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Civil Rights by Default

Barbara Kaye Besser*
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The Problem

It is apparent to those appearing before the Ohio Civil Rights Commission that the Commission's present procedures and limited powers afford an advantage to the respondent desirous of thwarting the Commission's regulatory process.¹ This advantage stems from the fact that due process mandates the establishment of a factual foundation prior to determining whether to impose disciplinary measurers for the alleged noncompliance with regulatory legislation.² If the development of this factual foundation can be frustrated, effective regulatory processes cannot proceed.

In the instance where a respondent cooperates fully in supplying the Commission with requested relevant information the procedures can continue in an orderly progressive manner. However, when a respondent refuses to comply with a Commission request for the production of any relevant information necessary for the continuation of the regulatory proceedings, the proceedings are brought to a halt. The traditional response of administrative agencies to this refusal to produce has been to refer such matters to the appropriate court for examination and further action. If the agency has acted within its authority, if its requests are reasonably related to the regulatory purposes of the agency, and if the respondent's arguments in support of the refusal to supply the information are rejected, the court ultimately compels the production of the information.³

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¹ Although this article concerns itself primarily with the problems which arise when a respondent is reluctant to comply with a Commission investigatory request, similar problems arise when complainants no longer have any interest in pursuing their charges or "vanish." For a general discussion of the Ohio Civil Rights Commission, see Robinson, The New Fair Employment Law, 20 OHIO ST. L.J. 570 (1959).

² Administrative agencies have been unsuccessful when asking courts to uphold its orders when those orders are not predicated upon factual findings. See Erie R.R. Co. v. United States, 39 F.Supp. 748 (S.D. Ohio 1945) (administrative orders void if, inter alia, facts found do not support order of agency); State ex rel. Squire v. National City Bank of Cleveland, 56 Ohio App. 401, 11 N.E.2d 93 (1937) (arbitrary or capricious exercise of power by administrative agency offends due process clause of U.S. Constitution).

Considerable time passes between the Commission's request for production and the court's order to produce. The result is that the respondent who has complied voluntarily with an agency request is in a more advanced phase of the agency proceeding, while the recalcitrant respondent has reaped a short-term benefit of delay by not complying until ordered to do so by the court. This delay, resulting from the administrative decision to litigate the question of the obligation to produce the information, is most inappropriate in discrimination cases. When individuals allege that they have been victims of discrimination in housing, employment or public accommodations, they are claiming that they have been denied rights basic to an egalitarian society. During the period between the alleged violation and a resolution, these individuals will be forced into the periphery of society. Because in many instances the victims of discrimination are already out of the mainstream of the basic societal structure, any delay in the resolution process merely compounds the problem and should not be tolerated. As John Rawls points out in his work, A Theory of Justice, the basic structure of society contains various social positions and . . . men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men's initial chances in life; yet they cannot possibly be justified by an appeal to notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance reply.4

Any delay in the processing of a charge of discrimination results in a serious denial of justice for both the complainant and the respondent,5 and also amounts to an unnecessary expenditure of Commission resources during preliminary stages of an investigation. Consequently, it is necessary that a mechanism be adopted whereby sanctions can be imposed upon the respondent who refuses to comply with discovery demands for relevant information. This mechanism is essential to enable the Commission to more effectively utilize its investigatory resources and to increase the Commission's efficiency in enforcing its statutory duty.

5 Delay in problem-resolution can also adversely affect respondents. While allegations of discrimination are pending against them, respondents may find themselves unable to obtain government contracts, to hire or to promote employees or to transfer any interest in the business venture involved.
It is the intention of this article to discuss the existing devices available to the Ohio Civil Rights Commission to compel a respondent to provide the relevant factual information requested; to point out the inadequacies of these procedures; and to propose an additional method to effectuate a speedy resolution of the controversies before the Ohio Civil Rights Commission.

