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## **An Agricultural Law Research Article**

### **The Functions of the Judicial Officer, United States Department of Agriculture**

by

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# THE FUNCTIONS OF THE JUDICIAL OFFICER, UNITED STATES DEPARTMENT OF AGRICULTURE

*Thomas J. Flavin\**

The United States Department of Agriculture has numerous regulatory laws to administer. Some of these are similar in nature<sup>1</sup> to the laws committed to the jurisdiction of the independent regulatory agencies such as the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, etc., and involve the exercise of quasi-judicial or judicial functions as well as those of investigative and prosecutive natures. These statutes vest all regulatory powers in the Secretary of Agriculture. Of course the administration of these various laws is assigned by the Secretary of Agriculture to agencies within the Department for performance of the duties of investigation, enforcement, prosecution, etc.

In the first *Morgan* case,<sup>2</sup> the United States Supreme Court ruled that a proceeding under the Packers and Stockyards Act<sup>3</sup> fixing reasonable rates for market agencies at a stockyard resembles a judicial proceeding, that the authority given by the act to decide the issues of the proceeding is not an impersonal or institutional one for the Department of Agriculture, that the Secretary's duty in this respect "is akin to that of a judge" and that the "one who decides must hear."

In view of the number of regulatory proceedings in the Department and the requirements laid down by the Supreme Court for the making of final decisions and orders in regulatory proceedings the Department sponsored the so-called Schwellenbach Act in 1940<sup>4</sup>

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\* Judicial Officer, United States Department of Agriculture. The views expressed herein are those of the author personally and do not necessarily coincide with those of the United States Department of Agriculture.

<sup>1</sup> A list of about 36 of these statutes appears in the United States Department of Agriculture Yearbook of Agriculture at 264-265 (1954). CUSHMAN, THE PROBLEM OF THE INDEPENDENT REGULATORY COMMISSIONS (1937). Studies on Administrative Management in the Government of the United States, The President's Committee on Administrative Management, Number 111 (1937), states at page eight that of the executive departments of the United States Government the Department of Agriculture has received the most regulatory powers.

<sup>2</sup> *Morgan v. United States*, 298 U.S. 468 (1936).

<sup>3</sup> 42 STAT. 159 (1921), as amended, 7 U.S.C. § § 181-229 (1952).

<sup>4</sup> 54 STAT. 81 (1940), 5 U.S.C. § § 516 a-516e (1952).

which authorized the Secretary to delegate his regulatory functions.<sup>5</sup> Pursuant to the authority so granted the position of Judicial Officer was established in the Office of the Secretary.<sup>6</sup> Reorganization Plan No. 2 of 1953,<sup>7</sup> revested all delegations in the Secretary but delegation from the Secretary to the Judicial Officer has continued substantially as it existed prior thereto.<sup>8</sup>

The Judicial Officer acts as the final deciding officer in lieu of the Secretary in Department administrative proceedings involving adjudication or rate-making where the statute requires an administrative hearing or opportunity therefor.<sup>9</sup> This conforms with the recommendation of the well-known final report of the Attorney General's Committee on Administrative Procedure in Government Agencies<sup>10</sup> which states:

It is obviously impossible . . . for the Secretary of Agriculture to adjudicate all the cases arising under the many statutes administered by his Department. In such instances the cases should be heard and initially decided by the hearing commissioners and be reviewed if necessary by *designated officials who are charged with that responsibility and who will perform it personally.* [Emphasis supplied.]<sup>11</sup>

The Judicial Officer functions principally in connection with the Agricultural Marketing Agreement Act of 1937 which reenacted, amended and supplemented provisions of the Agricultural Adjustment Act of 1933,<sup>12</sup> the Packers and Stockyards Act,<sup>13</sup> the Com-

<sup>5</sup> Section 3 of the act provides :

Whenever a delegation is made under section 516b of this title, all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture. A revocation of delegation shall not be retroactive, and each regulatory function or part thereof performed (within the scope of the delegation) by such individual prior to the revocation shall be considered as having been performed by the Secretary.

<sup>6</sup> Initially the position was called Assistant to the Secretary until November 7, 1945 when the title became Judicial Officer as a result of a reorganization of the Department. 10 FED. REG. 13769 (1945).

<sup>7</sup> 18 FED. REG. 3219 (1953).

