Cleveland State Law Review

Volume 18 | Issue 2 Article 8

1969

Credibility Gap in Judicial Review of Administrative Determinations

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THE INCREASING CREDIBILITY GAP in, and judicial review of, administrative determinations is a resultant of agency and judicial misunderstanding and language. Briefly, an examiner's intermediate report ordinarily evaluates the witnesses' demeanor, conduct, believability and credibility before accepting as true certain of their testimony, upon which findings of fact may now be based. Subsequently, the agency has the opportunity to exercise its statutory power to adopt, modify, or reject these findings.[1] Thereafter, on judicial review, the court's whole record approach takes into account as a factor and scrutinizes any examiner-agency disagreement as to findings of fact in determining whether substantial evidence exists to support those of the latter.[2]

Throughout this procedure the only person in a position actually to evaluate and determine (the physical "see"[3]) credibility is the examiner. In this respect he is analogous to a judge in a nonjury trial, or to the jury when it sits. It is blackletter law that credibility is respectively solely for the judge[4] or the jury.[5] So F.R.C.P. Rule 52(a)

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1 Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 492 (2nd Cir. 1951): "The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' . . ." See also, *infra* note 5.

Although *Universal Camera* was based on the basic Labor Board statute and the corresponding provision in the earlier A.P.A., the opinion and the holding are not to be restricted to these statutes in such a combination. The entire approach of the Court is a generalized one, applicable to all federal (and state) agencies unless the contrary specifically appears in statutory exclusionary language. See this writer's Administrative Law 480 (1956), Labor Law 792-806 (2d ed. 1965), and Judicial Review: Has the "Whole Record" Formula Superseded the "Substantial Evidence" Rule?, 2 Lab.L.J. 455, 519 (1952).

2 Universal Camera v. N.L.R.B., *supra* note 1 at 491; see also 487-8.

3 This writer draws a distinction between external and internal credibility, although, perhaps, one should speak of believability. Nevertheless, only a juror (judge, examiner) sees, hears, etc. a witness, and these are the physical aspects; upon these (and, of course, other factors) a subjective evaluation occurs, and a combined objective-subjective determination on credibility then occurs. This is the credibility of which we speak. As against this may be illustrated an objectively "solid" witness, but whose story is so inherently incredible that his credibility is destroyed; *e.g.*, Hunter v. N.Y., O. & W.R.R. Co., 116 N.Y. 615, 23 N.E. 9 (1889), the case turning upon judicial notice being determinative where a jury nevertheless granted plaintiff a verdict; or the testimony may be incredible as a matter of law, Tosto v. Marra Bros., Inc., 275 A.D. 686, 86 N.Y.S.2d 549 (2d Dept. 1949), affd. 299 N.Y. 700, 7 N.E.2d 74 (1949). This internal credibility (or incredibility) is not treated here. See also quotations and references in Sternberger v. United States, 401 F.2d 1012, 1016-17 (Ct. Cl. 1968).

4 See *infra* note 10.

5 *E.g.*, United States v. Hall, 396 F.2d 841, 844 (4th Cir. 1968), quoting on "the right

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makes "the opportunity of the trial court to judge [6] the credibility of the witnesses" a factor in determining whether findings of fact are clearly erroneous and, therefore, to be set aside.[7] Even in criminal cases the appellate courts feel that "Any question involved in the credibility of witnesses [is] for the determination of the trial judge and will not be reconsidered by this court on appeal." [8] The Supreme Court has also phrased the idea indirectly and negatively, *e.g.*, "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding . . . ." [9]

To illustrate the preceding judicial approach to credibility, when a question of the validity of his waiver of counsel was challenged by a defendant who alleged it was not intelligently and understandingly made, a hearing was held; said the appellate court: ". . . the utility of that hearing was lost by the death of . . ." the trial judge "who had heard appellant testify but had not yet ruled . . . ." The judge who reviewed the transcript a year later felt the defendant's charges carried "with them no believability," but, since he "had not heard appellant testify, his conclusion regarding appellant's credibility . . . need not be given the same effect by a reviewing court as a determination of credibility made by a trier of fact who has had the opportunity to observe and hear the witness." [10] In other words, the determination of credibility is for the one who sees, hears, weighs, compares, evaluates, etc.; that is, the subjective evaluation must be based on the objective physical aspects, and

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of the jury to determine credibility," and see also Roark v. Hunting, 28 A.D.2d 1190, 1191, 284 N.Y.S.2d 664, 666 (3d Dept. 1967), that "The credibility of the witnesses . . . were strictly within the province of the jury"; or "peculiarly within the competence of the jury," Miller v. Kushlin, First Appellate Term, N.Y. L. J., June 23, 1967 at 14; see further, Reid v. Haynes, 276 A.D. 977, 95 N.Y.S.2d 68 (2d Dept. 1950).