The Present Powers of the Commission

The present powers of the Ohio Civil Rights Commission are delineated by statutes and Commission Rules and Regulations. When the Commission is conducting an investigation it has the right of access, as is reasonably necessary for the furtherance of the investigation, to relevant documents, records and individuals. If necessary, subpoenas and interrogatories may be issued to a respondent "to the same extent and subject to the same limitations as would apply if [they] were issued . . . in aid of a civil action in a common pleas court." The Commission's subpoena power is as broad as the subpoena power invoked in aid of a civil action. In civil actions, subpoenas, issued pursuant to Rule 45, are used primarily for the purpose of obtaining information from persons who are not parties to an action. Similarly, the Commission's subpoena power, available to both respondents and the Commission, is used to produce witnesses at investigatory hearings.

Of primary concern here is the procedure for the enforcement of subpoenas and the imposition of sanctions for the refusal to obey subpoenas.

It is discretionary with the Commission whether or not to enforce subpoenas. In cases of contumacy or refusal, the Commission may petition for enforcement of a subpoena in the court of common pleas. In addition, upon the failure of a person to obey a subpoena or subpoena duces tecum, the Commission may apply to the court of common pleas for an order to show cause or "such further relief as may be appropriate pursuant to . . . Civil Rule 37." Al-

6 OHIO REV. CODE ANN. § 4112, et seq. (Page 1973); OHIO CIVIL RIGHTS COMMISSION RULES AND REGULATIONS [hereinafter cited as CR-].
7 Ohío REV. CODE ANN. § 4112.04(B) (3) (a) (Page 1973).
8 Id.
9 The subpoena powers of the Commission are found in OHIO REV. CODE ANN. §§ 4112.04(B) (3) (a), 4112.04(B) (3) (b), 4112.04(B) (4), 4112.04(B) (5), 4112.04(B) (6) (Page 1973), and CR-23 and 24, supra note 6.
10 Rule 45 of the Ohio Rules of Civil Procedure, adopted in 1970, closely follows Federal Rule 45. Consequently, case interpretation of the Federal counterparts should be applicable to the procedures under the Ohio rules where the exact language has been adopted.
12 CR-23.03, supra note 6.
though Section 4112.99 provides for the possibility of a fine for refusing to obey a subpoena, the Commission does not consider this the sole remedy.\textsuperscript{13} The reference to Rule 37 makes it apparent that lesser sanctions are available to the court in enforcing its contempt power, and of course the Commission can also request the court to impose further sanctions if necessary to accomplish the Commission's purposes.

As noted above, the Commission through its general discovery power\textsuperscript{14} is also given the authority to issue interrogatories to a respondent, in the same manner as is done in a civil matter.\textsuperscript{15} Through its rule making power, the Commission has adopted procedures to be followed where objections to interrogatories are filed by a respondent.\textsuperscript{16}

However, unlike the statutory provisions governing the enforcement of subpoenas, there are no statutory provisions available to the Commission to compel answers to interrogatories. Consequently, any such power is either nonexistent or must be implied from references in the statutes to Rule 37 and the procedures utilized in a common pleas court.\textsuperscript{17}

The statutory scheme, relegating interrogatories to an inferior position in the discovery process, places an undue emphasis upon the subpoena process. Without the power to compel answers to interrogatories, the Commission has made limited use of them. Rather, it seeks, through the subpoena power, to gain access to those records which will provide the information needed to complete discovery. If a respondent refuses to comply, the Commission is then free to proceed into court to enforce the subpoena. Such a procedure is wasteful, time-consuming and inefficient. Without effective enforcement powers, \textit{vis-a-vis} the interrogatory powers, the Commission is forced to do indirectly through the subpoena power that which it is not able to do by utilization of the interrogatory power. When faced with a reluctant respondent, the Commission must determine whether or not the data sought is worth the expenditure of time and expense in proceeding to court to obtain an order compelling compliance. It is necessary therefore, in order to streamline this cumbersome proce-

