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EXHAUSTING THE ADMINISTRATIVE REMEDIES: THE REHEARING BOG

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Administrative agencies, performing the dual functions of legislation and adjudication, exert a great and growing influence upon the lives of all of us. In the legislative area they fill out by rules, regulations and interpretations the framework set up by Acts of Congress, state statutes and municipal ordinances. In the field of adjudication they decide controversies in much the same way as courts do. Accordingly, their operations in this field are described as quasi-judicial, and it has been quite natural that the *procedure* of adjudication should be patterned after that followed by the judiciary. This pattern is the combined result of statutes, rules promulgated by the agencies themselves, and the pronouncements of courts made in the course of judicial review of agency action.

In working out this pattern there is an understandable tendency to make the procedure before administrative agencies conform completely to court procedure. Hence it is not surprising to find provisions in statutes and agency rules to the effect that following an otherwise final determination of the agency, an application for rehearing must or may be filed. The draftsmen of such provisions undoubtedly are thinking of procedure in courts of last resort when they employ such language.

The "final order" of an administrative agency climaxing an adjudication is usually subject to judicial review, i.e., the party aggrieved by the final order ordinarily may call upon some court or other, by means of some form of proceeding or other, to review the action of the agency and to judicially determine its validity.

The courts usually follow what Mr. Justice Brandeis called "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."¹ This is the well-known "exhaustion rule." There are important and complex exceptions to this rule, but a discussion of these is outside the scope of this paper.

One of the interesting problems which frequently arises in the application of the exhaustion rule is whether a petition for rehearing, following an otherwise final order of an administrative agency, is an essential step in the exhaustion of the administrative remedy. Is the case ripe for judicial review in the absence of a showing that an application for rehearing, or other type of reconsideration, has been made?

The statement of the problem has about it an air of disarming sim-

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1. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938).

plicity; actually, at the state level at least, courts and legislatures have combined to create great and undesirable complexities in this area of the law. There is a crying need for reform.

The statutory law falls into four classes:

1. Statutes which clearly make applications for rehearing mandatory.
2. Statutes which clearly dispense with any necessity for applying for a rehearing.
3. Statutes which apparently make such applications permissive.
4. Statutes which are silent on the subject of applications for rehearing.

It will be the purpose of this paper first to analyze each of these four statutory situations, next to discuss the complications which have arisen in the judicial interpretation of the statutes, and finally to suggest how the law relating to applications for rehearing can and should be reformed.

Analysis of the Four Classes of Statutes

1. *States which clearly make applications for rehearing mandatory.*

For various reasons of policy satisfactory to themselves, legislatures, both federal and state, have frequently provided with respect to particular administrative agencies that the administrative process shall not be complete until the aggrieved party has applied for a rehearing, and his application has been disposed of by the agency. With the wisdom of these policy decisions we shall not at the moment quarrel. Where this is the case, the courts have no alternative but to enforce the statute as written. The rehearing application becomes an indispensable part of the administrative process, and in the absence of a showing that it has been made, the administrative remedies have not been exhausted, and an effort to obtain judicial review will fail.

The Colorado rule respecting applications for rehearing in workmen's compensation cases may be taken as an example. It was pointed out in *French v. Industrial Commission*² that the Colorado statute provides that:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the Commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the Commission for a review."

The court held that this language was mandatory, and dismissed the complaint seeking judicial review, since no rehearing petition had been filed.

In *Industrial Commission v. Martinez*³ none of the parties called attention to the absence of an application to the Commission for review, but the court sua sponte held that the matter was jurisdictional and dismissed the case. In *Industrial Commission v. Plains Utility Co.*⁴ an application for review was filed with the Commission subsequent to the 15 days

2. 85 Colo. 173, 274 Pac. 742, 743 (1929).

3. 102 Colo. 31, 77 P.2d 646 (1938).

4. 127 Colo. 506, 259 P.2d 282 (1953).

allowed by statute. The Commission acted upon the application, and when judicial review was later sought the plaintiff asserted that it had thereby waived the time requirement. But the court held that the requirement was so positive that the Commission had no power to waive it, and that a petition for review, filed after the time allowed by statute, "was absolutely futile for all purposes,"⁵ which is certainly going the whole way. This case contains a review of the many Colorado cases forming an unbroken line of authority to the effect that such statutory provisions are mandatory in the most complete sense of the word.

It would serve no good purpose to multiply the instances in which legislatures have made applications for rehearing mandatory, and courts have enforced them. The Colorado cases may be taken as illustrative. The cases in the footnote are in accord.⁶ There appear to be no authorities contra to this proposition.

2. *Statutes which clearly dispense with any necessity for applying for a rehearing.*

The federal Administrative Procedure Act (hereinafter called "the APA") is the focal point of interest with respect to this second class of statutes. The APA, enacted in 1946, represents a commendable effort on the part of Congress to make uniform the procedure of the federal administrative agencies. The difficulties involved are too well known to require comment here. Section 10 of the Act⁷ pertains to judicial review. The operation of the entire section is subject to the introductory clause,

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. . . ."