[6] How judge-ful is a judge's judgment as to credibility? See, *e.g.*, Blatt, He Saw the Witnesses, 38 J. Am. Jud. Soc'y 86-88 (Oct. 1954).

[7] Whitson v. Yaffe Iron Metal Corp., 385 F.2d 168, 169 (8th Cir. 1967).

[8] Gullett v. United States, 387 F.2d 307 (8th Cir. 1967), citing two Second Circuit cases in which certiorari was denied. See also White v. Grey, 26 A.D.2d 972, 274 N.Y.S.2d 751 (3d Dept. 1966), stating that while in filiation proceedings "there are always doubts, we will not interfere with the trier of the fact, who sees and hears the witnesses, if we are satisfied from the record that the testimony is 'entirely satisfactory'. . . ."

[9] Brady v. Southern Ry. Co., 320 U.S. 476, 479-80 (1943).

[10] United States v. Russell, 388 F.2d 21, 24 (3rd Cir. 1968), footnoting F. W. Stock & Sons v. Thompson, 194 F.2d 493, 495-6 (6th Cir. 1952). In the light of this writer's procedural breakdown (see text keyed to *infra* note 39 et seq.) the quoted language confuses "believability" and "credibility." See *supra* note 3.

See also Douglas v. Alabama, 380 U.S. 415, 419 (1965), making the 6th Amendment's Confrontation Clause applicable to the states, and quoting from an 1895 opinion that cross-examination compels a witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

no written word can capture all of these latter facets and nuances.[11] So a blind person is rejected as a juror because credibility involves seeing a witness's facial expressions, bodily movements, etc., although blind persons are appointed as judges.[12]

When this judicial solicitude for its internal structure and operation is transferred to the administrative one, a different approach seems to become manifested. Apparently there is confusion in the courts as to exactly who determines credibility, and it may be that this stems from confusion as to function and authority or, perhaps, even an understanding of the term.[13] As to authority, every basic agency statute authorizes and directs the agency, and no one else, ultimately to make findings, determinations, and orders.[14] Even where trial examiners are authorized to be used, the agency need not do so but may itself hear and determine. And, regardless, no examiner can bind his delegator by any proposed findings or recommendations. All this, however, speaks of agency authority concerning the findings of fact and is still a far cry from hurdling the gap between the examiner who sees a witness and evaluates him as to "demeanor, bearing, delivery, etc.," and the agency which receives the "cold record" [15] and evaluates only this record. This gap which involves a determination as to credibility cannot be within the ability or (in this narrow situation) the function of the agency; it rests with the examiner, is solely within his province, and factually and experientially cannot be arrogated to itself by the agency or granted to it by the courts.[16]

There is a procedural and substantive distinction, however, which

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[11] For example, a trial judge's charge to a jury may, in the appellate record, be a model of fairness and excellence but, as many have observed, his gestures, grimaces, tone of voice, and all that he may add to his language conduces to influencing the jury's verdict. How to mirror this in a record has been a problem for centuries. Recording of a trial on TV video tape is a solution, but, *sans* a form of authority, United States Steel Corp. v. United States, 43 F.R.D. 447 (S.D. N.Y. 1968) seems to reject this (there denied for recording the taking of a deposition, as F.R.C.P. Rule 30[c] did not authorize it).

[12] On rejection as a juror see Mtr. of Lewinson v. Crews, 49 M.2d 1050, 269 N.Y.S.2d 185 (1966), aff'd. 28 A.D.2d 111, 282 N.Y.S.2d 83 (2d Dept. 1967), aff'd. 21 N.Y.2d 898 (1968), appeal dismissed 89 S.Ct. 46 (1968), and reference may also be made to the famous TV view of the hands of a witness during questioning before a Senate subcommittee. As to appointment as a judge, Mayor John V. Lindsay appointed Gilbert Ramirez to the Family Court of New York City as of Jan. 1, 1969; this writer applauded the appointment and inquired whether it meant a reappraisement as to jurors, N.Y. L. Jl., Jan 2, 1969, at 4, to which the Mayor replied that "I, too, hope that the barriers will be lifted from preventing blind persons to serve as jurors." *Ibid.*, Feb. 10, 1969, p. 4, col. 7.