<sup>8</sup> 19 FED. REG. 74 (1954).

<sup>9</sup> While the Schwellenbach Act and the delegations thereunder to the Judicial Officer authorized the exercise by him of rulemaking functions where a hearing is required by statute, in actual practice the Secretary has performed this role and since Reorganization Plan No. 2 of 1953 the Under Secretary and Assistant Secretary have also been authorized to do so. 19 FED. REG. 74 (1954).

<sup>10</sup> S. Doc. No. 8, 77th Cong., 1st. Sess. (1941).

<sup>11</sup> *Id.* at 53.

<sup>12</sup> 48 STAT. 31 (1933), 7 U.S.C. § § 601-674 (1952).

<sup>13</sup> See note 3 *supra*.

modity Exchange Act,<sup>14</sup> and the Perishable Agricultural Commodities Act.<sup>15</sup>

The major part of the Judicial Officer's duties is performed in proceedings subject to the provisions of sections 7 and 8 of the Administrative Procedure Act,<sup>16</sup> that is, proceedings in which a Department hearing examiner appointed under the Administrative Procedure Act presides at the hearing and, under the applicable rules of practice, issues a recommended decision. The hearing examiner's report is served upon the parties and any such party may file exceptions thereto. Oral argument upon exceptions to the hearing examiner's report may be requested and is generally available. Oral argument is held before the Judicial Officer. The final decision, including findings of fact and conclusions and the final order are prepared in the office of the Judicial Officer.

The Judicial Officer also serves as final deciding officer in reparation proceedings under the Perishable Agricultural Commodities Act and the Packers and Stockyards Act. In these proceedings the Department is not a party and the decisions made are subject to a *trial de novo* in a United States district court. These proceedings are exempt by section 5 of the Administrative Procedure Act from the hearing examiner requirements of sections 7 and 8 of that act. Hearings are presided over by attorneys from the Office of the General Counsel, United States Department of Agriculture, and the decisions are prepared by the Office of the General Counsel with the collaboration of the agency of the Department administering the act concerned and are submitted for review and issuance by the Judicial Officer.

In all proceedings described, the presiding officer, whether or not an Administrative Procedure Act hearing examiner, may either rule upon motions or questions raised during the course of a proceeding, such ruling to be reviewed by the Judicial Officer in the final disposition of the case, or certify them to the Judicial Officer for immediate decision. The Judicial Officer also acts directly upon petitions to reopen, to rehear or to reconsider. He also supervises the Hearing Clerk's office, which acts in effect as the court clerk in Department proceedings, and the preparation and publication of "Agriculture Decisions," a monthly publication reporting the de-

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<sup>14</sup> 49 STAT. 1491 (1949), 7 U.S.C. § § 1-17a (1952).

<sup>15</sup> 46 STAT. 531 (1930), 7 U.S.C. § § 499a-499s (1952).

<sup>16</sup> 60 STAT. 237 (1946), 5 U.S.C. § § 1001-1011 (1952).

cisions and orders in adjudicatory and rate-making proceedings under the regulatory laws administered by the Department. Many proceedings are disposed of by consent orders which are handled directly by the Judicial Officer.

The decisions and orders under the Agricultural Marketing Agreement Act are made under section 8c(15)(A) of that act which provides as follows:

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.<sup>17</sup>

There are 68 orders issued under that act regulating the handling of milk and 32 regulating the handling of fresh fruits and vegetables. About one-third of the milk produced in the United States for fluid purposes is covered by orders issued under the act. The orders regulating the handling of milk prescribe minimum prices for milk delivered by producers to handlers which are determined by formulas for different utilizations of milk by handlers and provide a pooling mechanism whereby each producer receives a price for his milk that is uniform for all producers in the market or all producers delivering to the same handler. Orders regulating the handling of fruits and vegetables do not fix prices but limit the quantity, grade or size of the commodity that may be handled. The general objectives of the orders are to establish orderly marketing conditions and to achieve the economic goal of the statute.

Any complaint by a handler as to an order, a provision thereof, or an obligation imposed in connection with an order must be processed through the administrative proceeding prescribed by section 8c(15)(A) before it can be adjudicated by a court.<sup>18</sup> The issues raised in these proceedings cover a wide area, ranging from the validity of an order or a provision thereof under the statute or the

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<sup>17</sup> 48 STAT. 31 (1933), 7 U.S.C. § 608c (15) (A) (1952).

