

# Report To The Congress

## OF THE UNITED STATES

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### Administrative Law Process: Better Management Is Needed

Federal executive departments and agencies process a larger case load than U.S. courts, affect the rights of a larger number of citizens, and employ more than twice as many Administrative Law Judges as there are active judges in Federal trial courts.

Administrative Law Judges are unique Federal employees. By virtue of nonspecific legislation, they are free to perform without structured evaluation in a complex administrative law field.

There are two major causes for delays in the administrative process--extensive agency review of Administrative Law Judges' decisions and the use of more complex judicial procedures than necessary to resolve some disputes. Ineffective personnel management of Administrative Law Judges is also described and recommendations made to improve their productivity and performance.

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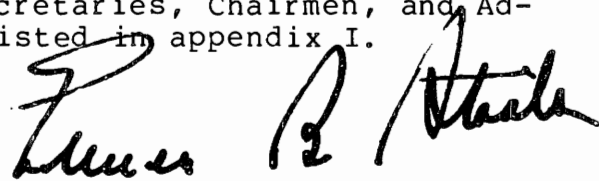
To the President of the Senate and the  
Speaker of the House of Representatives

This report points out two causes for delay in the administrative process--extensive agency review of Administrative Law Judges' decisions and use of more complex judicial procedures than necessary to resolve some disputes. The report also discusses the personnel management situation whereby Administrative Law Judges are free to perform without structured evaluation by virtue of nonspecific legislation and are practically assured lifetime tenure upon initial appointment.

This review was initiated at the request of Congressman John Moss. As he requested, we did not obtain formal comments from agency officials; however, we discussed the report with them and considered their comments.

We made the review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Legislative Reorganization Act of 1970 (Public Law 91-510).

Copies of this report are being sent to the Honorable John E. Moss, House of Representatives; the Director, Office of Management and Budget; the Chairman, U.S. Civil Service Commission; and the various Secretaries, Chairmen, and Administrators of the agencies listed in appendix I.

  
Comptroller General  
of the United States

D I G E S T

The lengthy and costly formal process through which most administrative disputes in the Federal Government are formally adjudicated can be improved. Cases can be adjudicated more expeditiously and the Administrative Law Judge--a pivotal figure--can be made more effective.

More than 1,000 Administrative Law Judges, with virtually guaranteed tenure until retirement, <sup>1/</sup> serve in 28 agencies as quasi-judicial officers presiding at formal administrative hearings to resolve disputes. The Federal executive departments and agencies collectively process a larger case load than U.S. courts, affect the rights of more citizens, and employ more than twice as many Administrative Law Judges as there are active judges in Federal trial courts. The administrative adjudicatory process costs the Federal Government and other involved parties millions of dollars each year. There are also intangible costs such as injuries and hardships, which can result from delays in the process.

The Administrative Procedure Act sought to insure the former hearing examiners--now designated Administrative Law Judges--judicial capability and objectivity by precluding agencies from evaluating their performance and by assigning responsibility for determining their qualifications, compensation, and tenure to the Civil Service Commission.

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1/Unlike Federal judges who have lifetime tenure, Administrative Law Judges have tenure only until retirement.

Administrative Law Judges are required to conduct hearings and make decisions independently of agency influence or interference. However, the final decision rests with the agency as the Administrative Law Judges are bound by agency rules and prior agency decisions. The agency, by adopting, modifying, or reversing the Administrative Law Judges' decisions, renders final administrative decisions which can be appealed to the U.S. courts. This distinguishes Administrative Law Judges from Federal judges whose decisions are final and have the force of law unless appealed to a higher court.

Questions have surfaced as to whether all of the more than 1,000 Administrative Law Judges are performing functions in the mode and with the responsibility normally associated with the title "judge." The questions arise when the administrative process and case complexity of the regulatory agencies are compared with the nonregulatory agencies. GAO is planning to review this particular issue in the near future.

#### OPPORTUNITIES TO IMPROVE THE ADJUDICATION PROCESS

Although the Administrative Procedure Act was enacted to resolve conflicts promptly and fairly, timely decisions are not being made because the process is burdened with extensive reviews and more complex, judicial procedures than necessary.

