Catholic University Law Review

Volume 8 | Issue 1 Article 3

1959

A Government Lawyer Looks at the Contract Appeal System

Frederick Sass Jr.

A GOVERNMENT LAWYER LOOKS AT THE CONTRACT APPEAL SYSTEM

by

FREDERICK SASS, JR.

A dignified London attorney, a widower and a golf enthusiast with considerable income, wanted to take two weeks away from the monotony of London life for a golfing holiday. Everybody had suggestions as to where he should go, the usual world-famous courses: St. Andrews, Prestwich, Sandwich, Carnoustie, Hoylake, etc., but one of his partners told him he should go to Sandringham. Our friend said that he had never been to Sandringham and did not know anything about it, but his partner insisted that it was the greatest course in all the world, abounding in untold beauty and charm. On the second week of his vacation, the lawyer arrived at Sandringham, and found that his partner had not exaggerated one iota. The fairways were as though God had planted each blade of grass—the greens as though the angels had painted them. The sand in the traps was like gold dust. The clubhouse was rustic and charming, and the show cases were filled with silver trophies and paraphernalia saved from many world-famous golf matches.

The lawyer approached the desk in the clubhouse and asked if he might be permitted to play a round.

"Member?" the Secretary asked, and he replied, "No sir."

"Guest of a member?" the Secretary asked pointedly. "No sir," replied our friend.

"Sorry," the Secretary said, and turned away.

Our fellow spotted a dignified old gentleman in the corner, smoking a pipe, reading the London Times—complete with monocle, moustache, and medals.

Editor's note: Ever since 1863 when the Navy contracted for the building of iron-clads, disputes clauses have been inserted in Government procurement contracts. Under these clauses the contracting officer can make findings of fact which bind a contractor unless he appeals within 30 days. Some twelve Boards of Contract Appeals whose procedures are exempted from the Administrative Procedure Act hear these appeals. In an article published in the Virginia Law Weekly on February 27, 1958, Bernard J. Gallagher, Chairman of the Public Contracts Committee of the Administrative Law Section of the American Bar Association, attacked this contract appeal system and urged that contractors be allowed to sue in the first instance in the Court of Claims and federal district courts. On August 25, 1958 Frederick Sass, Jr., Counsel for the Bureau of Aeronautics of the Navy Department, discussed this proposal with Mr. Gallagher during the sessions of the Administrative Law Section at the Los Angeles meeting of the American Bar Association. The discussion was repeated on September 26, 1958 before the Government Procurement Committee of the Federal Bar Association at its annual convention in Washington. The Review is publishing the address of Mr. Sass with his response to the proposals of Mr. Gallagher from the article of February 27.

"Begging your Lordship's pardon," our friend said, "My name is Higgenbottom, from the London law firm of Higgenbottom, Upchurch and Quimby. I'm wondering, sir, if I might play this delightful course as your guest?"

The member slowly lowered his Times, adjusted his monocle and gave Higgenbottom a long, appraising look, then trumpeted, "Religion?"

"Episcopalian, sir. My late wife was Church of England."

"Education?" "Eton, sir, and Oxford. Magna cum laude."

"Athletics?" "Rugby, sir, a spot of tennis, and I rowed No. 4 oar on the crew that beat Cambridge."

"Language?" "Private tutor in French, fluent German, and a bit of Greek."

"Military?" "DCOE, sir, Coldstream Guards, Victoria Cross and Knight of the Garter."

"Campaigns?" "Dunkirk, Normandy, and with Monty at El Alamein in North Africa."

Whereupon the member beckoned to the Secretary and said, "Nine holes!"

Maybe some of you, upon losing a case before a Board of Contract Appeals, have experienced a feeling similar to that of our friend in the story. I know *I* have. Now, disappointment in the loss of a case is one thing; unfairness in Board procedures quite another. The charges Mr. Gallagher has made are very serious and demand that the responsible heads of the executive agencies that house some twelve of these boards study their composition and operation. On the other hand, we have to be mindful of the fact that their development is comparatively new and that Rome was not built in a day. Whatever faults there be, are undoubtedly due more to growing pains than anything else. We can be very sure that no agency head wants the slightest suspicion of unfairness in his Board's operations.

