

COMMITTEE ON HEARING OFFICERS
PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE
RECOMMENDATIONS ON THE
APPOINTMENT AND STATUS OF FEDERAL HEARING OFFICERS

Earl W. Kintner, Chairman
September 8, 1954

RECOMMENDATIONS OF COMMITTEE ON HEARING OFFICERS

The Committee recommendations are, in most instances, in the alternative. Each alternative text is supported by four members of the Committee. Alternative I is sponsored by Messrs. Kintner, Doyle, Reynolds and Winings. Alternative II is sponsored by Messrs. Lester, McElvain, Meloy and Scharnikow.

Reports supporting the following recommendations have been issued under separate cover. The report supporting the Alternative I recommendations was issued August 10, 1954, and supplemented by an insert dated September 8, 1954. The report supporting the Alternative II recommendations was issued September 3, 1954.

ADMINISTRATION

Recommendation No. 1

Alternative I

It is recommended that the Office of Administrative Procedure, recommended by this Conference on November 23-24, 1953, be established and be expanded to include the administration of the hearing officer program and that such office be independent of any existing agency or department.

a. that the Office perform the following functions relating to the hearing officer program:

(1) recruiting, qualifying, and maintaining a list of currently qualified hearing officer candidates;

(2) overseeing matters of compensation, tenure and retirement; administration of removal procedures;

(3) constantly guarding against any encroachment upon the independence of hearing officers or upon the integrity of the administrative process.

b. that the Office of Administrative Procedure perform those additional functions heretofore recommended by the Conference:

(1) carrying on continuous studies of the adequacy of the procedures by which Federal Agencies determine the rights, duties and privileges of persons;

(2) initiating cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;

(3) collecting and publishing facts and statistics concerning the procedures of the agencies;

(4) assisting agencies in the formulation and improvement of their administrative processes.

c. that the Office be nonpartisan and consist of five members appointed by the President, as follows:

(1) a government expert in the field of Federal administrative law;

(2) a member of an independent Federal regulatory agency;

(3) a law professor;

(4) and (5) two nongovernment practicing lawyers.

d. that the members of the Office be authorized to employ an executive director and an appropriate staff.

e. that the members be empowered to call upon the services of other government agencies where appropriate and to designate panels of consultants.

f. that the first board members be appointed for terms of 1, 2, 3, 4 and 5 years respectively, the term of each to be designated by the President, but that their successors be appointed for terms of 5 years.

Alternative II

It is recommended that the administration of the hearing examiner program be continued by the Civil Service Commission under Section 11 of the Administrative Procedure Act and that the Civil Service Commission establish a new Bureau of Hearing Examiner Administration.

a. that the new bureau be charged with the responsibility for the hearing examiner program that is now divided among three bureaus of the Commission;

b. that a committee of five members be placed in charge of the bureau;

c. that there be brought into the administration of the hearing examiner program additional persons who have recently been engaged in the preparation and presentation of cases before administrative agencies, and that at least two of the members of the committee be lawyers who are well versed in Federal administrative adjudication and at least two of the members of the committee be officials of the Commission who have the broad gauge viewpoint of the hearing examiner program;

d. that subordinate personnel be assigned to the bureau, either on a full-time basis, or by detail from other bureaus of the Commission.

QUALIFICATIONS

Recommendation No. 2

Alternative I

It is recommended that qualification standards of hearing officers be raised substantially beyond those presently in force and that such standards be fixed within the discretion of the Office of Administrative Procedure but include as a minimum:

- a. A law degree and membership in a bar.
- b. six years' continuous legal experience immediately preceding qualification.
- c. adequate experience as a participant in adversary proceedings before courts of record or in administrative agencies.
- d. sufficient experience in the field of administrative law to insure familiarity with the administrative process.

Alternative II

It is recommended that the present high qualification standards established by the Civil Service Commission be retained.

RECRUITMENT, SELECTION AND APPOINTMENT

Recommendation No. 3

Alternative I

1. It is recommended that the following appointment procedure be adopted:

a. that the Office of Administrative Procedure recruit candidates and prepare and maintain a list of currently qualified candidates.

b. that the entire list be submitted to the agencies when appointments are to be made, and that the agencies select from that list the person or persons they desire.

c. that the person or persons so selected, upon approval by the Office of Administrative Procedure, be nominated by that Office for appointment by the President.

d. that hearing officers be housed in the selecting agencies but that there be reasonable provision for exchange or transfer in accordance with the fluctuating requirements of the various agencies.