Agencies review Administrative Law Judges' decisions because

- they want to maintain decision and policy-making authority and
- in some instances, short of such review, agencies have little assurance that Administrative Law Judges' decisions are reasonable and in accordance with agency policy.

While agencies have the authority to review Administrative Law Judges' decisions, the

process at some is burdened unnecessarily with multiple layers and numerous agency personnel. This increases the time required to reach a final decision by hundreds of days and the cost by millions of dollars. Delay also has other effects:

--Unfair labor practices may continue to exist.

--Licenses may not be granted to operate businesses.

--Health and safety violations may go uncorrected.

--Individuals may not be granted rightful claims for benefits.

These multilayer review processes also raise doubts that the act's goals--making Administrative Law Judges an important factor in the decision process and assuring that agency views are not being unduly emphasized or secretly submitted--are being achieved.

Some disputes are subjected to the act's formal adjudication procedures when it appears more simplified procedures offer viable alternatives. This occurs primarily because criteria does not exist to show when formal Administrative Procedure Act procedures are required to guarantee due process. The result has been

--a significant increase in the number and types of cases being formally adjudicated,

--an increase in the number of Administrative Law Judges required to hear them, and

--extensive delays which can deprive rather than guarantee due process to the parties involved.

AGENCY PERSONNEL MANAGEMENT SYSTEMS  
ARE NOT PARTICULARLY EFFECTIVE

Although Administrative Law Judges are agency employees with virtually guaranteed tenure until retirement, the Administrative Procedure Act specifically precludes agencies evaluating the performance of Administrative Law Judges. This personnel management function was not assigned to any other organization or person. Evaluation, to include developing objective standards, is critical to an effective personnel management system. Without it, it is difficult, if not impossible, to meet most other major personnel management needs. GAO found that agencies are unable to

- identify unsatisfactory Administrative Law Judges and take personnel action,
- make effective use of Administrative Law Judges to assure maximum productivity,
- plan adequately for Administrative Law Judge requirements to meet workload,
- provide the Civil Service Commission with information to determine the adequacy of its Administrative Law Judges certifying practices,
- develop Administrative Law Judges to their maximum potential through training or diversity of experience, and
- establish appropriate management feedback mechanisms to determine the effectiveness of an Administrative Law Judge personnel management system.

THE CIVIL SERVICE COMMISSION'S ROLE  
NOT CLEARLY DEFINED

While the Administrative Procedure Act assigned the Civil Service Commission responsibility for determining Administrative Law Judge qualification, compensation, and tenure, the legislation is silent on

whether the Commission is to carry out its normal Federal personnel management responsibilities, such as issuing guidelines for agency use and evaluating periodically agency systems for compliance. The Commission has been reluctant to perform its normal functions and has been of little help in assisting agencies to resolve Administrative Law Judge personnel management problems.

Because the Civil Service Commission does not have access to information relating to Administrative Law Judges productivity and use, it has virtually no basis to evaluate agency requests for additional Administrative Law Judges. The Administrative Conference of the United States is gathering Administrative Law Judges productivity data to develop a caseload accounting system. This could assist the Commission in this area.

The Civil Service Commission must approve the use by agencies of selective certification to hire Administrative Law Judges. This involves establishing Administrative Law Judge experience requirements. Generally these are obtained by working for, or practicing before, the agency establishing the requirements. Eleven agencies have selective certification authority, some for over 20 years. However, the Commission has not required these agencies to justify the continued need for this authority. Extensive use of selective certification raises doubts about the impartiality of Administrative Law Judges selected under this process.

#### RECOMMENDATIONS TO THE CONGRESS

The Congress should amend the Administrative Procedure Act to:

- Assign responsibility for periodic evaluation of Administrative Law Judge performance to a specific organization.

The responsible organization could be the Civil Service Commission by itself or as a part of an ad hoc committee composed of attorneys, Federal judges, chief Administrative Law Judges, agency officials, and the Administrative Conference of the United States.

- Clarify the extent to which the Commission can perform its normal personnel management functions in the case of Administrative Law Judges--issuing personnel management guidelines and evaluating periodically agency compliance.
- Establish an initial probationary period of up to 3 years and so eliminate immediate, virtually guaranteed, appointment and tenure.