[13] See *supra,* note 10 and references throughout.

[14] See *infra* note 48.

[15] Allentown Broadcasting Corp. v. F.C.C., 222 F.2d 781, 785 (App. D.C. 1954), a 2-1 decision rev'd. in 349 U.S. 358 (1955).

[16] Of course, a record which discloses a factual, etc. impossibility cannot be rejected or distorted by any examiner statement on credibility—but that is not the situation here discussed. See, e.g., *supra* notes 3 and 8.

must be made. The preceding has dealt with the examiner's determination as to the credibility of a witness, so that he may next draw inferences therefrom [17] and then base proposed findings thereon.[18] In reviewing these findings a court necessarily seeks for substantial evidence on the whole record, and this includes any examiner-agency disagreement as to findings and the weight to be given to the evidence as found, which in turn gets down into the credibility aspect which is involved in the raw evidence (the evidentiary facts).[19] This writer's present analysis is concerned solely with the initial credibility involving the witness and the evidentiary facts, not the next evaluation step as to the weight to be given to the basic facts accepted or the findings of fact. The courts appear not to distinguish this carefully, and the judiciary's language is, therefore, somewhat conducive to error.

If the overall and narrow approaches in the preceding paragraph are correct, then the Fourth Circuit's statement that "It is the province of the National Labor Relations Board to . . . pass on the credibility of witnesses," [20] and the Sixth Circuit's "rule that assessment of credibility . . . [is] within the special province of the Board," [21] or that of the three dissenters in the New York Court of Appeals that "the question of the credibility of the witness McPhillips was exclusively for the Police Commissioner [who reviewed the findings of the Trial Commissioner] to determine," [22] all seem to be completely at variance, as is a like statement by the Fifth and Sixth Circuits linking credibility "for determination by the Trial Examiner and the Board." [23] "The rule in

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[17] See *infra* on the overall procedures, text keyed to notes 41 *et seq.;* and also Judge Frank's views, *infra* note 35.

[18] See #4 in text prior to *supra* note 41.

[19] *E.g.,* Portable Electric Tools, Inc. v. N.L.R.B., 309 F.2d 423, 426 (7th Cir. 1962): "While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole."

[20] Filler Products, Inc. v. N.L.R.B., 376 F.2d 369, 370 (4th Cir. 1967).

[21] Champion Papers, Inc. (Ohio Div.) v. N.L.R.B., 393 F.2d 388, 394 (6th Cir. 1968), although the statement is, "Aside from the rule that assessment of credibility and the drawing of legitimate inferences are within the special province of the Board. . . ." The second portion is, of course, correct, but it is the first statement with which disagreement is here voiced. The 6th Circuit cited three earlier cases of its own to support this statement, on which see *infra* note 23.

See also Thompson v. Tomivill Cleaners, Inc., 30 A.D.2d 1008, 1009, 294 N.Y.S.2d 184, 185 (3d Dept. 1968—workmen's compensation); Zimmerman v. Catherwood, 30 A.D.2d 454, 294 N.Y.S.2d 107, 108 (3d Dept. 1968—unemployment insurance); Mtr. of Glashow v. Allen, 27 A.D.2d 625, 626, 275 N.Y.S.2d 994, 996 (3d Dept. 1966—education).

[22] Kelly v. Murphy, 20 N.Y.2d 205, 211 (1967). The majority of four disagreed, reversed the various aspects, and held against the Police Commissioner's findings.

[23] Hourchen's Market, etc. v. N.L.R.B., 375 F.2d 208, 211 (6th Cir. 1967); and see also N.L.R.B. v. Ogle Protection Service, Inc., 375 F.2d 497, 505 (6th Cir. 1967), in both of which the Sixth Circuit again cited three and four cases respectively, only

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[the] Eighth Circuit is that 'the question of credibility of witnesses and the weight to be given their testimony' in labor cases is primarily one for determination by the trier of the facts," [24] and the Seventh Circuit follows partially with "the question of credibility is for the trial examiner. ... ." [25] The Seventh thus limits the examiner's province to credibility, while the Eighth (solely in labor cases?) enlarges it to include the weight to be given the testimony; whereas, we, as already stated, divide these areas and consider only credibility as within the examiner's exclusive competence. The Seventh has expressed the reasoning well:

> . . . That demeanor which so impressed the Trial Examiner is not apparent from the printed transcript of the testimony before us which is all the Board had to consider. Its members did not see or hear Mr. Harlan. . . .
>
> The decision of the Trial Examiner is a part of the record before us and is entitled to considerable weight where the issue turns on the credibility of witnesses whom the Trial Examiner alone heard and saw.[26]

The Second Circuit's analogous view is that "The credibility findings of the Hearing Examiner, who saw and heard Mrs. Dolan and her son, are entitled to great weight," [27] but this does not square exactly with the

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one in both being common with one of those in *supra* note 21. The Fifth Circuit has also said that "The matter of the credibility of the witnesses is not for this court to pass upon. This is a function of the Trial Examiner and of the Board. . . ." N.L.R.B. v. May Aluminum, Inc., 375 F.2d 838 (1967).

[24] N.L.R.B. v. Morrison Cafeteria Co., etc., 311 F.2d 534, 538 (8th Cir. 1963).

[25] Portable Electric Tools, Inc., *supra* note 19, giving fuller quotation; this Circuit so held the same year *Universal Camera* was decided, in Angwell Curtain Co., Inc. v. N.L.R.B., 192 F.2d 899, 903-4 (7th Cir. 1951).

[26] Wm. H. Block Co. v. N.L.R.B., 367 F.2d 38, 42 (7th Cir. 1966), a 2-1 decision, the dissenter also discussing credibility.

The Seventh Circuit may have retrograded to merely the quoted "considerable weight" view from one given shortly after *Universal Camera*, although the earlier language narrows the fact-issue: "A resolution of the issue by the Trial Examiner depended upon his appraisement of the credibility of the witnesses. He saw and heard them testify, including their explanations as to any inconsistent statements contained in the affidavits. . . . There being nothing involved other than an issue of credibility, we think the Board went too far in its refusal to accept the Trial Examiner's resolution of the issue as to when the agreement was executed. N.L.R.B. v. Local 160, etc., 268 F.2d 185, 187 (1959). See also discussion *infra* note 37, where the *Thompson* case is said to be incorrect; this case was cited by the Seventh Circuit in the *Local 160* opinion.

[27] Dolan v. Celebrezze, 381 F.2d 231, 233 (2d Cir. 1967). In Wheatley v. Shields, 292 F.Supp. 608, 610 (S.D. N.Y. 1968), where a Coast Guard Examiner's decision, affirmed by the Commandment, was attacked, the district judge stated that "it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses." While this writer agrees (especially as to "province"), this does not square with the Second Circuit's views, nor does the citation support this statement. That citation was a 2d Circuit compensation matter, and its own references were to such others, and in this area the Deputy Commissioner's status and functions are analogous to those of an agency, i.e., to hear and determine. See, e.g., Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 477 (1947).

Seventh's or this writer's views; the Seventh speaks of the "decision" of the examiner being entitled to "considerable weight," whereas the Second refers to the "credibility findings" and gives these "great weight." We take the Second's "credibility findings" as equating with the examiner's decision on credibility of which we have spoken and give them a degree of finality; however, the Seventh's language may be construed as giving such credibility decision finality, and therefore, as a result, having the examiner's ultimate determination or decision on findings, etc., being entitled to such considerable weight. However, this "considerable weight" [28] does not necessarily equate with any required (agency and) judicial acceptance, even where the agency has adopted the examiner's findings of fact.[29]

What seems to be occurring now in the (federal) courts is, separately from any confusions as to what exactly credibility refers to and means, a parallel to their earlier self-imposed limited scope of review under the substantial evidence formula, the "very smoothness" of which lulled them into a course of conduct against which the late Justice Frankfurter inveighed,[30] and from which the present whole record formula eventuated.[31] Such parallel is striking and relevant, and we develop it somewhat. For example, included in the Justice's opinion is this language:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. (496) We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. (496) [The Senate Report on the Administrative Procedure Act of 1946 explained] that examiners' decisions would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. (496) [The] . . . statutes thus evince a purpose to increase the importance of the role of examiners in the administrative process. (495) Nothing suggests that reviewing courts should not give to the examiner's report such probative

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[28] Acme Products, Inc. v. N.L.R.B., 389 F.2d 104, 106 (8th Cir. 1968); and see also *supra* note 26.