<sup>18</sup> *United States v. Ruzicka*, 329 U.S. 287 (1946).

Constitution of the United States to the most complex disputes concerning the interpretation and application of the orders issued.<sup>19</sup> Many proceedings, such as several presently pending which challenge the addition of 13 counties in northern New Jersey to the metropolitan New York City marketing area regulated by Order No. 27 under the act necessarily involve the validity of action by the Secretary in his rule-making capacity under the statute. Recent examples of decisions by the Judicial Officer holding action of the Secretary invalid are found in *In re Hawk Dairies*,<sup>20</sup> and *In re Walgreen Company*.<sup>21</sup>

Under the Administrative Procedure Act, handlers petitioning pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act<sup>22</sup> are entitled to apply for interim relief pending the outcome of their cases upon the merits. Such applications are decided by the Judicial Officer [without reference to a hearing examiner] after oral argument if requested.<sup>23</sup> The Judicial Officer also acts directly upon applications to dismiss petitions or portions thereof by the Agricultural Marketing Service for failure to comply with the act or the regulations thereunder, failure to state a cause of action, etc.<sup>24</sup>

With respect to the Packers and Stockyards Act,<sup>25</sup> the Judicial Officer functions as the final deciding officer in three kinds of proceedings, rate, disciplinary and reparation.<sup>26</sup> There are 1,981 packers reporting under the act, over 570 stockyards posted as subject to the act, 1,814 registered market agencies and 4,345 registered dealers at posted stockyards; 13 areas of the country are designated as subject to the live poultry handling requisites of Title V of the act and there are 1,176 live poultry handling licensees. The rate

<sup>19</sup> For the kinds of problems treated, see: *Wawa Dairy Farms v. Wickard*, 149 F.2d 860 (3rd Cir. 1945); *Bailey Farm Dairy Co. v. Jones*, 157 F.2d 87 (8th Cir.), cert. denied, 329 U.S. 788 (1946); *Grandview Dairy Inc. v. Jones*, 157 F.2d 5 (2d Cir.), cert. denied, 329 U.S. 787 (1946); *Dairymen's League Cooperative Association v. Anderson*, 173 F.2d 57 (2d Cir.), cert. denied, 338 U.S. 825 (1949); *Titusville Dairy Products Co. v. Brannan*, 176 F.2d 332 (3d Cir.), cert. denied, 338 U.S. 905 (1949); *General Ice Cream Corporation v. Benson*, 217 F.2d 646 (2d Cir. 1954).

<sup>20</sup> 15 A.D. 1193 (1956). The citations are to "Agriculture Decisions."

<sup>21</sup> 14 A.D. 541 (1955).

<sup>22</sup> See note 17 *supra*.

<sup>23</sup> See *In re Chris Bodker*, 15 A.D. 893 (1956).

<sup>24</sup> A recent illustration is *In re Florida Fresh-Up Daily Juices, Inc.*, 15 A.D. 1294 (1956).

<sup>25</sup> *Supra* note 3.

<sup>26</sup> See Rules of Practice Governing Proceedings Under the Packers and Stockyards Act, 9 C.F.R. §§ 202.1-202.60 (1949).

proceedings concern the fixing of reasonable rates for stockyard companies or for market agencies subject to the act. The disciplinary proceedings include cease and desist order proceedings against packers under Title II of the act which prohibits unfair, unjustly discriminatory or deceptive practices in commerce by packers and a number of activities relating to monopoly, restraints of trade and manipulations of prices. Disciplinary proceedings under Title III of the act may be cease and desist order proceedings against stockyard companies, market agencies or dealers at stockyards and may involve also the suspension of the registration under the act of the market agency or dealer. There are also disciplinary proceedings under Title V of the act to suspend or revoke the license of a live poultry handler and proceedings in which an applicant's right to a live poultry handling license is adjudicated.

