.*, 5 C.F.R. § 772.305(c)(4) (1969) (Civil Service Commission); 20 C.F.R. § 404.928 (1969) (Health, Education and Welfare).
[9] Cohen v. Perales, 412 F.2d 44, 51 (5th Cir. 1969); Rocker v. Celebrezze, 358 F.2d 119, 122 (2d Cir. 1966); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690-91 (9th Cir. 1949).
[10] 305 U.S. 197 (1938).

able mind might accept as adequate to support a conclusion."[11] The Court then proceeded to state that "mere uncorroborated hearsay or rumor does not constitute substantial evidence."[12] The pre-APA substantial-evidence test of *Consolidated Edison* was cited by the Court with approval and without modification in *Universal Camera Corp. v. NLRB*,[13] a post-APA case, and clearly remains the law under the APA. In addition, numerous lower courts, including the Court of Claims, have cited the statement from *Consolidated Edison* as controlling on the question of hearsay as substantial evidence.[14] Clearly, then, mere uncorroborated hearsay does not constitute substantial evidence under the APA.

There is authority, however, for the proposition that hearsay may be relevant and have probative value in an administrative finding.[15] A close examination of the major cases in which hearsay evidence was deemed to be relevant reveals that the decisions were based on something more than hearsay alone; in each case there was, in addition to the hearsay evidence, direct and substantial evidence upon which the decisions were ultimately rested.[16] Aside from *Peters*, the correct and accepted rule has been that while uncorroborated hearsay may be admitted into evidence, the ultimate decision must be supported by other legal and substantial evidence.

The Court of Claims in *Peters*, though citing the substantial-evidence test of *Consolidated Edison* with approval, attached little significance to the Supreme Court's statement that "uncorroborated hearsay or rumor does not constitute substantial evidence."[17] The Court of Claims thought that this statement was "obviously dictum,"[18] but overlooked the extent

[11] *Id.* at 229.
[12] *Id.* at 230.
[13] 340 U.S. 474, 477 (1951).
[14] NLRB v. Amalgamated Meat Cutters, 202 F.2d 671, 673 (9th Cir. 1953); Montana Power Co. v. Federal Power Comm'n, 185 F.2d 491, 498 (D.C. Cir. 1950); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690 (9th Cir. 1949); United States v. Krumsiek, 111 F.2d 74, 78 (1st Cir. 1940); Hill v. Fleming, 169 F. Supp. 240, 245 (W.D. Pa. 1958); Conn v. United States, 376 F.2d 878, 883 (Ct. Cl. 1967); Camero v. United States, 345 F.2d 798, 800 (Ct. Cl. 1965).
[15] Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949); Morelli v. United States, 177 Ct. Cl. 848 (1966).
[16] Montana Power Co. v. Federal Power Comm'n, 185 F.2d 491 (D.C. Cir. 1950); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949); Hill v. Fleming, 169 F. Supp. 240 (W.D. Pa. 1958); Morelli v. United States, 177 Ct. Cl. 848 (1966); Camero v. United States, 345 F.2d 798 (Ct. Cl. 1965). *But see* United States v. Costello, 221 F.2d 668 (2d Cir. 1955) (indictment based solely upon hearsay sustained).
[17] 305 U.S. at 230.
[18] 408 F.2d at 723.

to which the principle has been adopted in the cases[19] after *Consolidated Edison.*

Corroboration by the Government's witnesses of the accuracy of the statements contained in the four affidavits did not add any probative value to the evidence in *Peters*, for the corroboration was itself hearsay.[20] Thus the court in effect allowed hearsay upon hearsay—pyramided hearsay —which is no more reliable than single hearsay to sustain a decision.[21] Judge Skelton in an able and revealing dissent in *Peters* aptly described what results from such corroboration: "Adding hearsay to hearsay is like adding zero to zero which still equals zero."[22]

In a further attempt to justify the Commission's decision based solely upon the four affidavits, the Court of Claims held that they contained declarations against interest because the declarants could be subjected to criminal liability for the crimes alleged.[23] By applying this label to the statements, the court was able to satisfy itself that an exception to the hearsay rule formed the basis of the Commission's decision; declarations against interest are recognized as possessing trustworthiness and probative value because the declarant would not intentionally make a statement against his interest unless it was true.[24] The court reasoned that since the hearsay had probative and reliable value, a decision resting upon it could be said to be based upon substantial evidence.