\begin{itemize}
  \item \textsuperscript{13}In a formal opinion of the Ohio Attorney General, it is made clear that although the Commission may cause suspected violators of the civil rights statutes to be prosecuted, the penalties provided in Ohio Revised Code Section 4112.99 may be imposed only by a trial judge of a court of competent jurisdiction and then only after a trial and conviction of the accused violator. Ohio Att'y Gen. Op., Opinion No. 70-108 (1970).
  \item \textsuperscript{14}The general discovery powers of the Commission are established by \textit{OHIO REV. CODE ANN.} § 4112.04(B) (3) (a) (Page 1973), and CR-22, 24 and 26, \textit{supra} note 6.
  \item \textsuperscript{15}\textit{See} note 8 \textit{supra}.
  \item \textsuperscript{16}CR-24, \textit{supra} note 6.
  \item \textsuperscript{17}\textit{See}, \textit{e.g.}, \textit{OHIO REV. CODE ANN.} § 4112.04(B) (3) (a) (Page 1973), CR-22.01, 22.02, 24.01, \textit{supra} note 6.
\end{itemize}
dure and to make the Commission a more efficient and effective agency, to increase the discovery powers of the Commission, primarily with respect to the usefulness of the interrogatory tool.

Proposed Solution

Except for the subpoena power discussed earlier, the present statute provides no explicit procedure to be used when respondents before the Commission refuse to cooperate with legitimate Commission investigations and hearings. House Bill 1195 [H.B. 1195], which sought to amend various sections of the Ohio Civil Rights Act and fill this void, was before the 110th Session of the Ohio General Assembly; but, much to the dismay of those interested in its passage, the bill died in committee. It is the authors' hope that a bill that will adequately meet this problem will be passed in the 111th Session.

Under H.B. 1195, upon a respondent's failure to comply with a Commission request for answers to interrogatories, the Commission would have had two alternatives available. Proposed Section 4112.04 (B) (6) would have made available to the Commission, upon contumacy or refusal, the right to petition for enforcement in the court of common pleas, on the basis that the recalcitrant was in contempt of court. Alternatively, and more importantly, the Commission, pursuant to proposed Section 4112.05 (E), could have entered default against a respondent failing to answer a complaint or interrogatories and proceeded with a hearing on the evidence in support of the complaint. The entry of default would have implied that failure to answer was an admission of the truth of the charges and that respondent had waived any right to participate in the succeeding administrative steps. However, this default, once entered, would not necessarily have been final; proposed Section 4112.05 (E) further provided that for good cause shown upon equitable terms and conditions, the Commission could have set aside the default.

While the proposed Bill was a step in the right direction, there were two major deficiencies in its provisions. The first of these was the lack of an order-notice sequence such as is found in the New Jersey Civil Rights Statute. The New Jersey plan provides that failure to answer interrogatories, after a Commission order to answer coupled

18 In Ohio H.B. No. 611, 110th General Assembly (1973-74), the Legislature did approve the amendments, but only insofar as they extend protection to persons who suffer discrimination on the basis of sex.

19 According to Rep. Michael Stinziano (D-30), it is probable that House Bill 1195, or a bill comparable to it, will be introduced in the 111th Session, as the proposed bill had the backing of the Ohio Civil Rights Commission and numerous legislators.

20 N.J.A.C. 13:4-1.1 et seq. (The New Jersey Administrative Code is an official publication of the State of New Jersey. It contains rules, regulations and other documents filed with the Division of Administrative Procedure pursuant to the Administrative Procedure Act of the Laws of 1968, N.J.A.C. 52:14 B-1 et seq.).
with notice of the consequences for failure to so respond, “shall result in the matters regarding which questions were asked being taken as established.” It is based on this “admission” that default judgment is entered. This system preserves the respondent’s rights by not concluding that the refusal to answer was an admission of the want of merit in the answers until after the respondent has been informed of the charges and has been given timely notice and an opportunity to answer the charges or interrogatories. In addition, the statutory scheme provides a fair and impartial manner for conducting the proceedings. The proposed Ohio plan did not adopt this order-notice sequence. Rather, it strengthened the Commission’s present subpoena power and provided new procedures governing the Commission’s interrogatory powers.