2. It is recommended that a career-merit system be established for hearing officers.

Alternative II

1. It is recommended that:

a. recruitment be continued on an open competitive basis, and concentrated on the most likely source of qualified applicants, such as lawyers with trial experience in administrative law both in and out of Government;

b. a current competitive register of candidates for appointment be established biennially;

c. selection for appointment to hearing examiner positions be limited to either the promotion, transfer or reinstatement of hearing examiners or appointment from the open competitive register.

2. It is recommended that the career-merit system be retained.

COMPENSATION

Recommendation No. 4

1. It is recommended that a single salary grade be established for the hearing officers in each agency.

Further --

Alternative I

2. It is recommended that:

a. the Office of Administrative Procedure in the future, as part of its continuing study of the hearing officer program, give careful consideration to the advisability of instituting a one-grade system throughout government.

b. the level of compensation for hearing officers be raised to a range between \$12,000 and \$14,000 per year and that the Office of Administrative Procedure be given authority, after consultation with the agencies, to fix the specific salary for a particular agency within the stated range.

Alternative II - COMPENSATION AND CLASSIFICATION

2. It is recommended that:

a. compensation be prescribed in accordance with the Classification Act;

b. that the classification specifications be revised (1) to bring the illustrative examples of cases up to date and to express the substantive portions of the specifications in less technical and simpler language, and (2) to delete the language that erroneously suggests that length of record is of some importance in prescribing the level of compensation of the hearing examiner.

c. that the level of compensation for hearing examiners range between \$8,300 (GS-13) and \$11,800 (GS-15) until higher grades are available under the Classification Act.

TENURE AND RETIREMENT

Recommendation No. 5

It is recommended

(1) that hearing officers have tenure until retirement; and that retirement age and retirement benefits be consistent with those applicable to other employees of the Executive Branch.

REMOVAL

Recommendation No. 6

1. It is recommended that removal be for cause only after hearing and upon the record thereof.

Further --

Alternative I

2. It is recommended that a qualified person designated by the Office of Administrative Procedure conduct the removal hearing, and a three-member review board designated by the Office of Administrative Procedure, but acting independently of that Office, hear all appeals from the initial decision.

Alternative II

2. It is recommended that the procedures for removal of hearing examiners as set forth in Section 11 of the Administrative Procedure Act be retained.

3. It is recommended that the agency study more closely the performance of hearing examiners and initiate removal proceedings where appropriate.

REDUCTION-IN-FORCE

Recommendation No. 7

Alternative I

It is recommended that present reduction-in-force rules be made inapplicable to hearing officers; that where an agency's hearing officer requirement is reduced, surplus hearing officers be placed under the supervision of the Office of Administrative Procedure; that such officers be available for temporary assignments; and that they be given preference by law for any permanent hearing officer positions arising in other agencies.

Alternative II

It is recommended that agencies avoid or minimize the application to hearing examiners, of the reductions of force provided by law (1) by utilizing hearing examiners from other agencies, under Section 11 of the Administrative Procedure Act, to meet unusual caseloads, rather than by appointing additional examiners to their staffs; and (2) by considering, in its determination of the classes of its employees to be separated in a necessary reduction in force, the loss of ability, experience, and training entailed in the separation of hearing examiners.

GRANDFATHER CLAUSE

Recommendation No. 8

Alternative I

It is recommended that incumbent hearing officers be retained and that any amendment of the Administrative Procedure Act, or other legislation concerning the hearing officer program, contain a "grandfather clause" which will blanket-in all incumbent hearing officers.

Alternative II

It is recommended that incumbent hearing examiners be retained subject only to the removal provisions of Section 11 of the Administrative Procedure Act.

September 8, 1954.

Honorable E. Barrett Prettyman,
Chairman, President's Conference
on Administrative Procedure,
U. S. Court Building,
Washington, D. C.