The Congress should also:

- Establish criteria for deciding what degree of formality is required to provide fair decisions in different types of administrative disputes and amend the Administrative Procedure Act and other legislation as necessary to clarify the agencies' power to adopt streamlined adjudication procedures.
- Amend other legislation as necessary to provide for standards of review along the lines outlined in Public Law 95-164 (91 Stat. 1290, 1314) which afforded Administrative Law Judges' decisions at one Commission greater finality.
- See that each agency employing Administrative Law Judges has taken steps to establish performance standards before additional Administrative Law Judges are given to agencies.

#### RECOMMENDATIONS TO THE HEADS OF AGENCIES

Federal agencies, commissions, and boards employing Administrative Law Judges (see app. I) should

- establish procedures which would preclude extensive review of Administrative Law Judges' decisions,
- establish one central body to conduct case reviews when necessary,
- establish objective performance standards delineating what is expected of all Administrative Law Judges in terms of quality and quantity of work, and
- see that an effective financial disclosure system is implemented.

The chief Administrative Law Judge at each agency, commission, or board should review the procedures by which cases are formally adjudicated to determine if simplified procedures can be used. The accomplishments and progress toward meeting each of the above recommendations should be reported to the cognizant congressional committees.

RECOMMENDATIONS TO THE CHAIRMAN,  
CIVIL SERVICE COMMISSION

The Civil Service Commission should:

- Encourage and assist the Administrative Conference in its efforts to develop an Administrative Law Judge caseload accounting system.
- Reexamine the need for selective certification at the agencies where it is currently in use and evaluate future requests for its use on a case-by-case basis.

GAO did not obtain formal comments on this report from agency officials. However, GAO discussed the report with them and considered their comments. Some of these officials felt that because GAO did not review all agencies employing Administrative Law Judges, GAO's observations may apply in differing degrees to individual agencies. Nevertheless, there was general agreement that reform was needed in this area.

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#### ABBREVIATIONS

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
BHA	Bureau of Hearings and Appeals
BVA	Bureau of Veterans Appeals
CAB	Civil Aeronautics Board
CSC	Civil Service Commission
FCC	Federal Communications Commission
FPC	Federal Power Commission
FTC	Federal Trade Commission
ICC	Interstate Commerce Commission
NLRB	National Labor Relations Board
NTSB	National Transportation Safety Board
OSHRC	Occupational Safety and Health Review Commission
SEC	Securities and Exchange Commission
SSA	Social Security Administration

## CHAPTER 1

### INTRODUCTION

Before the Administration Procedure Act (APA) was passed in 1946, formal Federal administrative disputes were adjudicated by agency officials called hearing officers. These individuals not only served in the capacity of judges but sometimes as prosecutors and investigators. As with other agency employees, their promotions and efficiency ratings were subject to agency control. Accordingly, the objectivity of these individuals in adjudicating disputes was often suspect.

The APA sought to rectify this situation. It contemplated that hearing examiners--now called Administrative Law Judges (ALJ) 1--would now preside at formal administrative hearings to resolve disputes. Section 11 of APA sought to insure the judicial capability and objectivity of these individuals by providing that examiners:

"\* \* \* shall be assigned to cases in rotation so far as practicable \* \* \* shall perform no duties inconsistent with their duties and responsibilities as examiners \* \* \*.

"\* \* \* shall be removable by the agency \* \* \* only for good cause established and determined by the Civil Service Commission \* \* \*.

"\* \* \* shall receive compensation prescribed by the Commission independently of agency recommendations or ratings \* \* \*."

### THE ADJUDICATION PROCESS AND ALJ

Agencies hold formal hearings adjudicating disputes involving

--applications for licenses and routes for transportation by air, rail, motor vehicle, or ship;

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1/The Civil Service Commission (CSC) administratively changed the title in August 1972.