This language, as an eminent authority has pointed out,⁸ raises difficult problems of interpretation, especially subdivision (2) of the introductory clause; but laying these aside (and they are probably at a minimum so far as rehearings are concerned) the following sentence in subsection (c) of section 10 (which relates to judicial review) represents a notable step forward in the solution of the rehearing problem:

5. 259 P.2d 282, 287 (1953).

6. *California:*

Louis Eckert Brewing Co. v. Unemployment Reserves Commission, 47 Cal.A.2d 844, 119 Pac. 227 (1941).

Illinois:

People ex rel. Illinois Highway Transportation Co. v. Biggs, 402 Ill. 401, 84 N.E.2d 372 (1949); Alton R. Co. v. Illinois Commerce Commission, 407 Ill. 202, 95 N.E.2d 76 (1950); Illini Coach Co. v. Illinois Commerce Commission, 408 Ill. 104, 96 N.E.2d 518 (1951).

Indiana:

McCarle v. Board of Commissioners, 195 Ind. 281, 144 N.E. 877 (1924).

Ohio:

Lee Jewelry Co. v. Bowers, 162 Ohio St. 567, 124 N.E.2d 415 (1955); Zephr Room, Inc. v. Bowles, 164 Ohio St. 287, 130 N.E.2d 362 (1955); Warner v. Ohio Edison Co., 152 Ohio St. 303, 89 N.E.2d 463 (1949).

Pennsylvania:

Turner v. Unemployment Compensation Board, 163 Pa.St. 16, 60 A.2d 583 (1948).

7. 5 U.S.C. § 1009.

8. Davis, *Administrative Law*, page 818 et seq.

"Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application . . . for any form of reconsideration. . . ."

This language would exclude from its operation the type of statute which we have discussed hereinabove as Class 1, but otherwise seems clearly to dispense with the necessity for applying for a rehearing of an otherwise final order.

Research does not disclose any federal case which construes this part of section 10 (c) of the APA in connection with the point in question. However, even before the enactment of the APA the U. S. Supreme Court had clearly indicated its views of the necessity of an application for rehearing as a part of the administrative process. The case of *Levers v. Anderson*,⁹ decided in 1945, was devoted entirely to this question. A District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue had entered orders annulling a permit to operate a wholesale liquor business and denying applications for an importer's and wholesaler's permit. The Treasury Regulations, according to the Court, provided that the Supervisor "may hear the application" for a rehearing. No such application had been made before the aggrieved party sought statutory judicial review of the orders, and counsel for the government contended that for this reason the appeal to the court should have been dismissed. They conceded that "motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders."¹⁰ But the government insisted that in the present instance the rehearing would be more than a formality, and that the failure to seek it should bar judicial review. With this contention the Court disagreed, even though a rehearing, if granted, would have afforded the petitioner for the first time an opportunity to see and except to adverse finding of fact, "and *might* also have given him a chance to present oral argument to the officer who made the orders."¹¹ Mr. Justice Black pointed out that the orders were of a definitive character, dealing with the merits of the proceeding. He concluded that:

"No other language of the regulations, and no satisfactory proof of publicly established practice under them, persuades us that the 'may' means 'must'. . . . Our conclusion is that the motion is in its effect so much like the normal, formal type of motion for rehearing that we cannot read into the Act an intention to make it a prerequisite to the judicial review specifically provided by Congress."¹²

If this were true in pre-APA days, under a statute of the "permissive" type,

9. 326 U.S. 219, 66 S.Ct. 72, 90 L.Ed. 26 (1945).

10. 326 U.S. 219, 222.

11. 326 U.S. 219, 223.

12. *Ibid.*

how much more true it should be today under the language of section 10 (c) of the APA!

Several later cases in the lower federal courts, post-APA but not mentioning that Act, have followed *Levers v. Anderson* on this point.¹³ In view of the *Levers* decision there can be little if any doubt what the attitude of the federal courts will be under section 10 (c) of the APA so far as the rehearing requirement is concerned.

In a later section of this paper we shall argue that the APA solution of the rehearing problem is the sound one, toward which the rationale of the *Levers* opinion clearly inclines.

A number of states have adopted statutes similar to the APA, with the like object of standardizing state administrative procedure. These statutes vary a good deal in language, especially as concerns the rehearing problem. The administrative procedure acts of California, Illinois and Ohio may be taken by way of illustration. It is interesting to compare them with each other and with the APA.

California in 1945 added to its Government Code a section called "Administrative Adjudication"¹⁴ which seems to be referred to in California as the "Administrative Procedure Act." Whether or not a particular state administrative agency comes under this Act is determined by the statutes pertaining to each individual agency. As to the agencies which do come under the Act, Sec. 11523 provides that the right to judicial review "shall not be affected by the failure to seek reconsideration before the agency." This language appears to be substantially identical with the corresponding provision of Sec. 10 (c) of the APA, and, indeed to be preferable because of its simplicity of statement. It *should* effectively settle the problem for California, as to the agencies covered by the Act.