Thus a disciplinary proceeding under this act may entail a determination as to whether a trade practice is in violation of the act or may be concerned solely with the issue as to whether a respondent committed the acts alleged without any controversy as to whether the conduct charged constituted a violation of the act. It can be seen, then, that administrative proceedings under this act cover nearly all types of the administrative activity currently catalogued in the literature of administrative law and procedure, that is, rule-making, rate-making, adjudication, licensing and reparation. Moreover, in addition to formal disciplinary proceedings in which a Department agency, the Agricultural Marketing Service, is the complainant, formal disciplinary proceedings pertaining to the rendering of stockyard service by a stockyard company or a market agency may be instituted and prosecuted by the private complainant without participation as a party by any agency of the Department.<sup>27</sup>

Transactions in commodity futures on exchanges designated as contract markets are regulated under the Commodity Exchange Act.<sup>28</sup> There are 16 such markets at the present time and the act covers futures trading not only in grain and cotton but in a number of other commodities enumerated in the act such as butter, onions,

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<sup>27</sup> See *Producers Livestock Marketing Association v. The Denver Union Stockyard Company*, 15 A.D. 638 (1956), *rev'd, sub nom. Producers Livestock Marketing Association v. United States*, 241 F.2d 192 (10th Cir. 1957), *cert. granted, sub nom. Benson v. Producers Livestock Marketing Association*, 353 U.S. 982 (1957) which concerns the legality of regulations issued by the stockyard company restricting livestock business activities of market agencies and dealers outside the stockyards.

<sup>28</sup> 49 STAT. 1491 (1936), 7 U.S.C. § § 1-17a (1952).

fats and oils, wool, peanuts, cottonseed meal and soybean meal. Manipulations of price and corners in commodities are prohibited by the act as well as other enumerated activities such as "bucketing" orders, "wash trades," and speculative trading limits are authorized. Customers' funds are required to be treated as trust funds by futures commission merchants. Under the act the Secretary is authorized after notice, hearing, etc., to order contract markets to refuse trading privileges to a person found to have violated the act and to suspend or revoke the registration under the act of a futures commission merchant or floor broker. The Judicial Officer acts as the deciding officer in these proceedings in place of the Secretary. Typical decisions are those in *In re Great Western Distributors*,<sup>29</sup> involving manipulation of egg prices and a corner in eggs on the Chicago Mercantile Exchange and *In re Corn Products Refining Company*,<sup>30</sup> concerning questions as to whether millions of bushels of corn futures held were in excess of speculative trading limits or were legitimate and exempt "hedged" under the act.

The Perishable Agricultural Commodities Act,<sup>31</sup> also authorizes disciplinary proceedings looking to the suspension or revocation of licenses. This act covers some 25,000 licensees who buy or sell fresh or frozen fruits or vegetables in interstate commerce in sufficient amounts to make them subject to the act. Unfair, unreasonable or deceptive practices are prohibited as well as failure to deliver produce contracted for or failure to accept produce ordered and failure to pay for produce purchased by a licensee or failure to account for and to remit correct proceeds to a shipper who has consigned produce for sale by a licensee.

As stated above there are formal reparation proceedings under the act as well as formal disciplinary proceedings. In addition section 4 of the act sets out a number of reasons whereby an applicant may be refused a license, and section 4(d) of the act provides an opportunity for a hearing to the applicant. Following the usual notice, a hearing before a hearing examiner and a recommended decision by him, exceptions, etc., the Judicial Officer issues the final decision and order in these licensing proceedings.

The following table covering the decisions and orders issued during

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<sup>29</sup> 10 A.D. 783 (1951), *aff'd*, 201 F.2d 476 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953).

<sup>30</sup> 13 A.D. 1117 (1954), *aff'd*, 232 F.2d 554 (2d Cir. 1956).

<sup>31</sup> 46 STAT. 531 (1930), 7 U.S.C. § § 499a-499f (1952).



the fiscal years 1947-1956 illustrates the scope of the duties of the Judicial Officer:

Fiscal Year	AMA <sup>32</sup>	ARS <sup>33</sup>	CEA <sup>34</sup>	GS <sup>35</sup>	P&S <sup>36</sup>			PACA <sup>37</sup>		USW <sup>38</sup>	Total
					Rate	Disc.	Rep.	Rep.	Disc.		
1947	18	.....	11	1	47	12	13	143	4	.....	249
1948	30	7	12	.....	46	32	12	167	5	.....	311
1949	19	2	10	3	38	56	18	211	9	.....	366
1950	27	3	4	.....	22	46	7	217	5	.....	331
1951	17	1	11	.....	40	39	6	256	5	2	377
1952	21	.....	7	.....	36	53	4	231	4	.....	356
1953	42	.....	1	2	31	89	7	239	7	.....	418
1954	17	.....	12	1	21	50	9	303	5	.....	418
1955	11	.....	11	1	23	50	6	246	3	.....	351
1956	22	.....	7	5	22	40	10	302	15	.....	423