I cannot agree, however, that the remedy is to abolish all boards of contract appeals and send contractors directly to the Court of Claims or the district courts for relief from decisions of the contracting officer. Lest I be misunderstood, let me say at the outset, however, that while I believe that boards of appeals are here to stay, I am sure their procedures can be improved. Show me the legal institution whose procedures cannot be. In the nature of things, law is dynamic, and must change with the times. As Dean Roscoe Pound so wisely said: "Law must be stable and yet it cannot stand still."[1]

[1] POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (2d ed. 1946).

My reasons for defending the concept of a board of contract appeals stem from my experiences with, and my high respect for, the Armed Services Board of Contract Appeals. It is perhaps the oldest and best of the boards, and could well serve as a model around which to construct uniform procedures for all boards. So let's take a look at it and its three Service Panels.

When the Navy Board was created during World War II it consisted of a lawyer, an engineer and an accountant. It was designed to give a speedy, inexpensive decision to disputed questions of fact. Today, however, the successor Armed Services Board of Contract Appeals is composed entirely of lawyers who decide questions of fact and questions of law.

It is not realistic to talk of abolishing boards of contract appeals and permitting contractors to sue in the first instance in the Court of Claims or a United States district court. All government contracts, procurement particularly, are complicated. Litigation in the Court of Claims is both expensive and slow. Accurate up to date statistics are not available because for some reason the Administrative Office of the Courts does not audit the Court of Claims as it should. But from such time-studies as have been made, it is fair to say that contract litigation in the Court of Claims takes on the average between two and a half to four years and would take as long or longer in an ordinary district court.

In fact the Armed Services Board of Contract Appeals has done such good work that the House Small Business Committee during the 81st Congress concluded it was better than the Court of Claims for the small contractor, and the Committee urged that other agencies create similar boards. Contractors accept decisions from the Armed Services Board of Contract Appeals. Gilbert A. Cuneo, until recently a member of the Army Panel and a recognized authority on board procedures, states that from its organization in 1942 down to 1955, out of some 7,000 cases decided on the merits by the Board, only 41 ever reached the Court of Claims.

For most contractors the Armed Services Board is the end of the road. Comparatively its procedures are informal, inexpensive and prompt. I doubt that many government contractors who have the choice, would prefer the more formal, expensive and slower procedures of the Court of Claims and the ordinary federal district courts. Needless to say those overcrowded courts would not welcome our dumping this large volume of technical and difficult litigation upon them. As a friend of mine often says, "it is too late for 'Herpicide,'" and since we will have to live with boards of contract appeals whether we like them or not, it behooves all

of us to do our best to improve the procedures of the boards we have, and to stop talking about transferring the litigation to the Court of Claims or the district courts.

To better understand the Armed Services Board, you should know how it is organized, and how it tries its cases. Created in 1949 by a joint charter from the three Service Secretaries, the Board now has 21 members —all lawyers. It is divided into three Panels, Army, Navy, and Air Force, each Service Secretary appointing his own members. Each panel tries the cases from its own service, usually before one member, but in the case of the Army and the Navy, sometimes before a hearing examiner. The trial judge—for such he really is—drafts an opinion which he then submits for approval to two other members of the panel. If a hearing examiner tries the case, he must submit his opinion to three panel members. These three constitute a Division and cases are decided by majority vote.

Before an opinion can be released, the chairman of each of the three panels must certify that the case does not warrant review by the full 21 member board. For this reason as a practical matter the chairman of each panel customarily acts as a member of the division, and he reviews the draft opinion in his capacity both as a member of the division and as chairman of the panel. Incidentally, it is not the practice of any of the panels to announce in advance of, or at the trial, the names of the other two members of the division. Thus, whereas in a court of appeals you see the three Judges before whom you argue, under this system, lawyers for the government and the contractor try the case before two empty chairs. As I previously indicated, if, when presented a case, the chairmen of all three panels do not waive review by the full board, then all 21 members must study the case and vote on it.

In its short history the Armed Services Board of Contract Appeals has never sat *en banc* for the trial of a case. However, it frequently sits *en banc* to hear argument from the government or a contractor of a motion to reconsider a board decision.

Certain aspects of this procedure disturb me. In the first place, only the member or the hearing examiner that tries the case sees and hears the witnesses, yet under the system the final opinion may not reflect fully his conclusions about the case. No doubt when necessary the chairmen of the panels and the absent members of the division do read the briefs and records. But the volume of the work of the panels is such that, in most cases, only the trial judge does so. Review by the most conscientious must, under this system, be perfunctory in comparison with the attention that the trial judge devotes to the case.