This section was amended in 1953, but significantly the language just quoted was reenacted without change. We should expect that California cases which involve the rehearing point and which were decided subsequent to 1945 would at least consider the effect of Sec. 11523. Strangely enough, the only two post-1945 decisions disclosed by research which directly involved the point¹⁵ did not mention this section, and ruled, in accordance with an earlier line of California cases¹⁶ that an application for rehearing was an indispensable part of the administrative process. Perhaps the State Personnel Board involved in the *Child* case is not one of the agencies subject to the provisions of the Administrative Adjudication Act; at least one should expect the opinion to consider the effect of Sec. 11523.

13. Of these the most pertinent are *Pincourt v. Palmer*, 190 F.2d 390, 392 (3rd Cir. 1951) and *Cuiffo v. U.S.*, 137 F.Supp. 944, 948 (Ct. Cl. 1955).

14. Cal. Govt. Code, §§ 11500 to 11529.

15. *Child v. State Personnel Board*, 97 Cal.App. 467, 218 P.2d 52 (1950); *Rogers v. Retirement Board*, 109 Cal.A.2d 751, 241 P.2d 611 (1952).

16. Represented by *Clark v. State Personnel Board*, 61 Cal.A.2d 800, 144 P.2d 84 (1943) and *Alexander v. State Personnel Board*, 22 Cal.A.2d 198, 137 P.2d 433 (1943).

In the other post-1945 California decision, the *Rogers* case, the District Court of Appeals mentioned and followed the *Child* case and the earlier California line, observing that:

"At least as to boards exercising state-wide jurisdiction, a petition for rehearing must be filed as a condition precedent to proceeding . . . to review the decision of the board."

The court distinguished these cases on the basis that the Retirement Board (involved in the *Rogers* case) was a municipal body, and that no petition for rehearing was required of the claimant in the instant case since the Board had found the applicant entitled to retirement benefits, although on grounds somewhat different from those later asserted.

Thus the California legislature, to the extent of the Act's coverage, has put it within the power of the courts to solve the rehearing problem by holding that applications for rehearing are not an indispensable part of the administrative process, but seemingly court and counsel have not been educated to the significance of Sec. 11523.

Illinois adopted the "Administrative Review Act" in 1945. It is similar to the Administrative Adjudication Act in California, and provides that it:

". . . shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act."¹⁷

But the Act nowhere makes it clear whether petitions for rehearing are required or are to be dispensed with for purposes of exhausting administrative remedies. In the only post-1945 Illinois cases disclosed by research¹⁸ no mention of the Administrative Procedure Act was made. *Asche v. Rosenfield* held that where a rehearing is *authorized* by statute, failure to apply for it precludes judicial review. The other cases involved statutes expressly requiring applications for rehearing.

The confusion in the Illinois Act results from the following provisions: Section 265 provides that:

"If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of . . . application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review. . . ."

But Section 264, in defining "administration decision," provides that:

17. Ill. Rev. Stats. 1951, Ch. 110, § 265.

18. *People ex rel. Illinois Highway Transportation Co. v. Biggs*, 402 Ill. 401, 84 N.E.2d 372 (1949); *Illini Coach Co. v. Illinois Greyhound Liner*, 403 Ill. 21, 85 N.E.2d 39 (1949); *Asche v. Rosenfield*, 405 Ill. 108, 89 N.E.2d 885 (1950); *Alton R. Co. v. Illinois Commerce Commission*, 407 Ill. 202, 95 N.E.2d 76 (1950); *Illini Coach Co. v. Illinois Commerce Commission*, 408 Ill. 104, 96 N.E.2d 518 (1951).

"In all cases in which a statute or a rule of the administrative agency requires or permits an application for a rehearing or other method of administrative review, and an application for such rehearing or review is made, no administrative decision of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied."

Taking these two sections together, the Illinois Act does not tell us (as do the APA and the California Act) whether applications for rehearing are or are not indispensable parts of the administrative process. If the object of administrative procedure acts is to make administrative procedure uniform, it is easily accomplished, so far as the necessity for applications for rehearing is concerned, by a provision similar to section 10(c) of the APA or section 11523 of the California Act. But language such as appears in the Illinois Act leaves the rehearing problem no nearer solution than it was before the Act was passed.

The legislature of Ohio in 1943 adopted an Administrative Procedure Act which is compared with the federal APA in an interesting Cincinnati Law Review article.¹⁹ The Ohio Act was thrice amended and appears in its present form as Ohio Revised Code (1953) Secs. 119.01 et seq. The law review writer criticizes the Act as "narrow in scope and yet unwieldy when compared to the Federal Act . . . little coverage is given the important aspects of administrative procedure such as hearing procedure, judicial review, and publication."²⁰ The term "agency" is defined all inclusively, with a good many specific exceptions. There is no provision of the Ohio Act specifically relating to rehearings, and no provision comparable to Sec. 10(c) of the federal APA. Thus the situation in Ohio is subject to the same criticism as that in Illinois, and to this extent at least points up the Cincinnati Law Review evaluation.

