

CHAPTER VIII

PROCEDURAL SHORTCUTS

Many administrative statutes contain clauses conferring broad rights to trial-type hearings. Administrative hearings, however, can be costly in time, manpower, and other resources, and they sometimes make only a marginal contribution to the quality of information available or to the acceptability of the final decision. Thus, agencies often have an incentive to develop procedural techniques for avoiding unnecessary hearings or for narrowing the issues that will be considered in a formal setting. Several such techniques are examined in this chapter.

1. A. AVOIDING HEARINGS THROUGH RULEMAKINGS

Most agencies now operate under statutory schemes that permit them to issue legislative rules. Once such a rule has been promulgated, private parties have no further right to be heard at the

agency level on the issues addressed in the rule; those issues will remain settled until the rule is revoked, or invalidated by a court. (The term “substantive rules” is sometimes used as a synonym for “legislative rules,” but it is slightly misleading, because a *procedural* rule can also be “legislative,” settling the issues it addresses. They are also commonly known as “regulations” though that is not a term used in the APA.) Sometimes it is unclear whether an agency’s rulemaking authority applies to a given administrative function; private parties may

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contend that this authority cannot be used to defeat their own statutory right to a trial-type administrative hearing. In general, however, the Supreme Court has rejected these contentions, preferring to construe agencies’ rulemaking powers expansively.

Early experiments in using rulemaking to streamline adjudications were initiated by licensing agencies. The Federal Communications Commission, for example, was required to hold a “full hearing”—a formal adjudication under the APA—before refusing an application for a broadcast license. In [*United States v.*](#)

for individualized determinations, an agency may use rulemaking to resolve some of the relevant issues “unless Congress clearly expresses an intent to withhold that authority.” [American Hosp. Ass’n v. NLRB](#), 499 U.S. 606 (1991) (upholding rule defining appropriate bargaining units in hospitals).

The rules challenged in *Storer* and *Texaco* had actually been relatively flexible, for they had provided that companies could ask for a waiver on the basis of individual circumstances. However, a rule that lacks a waiver provision can still be valid. For example, the Court allowed the FCC to adopt a flat rule that radio stations’ changes of format would never be considered during license renewal proceedings. [FCC v. WNCN Listeners Guild](#), 450 U.S. 582 (1981). See also *Baker v. FAA*, discussed p. 198 supra.

The Court followed similar principles when it upheld the “medical-vocational guidelines” used by the Secretary of Health and Human Services in the Social Security disability program. [Heckler v. Campbell](#), 461 U.S. 458 (1983). Under the Social Security Act, benefits are to be paid to persons who are so severely disabled that they cannot engage in any work available in the national economy. The claimant’s job qualifications

Storer Broadcasting Co., 351 U.S. 192 (1956), the Commission had issued multiple ownership rules reducing the number of television outlets that could be controlled by one licensee. Storer, which exceeded the new maximum limit, had applied for an additional license before the rule became final, but the FCC nonetheless dismissed the application as not conforming to the new rule. Storer claimed that this procedure was a denial of its statutory right to a full hearing, but the Supreme Court held that the rule was valid and therefore the denial of a trial-type hearing was proper. Subsequent decisions made clear that the *Storer* principle was not limited to the communications field. See Mobil Oil Exploration & Prod. Southeast Inc. v. United Distrib. Cos., 498 U.S. 211 (1991) (upholding FERC rule that established a pre-authorization procedure for abandoning supply contract obligations); FPC v. Texaco, Inc., 377 U.S. 33 (1964) (upholding FPC rule that imposed conditions on the grant of gas pipeline certificates); American Airlines, Inc. v. CAB, 359 295

F.2d 624 (D.C. Cir. 1966) (en banc) (upholding CAB rule that effectively modified some air carriers' certificates by prohibiting the companies from transporting cargo through "blocked space" arrangements). In short, even where a statute calls

are to be judged in light of four variables: age, education, work experience, ²⁹⁶

and physical ability. The guidelines, also known as “grid regulations,” listed numerous combinations of the four threshold variables and stated, for each combination, whether a worker with those qualifications was employable. Thus, administrative law judges hearing disability benefits claims would no longer rely on expert testimony in deciding whether a claimant was employable; instead, they would simply make findings concerning the four variables, and reference to the guidelines would then automatically determine whether the claimant was entitled to benefits. The Court concluded that, although the Act states that the disability determination is to be made on the basis of evidence adduced at a hearing, this provision “does not bar the Secretary from relying on rulemaking to resolve certain classes of issues.”

The rules upheld in *Campbell* were controversial, for they tended to curb ALJs’ ability to respond to individual circumstances that might come to light at an evidentiary hearing. As the Court noted, however, use of the guidelines enhanced the efficiency of the

program and helped bring about uniform results nationwide. Moreover, the process was not entirely impersonal, because an ALJ still had to use individualized judgment in assessing a claimant's particular abilities.

In any event, *Campbell* endorsed rulemaking only with respect to "issues that do not require case-by-case consideration," and subsequent cases have demonstrated that the Secretary's rulemaking authority has limits. In [Bowen v. Yuckert](#), 482 U.S. 297

[137 \(1987\)](#), another HHS rule provided that a claimant would automatically be deemed ineligible for benefits if her impairments were not "severe" enough to significantly limit her ability to do most jobs. The Court upheld the rule, but two concurring Justices cautioned the Secretary to use the rule with restraint, because aggressive applications of the rule could (and in the initial months of the rule actually did) deny benefits to claimants who had a statutory right to receive them. Later, in [Sullivan v. Zebley](#), 493 U.S. 521 (1990), the Court struck down a third rule, under which a child would be deemed ineligible for benefits unless she had one of 182 medical conditions listed in the rule. The statute extended benefits to all children