Under the present statutory scheme the court of common pleas enforces Commission subpoenas: the proposed amendments assumed the validity of the Commission-issued subpoena and treated the refusal to obey as an act in contempt of court. As the present law stands, the refusal to answer or object to interrogatories issued during the investigatory stage of the Ohio procedure can be enforced as a contempt of court. This procedure would still have been followed under the proposed House Bill. However, the bill provided that once the Commission had issued and served a written complaint upon a respondent, failure to answer either the complaint or interrogatories would have resulted in the Commission entering default against the respondent. In order to protect the constitutional due process rights of the respondent, this mandatory default could have been set aside for good cause. Since the default judgment could have been set aside “for good cause shown upon equitable terms and conditions”, this

21 N.J.A.C. 13:4-8.3(b) (1).
22 N.J.A.C. 13:4-8.3(a) (1) & (2) (provides for informing the respondent of charges filed against him).
23 The default procedure is to be used only after the respondent has failed to exercise his rights to answer and has had notice of the consequences which will follow. N.J.A.C. 13:4-8.3. See also the Rules and Regulations of the Ohio Civil Rights Commission. CR-11.07 and 23.03, supra note 6.
24 N.J.A.C. 13:4-12.1 et seq.
25 By utilization of the rule-making power of the Commission, § 4112.04 (A) (4), such a procedure could be adopted. Indeed, so as to insure a respondent’s due process rights, such procedures must be adopted. Cf. Edelman v. Jordan, 415 U.S. 651, 671-73 (1974) and cases cited therein.
26 See note 11 supra and discussion in accompanying text.
27 Ohio H.B. No. 1195, 110th General Assembly, § 4112.04(B) (6) (1973-74) [hereinafter cited as “H.B.” eg. H.B.1195, § 4112.04(B) (6)].
28 H.B. 1195, § 4112.05 (D).
29 H.B. 1195, § 4112.05 (E).
safeguard would have forestalled a respondent from positing supposed violations of constitutional rights and relevancy in lieu of replying to discovery requests. The proposed H.B. 1195 therefore clearly complied with the protections afforded to the respondent under the fifth and fourteenth amendments to the Constitution.

In the case of a failure to answer a complaint, these amendments would have merely been the adoption into statute of that which currently is provided for by regulation. And as to discovery proceedings, the proposed amendments merely transferred some of the existing sanction powers from the courts to a quasi-judicial body, with judicial review of the agency decision available to the respondent.

While the proposed default mechanism of H.B. 1195 would have improved the existing Commission discovery procedures, obvious omissions existed. Although the legislation, as introduced, extended to the Commission the power to utilize all discovery procedures, it made only the failure to answer a complaint or interrogatories grounds for the entry of default. Thus, the Commission would have been forced to resort to the court to enforce all other discovery demands. The natural outgrowth of this would have been increase in the Commission's use of interrogatories and a decrease in the use of other useful discovery devices. In many instances interrogatories may not be the most efficient or effective device available for obtaining relevant information. Yet, the cumbersome procedures which would be required to obtain compliance with these alternative devices will naturally result in an increased reliance upon interrogatories. To better effectuate the purpose for which these legislative changes are made, logic would dictate that the default mechanism should be extended to include not only situations of failure to answer complaints or interrogatories but all failures to comply with requests under the discovery process.

Such an extension would make uniform the procedures to be followed when there is a failure to respond to a request for discovery, rather than providing one procedure for the enforcement of subpoenas, another for compelling answers to interrogatories, and yet a third for dealing with all other discovery devices.


31 CR-14, supra note 6.

32 CR-11:07, supra note 6 — Failure to Answer, provides, upon the failure to file an answer, for the entrance of default and a continuation of the hearing on evidence in support of the complaint.

33 OHIO REV. CODE ANN. § 4113.06(A) (Page 1973).

34 H.B. 1195, supra note 6-04(B) (3) (a).
Finally, any default mechanism adopted by the Commission, whether by statute or through utilization of its rule-making power, must include a procedure similar to that in effect in New Jersey— which not only requires a respondent to reply to the discovery requests but also notifies him of the consequences for failure to reply—for such a procedure is first mandated by the requirements of the constitution, and, secondly, compelled by strong policy considerations.