- licenses for broadcasting;
- rates for postal, gas, electrical, communications, and transportation services;
- compliance with Federal standards relating to international trade, labor-management relations, advertising, communications, food and drugs, banking, corporate merger, and antitrust;
- health and safety regulations in mining, transportation, and industry;
- securities, commodities, and futures trading; and
- social security issues and matters relating to mining or forestry on public lands, voters' rights, school desegregation, equal rights employment, protection of the environment, consumer products safety, and international trade.

The ALJ, an agency employee with practically assured tenure until retirement, is the pivotal figure in the administrative adjudication process. A chief purpose of the APA was to assure that those who hear the case participate in the decision and to make them an important factor in the decision process. As stated in Senate Document No. 248 (79th Cong., 2d Sess., 1946), p. 366:

"The provisions of [the APA] are designed to make it certain that those who sign decisions or decision papers are actually the people responsible for them, that the evidence and the arguments of the private parties are fully and fairly considered, that the views of agency personnel are not unduly emphasized or secretly submitted, and that the official record alone is the basis of decision." (Emphasis added.)

Under section 7 of APA, ALJs generally have authority to

- administer oaths and affirmations;
- issue subpoenas authorized by law;
- rule on offers of proof and receive relevant evidence;
- take or cause depositions to be taken whenever the ends of justice would be served;

- regulate the hearing;
- hold conferences to settle or simplify the issues with the parties' consent;
- dispose of procedural requests or similar matters;
- question witnesses;
- consider facts in the record and arguments made on questions involved;
- determine credibility and make findings of fact and conclusions of law;
- make decisions or recommend decisions on the basis of reliable, probative, and substantial evidence; and
- take any other action authorized by agency rule consistent with the act.

Although an ALJ's decision is to be made independently of agency influence or interference, final decisionmaking authority rests with the agency. The ALJ decision is intended to give the agency an independent judgment as to the issues contested before him/her during a trial type hearing. The ALJ is free, after analyzing the hearing record and reading the parties' briefs, to determine what are the decisive issues in a case. In considering the issues and arriving at his/her decision, however, the ALJ is bound by the agency's rules and prior decisions.

If the parties to the case do not appeal the ALJ's decision, and the agency head does not elect to review it, his/her decision becomes the agency's decision. The agency's decision, whether made by adopting the ALJ's decision or by modifying or reversing it, is administratively final and thus, appealable to the U.S. courts. The fact that the agency retains the authority to make the final decision distinguishes ALJs from regular judges. Regular judges' decisions are final and have the full force and effect of law unless appealed to a higher court.

#### RESOLVING ADMINISTRATIVE DISPUTES IS A COSTLY PROCESS

Almost unknown to the public at large, ALJs are involved in a costly process which ultimately results in agency decisions that have the force of law. These decisions can significantly impact on the national economy and on the claims for

administrative justice of thousands of citizens and business firms. According to the administrative officer of the U.S. courts, Federal executive departments and agencies collectively process a larger caseload than the U.S. courts, affect the rights of more citizens, and employ more than twice as many ALJs as there are active judges in the Federal trial courts. As recently reported by the Senate Committee on Governmental Affairs: 1/

"\* \* \* While the annual Federal budget for regulations is almost \$3 billion, estimates of the total costs of regulation to private and public sector range from \$16 to \$130 billion. \* \* \*"

With respect to the \$3 billion annual budget figure, the Committee pointed out that a week's delay in the normal process would increase costs by about \$53 million annually; a month's delay by about \$200 million. The Committee also noted that delay:

"\* \* \* inflates legal fees and other costs of participation, increases the expense of doing business which is passed along to consumers, discourages business investment, and results in major health costs related to needless injuries and deaths. \* \* \*"

While cost figures directly related to the adjudication process are not generally available, it is fair to say, based on the magnitude of the total cost cited above, that they are substantial. In this regard, at the Occupational Safety and Health Review Commission (OSHRC)--a relatively small agency employing about 188 people whose sole function is to adjudicate disputes involving health and safety issues--costs for ALJs and agency review personnel for fiscal year 1976 amounted to approximately \$3.5 million.