[29] United Insurance Co. of America v. N.L.R.B., 371 F.2d 316, 321 (7th Cir. 1966), quoting from N.L.R.B. v. Elias Bros. Big Boy, Inc., 327 F.2d 421, 426 (6th Cir. 1964).

[30] Universal Camera, *supra* note 1, at 477. Text paginations refer to this case.

[31] This writer's language should not be taken to mean that "whole record" and "substantial evidence" are two different rules; to the contrary, in theory they follow in a linked concert of cooperative understanding, albeit in practice the courts erred in their reviewing authority. See discussions in references in *supra* note 1.

> force as it intrinsically commands. (495) [A] . . . reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. (488) We are aware that to give the examiner's findings less finality than a master's and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review. (493)[32]

The impact of this language and the mood expressed in the opinion varied in the lower courts. The Second Circuit's early and present approaches are interesting. For example, upon remand, the Board's findings were now rejected, with Learned Hand writing the majority opinion and giving as one reason that "an examiner's findings on veracity must not be overruled without a very substantial proponderance in the testimony as recorded." [33] Jerome Frank's "delightful concurrence . . . throws much light upon the [former's] opinion" [34] and he said, of Hand, that "I think his modesty has moved him to interpret too sweepingly the Supreme Court's criticism of our earlier opinion written by him." Frank's views are here footnoted,[35] and they give a procedure which is generally acceptable.[36] The Hand-Frank disagreement was highlighted by the former's decision two years later in rejecting an agency's finding (not the credibility determination) as against that of the examiner, and

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[32] Universal Camera, *supra* note 1.

[33] N.L.R.B. v. Universal Camera Corp., 190 F.2d 429, 430 (1951).

[34] Allentown Broadcasting, *supra* note 15, at 790, per Prettyman, C.J., dissenting.

[35] 190 F.2d at 432: ". . . [A]s I understand him [Hand], interprets as follows the Supreme Court's ruling: The Board may never reject an examiner's finding if it rests on his evaluation of the credibility of oral testimony unless (1) that rejection results from the Board's rational use of the Board's specialized knowledge or (2) the examiner has been absurdly naive in believing a witness. This, I think, is somewhat more restrictive of the Board's powers than the Supreme Court suggested. . . ."

"I would also, by way of caution, add this qualification . . .: An examiner's finding binds the Board only to the extent that it is a 'testimonial inference,' or 'primary inference,' *i.e.*, an inference that a fact to which a witness orally testified is an actual fact because that witness so testified and because observation of the witness induces a belief in that testimony. The Board, however, is not bound by the examiner's 'secondary inferences,' or 'derivative inferences,' *i.e.*, facts to which no witness orally testified but which the examiner inferred from facts orally testified by witnesses whom the examiner believed. The Board may reach its own 'secondary inferences,' and we must abide by them unless they are irrational; in that way, the Board differs from a trial judge . . . who hears and sees the witnesses, for, although we are usually bound by his 'testimonial inferences,' we need not accept his 'secondary inferences' even if rational, but, where other rational 'secondary inferences' are possible, we may substitute our own. Since that is true, it is also true that we must not interfere when the Board adopts either (1) its examiner's 'testimonial inferences' and they are not absurd, or (2) his rational 'secondary inferences.'" On "absurd" see *supra* note 3. On these inferences see text keyed to *infra* note 41 *et seq.*

[36] As shortly seen, however, he combines credibility and fact evaluation, on which see *infra* notes 40 and 42, as well as text discussion.

reinstating[37] the latter's.[38] Four years after the original Hand-Frank divergence the Supreme Court rejected the relatively strict approach of the former but only as to the examiner's findings of fact.[39]

In other words, the High Court's language dealt with "an examiner's findings [of fact]" and not the credibility finding per se, while Hand's original language had mentioned "an examiner's findings on veracity," although the judge had permitted this credibility determination to be "overruled [by] . . . a very substantial preponderance in the testimony as recorded." Frank's formulation of Hand's views therefore began in error, *i.e.*, he felt the latter held the Board could not "reject an examiner's finding [of fact] if it rests on his evaluation of the credibility of oral testimony," and this was not so, as Hand's quoted language discloses; but then Frank set forth views which began with testimonial inferences, and, as heretofore noted, this combines credibility and evaluation. In other words, both Hand and Frank erred, but on different aspects of the total procedure, and Hand was not incorrect in the first half of his statement and, conceivably, also not as to the second.[40]

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[37] See *infra* note 38. In administrative practice a reviewing court has no authority to choose between examiner and agency as to a finding of fact. Its only question is whether substantial evidence is present to support the latter's finding. In so examining the whole record, the court takes all factors into account, including this examiner-agency disagreement as to this finding of fact. If, however, the court determines that the agency's finding is not so supported, the court must remand (assuming other choices are possible on the evidence) for the agency to choose anew (unless it stipulates or concedes). In this, therefore, Hand erred.