The Constitutionality of the Proposed Default Mechanism

Faced with the possible imposition of sanctions for failing to reply to discovery requests for relevant information, a recalcitrant respondent may argue that the entire default mechanism, by sidestepping a hearing on the merits, works an unconstitutional denial of due process. Such an argument is not persuasive when tested against the judicially established requirements of due process.

There are few concepts which are more basic to American jurisprudence than due process. However, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government functions involved as well as of the private interest that has been affected by governmental action.

In other words, while principles of due process are at the very roots of the Constitution, and surely the main stay of the fourteenth amendment, there is no absolute set of standards to be followed which would assure compliance with due process. But, even though there is no single formula under which one may be afforded due process, there are several elements without which due process would not exist. One such element is the opportunity to be heard. In 1914 the Supreme Court stated that "[t]he fundamental requisite of due process of law is the opportunity to be heard." While the importance of the op-

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35 For a copy of the New Jersey notice and order, see N.J.S.A. 13:4-8, 3(A) (1) (b) (1972).
36 See discussion beginning at note 38 infra, and accompanying text.
38 Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); accord, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). The constitutional doctrine of separation of powers is not a bar to the vesting of adjudicatory powers in administrative agencies provided that certain minimal procedural requirements are met. As such, the courts have concluded that the standard of due process applicable to administrative proceedings is not the same, nor as strict, as that applied to judicial proceedings. See Application of Milton Hardware Co., 19 Ohio App. 2d 157, 250 N.E.2d 262 (1969). Therefore, if the proposed default procedure is found to comport with the judicial standard of due process, a fortiori, it will meet the administrative standard.

The opportunity to be heard has been expressed more eloquently, certainly no statement can make its importance any clearer. The opportunity to be heard, being the very least which due process commands, may cause us to question whether or not a default mechanism based upon Federal Rule 37 is violative of due process. The history of the rule and the judicial pronouncements thereunder have shown the rule to be in conformance with the requirements of due process.

See, e.g., Poindexter v. Willis, 23 Ohio Misc. 199, 208, 256 N.E.2d 254, 260 (C.P. 1970), wherein the court stated:

Due process of law in the XIV Amendment refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions. It implies conformity with the natural and inherent principles of justice and requires that no one shall be condemned in person or property without opportunity to be heard.

Ohio R. Civ. P. 37. The relevant portions of Rule 37 are as follows:

(B) (2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B) (3) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination....

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. And Rule 37 (D) provides:

If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(B) (5) or Rule 31(A) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsection (a), (b) and (c) of subdivision (B) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In *Hovey v. Elliot*, the Supreme Court, in a pre-rules decision, found a denial of due process where, as a penalty for refusal to obey a court order, a refractory defendant, not in default for answer, had his answer stricken and a decree pro confesso entered against him. The Court, per Justice White, said:

If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? . . . How can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution.

Twelve years later, in *Hammond Packing Co. v. Arkansas*, another pre-rules decision, the Supreme Court allowed the use of the same remedies as those denied in *Hovey*. The Hammond Packing Co., in an action under a state antitrust law had refused to produce books, papers and witnesses before the examining commissioner. A state court, pursuant to a state statute, had ordered the production. Upon the failure, the court, as authorized by its state statute, struck the company's answer and entered a default judgment. The Court, affirming the judgment of the state court, found *Hovey* not controlling:

*Hovey v. Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the law-making power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. . . . The difference between mere punishment, as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process of law was secured by the presumption that the refusal to produce

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43 197 U.S. 409 (1897).
44 *Id.* at 417.
45 212 U.S. 322 (1909).
evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.46

In 1958, after the adoption of the Federal Rules, the Court again dealt with the problem of sanctions. In Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell,47 plaintiff’s action was dismissed due to the failure to comply with an order under Rule 34 to produce certain documents. Although plaintiff had attempted to achieve compliance with the order, he had been unable to do so because Swiss law, which was controlling on plaintiff, forbade the disclosures sought. In reversing this dismissal, the Court stated that the two earlier decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.48

