

1-1-2001

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Recommended Citation

F. Amanda DeBush, *Role of Judicial Review in Administrative Enforcement Cases*, 26 Brook. J. Int'l L. (2001).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol26/iss3/20>

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ROLE OF JUDICIAL REVIEW IN ADMINISTRATIVE ENFORCEMENT CASES

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I. INTRODUCTION

This paper examines the role of judicial review in administrative enforcement cases under the authority of the Export Administration Act (EAA).¹ The Administration has been working with Congress on a renewed Export Administration Act with stronger enforcement provisions. In September 1999, the Senate Committee on Banking, Housing and Urban Affairs passed Senate Bill 1712 (S. 1712), the Export Administration Act of 1999.² S. 1712 would change the judicial review of enforcement cases to improve and simplify the process and maintain consistency with other civil penalty cases at the Department of Commerce ("Commerce").

II. EXPORT CONTROL CASES

Export enforcement cases of the Bureau of Export Administration (BXA) proceed on two tracks: criminal and administrative. Special agents in BXA's Office of Export Enforcement (OEE) and the U.S. Customs Service investigate violations of

* This paper is based on remarks delivered by Assistant Secretary DeBusk at the Court of International Trade's Eleventh Judicial Conference in December 1999. The following people contributed to this article: Susan Silver, Export Enforcement Policy Analyst, Office of the Assistant Secretary for Export Enforcement; Thomas Barbour, Director of Enforcement and Litigation Division; Matthew Borman, Senior Advisor; and Sandra Lambright, Paralegal Specialist; all from the Office of Chief Counsel for Export Administration.

1. The Export Administration Act of 1979, *as amended*, 50 U.S.C. app. §§ 2401-2420 (1988) (expired Aug. 20, 1994). *See also* Exec. Order No. 12,924, 3 C.F.R. § 917 (1995), extended by Presidential Notices of Aug. 15, 1995, 3 C.F.R. § 501 (1996); Aug. 14, 1996, 3 C.F.R. § 298 (1997); Aug. 13, 1997, 3 C.F.R. § 306 (1998); Aug. 13, 1998, 3 C.F.R. § 294 (1999); and Aug. 10, 1999, 3 C.F.R. § 302 (2000) (all of which continued the Export Administration Regulations in effect, using his authority under the International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701-1706 (West 1991 & Supp. 2000)).

2. Export Administration Act, S. 1712, 106th Cong. (1999). The 106th Congress adjourned without voting on S. 1712. On January 23, 2001, Senate Bill 199, 107th Cong. (2001) (which contains substantially the same provisions regarding administrative procedure and judicial review as S. 1712) was introduced into the 107th Congress.

the Export Administration Act and Export Administration Regulations (EAR).³ Special agents work with an Assistant United States Attorney from the Department of Justice to develop a potential criminal case. These cases may be brought in the U.S. District Court sitting in the jurisdiction where the violation occurred.⁴ Cases also may be brought in the U.S. District Court for the District of Columbia on the theory that the offense, failure to obtain a license, occurs in Washington, D.C., where the Commerce Department issues licenses. If the offenses were begun in one district and completed in another, cases may be prosecuted in the district where the offense was begun, continued, or completed.⁵ If the offenses were not committed in any district, cases may be brought at the last known address of the offender, or if unknown, in the District of Columbia.⁶ Criminal cases can be appealed to the U.S. Court of Appeals and eventually to the U.S. Supreme Court.

III. CIVIL CASES

The majority of BXA's administrative cases result in civil settlements. In those instances where there are reasonable prospects for settlement, the Office of Export Enforcement will issue a proposed charging letter (PCL) containing the violations believed to constitute the offense.⁷ Settlement negotiations are conducted by the Director of the Office of Export Enforcement, and the Office of Chief Counsel.⁸ Once a settlement agreement is reached, the respondent and the OEE Director sign the agreement. However, the settlement is not final until the Assistant Secretary for Export Enforcement signs the implementing order imposing the agreed resolution, which can include civil monetary penalties and denial of export privileges.⁹

3. 15 C.F.R. §§ 730.9(b), 758.7(b) (1985).

4. *See* 18 U.S.C.A. § 3231(34) (West 1991 & Supp. 2000).

5. *See id.* § 3231(35).

6. *See id.* § 3231(34).

7. *See* 15 C.F.R. § 766.20(a) (1985).

8. *See id.*

9. *See id.* *See also* 15 C.F.R. § 764.3 (1985).