So much for statutes which clearly dispense with any necessity for applying for a rehearing, with special reference to state administrative procedure acts.

3. *Statutes which apparently make applications for rehearing permissive.*

In the absence of an administrative procedure act which prescribes a uniform rule for the procedure before all agencies, the statutes pertaining to each individual agency will, of course, govern the procedure before each. As we have already noted, such statutes sometimes clearly make applications for rehearing mandatory, and sometimes they clearly dispense with the necessity for applying for a rehearing. Many statutes apparently make rehearing applications permissive. The interpretation of this kind of statute has produced a sharp conflict of authority. As we have already noted, the federal rule is that under such a statute, in the absence of special circumstances an application for rehearing is not an indispensable part of the administrative process, and the failure to apply for one will not

19. 24 Univ. of Cincinnati Law Rev. 365 (1955).

20. Ibid, page 380.

preclude judicial review of agency action; the "may" will not be read as "must." Alabama, Nebraska and Pennsylvania follow the federal rule,²¹ while California, Illinois, New York and Ohio follow the opposite rule and hold that "may" does mean "must."²²

Some of the cases merit special comment. Taking up first the federal rule and the state cases following it, the U. S. Supreme Court in *Levers v. Anderson*²³ indicated approval of the following reasons for the rule: motions for rehearing are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders. To these may be added the argument of the dissenting California judges in the *Alexander* case²⁴ that the rule interpreting permissive language as mandatory "would take no account of the endless variations in the administrative bodies throughout the state." Finally, there is the dictionary argument that the word "may" (or its equivalent) is a permissive word. The cases (other than *Levers v. Anderson*) are not much given to discussing reasons behind the rule. A fair example is the statement of the Supreme Court of Pennsylvania:²⁵

"While a person aggrieved by an order may request the Commission to revise its findings this is not a necessary preliminary to appeal. The Act does not so command, and such procedure is permissive only. The failure of these parties to so proceed was not error."

The statute involved in the case is set out in the footnote.²⁶

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21. *Alabama Public Service Commission v. Higginbotham*, 256 Ala. 621, 56 So.2d 401 (1952); *Baggett Transportation Co. v. Avery Freight Lines*, 256 Ala. 615, 56 So.2d 669 (1952); *Alabama Public Service Commission v. Decatur Transfer and Storage Co.*, 257 Ala. 346, 58 So.2d 887 (1952); *Application of C. B. & Q. R. Co.*, 154 Neb. 281, 47 N.W.2d 577 (1951); *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 497, 1 A.2d 775 (1938).
22. *California*:
Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433 (1943); *Clark v. State Personnel Board*, 61 Cal.A.2d 800, 144 P.2d 84 (1943); *Child v. State Personnel Board* 97 Cal.A.2d 467, 218 P.2d 52 (1950).
Illinois:
Asche v. Rosenfield, 405 Ill. 108, 89 N.E.2d 885 (1950).
New York:
N. Y. Central R. Co. v. Public Service Commission, 238 N.Y. 132, 144 N.E. 365 (1924); *City of New York v. Richmond L. and R. Co.*, 183 N.Y.S. 922 (1920), Aff. 194 N.Y.J. 924 (1922), *Application of Nockelin*, 73 N.Y.S.2d 536 (1947); *Childs v. Brooklyn Edison Co.*, 105 N.Y.S.2d 503 (1951).
Ohio:
Industrial Commission v. Ramsey, 119 Ohio St. 497, 164 N.E. 509 (1928); *Grabler Mfg. Co. v. Wrobel*, 125 Ohio St. 265, 181 N.E. 97 (1932); *Crumpton v. B. E. Good-Rich Co.*, 139 Ohio St. 383, 40 NE.2d 423 (1942) (dictum).
23. *Supra* note 9.
24. *Alexander v. State Personnel Board*, 22 Cal.2d 198, 137 P.2d 433, 435 (1943).
25. *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 497, 1 A.2d 775 (1938). The Commission's order in this case fixed prices, a function not strictly adjudicatory, see 42 Am.Jur. 591.
26. "That upon application in writing from a person aggrieved by an order of the Commission hereunder filed within fifteen (15) days after the issuance of the order complained of, or upon its own motion, the Commission may, within twenty (20) days after the effective date of such order, issue an order revising or amending such order. . . ."

There was language in the statute involved in the *Higginbotham* case²⁷ on the basis of which a court might have found a rehearing application to be mandatory. The statute provided that:

“. . . any party thereto may make application to the commission for reconsideration or rehearing of the same. . . Such application shall be filed within 30 days after date of such . . . order.”

But the Alabama Supreme Court treated the statute as permissive only, and refused to find that the complaining party had failed to exhaust his administrative remedies because he had filed no application for rehearing.

Similarly, the Nebraska statute considered in *Application of Chicago, Burlington and Quincy R. Co.*²⁸ could have been interpreted by a hostile court as being mandatory. The requirement was that:

“. . . a motion for rehearing shall be filed within ten days after the mailing of a copy of such order by the commission to the persons affected, and the time for appeal shall run in case such motion is filed from the date of the ruling of the commission on the motion for rehearing.”