A worse fault is that the cases are not decided at the conclusion of trial, but literally months thereafter. After your case is reached on the trial docket, decision is delayed as follows:

1. For completion of the trial;
2. For briefing following the trial;
3. For the drafting of the Board's opinion by the member or hearing examiner who tries it;
4. For review of the draft opinion by the absent members of the division;
5. For review of the draft opinion by the respective Chairman of the Army, Navy or Air Force Panels; and,
6. In the event that one chairman refuses to waive, for review by each of the 21 members of the full Board.

In years gone by cases before the Navy Board took an average of three years. But fortunately in its present General Counsel, F. Trowbridge vom Baur, the Navy has a lawyer with extensive litigation experience and with a keen interest in Administrative Law. He is the author of a fine text on the subject. At Mr. vom Baur's suggestion Board procedures have been streamlined by the adoption of new rules which were effective June 30, 1955. These new rules incorporate such modern features as liberal examination before trial, production of documents and the pre-trial conference. The result has been that Navy cases tried under the new rules now average about 13 months. If, as Mr. Gallagher has contended, other boards do not have such rules, they should adopt them. Even though the progress thus far made has been commendable, nevertheless study of board procedures convinces me that trial time can and should be even further reduced.

It would be my thought to require that trial briefs be submitted in advance of trial, so that the trial judge can read them before he undertakes the trial. If he does this, regardless of whether he is a member or a hearing examiner, he ought to be ready *then* to decide the case. It was in large part by compelling trial judges to decide cases immediately after the conclusion of the trial that the late Chief Justice Arthur T. Vanderbilt brought the trial calendars of New Jersey up to date with fewer judges than when they fell behind.

Speaking of this problem to the Law School of "The University" at Charlottesville, Virginia in 1955, Chief Justice Vanderbilt said:

> "With pretrial procedures to get at the facts, with a pretrial to limit the trial to the real points in controversy, and with trial briefs where necessary, made available to the court in advance of trial, there is no reason why in nonjury cases, the trial judge, having studied the trial briefs and having heard the evidence and having listened to the closing arguments of counsel, should not be in a position to decide the case at once. He will never know more about it than he does at that time. The moment for decision has arrived before other cases intervene to dull and blur his grasp of the pending case.[2]"

[2] VANDERBILT, THE CHALLENGE OF LAW REFORM 79-80 (1955).

Anticipating that lawyers might argue that the trial judge needs more time to look up the law, Chief Justice Vanderbilt went on to say:

> ". . . the answer is he should have called for it earlier. All of us know that in most cases, both at the trial level and on appeals, it is the facts rather than the law that cause us most difficulty. If a judge cannot decide a motion within a week or a case within four weeks, he should frankly say so and call for a reargument to get himself off dead center and then start over. The farther the judge gets away from the trial and the more matters intervene, the more elusive will the facts and the 'feel' of a given case become." [8]

In line with what Justice Vanderbilt so successfully accomplished in New Jersey, my suggestion is that the man who tries the case be compelled at trial's end to give his decision. If along with this, we were to eliminate division and full board review, a great deal of time would be saved. I recognize that possibly the three chairmen should review decided cases to keep Board policies and procedures uniform. They could also be given power, by majority vote to call for full board review. But they should be required to act within 30 days after the trial ends and the trial judge's decision is made.

There is entirely too much delay after a case is tried, and in my judgment we should give serious consideration to eliminating some of the steps in this elaborate review. Too much time is now spent passing paper for signature to persons who were not at the trial, did not see or hear the witnesses, and in many instances have not read the briefs or record.

Sometimes the grocery man loses on his parsnips to sell a greater volume of spinach, thus making a greater overall profit. What we would lose by eliminating some of the review of the trial judge that the present system requires, would be more than made up by prompt decisions at trial's end. In turn, this would release board members and their hearing examiners to try more cases and get rid of the board's large backlog, which amounted to 792 cases as of June 30, 1958.

So much for the time it takes to get a decision from the board. Now, I am going to make another suggestion, which I think would eventually bring about much improved procedures for the board. What we need is an administrator with a staff to keep books on the operations of the board and have available at all times continuous up to date studies, the way the Administrative Office of the Courts does. By bitter experience, students of court procedures have found out that lawyers and judges are notoriously poor housekeepers. Yet complete facts with respect to board operations are essential to those who have the responsibility of their direction.