IV. ADMINISTRATIVE ENFORCEMENT PROCEDURES

For those cases that are not settled, EAR provides a structure for administrative enforcement proceedings. In 1988, Congress amended the EAA to require notice and opportunity for a hearing before an Administrative Law Judge (rather than the Hearing Commissioner, as had been the case previously), subject to some newly-added EAA provisions.¹⁰ These amendments created a limited opportunity for judicial review for export enforcement cases. However, this change did not apply to antiboycott proceedings. As a result of amendments in the late 1970's, antiboycott cases are subject to Sections 554 through 557 of the Administrative Procedures Act (APA).¹¹

When Commerce brings an enforcement action against an exporter in an export enforcement case, OEE sends a charging letter to the party alleged to have committed the violations. As in the PCL, the charging letter contains the facts believed to constitute the offense. The charged party is entitled to notice and an opportunity to be heard before an Administrative Law Judge (ALJ). Notably, there is significant flexibility in an ALJ proceeding. Formal rules of evidence are inapplicable.¹² For example, the EAR hearing provisions state that "all evidentiary material deemed by the Administrative Law Judge to be relevant and material to the proceeding and not unduly repetitious will be received and given appropriate weight."¹³ Parties are free to modify any procedures or extend any applicable time limitations by stipulation filed with the ALJ.¹⁴ In addition, parties are able to conclude the proceedings through a settlement agreement, which does not have to be approved by the ALJ.¹⁵ The ALJ may order compliance with discovery and, absent compliance, "may make a determination or enter any order in the proceeding as the judge deems reasonable and appropriate."¹⁶ The ALJ may strike related charges or offenses and may take related facts as being established.¹⁷

10. See 50 U.S.C. app. § 2410.

11. See *id.*

12. See 15 C.F.R. § 766.13(b) (1985).

13. *Id.*

14. See *id.* § 766.16.

15. See *id.* § 766.18.

16. 15 C.F.R. § 766.9(d) (1985).

17. See *id.*

The ALJ proceeding must be concluded within one year, as required by EAA.¹⁸ Once the ALJ has rendered a decision, it must be referred to the agency head, in this case, the Under Secretary for Export Administration.¹⁹ The Under Secretary will review the ALJ's findings of facts and conclusions of law. Within 30 days, the Under Secretary must affirm, modify, or vacate the ALJ's decision; however, the Under Secretary is not permitted to reverse the decision, as in the APA.²⁰

V. JUDICIAL REVIEW PROCEDURES UNDER 1979 EAA

The charged party can appeal the Under Secretary's decision to the U.S. Court of Appeals for the District of Columbia.²¹ The circuit court's review is limited only to those issues necessary to determine liability for the civil penalty or other sanctions involved.²² The court "shall set aside any finding of fact for which the court finds there is not substantial evidence on the record and any conclusion of law which the court finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²³ This has been held to exclude review of the amount of penalty imposed.²⁴

VI. *IRAN AIR V. KUGELMAN*

The role and authority of agency decisions in judicial review was clarified in *Iran Air v. Kugelman*.²⁵ In this case, Iran Air had ordered three signal generators from a German-based company, Fluke Germany, for export to Iran. The purchase order stated, "Please ship to Iran Air Frankfurt Airport for reforwarding to Tehran, Iran."²⁶ Although Fluke Germany did not have the generators in stock, the company referred the order to its affiliate, Fluke Holland.²⁷ Fluke Holland did not have the generators either, but obtained them from the U.S.

18. See 50 U.S.C. app. § 2412.

19. See *id.*

20. See *id.*

21. See *id.*

22. See *id.*

23. *Id.*

24. See *Moller-Butcher v. U.S. Dep't of Commerce*, 12 F.3d 249 (D.C. Cir. 1994).

25. 996 F.2d 1253 (D.C. Cir. 1993).

26. *Id.* at 1255.

27. See *id.*

manufacturer, Fluke U.S.A.²⁸ Fluke Germany delivered the Fluke generators to Iran Air in Germany. Iran Air shipped the generators to Iran without obtaining the required reexport authorization.²⁹

The Office of Export Enforcement initiated an administrative proceeding against Iran Air for EAR violations. OEE alleged that Iran Air caused the reexport of the generators to Iran without the required reexport authorization.³⁰ The ALJ dismissed the charge ruling that OEE failed to allege or prove that Iran Air knowingly had violated the law.³¹ Upon referral, the Acting Under Secretary for Export Administration disagreed with the ALJ's reading of the Export Administration Act. The Acting Under Secretary ruled that the civil sanction included no state of mind requirement,³² and remanded the case to the ALJ for reconsideration consistent with the agency's view of the controlling law. On remand, the ALJ refused to follow the Acting Under Secretary's interpretation of the law and dismissed the case again, ruling that the Acting Under Secretary only was authorized to "affirm, modify or vacate" the ALJ's decision.³³

Once more, the Acting Under Secretary vacated the ALJ's decision and remanded the case for a determination that knowledge was not a required element of the case. Again, the ALJ refused to do so, claiming a warning letter was the appropriate penalty. In his final order, the Acting Under Secretary restated the agency's position. Concluding that a further remand would be futile, the Acting Under Secretary imposed a \$100,000 civil penalty.³⁴

Iran Air appealed the Acting Under Secretary's decision to the Court of Appeals for the District of Columbia arguing that the ALJ's decision was correct and no penalty should be imposed.³⁵ The circuit court disagreed with Iran Air, holding that the regulations under which Iran Air was charged did not require the government to establish the state of mind of the

28. *See id.*

29. *See id.* at 1256.

30. *See id.*

31. *Iran Air*, 996 F.2d at 1253.

32. *See* 50 U.S.C. app. § 2410.