This reasoning significantly diluted the substantial-evidence test. Even if the declarations could be labeled as exceptions to the hearsay rule, the statements contained in the affidavits were still hearsay. They could be introduced and accorded some weight in an administrative hearing, but they were in fact the only evidence used to sustain the decision.

Moreover, it is doubtful that these statements against penal interest were traditional hearsay exceptions under federal law.[25] And there is doubt

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[19] See note 14 *supra.*

[20] *See* Neal v. United States, 22 F.2d 52, 55 (4th Cir. 1927); Royal Ins. Co. v. Taylor, 254 F. 805, 809 (4th Cir. 1918).

[21] See United States v. Grayson, 166 F.2d 863, 869 (2d Cir. 1948). *But see* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 14.10-.12 (1958).

[22] 408 F.2d at 738 (dissenting opinion).

[23] *Id.* at 724.

[24] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 253 (1954).

[25] In Donnelly v. United States, 228 U.S. 243 (1913), the Supreme Court declared that a statement against *penal* interest was not within the exception to the hearsay rule. The holding in *Donnelly* is the overwhelming majority rule today. 5 J. WIGMORE, EVIDENCE § 1476 (3d ed. 1940). A minority of jurisdictions reject the rule in *Donnelly* and hold that a statement against penal interest is within the exception. *See, e.g.*, People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961); Sutter v.

that these statements were actually against penal interest, for as the dissent in *Peters* pointed out,[26] none of these affiants was ever punished in any way. One can infer that the Government promised immunity in return for the affiants' signing the statements. Thus the reliability and probative value of these statements are diminished even further, and they should be entitled to no more consideration than any other hearsay.

The final aspect of *Peters* that is significant is the Court of Claims' holding with regard to the right to confrontation at an administrative hearing. In denying Peters' contention that his procedural right of cross-examination had been violated, the court held that the initial burden of producing the opposing witnesses was upon Peters. The court said that because he failed to attempt to procure their attendance at the hearing, it was his own inaction that prevented his opportunity to confront.[27]

Administrative discharge of civilian employees and career servicemen without the safeguard of the right to confrontation has become an increasing concern.[28] Attack under the due process clause of the fifth amendment has been futile because of the established doctrine that an individual has no constitutional right to governmental employment[29] or military status.[30] A constitutional right of confrontation in deportation hearings has been found,[31] but confrontation has not been accorded the status of a right in ordinary administrative hearings. It is particularly un-

Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Blocker v. State, 55 Tex. Crim. 30, 114 S.W. 814 (1908); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923). It should also be noted that those jurisdictions recognizing statements against penal interest as a proper exception to the hearsay rule do so only to exculpate the accused. In *Peters* the declarations were used to incriminate the accused. *But see* State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901); State v. Voges, 197 Minn. 85, 90, 266 N.W. 265, 267 (1936) (dissenting opinion).

[26] 408 F.2d at 733 (dissenting opinion).

[27] *Id.* at 725.

[28] See Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498 (1964); Susskind, *Military Administrative Discharge Boards: The Right to Confrontation and Cross-Examination*, 44 MICH. ST. B.J. 25 (1965); Note, *Confrontation and Cross-Examination in Hearings for the Administrative Separation of Military Officers*, 20 STAN. L. REV. 360 (1968); 12 AM. U.L. REV. 205 (1963).

[29] *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

[30] *See, e.g.*, Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); Beard v. Stahr, 200 F. Supp. 766 (D.D.C. 1961). However, there is authority for the proposition that lack of a substantive due-process right should not defeat the right to procedural due process. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968).