[8] *Ibid.* 80.

I am prompted to make this suggestion because the statistics that the panels publish of their operations are quite inadequate, and the different panels use different reporting forms. None gives median time nor follows the accepted audit pattern that the Administrative Office of the Courts employs for the federal district courts. Such time and other studies as are available are made up *ad hoc* to satisfy the inquiry of *this* Congressional Committee, or *that* service Secretary. No current statistics are kept as to the time it takes to try cases.

In commenting on the extraordinary achievement of the late Chief Justice Vanderbilt in New Jersey, Judge Harold Medina of the United States Court of Appeals for the Second Circuit, speaking at Dallas, Texas in 1951 said that in large measure this was due to Vanderbilt's insistence upon using live statistics published weekly, monthly and quarterly rather than dead annual figures. In fact, Judge Medina stated that the *sine qua non* of successful judicial administration is the appointment by a Chief Justice of "an administrative director of the courts who may be his *alter ego* in attending to the multitudinous details of running" a court system efficiently. Said Judge Medina:

> "There is no doubt that there has been well founded criticism of the courts for their failure to adopt business-like methods. There has been far too much delay, too much inefficiency and too little self-criticism and search for improvement. We hear it said on every side by well informed persons whose good will and whose motives are above reproach that the law has not kept abreast of modern conditions to the same extent as have medicine and the sciences. There is a good deal of claptrap in connection with the insistence that new techniques be developed for the ready and infallible winnowing of the true from the false; *but on the subject of the business administration of the courts the case is really too clear for reasonable debate.*[4]"

I am sure that the procedures of the Armed Services Board would be greatly improved if the trial judge decided the case at trial's end and if the board were given a full time Administrator to not only collect and publish statistics as to its day by day operations, but also to make needed changes in procedures.

In stressing these two points in my suggestions for improvement, I do not mean to overlook other problems. Mr. Gallagher was correct when he said that members of the boards are drawn almost exclusively from career government men. Of course, the service Secretaries would welcome applications from practicing lawyers, but there is little likelihood many will apply. Board members serve at the pleasure of the Secretary, and while Grade 15 pays well for a Government job, the salary does not compare favorably with what competent lawyers make in private practice.

[4] Medina, *The Work of the Administrative Office of the Courts*, 11 F.R.D., 353 (1952).

Something should be done to make it more attractive. I have always found members of the Armed Services Board of Contract Appeals to be fair and impartial. It goes without saying that all board members should be. Their work is judicial; it is only their grade and pay that is not.

A great many cases are still dismissed for lack of jurisdiction, although commendable progress has been made toward settling jurisdictional questions promptly. Board records are not public, but perhaps they should be. Certain government contracts, notably those of the Army Engineers, require a contractor to appeal to the Corps of Engineers Board of Contract Appeals before he can bring his case to the Armed Service Board of Contract Appeals. I agree with Mr. Gallagher that double administrative appeals of this sort are undesirable.

At present the Army and Air Force Panels are quartered in the Pentagon, and the Navy Panel in very inadequate quarters in a World War II temporary building. It might enhance the dignity, impartiality and independence of the Armed Services Board of Contract Appeals if all three Panels were quartered together. In view of its judicial character it might be that the full board should take quarters in a building away from either the Pentagon or the Navy. The Court of Military Appeals did this to real advantage.

All these suggestions merit study but all pale in significance and importance to the need for prompt decision at trial's end and accurate statistical information with respect to board operations. The truth of the matter is that we have not yet thought through the jurisprudential status of boards such as Boards of Contract Appeals. It is neither a court nor an independent administrative agency. That is why, when a contractor files in the Court of Claims, he is free to introduce new evidence that he did not produce before the board, and that is why only the contractor can appeal.

Perhaps the time has come to recognize that these contract boards are really trial courts, from which contractors ought to be made to appeal to the Court of Claims on the record they make before the board. However, if their present character is to be changed, we should go about it slowly. Both the government and the contractors have advantages, in the flexibility of the present system, that with hasty action they might lose. In matters of this kind, study of the facts as revealed by a careful audit of Board operations is necessary, and this takes time. As Mr. Justice Felix Frankfurter wisely observed: "Reflection is a slow process. Wisdom, like good wine, requires maturing."[5]

[5] Frankfurter, J., in Kinsella v. Krueger, 351 U.S. 470, 485 (1956).