33. *Iran Air*, 996 F.2d at 1256.

34. *See id.* at 1257.

35. *See id.*

exporter, because the word "knowingly" was expressly deleted from the regulation which Iran Air was charged with violating.³⁶ This is an important point, because there is a regulation that contains a "knowing element," but Iran Air was not charged with violating that regulation.³⁷ The D.C. Circuit Court affirmed the Under Secretary's ruling that Iran Air violated the Export Administration Act and Export Administration Regulations. The court also held that the Under Secretary remains the final administrative arbiter on questions of law and policy.³⁸

The court distinguished its decision from *Dart v. United States*.³⁹ In that case, the D.C. Circuit Court had held that the Under Secretary owed deference to the factual determination of the ALJ.⁴⁰ In *Iran Air*, the court drew a distinction between factual and legal determinations.⁴¹ The court explained that the agency head may not overturn the ALJ's decision on findings of fact.⁴² The court declined, however, to extend the *Dart* precedent beyond fact findings to questions of agency law or policy.⁴³ The court affirmed the Under Secretary's ruling that Iran Air violated the EAA, but vacated the sanctions imposed and remanded the case to the Acting Under Secretary for a reasoned determination of the appropriate sanction consistent with the ALJ's assessment of the facts and the circumstances of Iran Air's violations.⁴⁴

Iran Air is important because it underscores the deference the Court has shown to agency decisions on matters involving interpretation of its own regulations. The Court's decision was appropriate because the agency has the expertise to interpret the regulations it issues and implements.

36. *See id.*

37. *See id.* at 1257-58.

38. *See id.* at 1262.

39. 848 F.2d 217 (D.C. Cir. 1988).

40. *See id.* at 230-31.

41. *See Iran Air*, 996 F.2d at 1291.

42. *See id.*

43. *See id.*

44. *See id.* at 1262.

VII. TEMPORARY DENIAL ORDERS

Judicial review of temporary denial orders (TDOs) proceeds along the same basis. The Assistant Secretary for Export Enforcement may impose, on an *ex parte* basis, a temporary denial order for up to 180 days without an administrative hearing to prevent an imminent export violation.⁴⁵ The exporter subject to a TDO can appeal in writing to an ALJ.⁴⁶ After reviewing the pleadings, within ten working days, the ALJ makes a recommendation to the Under Secretary as to whether the TDO should stand. Within five working days, the Under Secretary can accept, reject, or modify the ALJ's decision.⁴⁷ The exporter may appeal this decision within 15 working days to the Court of Appeals for the District of Columbia.⁴⁸ The court may review the issues relating to whether the standard for issuing TDOs (to prevent an imminent violation of the EAA) has been met. The court will vacate the order if it finds that the ruling was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁹ This review process is not available during the lapse of the EAA.

VIII. CHANGES TO JUDICIAL REVIEW IN S. 1712

S. 1712 would change the judicial review provisions related to administrative enforcement cases, consistent with the provisions in the Administration's 1994 proposed Export Administration Act. Under S. 1712, judicial review of anti-boycott and export enforcement cases would be treated the same way.⁵⁰ S. 1712 would revise current practice for both anti-boycott and export enforcement violations, which requires that, if the civil penalty is imposed, but not paid, the U.S. government must file actions to collect the unpaid penalty in district court, where all issues necessary to establish liability are established *de novo*.⁵¹

45. See 15 C.F.R. § 766.24(a)(b)(4) (1985).

46. See *id.* § 766.24(e).

47. See *id.*

48. See *id.* § 766.24(g). See also 50 U.S.C. app. § 2412(d)(3).

49. 15 C.F.R. § 766.24 (1985).

50. See Export Administration Act, S. 1712, 106th Cong. § 608 (1999).

51. See *id.*

In 1994, the Administration proposed to make enforcement proceedings under the EAA subject to judicial review under the APA,⁵² as with most other civil penalty matters. This proposed change is contained in S. 1712.⁵³ Essentially, this means that cases would be reviewed by the district court, based on the administrative record, to determine if the agency decision had been made on arbitrary or capricious grounds.

S. 1712 also simplifies the administrative enforcement process at Commerce by making all of the enforcement cases subject to Sections 554 through 557 of the APA.⁵⁴ Thus, review by the Under Secretary would no longer be required. The exporter, however, would have the right to appeal the ALJ's decision to the Under Secretary. If the exporter does not appeal, the decision of the ALJ becomes the decision of the Department; which is standard for other cases that are subject to the APA and is what happens in boycott cases today.⁵⁵ The process for reviewing TDOs would remain the same as that under the lapsed EAA, with a change for the standard of review to become "reasonable cause to believe."⁵⁶

IX. CONCLUSION

These changes would simplify the review process, make the process work better, help maintain consistency in anti-boycott and enforcement cases, and bring the process in line with other civil penalty cases at the Commerce Department.

52. 5 U.S.C. §§ 701, 706 (1994).

53. Export Administration Act, S. 1712, 106th Cong. § 608 (1999).

54. *See id.*

55. *See id.*

56. *Id.*