After analyzing this language the court concluded “that the Legislature left it optional, as distinguished from mandatory, whether or not the party aggrieved would timely file a motion for rehearing.”

On the other side, the case of *Alexander v. State Personnel Board*²⁹ is representative of the line of authority which holds the statutory language *permitting* applications for rehearing should be interpreted as *requiring* such applications. The successful party in this case was represented by the then Attorney General of California, now Chief Justice of the United States, Earl Warren. In this case two men sought mandamus against the State Personnel Board requiring the Board to reinstate them as state employees, with back pay. After a proper hearing the Board had dismissed them. They did not petition for rehearing, but filed the mandamus case within the time prescribed by the Civil Service Act. The trial court sustained a demurrer on the sole ground that application for rehearing had not been made within the time prescribed by the Civil Service Act following the order of the Board, and the Supreme Court affirmed, two judges dissenting. The statute pertaining to rehearing provided as follows:

“Within thirty days from and after . . . the decision rendered by the board in a proceeding under this section, the employee or the appointing power may apply for a rehearing by filing with the board a petition in writing therefor.”

In reaching its decision the majority reasoned that (1) The exhaustion rule is well established in California. (2) The provision for rehearing is a part of the administrative remedy which must be exhausted. (3) The

27. *Alabama Public Service Commission v. Higginbotham*, 256 Ala. 621, 56 So.2d 401 (1952).

28. 154 Neb. 281, 47 N.W.2d 577 (1951).

29. 22 Cal.2d 198, 137 P.2d 433 (1943).

exhaustion rule must be uniformly enforced; its enforcement is not a matter of judicial discretion. (4) Even though the statute does not make an application for rehearing a condition precedent to resort to the courts, "the rule of exhaustion of administrative remedies supplies the omission." (5) The purpose served by an application for rehearing is to give the board an opportunity to correct any mistakes it may have made.

This reasoning ties up into a neat package. Its weakness lies in the fact that an application for rehearing is a part of the administrative remedy (which must be exhausted) only because the court chooses to *make* it so. The dissenting judges called attention to the fact that under the rationale of the majority it should never be necessary that the legislature expressly *require* applications for rehearing, then pointed out a number of instances where the legislature had done just that; under the majority interpretation, said the dissenters, such language is reduced to "mere surplusage." As already noted, the dissenters objected to the rigidity of the rule followed by the majority, and protested that it does not take into account the differences in the various state administrative agencies, which might in one instance justify a mandatory requirement unwise in the case of another agency differently constituted and doing a different job. And, of course, the dissenters emphasized the ordinarily permissive quality of the word "may" in the phrase "may apply." Thus the California court gave the rehearing requirement a good working over, pro and con, in the *Alexander* case.

The same court distinguished the *Alexander* rule in *Ware v. Retirement Board*³⁰ where for some reason or other the City Retirement Board had refused to grant a hearing to the guardian of a city employee who had allegedly become mentally incompetent and entitled to retirement benefits. The Municipal Code provided that when the Board denied such benefits "any applicant . . . may file an application for rehearing . . . within 30 days after written notice of the determination of the Retirement Board." No such application had been filed before judicial review was sought. The court nonetheless permitted a mandamus action against the board, distinguishing a "refusal to act" from the situation existing in *Alexander* where the agency did hold a hearing and make a decision. There seems to be no compelling reason why such a distinction should be made.

The Illinois and New York cases do not seem to add any special interest to the line of authority now under discussion.

The Ohio cases deal with workmen's compensation benefits, and the statutes involved afford some justification for the holding that in this context, apparently permissive language should be interpreted as being mandatory. The Ohio Workmen's Compensation statutes, set out in full in the *Ramsey* case,³¹ provide that if the Commission denies the claim benefits "the claimant may within thirty days after receipt of notice of such finding of the commission, file an application with the commission for

30. 65 Cal.A.2d 729, 151 P.2d 549 (1944).

31. *Industrial Commission v. Ramsey*, 119 Ohio St. 497, 164 N.E. 509 (1928).

a rehearing of his claim." If the application is filed, the statute then makes it compulsory that the commission hold a formal rehearing, at which the evidence is taken "as in the trial of civil actions." If the ruling is again adverse to the claimant, he may appeal to the court within 60 days after receipt of notice of the commission action. In holding that an application for rehearing is prerequisite to an appeal to the court, the court pointed out that the claim is first handled on an informal basis, that on the rehearing the proceedings are formal and a record of the evidence is made, and that the commission must grant the rehearing when requested. If the disappointed claimant went into court without having applied for a rehearing, the court would have no record before it upon which to review the agency action. Under these circumstances a rehearing requirement makes sense.