[31] Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928); *Ex parte* Radivoeff, 278 F. 227 (D.C. Mont. 1922).

fortunate that safeguards have not been extended to hearings on discharge of governmental employees and servicemen, for many times these proceedings are almost criminal in nature and result in unemployment and loss of reputation. While the courts have departed from the traditional reluctance to inquire into an agency's action in cases in which the outcome "stigmatizes" the governmental employee[32] or serviceman,[33] these inquiries have been restricted almost entirely to interpretation of the statutory procedural rights provided.[34] An exception is some dictum in the case of *Greene v. McElroy*.[35]

In *Greene* an employee of a private manufacturer was discharged solely as a result of revocation by the Department of Defense of his clearance to handle classified information.[36] Greene was provided a hearing, but was denied the opportunity to confront witnesses whose statements were adverse to his interests.[37] The Supreme Court reversed the revocation of Greene's clearance on the basis that neither Congress nor the President had authorized such a procedure. In significant dictum, Chief Justice Warren, writing for the majority, stated that the Court has adamantly protected the right of confrontation with one's accusers "not only in criminal cases . . . but also in cases where administrative and regulatory action was under scrutiny."[38] Such language indicates that the Court is cognizant that due process is a necessity if the administrative action threatens serious injury to the individual.[39]

But in *Williams v. Zuckert*[40] the Court again avoided squarely facing the constitutional issue of the right to confrontation. Williams was discharged on the basis of three affidavits admitted at an administrative hearing. At the hearing Williams requested for the first time the appearance of the affiants for cross-examination. Williams had made no prior attempt

[32] See Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); *cf.* Peters v. Hobby, 349 U.S. 331, 333 (1955).

[33] Bland v. Connelly, 293 F.2d 852, 858-59 (D.C. Cir. 1961); Covington v. Schwartz, 230 F. Supp. 249 (N.D. Cal. 1961).

[34] *See, e.g.*, Williams v. Zuckert, 371 U.S. 531 (1963), *noted in* 12 AM. U.L. REV. 205 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959).

[35] 360 U.S. 474 (1959).

[36] *Id.* at 475.

[37] *Id.* at 479.

[38] *Id.* at 497.

[39] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.05, at 162 (Supp. 1965).

[40] 371 U.S. 531 (1963). The question whether hearsay constitutes substantial evidence was not raised.

to arrange privately for their appearances, and the Supreme Court dismissed certiorari on the basis that the then applicable Commission's regulation[41] required that he *must* make his own arrangements for the presence of witnesses by at least assuming the initial burden of attempting to produce them. By not assuming this burden, Williams lost his right to confrontation. Justices Black and Douglas, dissenting, reached the constitutional issue:

> [P]etitioner has been branded with a stigma and discharged on the strength of three affidavits. Though he asked that these affiants be produced at his hearing, none was called to confront him. The Court says that petitioner's request came too late to conform with the applicable regulation. Due process dictates a different result. We have heretofore analogized these administrative proceedings that cast the citizen into the outer darkness to proceedings that "involve the imposition of criminal sanctions"; and we have looked to "deeply rooted" principles of criminal law for guidance in construing regulations of this character . . . . The requirements of due process provided by the Fifth Amendment should protect him . . . by giving him the same right to confront his accusers as he would have in a criminal trial.[42]

In *Hanifan v. United States*[43] the Court of Claims modified somewhat this initial burden of production of witnesses by the accused in administrative hearings. The petitioner in *Hanifan* had made numerous requests over a period of several months prior to the hearing for the production as witnesses of employees of the Internal Revenue Service. Hanifan, however, did not attempt to arrange privately for their attendance. The court held that Hanifan was excused for his failure to attempt to arrange privately for their appearance because the conclusion was inescapable that the witnesses would not have accepted his invitation if tendered.[44]

It can be argued that *Peters* involved a situation in which the application of the *Hanifan* principle would have been appropriate to overcome the lack of greater initiative on Peters' behalf. Because the affiants may have been granted immunity, their presence would have been undesirable to the

[41] 20 Fed. Reg. 2699 (1955), provided: "The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency must make their own arrangements for the appearance of witnesses."

[42] 371 U.S. at 533-34 (dissenting opinion) (footnotes omitted).

[43] 354 F.2d 358 (Ct. Cl. 1965).

[44] *Id.* at 363.

Government; it appears unlikely that an invitation from Peters to appear at the hearing would have been accepted.