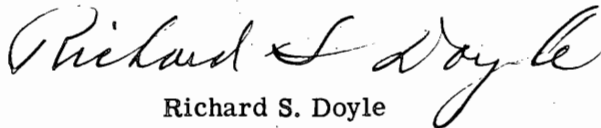
Dear Judge Prettyman:

The four undersigned members of the Committee on Hearing Officers of the President's Conference on Administrative Procedure, after consideration of comments and suggestions received respecting the draft report of August 10, 1954, have adopted such draft report as a final report to the Conference, subject to the following attached changes and additions thereto. There is further attached hereto a revised Summary of Recommendations approved by the undersigned which is substituted for the Summary contained at pages 84-86 of the report.

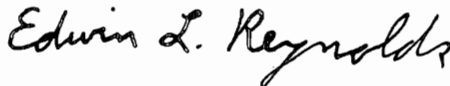
Respectfully submitted,



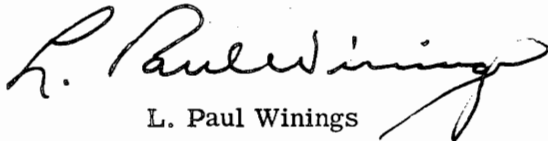
Earl W. Kintner, Chairman



Richard S. Doyle



Edwin L. Reynolds



L. Paul Winings

2 Attachments.

CHANGES AND ADDITIONS

Following are changes and additions in the text of the report;

P. 54, line 37 - "supon" - "upon"

P. 61, line 31 - "salutory" - "salutary"

P. 63 - Composition and Appointment - delete (4); and 5. Substitute:
"(4) and (5) two non-government practicing lawyers."

P. 72 - Substitute for point c:

"c. that the person or persons so selected, upon approval by the Office of Administrative Procedure, be nominated by that Office for appointment by the President."

P. 73 - Substitute for third paragraph:

"As noted, we recommend further that the act of appointment be performed by the President after selection by the agency and nomination by the Office of Administrative Procedure, upon approval by that Office of the person or persons selected by the agency."

P. 78, line 34 - delete "unwholesome"

P. 80 - "a. Tenure" - place at head of third complete paragraph P. 81.

P. C-34 - Assignment of cases - Delete text, substitute, "Examiners are dispersed among various ports. Assignment of cases is by rotation in those ports having more than one examiner."

P. E-2 - Martin M. Volz, delete "University of Houston," substitute "University of Kansas City"

P. E-8 - "Edward G. Johnson" - "Edward C. Johnson"

P. E-9 - "Edwin C. Johnson" - Same

P. E-9 - Ray Mormon - delete "Bureau of Inspection and Classification Audit," substitute "Bureau of Programs and Standards"

P. E-10 - Odell Kominers, delete "Practitioner," substitute "Member of the Bar, Radner, Zito, Kominers & Fort, Washington, D. C."

P. E-10 - Add to list of Additional law professors: "Stefan Riesenfeld"

P. G-16 - "General Counsel" Reidy - "Chief Counsel"

P. G-18 - "Notation" - "Rotation"

Changes and Additions (continued)

P. G-27 - "nevery" p. 498 - "never"

P. H-10 - John B. Gage - Kansas City, Missouri - add "Consultant to Committee"

P. I-17 - Delete entire page, add following digests of professor's views:

Maurice S. Culp - Western Reserve University

1. General knowledge of the law coupled with good personal and professional qualifications, including a judicial temperament. Need not have any specialized experience.
2. Appointment by the President from panels of qualified lawyers presented by an Office of Administrative Procedure.
3. Hearing officers should be officers of some central office. Should be physically separated from agency quarters.
4. Tenure for a term of 10 years.
5. Removal for cause by the President "separate and apart from ordinary Civil Service reduction-in-force rules."
6. Equal to that of U. S. district judges. One grade of compensation.

Edward A. Hogan, Jr. - University of California, Hastings College of Law

1. "Knowledge of law and judicial temperament are the bare minima. To be able to render more expert opinions than courts, I should suppose an administrative agency needs highly skilled technicians."
3. Should not be subject to executive control of agencies for which he works. If no valid constitutional objection should be within the jurisdiction of a reconstituted Administrative Office of the United States Courts and Hearing Officers. Fixed tenure either for a definite number of years or for life.
6. Salary grades based on different and more burdensome responsibilities.