4. Statutes which are silent on the subject of applications for rehearing.

There appears to be a paucity of authority relating to the last of the four classes of statutes. Two cases from Louisiana³² have ruled that under such circumstances no application for rehearing is required as a part of the administrative process. In *Roussel v. Digby*, the party aggrieved by an order of the Commissioner of Conservation concerning the land to be included within a "compulsory drilling unit" in an oil field did not seek any reconsideration from the Commissioner. The statute was silent as to such a requirement. The aggrieved party filed an injunction suit against the Commissioner, and he sought to have it dismissed for failure to seek reconsideration. In rejecting the Commissioner's contention, the court said:

"If Roussel was compelled to comply with the contention urged herein, the Commissioner could exclude certain lands and include others from time to time as application was made and the administrative remedy would never become exhausted."³³

This language strikes a note which will be picked up in the following section of this paper.

*Hunter v. Hussey*³⁴ involved the same Commissioner in a situation where, after a hearing, he had ordered certain conservation measures to be taken in a particular oil field. Royalty owners who had participated in the hearing filed an action to enjoin the enforcement of the order without first asking the Commissioner to reconsider. The court held that in the absence of a statute or an administrative rule requiring it, an application for rehearing or amendment of the order was not an essential part of the administrative process.

Thus far the rehearing problem can hardly be considered boggy. We have up to this point encountered only a variety of legislative attitudes

32. *Roussel v. Digby*, 222 La. 779, 64 So.2d 1 (1953); *Hunter v. Hussey*, 90 So.2d 429 (La. 1956).

33. 222 La. 779, 64 So.2d 1, 2 (1953).

34. 90 So.2d 429 (La. 1956).

toward the necessity of applying for a rehearing, expressed in three different types of statutes, with a sharp conflict of authority as to the interpretation of one of the three types; in addition we have a fourth type of statute in which the legislature has expressed no attitude at all on the subject. Reserving final judgment as to the best way to handle the rehearing problem, let us now explore the complications which may arise when we consider this question:

*Must More than One Application for Rehearing Be Made
in Order to Exhaust the Administrative Remedy?*

In seeking the answer to the question we begin with the assumption that one application for rehearing has been made and acted upon by the agency. Is it then safe, under all four classes of statutes, to go into court and seek judicial review? Has the exhaustion rule been satisfied? Here is where the bog begins.

The area in which the problem appears most acutely is that of workmen's compensation, and for the sake of intensifying an examination of the complications which can and do arise, the discussion of these complications will be limited to workmen's compensation cases. What is said could apply, although perhaps not so acutely, to other administrative areas.

A good point of beginning is the Colorado case of *Carroll v. Industrial Commission*.³⁵ As previously noted, the Colorado statute requires an application for rehearing as a prerequisite to judicial review of decisions of the Industrial Commission. In the *Carroll* case the original decision of the commission was adverse to the compensation claimant. He filed a petition for rehearing. It was granted, and the commission took further testimony which was cumulative only. The Commission then made a second order denying compensation, and the claimant thereupon sought judicial review. The employer contended that the action was premature for the reason that no further petition for rehearing had been filed by the claimant. In rejecting this contention the court said:³⁶

"The petition for rehearing which was filed accomplished all that the statute contemplates with reference to such petitions. A second petition for a rehearing by the same party, filed after the Commission makes an order exactly the same as a previous order, would serve no purpose other than to further delay the termination of the proceedings."

This ruling seems to make good sense. However, the question immediately suggests itself, would the ruling have been otherwise had the commission upon hearing *reversed* its original decision?

The Supreme Court of California considered this very situation in *Harlan v. Industrial Accident Commission*.³⁷ In that case the original

35. 69 Colo. 473, 195 Pac. 1097 (1921). Accord, *Industrial Commission v. Pemberton*, 37 OhioA.527, 174 N.E. 792 (1930).

36. 69 Colo. 473, 195 Pac. 1077, 1098 (1921).

37. 194 Cal. 352, 228 Pac. 654 (1928).

decision of the commission was in favor of the employer. The employee petitioned for rehearing, the commission granted it, then reversed itself and awarded compensation. The employer thereupon sought judicial review, which the employee resisted on the ground that under the circumstances the employer should have petitioned for a rehearing as a necessary step in exhausting his administrative remedy. In California, as in Colorado, the statute made an application for rehearing mandatory. The court held that the administrative remedy had been exhausted, and that no further petition for rehearing was necessary:

“The act contemplates a speedy determination of questions involving the right to compensation, and the Commission is given broad powers to the end that long delays may be avoided. It is the policy of the law in general practice to consider but one application for a rehearing. . . .”

In so deciding the court relied upon the earlier California case of *Federal Mutual Liability Insurance Co. v. Industrial Accident Commission*,³⁸ where the situation was the reverse of that in the *Carroll* case, i.e., both the original decision and the decision upon rehearing were in favor of the claimant. The California court had held in that case that no second petition for rehearing was necessary.

A few years later, in *Dalsheim v. Industrial Accident Commission*³⁹ the Supreme Court of California modified the rule in the *Harlan* case by holding that where a rehearing has been granted, and on such rehearing the commission reverses its original award, the party aggrieved by the last award has the choice of petitioning for a further rehearing or of going directly into court on a writ of review.