The position of Judicial Officer is located in the Office of the Secretary and the incumbent acts as the Secretary in deciding quasi-judicial or judicial proceedings where the applicable statute requires a hearing.<sup>39</sup> He has no responsibility in any way for investigation, prosecution or advocacy. The various statutes involved are assigned by the Secretary to agencies of the Department for administration and the legal work incident to presenting the agency's case is performed by attorneys in the Department's Office of the General Counsel. Thus there is a complete separation of prosecuting and deciding functions within the Department in this field, at the final stage as well as at the hearing examiner level.<sup>40</sup> This situation, which

<sup>32</sup> Agricultural Marketing Agreement Act, c.296, 50 STAT. 246 (1937).

<sup>33</sup> Act regulating the handling of anti-hog-cholera serum and hog cholera virus administered by the Agricultural Research Service, 49 STAT. 781 (1935), 7 U.S.C. §§ 851-855 (1952).

<sup>34</sup> Commodity Exchange Act, *supra* note 28.

<sup>35</sup> Grain Standards Act, 39 STAT. 482 (1916), 7 U.S.C. §§ 71-87 (1952).

<sup>36</sup> Packers and Stockyards Act, Rate, Disciplinary and Reparation, *supra* note 25.

<sup>37</sup> Perishable Agricultural Commodities Act, Reparations and Disciplinary, *supra* note 31.

<sup>38</sup> United States Warehouse Act, 39 STAT. 486 (1916), 7 U.S.C. §§ 241-273 (1952).

<sup>39</sup> The report of the Task Force on Agriculture Activities of the original Hoover Commission on the Reorganization of the Federal Government states that the Judicial Officer system has "worked well" (p. 17) and recommends that the system be expanded to include all Department rule-making where a hearing is required by statute and also adjudications where a hearing is provided by regulation as well as by statute.

<sup>40</sup> McFARLAND, MILK MARKETING UNDER FEDERAL CONTROL 27 (rev. ed., Sellers

is unusual if not unique, has existed for over 15 years and should be of some interest in connection with the long-standing controversy<sup>41</sup> over the mingling of such functions in the same persons in regulatory agencies.

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& Baskette 1954), says with respect to the activities of the Judicial Officer in connection with proceedings under § 608c (15) (A) of the Agricultural Marketing Agreement Act:

"This officer has nothing to do with the actual promulgation of milk marketing orders—a function which the Secretary has heretofore reserved to himself. In effect, therefore, there has been a separation of the quasi-legislative and quasi-judicial functions authorized to be performed under the Milk Marketing Act. This separation of functions, self-imposed by the Department of Agriculture, has had the commendable effect of making it possible to secure decisions of an objective type in proceedings brought by individual handlers to test the validity of milk marketing orders. The official who decides such cases, in a very real sense, conducts himself as does a judge in a court proceeding, and such official has nothing to do with the issuance of the milk marketing order in the first place."

<sup>41</sup> Attention is called to a few highlights of the controversy. The Report of the President's Committee on Administrative Management in the Government of the United States, January 1937, pp. 36-38, proposed that the independent regulatory commissions and boards be placed within executive departments but that the "judicial functions" of the agency should be located in a "judicial section" of the executive department which would be independent of the executive department and the President. The majority of the Attorney General's Committee on Administrative Procedure in Government Agencies believed it not feasible as a general proposition to require more separation of functions within an agency than the establishment within the agency of a corps of independent hearing commissioners (S. Doc. No. 8, 77th Cong., 1st Sess. (1941), pp. 55-60, but three members of the committee, however, were not quite satisfied that more should not be done (pp. 203-209).

The Task Force Report on Legal Services and Procedures, March 1955, Commission on the Reorganization of the Executive Branch of the Government, (pp. 239-256) recommends that at least certain kinds of judicial functions exercised by regulatory agencies be transferred to the courts.