In *Peters*, the Court of Claims relied entirely upon *Williams* and analogized the regulations[45] involved in each case. The court concluded that since Peters had not taken the initiative in securing the witnesses' attendance, he was estopped from claiming a denial of the right to confrontation. The analogy between the regulation involved in *Peters* and the one involved in *Williams* is clear, but the Court of Claims failed to realize that the cases are easily distinguishable. In the latter, the Supreme Court placed great reliance upon the fact that Williams' first request for the appearance of the witnesses came *at* the hearing;[46] however, in *Peters* the plaintiff had made a request *prior to* the hearing date—in conformity with the regulation. It can also be argued that in *Peters* the right to confrontation was particularly important, for dismissal for a crime such as accepting bribes results in a stigma attaching to the discharged individual.

Peters is the result of a reviewing court's strained attempt to conform the evidence to meet the standards of the substantial-evidence test. This decision has produced, in effect, a new and less stringent test that treats hearsay as any other substantive evidence and reduces confrontation to an even lesser privilege than it has been accorded in the past. Probably worried about shackling administrative agencies with the bonds of a jury-trial system of evidence, the Court of Claims retreated into a position based upon unsound reasoning.

One possible solution is to require direct evidence when the discharge of government employees or servicemen is in issue before an administrative agency. This solution would also eliminate most confrontation problems inherent whenever hearsay evidence forms the basis of a decision. Perhaps application of a direct-evidence rule to administrative agencies should depend upon the nature of the hearing and the consequences of an adverse decision against the individual so that hearsay evidence alone would not be held sufficient to support a decision in a proceeding that is virtually criminal in nature. Action by Congress is necessary to enact such procedural safeguards for the accused in administrative hearings; neverthe-

[45] 28 Fed. Reg. 10089 (1963), in effect when the hearing in *Peters* took place, provided: "Both parties are entitled to produce witnesses but as the commission is not authorized to subpoena witnesses the parties are required to make their own arrangements for the appearance of witnesses." The current regulation is not significantly different. *See* 5 C.F.R. § 772.305(c)(2) (1969). See note 41 *supra* for the regulation involved in *Williams*.

[46] 371 U.S. at 532.

less, if Congress fails to act, it is not improbable that the Supreme Court may intervene to provide the much-needed protection.

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Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants

With the advent of far-reaching long-arm statutes[1] allowing a basis for in personam jurisdiction with only minimal contacts[2] in a state, courts in the future will be faced increasingly with the problem of what manner of service of process is to be allowed as a sufficient giving of notice to the defendant. It is only logical that as the geographical-power concept of jurisdiction diminishes and in personam jurisdiciton can be had over a greater number of nonresidents,[3] courts must give more attention and primary concern to notice requirements.

The purpose of service of process is to give the defendant notice of a suit pending against him so that he may come in and defend.[4] But what happens when the plaintiff has a basis for in personam jurisdiction and the defendant cannot be found so that he can be served with process?

[1] *See* N.C. GEN. STAT. § 1-75.4 (1969); WIS. STAT. ANN. § 262.05 (Supp. 1969). For a thorough discussion of these statutes, see Revision Notes to WIS. STAT. ANN. § 262.05 (Supp. 1969); Hinson, *Jurisdiction Over Persons and Property*, in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON JURISDICTION, JOINDER AND PLEADING UNDER NORTH CAROLINA'S NEW RULES OF CIVIL PROCEDURE II-1 (1968).

[2] There is extensive judicial development in the area of the minimal-contact theory. *E.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See generally* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[3] In all the problematic situations dealt with in this note, it is assumed that the applicable state long-arm statute has provided the plaintiff with a basis for in personam jurisdiction. The only question for discussion is whether the plaintiff has achieved satisfactory service upon the defendant.

[4] In early American law, jurisdiction and service of process were approached as two aspects of the same thing. *E.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). However, with the modern view of service as notice-giving, the two have become separate questions. No longer is the manner of notice that is to be given clearly defined by the type of jurisdiction acquired. No matter what type of jurisdiction is acquired, plaintiff is required to give defendant the best notice possible. *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).