In 1927, three years after *Harlan*, a District Court of Appeals in California decided the case of *Crowe Glass Co. v. Industrial Accident Commission*.⁴⁰ Here the first decision of the commission was in favor of the employer, the claimant petitioned for rehearing, and upon rehearing the original decision was affirmed. The claimant then applied for a second rehearing, which the commission granted. Without taking any further testimony, the commission then reversed itself and held for the claimant, whereupon the employer sought a judicial review, contending that the commission had no power to grant a second rehearing. Applying the rule of the *Harlan* case, the court held that the statute “contemplates but one rehearing and the party aggrieved must then look to the appellate courts for a review of the proceeding.” The jurisdiction of the commission was exhausted after it had acted on the first rehearing, said the court. Accordingly, the award in favor of the claimant was annulled. The Act contemplated a speedy determination of controversies arising thereunder, “and not a vacillating attitude on the part of the commission.” Foreseeing the consequence of ruling otherwise, the court said:⁴¹

38. 190 Cal. 97, 210 Pac. 628 (1922).

39. 215 Cal. 107, 8 P.2d 840 (1932).

40. 84 Cal.App. 287, 258 Pac. 130 (1927).

41. 84 Cal.App. 287, 258 Pac. 130, 133 (1927).

"Under such a practice there would be no end of litigation, as no time, however great, would operate to bar successive applications provided only that they were applied for in reasonable time. Such a construction would lead to legal chaos."

That these words were prophetic was demonstrated three years later by the decision of the Supreme Court of California in *Ingram v. Department of Industrial Relations*.⁴² An employee applied to the Industrial Accident Commission for workmen's compensation benefits. The commission considered the case and made an award against the employer, who then filed a petition for rehearing. The petition was denied. The employer then filed a "Petition to Set Aside Order Denying Rehearing." The commission granted this petition and considered the case as if on rehearing, handing down new findings but making the same decision as before. The employer next sought judicial review. The employee resisted on the ground that the employer had not exhausted his administrative remedy, because he had failed to file *another* petition for rehearing. The Supreme Court held that under the rule of the *Crowe* case the "Petition to Set Aside Order Denying Rehearing" could not be treated as a second petition for rehearing, but that this petition could be treated as an application to reopen the case and to invoke the continuing jurisdiction possessed by the commission in workmen's compensation cases; this despite the fact that the grounds set out in the "Petition to Set Aside Order Denying Rehearing" made averments typical of an application for rehearing. It followed that when the commission again made a decision adverse to the employer, he *should* have filed another petition for rehearing, and his failure to do so *would* have precluded him from obtaining judicial review except for the fact that (as the court found) there were "peculiar circumstances" which would make it inequitable to so hold! The "legal chaos" foreseen in the *Crowe* opinion had arrived. In such ways did the law in California on petitions for rehearing become "curiouser and curiouser," as Alice in Wonderland might have observed. . . .

The same confusion between reopening and rehearing was involved in *Mustain v. State Industrial Accident Commission*⁴³ which the District Court of Appeal decided in 1933. The first award was in favor of the employee. The insurance carrier petitioned for rehearing, which was granted. On this "rehearing" the commission found that a new injury had occurred, rather than a "new and further disability" chargeable to the original injury, and made an award in favor of the employee. Upon the "rehearing" the employee asked the commission to exercise its continuing jurisdiction to reopen the case. The employee was not satisfied with the award, and filed a petition asking for "further rehearing and a reopening of the case," but alleged no change of conditions since the date of the second award. The commission then entered an order denying rehearing and affirming its last previous award, and the employee sought judicial

42. 208 Cal. 633, 284 Pac. 212 (1930).

43. 130 Cal.A.447, 19 Pac. 1031 (1933).

review. The court held that the employee's second petition should have been directed to the *first* award rather than the second; that in order to attack the first award the employee's second petition should have been filed within 30 days after the first award. Since it was not filed in time, the employee was precluded from seeking judicial review of the first award. The court proceeded to review the second award on its merits, and affirmed the commission.

Something approaching the ultimate in complications is exemplified by *Goodrich v. Industrial Accident Commission*, decided by the Supreme Court of California in 1943.⁴⁴ The original award was in favor of the claimants. The insurance carrier's petition for rehearing was granted, and the commission reversed its previous order and found in favor of the employer. Claimants then petitioned to reopen the case and produce new evidence. This petition was denied. Claimants then petitioned for rehearing, based upon the alleged newly discovered evidence. This petition was granted, further evidence was introduced, and the commission affirmed its last previous decision. Claimants then petitioned for further hearing and the petition was denied. The court held that the last mentioned petition should have been granted, because the commission's action was equivalent to rescinding the order denying claimants' petition to reopen, and amending the decision on rehearing made in favor of the employer. At this point we could well echo the remark of Mr. Justice Jackson, dissenting in *Sec. v. Cheney Corporation*:⁴⁵

"I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it'."

Thus it is that the traveler through Administrative Law Land may sometimes find his journey interrupted by the Rehearing Bog. It may be at times a close question as to which will first be exhausted—the administrative remedies, or the litigants.