If past trends continue--and indications are that they will--the cost of formal administrative adjudication can only increase. The number of ALJs has quadrupled since passage of the APA, and the number of agencies employing them has doubled. In June 1947, there were 15 agencies employing 196 ALJs; in April 1977, there were 28 agencies employing 826 permanent ALJs and 199 temporary ALJs bringing the total to 1,025. 2/

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1/"Study on Federal Regulation," Vol. IV, Delay in the Regulatory Process, July 1977.

2/Recent congressional action has allowed temporary ALJs to be appointed to permanent positions (Social Security Financing Amendments of 1977, P.L. 95-216, Dec. 20, 1977).

Prior to our review, numerous studies were made of the APA and its implementation by CSC and other agencies. Among the most recent is a report issued by the Senate Committee on Governmental Affairs, 1/ which discusses many of the issues relating to delays in the administrative process:

- Overformalized agency procedure and duplicative and lengthy agency review of ALJ decisions.
- The key role ALJs can play in reducing delay in much of the adjudicating process.
- The need for agency management systems, including the collection and analysis of production data over a period of time to identify problems and provide information necessary to solve them.
- The adverse effects of selective certification including agency inbreeding and a tarnishing of the image of ALJ independence.

TITLE CHANGE: HEARING  
EXAMINER TO ALJ

Before changing the title, CSC obtained the views of top agency officials, hearing examiners, bar associations and practitioners, members of the Administrative Conference, and the Judiciary. After analyzing these comments, CSC published a proposal in the Federal Register to change the title. There were only 3 unfavorable comments out of the approximately 80 received from hearing examiners, practicing attorneys, and agency officials. CSC concluded that the new title most appropriately covers the kinds of proceedings and the variety of functions performed by hearing examiners.

However, the Judicial Conference of the United States and the Job Evaluation and Pay Review Task Force of CSC had different opinions concerning the title change. In 1966 and 1970 the Judicial Conference of the United States opposed the title change for hearing examiners that involved the word "judge." The Conference's 1970 statement reflects the reason for its opposition in both years.

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1/See footnote 1, p. 4.

"H.R. 14688, 91st Congress, would redesignate hearing examiners as 'administrative trial judges.' The Conference at its September 1966 session (Conf. Rept., p. 40) expressed the opinion that the designation 'hearing examiner' is well understood and that the proposed change would be inappropriate and confusing. The Conference was informed that the Administrative Conference of the United States at its October 1969 session disapproved the change in the title of 'hearing examiner.' After further consideration, the Conference reaffirmed its disapproval of this legislation." (Proceedings of the Judicial Conference of the United States, p. 11 (September 1970).)

The CSC Job Evaluation and Pay Review Task Force (Oliver Report), January 1972, found that:

1. "Hearing examiner" was a desirable title, but was not truly descriptive of the duties involved.
2. "Administrative Law Examiner" received a high degree of agency support and should be the new title.
3. "Judge" was too controversial and was not a viable choice.

However, the Congress recently enacted legislation (P.L. 95-251, 92 Stat. 183, Mar. 27, 1978) formalizing in statute CSC's administrative title change.

Questions have surfaced as to whether all of the more than 1,000 ALJs are performing functions in the mode and with the responsibilities normally associated with the title of "judge." The questions arise when the administrative process and case complexity of the regulatory agencies are compared with the nonregulatory agencies. We are planning to review, in the near future, this particular issue.

#### SCOPE AND APPROACH OF REVIEW

In conducting this review, we included a representative number of ALJs employed by the 28 agencies. (See app. I for a complete listing of the agencies employing ALJs.) We did our review at the following four agencies.

<u>Agency</u>	<u>ALJs</u>
Department of Labor	43
National Labor Relations Board (NLRB)	96
OSHRC	43
Interstate Commerce Commission (ICC)	<u>62</u>
Total	<u>244</u>

We also distributed a questionnaire to the 857 permanent ALJs employed by the 28 agencies as of August 1977. We received responses from 754 ALJs about their recruiting and selection, training, case processing characteristics, and perceptions toward their duties. Appendix II contains a discussion of the questionnaire design, administration and responses, the questionnaire, and ALJs' responses.