Paul Oberst, University of Kentucky

1. "There is no such thing as a hearing officer. There are rather hearing officers. Some positions demand specialized qualifications, others do not. Diversity, not uniformity, is needed . . ."
2. "My own preference would be for selection of examiners by an agency which would take into account qualifications of personality and background that cannot be reduced to a formula. Somewhere in the executive

Changes and Additions (continued)

Paul Oberst, University of Kentucky (continued)

branch there should be reposed a pretty free hand with appointments coupled with pay and tenure sufficient to insure judicial independence."

3. "If an examiner has no integrity and independence, you can't give him any by putting him in a separate central office."
4. Long term.
5. For cause.
6. "The notion that all hearing officers should be the same in pay and qualifications is absurd, . . . pay should fit the demands of the kind of work and the kind of agency he is assigned to . . ."

Harrop A. Freeman, Cornell Law School

1. "A sense of fairness and perspective are the most important qualities. I do not mean a 'judicial temperament'; for most of the agencies are not trying to decide as a judicial officer should or does. Administrative law is partly to avoid the attitude that a lawsuit is a 'contest to be won' and replace it by an attitude of a 'problem to be solved'. Administrative law assumes that a 'policy' has been established for the agency; it is fully proper that the hearing officer be part of carrying out that policy. In many agencies this involves specialized knowledge. . . . Hearing officers should have real knowledge in the fields where they operate; some do not . . . I would expect most able hearing officers to have come up through the legal staffs of agencies; they might also come from hearing officer positions in State agencies; on occasion they could come from the Courts, or legal practice, or Arbitration Association, etc."
2. Each agency should appoint hearing officers from a group approved by a central agency after examination and grading.
3. Hearing officer to be officer of the agency as at present. If separate Office of Administrative Procedure, should be independent.
4. Term of years, perhaps 10, with possibility of renewal up to age 65 or 70.
5. Removal for cause with hearing.
6. Compensation not higher than salary of head of agency. Comparable to highly paid government attorney or subordinate judge. Favors number of levels of compensation within agency.

Changes and Additions (continued)

Stefan A. Riesenfeld, University of California

1. General knowledge of the law, coupled with judicial temperament. Office in charge of administrative program should determine necessity of further special qualifications.
3. Best solution a reorganized Administrative Office of the U. S. Courts and Hearing Officers. Otherwise a New Office of Administrative Procedure within Department of Justice. Director to be additional Assistant U. S. Attorney.
4. Tenure for life after trial period of 3 years.
5. Removal for cause only after hearing.
6. Three salary grades, promotion to be administered by a Tenure and Promotion Board of the administering agency.

V. REVISED SUMMARY OF RECOMMENDATIONS*

We, believing that recognition should be given to the importance of the hearing officer in the administrative process and to his paramount role in achieving the elimination of unnecessary delay, expense and volume of records, recommend to the President's Conference on Administrative Procedure as follows:

1. That the Office of Administrative Procedure recommended by the Conference on November 23-24, 1953, be established and be expanded to include administration of the hearing officer program and that such Office be independent of any existing agency or department. (Report, pages 55-63)

a. that the Office perform the following functions relating to the hearing officer program:

- (1) recruiting, qualifying, and maintaining a list of currently qualified hearing officer candidates; (Report, pages 63-64, 71-73)
- (2) overseeing matters of compensation, tenure and retirement; administration of removal procedures; (Report, pages 74-82)
- (3) constantly guarding against any encroachment upon the independence of hearing officers or upon the integrity of the administrative process. (Report, pages 50-51, 62)

b. that the Office of Administrative Procedure perform those additional functions heretofore recommended by this Conference: (Report, pages 62-63)

- (1) carrying on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties and privileges of persons;
- (2) initiating cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable, uniform rules of practice and procedure;
- (3) collecting and publishing facts and statistics concerning the procedures of the agencies;
- (4) assisting agencies in the formulation and improvement of their administrative procedures.

c. that the Office be non-partisan and consist of five members appointed by the President, as follows: (Report, page 63)

- (1) a government expert in the field of Federal administrative law;
- (2) a member of an independent Federal regulatory agency;
- (3) a law professor;
- (4) and (5) two non-government practicing lawyers.

d. that the members of the Office be authorized to employ an executive director and an appropriate staff. (Report, page 63)