The Need for Reforming the Law Relating to Petitions for Rehearing

Responsibility for the difficulties to which the rehearing problem has given rise cannot be laid at any one door. It must be shared by the legislature, the court, and the nature of the administrative process. The problem is of more than academic interest. If the litigant does not apply for a rehearing, and the court holds that he should have done so, he is usually out in the cold (in addition to the time and expense involved) because by the time the court decides the point, it is too late for the litigant to go back to the agency and file a petition for rehearing. If, on the other hand, he applies for a rehearing to be on the safe side, and it turns out that no application for rehearing was required, he may be equally remediless. For

44. 22 Cal.2d 604, 140 P.2d 405 (1943).

45. 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

example, in *Canzano v. Handley*⁴⁶ the statutory procedure for court review of decisions of Zoning Board of Appeal required the institution of the court action within 30 days after the Board's decision. Plaintiff, who had objected to the issuance of a building permit by the Board to one of his neighbors, asked for a rehearing, in accordance with a rule of the Board which permitted such applications. The Board denied the application, and plaintiff instituted court proceedings within 30 days from the denial of the rehearing, but more than 30 days from the decision of the Board granting the permit. He was held barred from judicial review by the statutory limitation.

The following suggestions for reform are offered with the realization that they do not constitute a perfect solution to the problem, but in the belief that if adopted they would substantially improve the present situation. Since the emphasis in this paper has been upon state law, the suggestions are framed in terms of changes at the state level. The federal situation appears to be satisfactory.

1. The present system existing in most states whereby rehearing procedure is set up exclusively by the individual statutes relating to each separate administrative agency should be abolished, and be replaced by a single statute applying to all state administrative agencies. The provisions of this single statute should be similar to section 10(c) of the APA or Sec. 11523 of the California Administrative Adjudication Act.⁴⁷ Perhaps the following combination of the two would serve the purpose:

"Agency action otherwise final shall be final so far as the right to judicial review is concerned whether or not there has been presented or determined any application for rehearing, or other form of reconsideration; the right to judicial review shall not be affected by the failure to seek reconsideration before the agency."

For convenient reference, this proposed statute hereinafter will be called "the uniform statute."

2. Coincident with the enactment of the uniform statute, the rehearing provisions contained in the individual states relating to each separate administrative agency should be amended so as to make applications for rehearing expressly and clearly *permissive*. Thus, if a party aggrieved by the initial (and otherwise final) decision of the agency felt that he had anything to gain thereby, he could, at his option, petition for a rehearing, but he would not be *required* to do so as a prerequisite to judicial review. Legislatures could still *induce* litigants to apply for rehearings if that were deemed desirable, by including provisions such as those appearing in the

46. 66 N.Y.S.2d 709 (1946).

47. Apparently the Industrial Accident Commission has not been included within the California Adjudication Act (see notes to Deering's California Government Code, Sec. 11501) hence the California courts have not been able to apply Sec. 11523 to the rehearing problem in workmen's compensation cases.

Ohio Workmen's Compensation Act⁴⁸ to the effect that no record shall be made except upon a rehearing. Permissive rehearing provisions should contain safeguards as to the number and kinds of rehearing petitions which could be filed (and these should be strictly limited), so as to protect agencies and courts from such perplexities as confronted the California courts in the workmen's compensation cases.

3. In instances where, as in the workmen's compensation area, the agency has continuing jurisdiction over a case, the permissive rehearing statutes should in clear terms make a distinction between petitions for rehearing and applications to *reopen* the case on grounds of changed conditions or newly discovered evidence. Much confusion has arisen because of the failure to insist upon this distinction, and the rehearing problem has been immeasurably complicated thereby. If the agency has been given the power to reopen a case, proceedings along that line can take place independently of petitions for rehearing. If, while a case is going through the process of judicial review, an application to reopen is filed, the court can stay its hand until the agency disposes of the petition to reopen, since the judicial review may, of course, be affected by agency action taken after a reopening.

The uniform statute is not inseparably connected with the adoption of an entire Administrative Procedure Act, but could be enacted quite independently of such an Act. If adopted, it would first of all unify the now diverse statutory provisions existing in each state relating to the necessity of an application for rehearing as a prerequisite to judicial review. All four types of statutes may and probably do now exist in a single state as to various agencies—statutes making such applications mandatory, statutes dispensing with the necessity for such applications, statutes making such applications apparently permissive, and statutes which make no provisions at all on the subject. This is in itself confusing. The uniform statute would not *abolish* petitions for rehearing, but continue to make them available, subject to the legislative will, on an optional basis. Thus they would be open to an aggrieved party should he feel they might be helpful in particular cases. And finally, the uniform statute and the clarifying amendments of the permissive statutes would protect the courts and agencies from being drawn into the rehearing bog. Thus the net result would be to achieve that "speedy determination of questions" which the California court visualized in *Harlan v. Industrial Accident Commission* as one of the goals of the administrative process.

48. *Supra* note 31.