We interviewed agency officials, including the chairman and/or commissioners, assistant secretaries, executive directors, executive secretaries, and the chief ALJs at each agency. We also talked with or obtained comments from officials at the:

- Administrative Conference of the United States.
- CSC's Advisory Committee on ALJs.
- Administrative Office of the United States Courts.
- Veterans Administration's Board of Veterans Appeals (BVA).
- U.S. Tax Court.
- Federal Administrative Law Judge Conference.
- Bureau of Hearings and Appeals (BHA), Social Security Administration (SSA).
- Standing Committee on Administrative Law Judges, Federal Bar Association.
- Professor Arthur S. Miller, George Washington University Law School.

--Chief Administrative Judges, Federal Trade Commission, Federal Energy Regulatory Commission, U.S. Coast Guard, Department of the Interior, and Federal Communications Commission.

--Executive Director, Federal Energy Regulatory Commission.

Some of these officials felt that, because we did not review all agencies employing ALJs, our observations may apply in differing degrees to individual agencies. Nevertheless, there was general agreement that reform was needed in this area.

In addition, we discussed and obtained information regarding ALJ matters with CSC officials, including the Executive Director and Director of the Office of ALJs. Our focus was on personnel management for ALJs and other Federal employees and CSC's and other agencies' role in this regard. Information was also obtained on alternative methods to formal adjudication of administrative cases, standards of performance, evaluation of ALJ productivity, and background and history of APA and ALJs.

We reviewed the information which CSC received in response to the "Report of the Committee on the Study of the Utilization of Administrative Law Judges" (La Macchia study) questionnaire sent to chief ALJs, ALJs and Government attorneys. In addition, we examined previous studies of the system of administrative law, including the organization and procedure of formal adjudication, and analyzed the APA of 1946 and regulations and policies pertaining to formal adjudication. We also read numerous articles and studies concerning ALJs and the APA. (See app. III.)

At the four agencies visited, we reviewed the case processing system for selected cases and evaluated the personnel management system, the use of ALJs and staff, and the control exercised over ALJ performance. We did not evaluate the correctness of ALJs' decisions. We also gathered statistics on ALJ productivity, determined the extent of case backlogs and case processing times, and discussed case processing

delays with agency officials and chief ALJs to determine efforts to overcome problems noted. A previous review 1/ conducted during 1976 examined many of these same areas at SSA.

We recognize rulemaking is a viable alternative for administratively handling certain types of cases. However, this report does not address the rulemaking process since the role of ALJs is greatly concentrated in the adjudicatory process. 2/

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1/"Problems and Progress in Holding Timelier Hearings for Disability Claimants," HRD-77-173, Oct. 1, 1976.

2/For a general discussion of this subject see: Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Reform, 118 U. Pa. L. Rev. 485 (1970).

## CHAPTER 2

### OPPORTUNITIES TO IMPROVE

### THE ADJUDICATION PROCESS

Although the Congress enacted the Administrative Procedure Act to resolve conflicts promptly and fairly, timely final decisions are not being made because the process is burdened with extensive agency review and the use of more complex and judicial procedures than necessary to resolve some cases (overformalization). These processes increase the time and money being spent to reach final decisions and raise doubts about the impartiality provisions of the administrative process being achieved.

### ADMINISTRATIVE LAW AND THE APA

The Congress enacted the APA to reform the adjudication of cases by prescribing various standards and ways to improve the administrative adjudication process. The APA's basic purposes:

1. Require agencies to keep the public currently informed of their organization, procedures, and rules.
2. Provide for public participation in the rulemaking process.
3. Prescribe uniform standards for the conduct of formal rulemaking and adjudicatory proceedings.
4. Restate the law of judicial review.

During Senate consideration of the APA, Senator McCarron said:

"\* \* \* The purpose [of the bill] is to improve the administration of Justice by prescribing fair administrative procedure, (it) is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guarantees of due process in administrative procedure." (Emphasis added.)

Subsequently, John W. Macy, Jr., former Chairman, CSC, stated:

"The Act sought to afford all affected by administrative powers a means of knowing what their rights are and how they may be protected, to prescribe minimum procedural requirements for making general regulations and for adjudicating particular cases; and to state clearly the jurisdiction of the courts."