[38] Hand's new opinion referred to *Universal Camera* and said that "the Supreme Court did not try to lay down in general terms how far the Board should accept the findings of its examiner. Plainly it did not mean them to have the finality of the findings of a master in chancery, or of a judge; but it necessarily left at large how much less reluctance the Board need feel in disregarding them than an appellate court must feel in doing the same to the findings of a district judge. The difficulty is inherent in any review of the findings of a judicial officer who chooses between discordant versions of witnesses whom he has seen, because the review does not bring up that part of the evidence that may have determined his choice. Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test." N.L.R.B. v. James Thompson & Co., Inc., 208 F.2d 743, 746 (2d Cir. 1953).

[39] F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955); and see *supra* note 15, the Supreme Court feeling "this attitude goes too far. It seems to adopt for examiners of administrative agencies the 'clearly erroneous' rule . . . applicable to courts. In *Universal Camera* . . . we said . . . 'The responsibility for decisions thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.'"

The Second Circuit now follows this approach, *e.g.*, N.L.R.B. v. Interboro Contractors, Inc., 388 F.2d 495, 499 (1967). The *Allentown* reversal by the Court of Appeals was in part due to the undue weight given by the latter to the applicant's

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The present course pursued by the federal (and state) courts with respect to the fact of credibility thus indicates either a lack of appreciation of *Universal Camera,* or else the use of incorrect language to express what the reviewing judges nevertheless are doing correctly. Talismanic words can never substitute for the actuality of judicial conduct, and it would therefore be entirely feasible for courts to correct their words but not their approach. This proper approach, however, is what is now sought to be formulated generally. Thus, as heretofore, we must distinguish among: (#1) the narrow determination by an examiner of a witness's credibility based solely upon demeanor, etc., *i.e.,* the physical aspects; (#2) utilizing this credibility determination, the examiner's next evaluation and then acceptance or rejection of all or a portion of such witness's (the evidentiary facts) testimony; (#3) utilizing this accepted testimony in conjunction with that of others so as to determine, through an evaluating (pro-con) approach, what the true (or basic) facts are; (#4) drawing rational inferences therefrom, or findings of fact; and (#5) then proceeding further to get a conclusion of law, order, etc. (not here of moment).

These first four steps are ordinarily the important ones, and this writer has placed the credibility aspect into a preliminary category. In this manner there is a distinction drawn between the evaluation of credibility (#1) and the evaluation and acceptance of a witness's evidentiary facts (#2), for in this latter the inherent probability or improbability, or the incredibility aspect, also enter,[41] and here the agency or the court may utilize their own expertise, etc. [42] For example, Frank combined both of these divisions in his language,[43] as do other courts.[44] Because of this a court may properly write that the examiner's "findings

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supposed evasiveness and lack of candor, and its conclusion thereon relying "largely on its understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board with a " 'very substantial preponderance in the testimony as recorded,' " citing Hand in the remanded *Universal Camera* case, *supra* notes 33 and 35. This statement was then followed by the quoted portion above.

[40] The second portion enables a reviewing court, and therefore also the agency, to overrule the credibility finding of the examiner. If Hand meant that the credibility finding per se, and without reference to the testimonial evaluation or testimonial inference, could be so overruled, then he was in error; if, however, Hand combined these two, then obviously he would not be incorrect.

[41] *Supra* note 3.

[42] So, too, may the examiner so evaluate in this second area, and do so simultaneously with the first evaluation, so that #2's inherent improbability may boomerang into a rejection of #1. Regardless, the two areas must be kept separated as a witness may testify as to (say) two facts, one of which is incredible but the other highly acceptable; all that can now be said is that the incredible may have some bearing upon the credible, but this permits rejection or acceptance of parts (unless inextricably intertwined).

[43] *Supra* note 34.

[44] *E.g.,* N.J. Bell Tel. Co. v. Communications Workers, 5 N.J. 354, 75 A.2d 721 (1950).