*Submitted by Messrs. Kintner, Doyle, Reynolds and Winings of the Committee on Hearing Officers as the final draft of this portion of their August 10, 1954, tentative report.

e. that the members be empowered to call upon the services of other government agencies where appropriate and to designate panels of consultants. (Report, page 63)

f. that the first board members be appointed for terms of 1, 2, 3, 4 and 5 years respectively, the term of each to be designated by the President, but that their successors be appointed for terms of 5 years. (Report, page 63)

2. That qualification standards of hearing officers be raised substantially beyond those presently in force and that such standards be fixed within the discretion of the Office of Administrative Procedure but include as a minimum: (Report, pages 63-71)

a. a law degree and membership in a bar. (Report, pages 65-66)

b. six years' continuous legal experience immediately preceding qualification. (Report, pages 66-67)

c. adequate experience as a participant in adversary proceedings before courts of record or in administrative agencies. (Report, page 68)

d. sufficient experience in the field of administrative law to insure familiarity with the administrative process. (Report, pages 67-68)

3. That the following appointment procedure be adopted:

a. that the Office of Administrative Procedure recruit candidates and prepare and maintain a list of currently qualified candidates. (Report, pages 71-73)

b. that the entire list be submitted to the agencies when appointments are to be made, and that the agencies select from that list the person or persons they desire. (Report, pages 72-73)

c. that the person or persons so selected, upon approval by the Office of Administrative Procedure, be nominated by that Office for appointment by the President. (Report, pages 72-73)

4. That hearing officers be assigned to their respective agencies and be housed in such agencies, but that there be reasonable provision for exchange or transfer in accordance with the fluctuating requirements of the various agencies. (Report, pages 73-74)

5. That a single grade of compensation be established in each agency and that the Office of Administrative Procedure in the future, as part of its continuing study of the hearing officer program, give careful consideration to the advisability of instituting a one-grade system throughout government. (Report, pages 74-79)

6. That the level of compensation for hearing officers be raised to a range between \$12,000 and \$14,000 per year and that the Office of Administrative Procedure be given authority, after consultation with the agencies, to fix the specific salary for a particular agency within the stated range. (Report, page 79)

7. That hearing officers have tenure until retirement; that retirement age and retirement benefits be consistent with those applicable to other employees of the Executive Branch. (Report, pages 79-81)

8. That removal be for cause only after hearing and upon the record thereof; that a qualified person designated by the Office of Administrative Procedure conduct the removal hearing and a three-member review board designated by the Office of Administrative Procedure but acting independently of that office hear all appeals from the initial decision. (Report, pages 80-82)

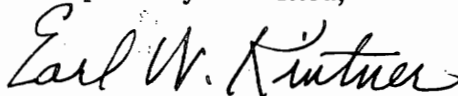
9. That present reduction-in-force rules be made inapplicable to hearing examiners; that where an agency's hearing officer requirement is reduced, surplus hearing officers be placed under the supervision of the Office of Administrative Procedure; that such officers be available for temporary assignment; and that they be given preference by law for any permanent hearing officer positions arising in other agencies. (Report, pages 80-82)

10. That any amendment of the Administrative Procedure Act, or other appropriate legislation concerning the hearing officer program, contain a "grandfather clause" which will blanket-in all incumbent hearing officers. (Report, pages 82-83)

11. That for the purpose of implementing these recommendations, the President's Conference recommend appropriate legislation amending the Administrative Procedure Act. (Report, page 83)

12. That Civil Service Commission jurisdiction over the hearing officer program under Section 11 of the Administrative Procedure Act be terminated. (Report, pages 46-54, 57-59, 62)

Respectfully submitted,



Earl W. Kintner, Chairman
General Counsel
Federal Trade Commission



Richard S. Doyle
Blair, Korner, Doyle & Appel
Washington, D. C.



Edwin L. Reynolds
Solicitor
Patent Office



L. Paul Winings
General Counsel
Immigration & Naturalization Service

IMPLEMENTATION OF RECOMMENDATIONS

Recommendation No. 9

Alternative I

It is recommended that Civil Service Commission jurisdiction over the hearing officer program under Section 11 of the Administrative Procedure Act be terminated and that appropriate legislation amending the Administrative Procedure Act be recommended by the President's Conference for the purpose of implementing these recommendations.

Alternative II

It is recommended that no statutory changes be made.