However, the Court did not find it necessary to decide the case on constitutional grounds. The question raised in Societe, which had not been dealt with in earlier decisions, was whether due process was violated by the striking of a complaint by the court because of a plaintiff’s inability to comply with a pretrial production order, despite the plaintiff’s good faith efforts to comply. The Court held that the failure to respond to a court order to produce was a non-compliance, bringing Rule 37 into play, even though in good faith the failure could not have been avoided. However, the Court held that the sanction of dismissal could not be imposed if the failure to comply was due to the inability of the party. The Societe principle has also been extended to a default judgment imposed against a defendant who, in good faith, was unable to comply with an order to produce (i.e., his inability to produce was fostered neither by his own conduct, not by circumstances within his control).49 Thus, the courts are very conscious of the rule in Societe and the constitutional limitations set forth in Hovey and Hammond. Where good faith and diligent efforts are made by a party to comply, dismissals and default judgments have not usually been upheld. Rather, the courts

48 Id. at 208-09.
49 See Read v. Ulmer, 308 F.2d 915, 918 (5th Cir. 1962).
have required the facts and circumstances of the individual cases be closely scrutinized and balanced to determine whether or not sanction should be imposed. 50

Another aspect of the constitutional problem concerns the question of whether or not a defendant, in failing to answer an interrogatory on one specific issue, may be subject to the court's striking his answer to plaintiff's complaint and entering default judgment against him. Some courts have ruled that entering default judgment for failure to answer one interrogatory was improper and that the appropriate sanction in such a case is to bar the party from presenting evidence on issues related to the interrogatory which was not answered. 51 However, this approach is not universally accepted. For example, in United States v. 3963 Bottles, More or Less, Etc., 52 where a defendant failed to answer interrogatories regarding the production, research and testing of drugs that entered interstate commerce, and the issue of the testing and research of the drug was a key matter, a default decree of condemnation was affirmed. Further, one commentator has noted that

the original Advisory Committee [on the Federal Rules], discussing the Hovey and Hammond Cases in its note to Rule 37 appears to have taken the view that the availability of the sanctions of dismissal or default judgment is a reasonable means of securing the production of material evidence by discovery, and therefore consistent with due process. Should the Supreme Court be willing to adopt this interpretation with only the qualification that the refusal be willful, there would appear to be no constitutional requirement that the sanctions be limited to those specific issues for which discovery is sought. 53

As various sections of Rule 37 have come under attack, courts have upheld the validity of the rule as it relates to due process. Maurice Rosenberg summarized the result of this litigation:

[T]he court may make such orders "in regard to the refusal as are just" including an order deeming certain facts estab-

50 Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967), cert. denied, 393 U.S. 859 (1968).


52 265 F.2d 332 (7th Cir.), cert. denied, 360 U.S. 931 (1959).

lished, precluding evidence on certain claims or defenses, striking out pleadings or parts thereof, or rendering a default judgment.\(^5\) (citations omitted).

In *Norman v. Young*, default judgment was entered by the district court against a defendant for the failure to produce certain documents. On appeal, the defendant challenged the court’s authority to enter a default judgment pursuant to Rule 37(b)(2)(iii); the Court of Appeals for the Tenth Circuit upheld the district court’s action. The court, citing the reasoning used in *Hammond*, said:

[A] court could properly strike an answer and enter a default judgment under circumstances where a party fails to produce documents as ordered. . . . [T]rial courts have inherent power to presume the bad faith and untruth of an answer where the proof was suppressed provided it was essential to the disposition of the case.\(^6\)

The proposed default mechanism is analogous to that available under Federal Rule 37(b)(2)(c) and Ohio Rule 37(B)(2)(c) and, therefore, comports with the due process standards set forth in both *Hammond* and *Norman*. While it may be argued that the implementation of the default judgment by the Ohio Civil Rights Commission seems to be in the nature of a punishment, and thus proscribed by *Hovey*, the *Norman* court makes allowances for this type of situation:

Undoubtedly this default judgment includes an element of punishment, as the Rule intends. . . . But here the element of punishment does not rise to the level of reprisal. . . . The entry of default judgment was not vindictive but was compelled by defendant’s conduct, in order to protect the statutorily created right of discovery and the constitutionally guarded due process right of plaintiff.\(^7\)

In *Ward v. Hester*, the first reported Ohio case to deal with the issue of sanctions under Rule 37, plaintiff brought an action to recover for personal injuries allegedly caused by defendant’s agent. Plaintiff served on defendant a request for the production of certain documents for inspection and copying. Receiving no response from defendant, plaintiff obtained from the court an order compelling the production of the documents requested. Finally, defendant having failed to comply with the order, plaintiff filed a motion requesting the court to impose Rule 37 sanctions. The trial court, in imposing the

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\(^5\) Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COL. L. REV. 480, 487-88 (1958). This article has been cited with approval by at least 8 federal courts including the United States Supreme Court in *Societe*.

\(^6\) 422 F.2d 470 (10th Cir. 1970).

\(^7\) Id. at 473.

\(^7\) Id. at 474.

\(^8\) 32 Ohio App. 2d 121, 288 N.E.2d 840 (1972).
sanctions, ordered that for the purposes of the action all matters regarding the agency and scope of employment issues were to be deemed established in accordance with the plaintiff's allegations. Following trial, defendant appealed alleging that the imposition of the sanctions deprived defendant of a hearing on the merits and arguing, *inter alia*, that

the documents sought...related only to the issue of agency and not to the issue of scope of employment and that if it could be determined that the trial court could impose the sanction of eliminating the issue of agency it still could not properly impose a sanction eliminating the issue of scope of employment.\(^{59}\)

The Court of Appeals for Allen County determined that the trial court had not abused its discretion in imposing sanctions under Rule 37.

Sanction orders are long established in our jurisprudence and there seems to be no sound reason that we can fathom to determine that an order made [due to willfulness or bad faith] and not made in the face of proof of inability to comply, should be unconstitutional in any of the respects asserted by defendant company.\(^{60}\)

\(^{59}\) *Id.* at 125-26, 288 N.E.2d at 843-44.

\(^{60}\) *Id.* at 126-27, 288 N.E.2d at 844.

Discovery, as well as being a means of reducing the difficulties of obtaining evidence, is part of the process of narrowing the issues for trial, with full protection given to the party against whom discovery is sought to have his day in court by applying for a protective order under Rule 26(C), or in resisting a motion for an order compelling discovery under Rule 37(A), or in resisting the imposition of sanctions under Rule 37(B). If the party against whom discovery is sought has not sought a protective order, has not brought forth proper reasons for the denial of an order compelling discovery, or has not shown proper reasons why sanctions should not be imposed he has effectively waived his right to assert the issues which the court's sanctions deprive him from asserting and he has not been deprived of any further constitutional due process or right of trial by jury any more than he would have been so deprived had he failed to file an answer to the plaintiff's complaint, or in some other manner had failed to join issue.

It is beyond the scope of this article to discuss the rights of either party to an action to object to the use of interrogatories or other discovery devices in a particular situation. However, it should be noted that these rights do exist and recognition of this is found in Rule 26(C) of both the Ohio and Federal Rules of Civil Procedure. The Ohio rule reads, in part, as follows:

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....

**Ohio R. Civ. P. 26(C).** The *Ward* court discussed these rights and further noted the propriety of Rule 37 sanctions against those individuals for whom the rule is not applicable...
The court went on to expand the Norman rule which limited the sanction to evidence which was essential to the disposition of the case.