(#4) which turn on credibility determinations (#1) with respect to witnesses whom he alone saw and heard, are entitled to considerable weight" under *Universal Camera's* whole record rule,[45] and that, therefore, "evidence (#2) supporting a [Board finding (#4)] may be less substantial when an experienced examiner, who has seen and heard the witnesses, reaches a [finding (#4)] contrary to that reached by the Board, and this is particularly true where the credibility of witnesses (#1) is involved."[46] So, too, the Seventh Circuit's early view,[47] giving a degree of finality to the examiner's resolution of a factual issue (#3) when only credibility (#1) was involved, is not incorrect if, and assuming, that substantial evidence could now be held, or was otherwise present, to support a finding. On this tight factual situation the analogy is to a jury's determination and seems to be acceptable.

In situations where other factors are or may be involved (#3), then the "considerable weight" approach should be utilized;[48] where no credibility factor is involved then the basic facts (#3) may be obtained from the cold record, permitting the agency to do such a job, and thereafter the agency's findings (#4) obviously should not be reviewed on any such credibility basis; and, lastly, where credibility is "a" or "the only" factor, and the examiner and agency do not disagree as to the findings (#4) predicated on such testimony, then a reviewing court still must determine whether or not substantial evidence exists to support such findings (#4), although now its approach would be a soft one.[49] Regardless of everything, this judicial reviewing obligation is a constant. It is, therefore, the overall approach, concerning which Justice Frank-

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[45] Acme Products, *supra* note 28, at 106.

[46] N.L.R.B. v. Johnnie's Poultry Co., 344 F.2d 617, 618 (8th Cir. 1965).

[47] *Supra* note 26.

[48] *E.g.*, the Eighth Circuit writes "that resolutions of credibility are matters for determination by the trier of the fact," Jas. H. Matthews & Co. v. N.L.R.B., 354 F.2d 432, 438 (1965), but also holds that "the question of credibility of witnesses and the weight to be given their testimony in labor cases is primarily one for determination by the trier of facts." N.L.R.B. v. Morrison Cafeteria Co., etc., *supra* note 24. On this writer's approach, the first quotation is acceptable but not the second, as in this latter the agency can take the credibility factor as a datum and itself, from the now-cold record, assess (#2). The point is that where demeanor, etc. necessitates #1's determination, the record is still hot; when so resolved, however, it becomes a cold record which is now, in #2, resolvable by any qualified person or body. Only so long as #2 requires the #1 resolution does the record remain hot.

[49] The Second Circuit's language, with this writer's bracketed additions, indicates the approach: "Thus the Board may reject the examiner's [credibility resolutions and] findings, even though they are not clearly erroneous, if the other [non-credibility] evidence provides sufficient support for the Board's decision. But it seems that the Board's supporting [non-credibility] evidence, in cases where it rejects the examiner's [credibility resolutions and] findings [of fact], must be stronger than would be required in cases where the [credibility resolutions and] findings [of fact] are accepted, since in the former cases the [Board's] supporting [non-credibility] evidence must be deemed substantial [only] when measured against the examiner's contrary [credibility and fact] findings as well as the opposing [totality of, *i.e.*, detracting] evidence." N.L.R.B. v. Interboro, *supra* note 39, at 499.

furter wrote, that is to be considered. He said that in this overall approach the courts must inject any examiner-agency disagreement as a fact (or) to be judicially considered, but, as we have seen, credibility may or may not be involved. Only where credibility is at the base, in whole or in part, can a court utilize this. The degree of weight to be given this factor is a function of the total picture (whole record), but in line with the approach here considered a court will accept the examiner's credibility determination as a fact.

The credibility gap here discussed is therefore a limited and narrow area into which only the examiner should enter, although his determination cannot and does not decide anything which follows, *e.g.*, accepting a witness's credibility does not mean that all his statements necessarily are to be accepted as true.[50] And, in the light of our analysis, rendering unto the examiner this extremely limited power does not magnify his authority or jurisdiction beyond that which he should have,[51] and, as this writer concludes, he actually possesses. It is the courts which should mend their language, recognize this facet of the administrative process, and give the examiner's credibility determination the finality which it requires.

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[50] For example, when evaluated inherently or in another context, *supra* notes 3 and 42.

[51] We do not discuss other questions, *e.g.*, giving examiners a trial judge's status, making (certain) agencies such as the Labor Board into (appellate) Labor Courts, with examiners as the trial judges or referees and the corresponding power to determine.