We find in Rule 37 (B) nothing limiting the scope of sanctions solely to the issue to which the matter to be discovered relates. Subdivisions 2(a), 2(b) and 2(c) thereof provide, in each case, for sanctions beyond such issues including the ultimate sanctions of dismissal of the action or default judgment. Moreover, although agency might be determined as a fact without any determination of scope of employment the reverse is not usually true, as scope of employment depends largely on the fact and character of the agency. 61

The trend of authority leaves no doubt as to the constitutionality of Rule 37 and its conformance with due process standards. In Link v. Wabash R.R., 62 the Supreme Court, per Justice Harlan, upheld the district court's sua sponte dismissal, pursuant to Rule 41, in a diversity of citizenship action when the plaintiff's attorney failed to indicate a "reasonable reason" for his non-appearance at a pre-trial hearing. In holding that such a harsh procedure was not violative of due process the court indicated that

the adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. 63

As was earlier pointed out, considerations of the precise nature of due process are not to be found. While there is agreement as to some of its components (i.e., opportunity to be heard and adequate notice), many of its requirements are left to the discretion of the court as it balances competing interests. Thus, as the fact situations vary, the standards determining what constitutes due process have also varied.

While one must agree that due process of law is as equally applicable to administrative as it is to judicial proceedings, 64 the question of what standard of due process administrative hearings must meet remains unanswered. Courts are of the opinion that standards for administrative due process need not be as rigid as those to be followed for judicial due process. This willingness to "relax" due process standards may be attributed in part to a desire to expedite administra-

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61 Id. at 128-29, 288 N.E.2d at 845-46.
63 Id. at 632. Cf. United States v. Inter-American Shipping Corp., 455 F.2d 938 (5th Cir. 1972).
tive hearings and in part to the availablity of judicial review to remedy any serious administrative errors. However, the procedure is not to be so relaxed that all standards of due process are ignored. It has been held that in a state administrative hearing
due process of law is afforded when (1) the ‘accused’ is in-fore with reasonable certainty of the accusation lodged against him, (2) he has timely notice and opportunity to answer these charges and to defend against attempted proof of such accusation, and (3) the proceedings are conducted in a fair and impartial manner.

In 1962, in *R. A. Holman v. SEC,* the district court for the District of Columbia, weighing the public good against the defendant’s right to do business, upheld a Securities and Exchange Commission rule under which the plaintiff’s exemption from certain registration require-
ments was temporarily suspended, without notice or hearing. While the rule approved in *Holman* may seem a drastic denial of due process it indicates the power which courts are willing to confer upon admin-
istrative agencies. Often the individual interests must be accomodated so that the administrative agency can more readily utilize its time and process to protect the public interests.

The proposed default procedure affords the respondent the high-
est degree of due process. The ultimate assurances of due process are the “safeguards” upon which the respondent may rely. The mechan-
isms in effect to insure the respondent a proper degree of protection are the opportunity to request protective orders; the limiting of the scope of investigation; the availability of a procedure for setting aside a default; and the resort to the courts for judicial review of a final order. Any one of these standing alone would protect the respondent’s rights. All four of them operating together seem to make a denial of due process a spurious argument.

**Conclusion**

Confronting discrimination means dealing with blatant denials of equality. The legislature must not allow a person charged with such illegal acts to delay an investigation of the charge by refusing to comply with discovery. A speedy determination of the merits of

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65 Marine Space Enclosures, Inc. v. Federal Maritime Commission, 420 F.2d 577, 589-90 (D.C. Cir. 1969). "The requirement of a hearing in a proceeding before an administra-
tive agency may be satisfied by something less time-consuming than courtroom drama."


68 See OHIO REV. CODE ANN. § 4112.04(B)(3)(a) (Page 1973) (requiring all Com-
million investigation to comply with the fourth amendment to the Constitution).
every case is essential to the preservation of civil rights. Litigation can be, and often is, costly and time consuming. While the rights of all parties in litigation must be protected, the legislature should not be willing to allow either party to obstruct justice. The refusal to comply with relevant discovery requests results in lengthy and expensive hearings and trial. The proposed procedure would allow the Ohio Civil Right Commission to render determinations quickly and inexpensively while remaining within the constitutional bounds of due process.

The default procedure herein discussed, affording the respondent an opportunity to be heard, operates fairly and conforms with due process principles while preventing undue delay in the protection of the complainant’s civil rights. Such a procedure is vitally needed. And after the order-notice sequence is added to the proposed House Bill, hopefully the proposed procedure will become the procedure.