Thus, APA seeks to provide justice, in a fundamentally fair way, to those who are affected by the actions of administrative agencies. This goal, however, is not being fully achieved.

#### DELAYS IN THE PROCESS

After hearing cases, which take an average of 1 to 5 days each, the Administrative Law Judges and agencies together take hundreds, in some instances thousands, of days to reach final decisions. The following chart shows the average (mean and median) time involved in completing hearings, reaching initial decisions, and performing the agency reviews for high volume type cases handled by the Department of Labor, Occupational Safety and Health Review Commission, Interstate Commerce Commission, and National Labor Relations Board.

Agency	Length of hearing	<u>Average Number of Days To Reach Final Decision</u>				Total from hearing to final decision when reviewed	Number of cases
		Hearing to Judges' decision		Agency review			
		Mean	Median	Mean	Median		
Labor (note a)	1-2	124	110	157	131	281	137
OSHRC (note b)	1	169	141	437	511	606	173
ICC (note c)	1-2	136	89	250	216	386	1,091
NRLB (note d)	5	N/A	89	N/A	120	N/A	1,009

a/Federal Labor Management Relations cases.

b/Health and Safety violation cases.

c/Motor Carrier Operating License Application cases.

d/Unfair Labor Practice cases.

The Senate Committee on Governmental Affairs 1/ also was concerned with delay in the process. It looked at 11 types of cases at 7 different agencies 2/ and determined that on an average none took less than 800 days from referral to the final decision. Of the 11 types of cases, 5 took from 1,109 to 1,377 days to reach the final decision. The Committee concluded that most Federal regulatory proceedings are characterized by seemingly interminable delays and noted that, in addition to being very costly for Government and consumers and industry, undue delay prevents agencies from fully achieving their purpose.

Of the 692 ALJs responding to our question on delay, 67 percent said there is unnecessary delay in the adjudication process. Other individuals knowledgeable about the process also have cited delay as a critical problem to achieving fair and expeditious resolution of conflicts. For example, in 1971 the chairman of the Administrative Conference of the United States wrote:

"While administrative agencies were created to provide expeditious determinations of matters that courts and legislatures could not effectively handle, a continuing chorus of complaints of delay in the administrative process indicates that the ideal has not yet been achieved."

The President's Advisory Council on Executive Organization (the Ash Council Report) also concluded in 1971 that

"over judicialization of the administrative adjudicatory process as evidenced by systematic full commission review of agency hearing examiner decisions, frequently characterized by de novo review [3/] of findings and legal issues raised in hearings has unduly prolonged proceedings and nurtured high case backlogs leading to ineffective uses of agency resources and unjust burdens on the parties."

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1/See footnote 1/, p. 4.

2/Five of the 11 cases involved ratemaking at CAB, FMC, ICC, and FPC. The other six cases involve approvals of mergers and securities issues at ICC, antitrust cases at FTC, nuclear powerplant licensing at NRC, merger cases at CAB and AM radio cases at FCC.

3/de novo review is essentially a complete review of the case.

Numerous causes have been identified as contributing to delay; cumbersome and overformalized agency procedures; tactics outside parties use to forestall action; generic problems--the system itself; lack of penalties for parties or protestors who do delay; and lack of clear policies, priorities, standards, and deadlines. This chapter focuses on two factors--the agency review process and overformalization.

#### AGENCY REVIEW OF ALJ DECISIONS

The agency review of ALJ decisions for the selected cases at Labor, ICC, and OSHRC involves multiple review layers and numerous personnel and highlights the problems inherent in the current review process. For example, before the Assistant Secretary for Labor-Management Relations at Labor makes a final decision in a Federal Labor-Management Relations case an ALJ adjudicates, the ALJ decision will have been reviewed by:

- The Director, Division of Operations, Office of Federal Labor-Management Relations.
- A GS-15 supervisor in the Division of Operations.
- A staff member in the Division.
- The agenda committee consisting of the Director and Deputy Director of the Office of Federal Labor-Management Relations; the Director, Division of Operations, and his three supervisors; and the Director, Division of Regulations and Appeals.
- The case committee consisting of an associate solicitor or deputy associate solicitor, Director or Deputy Director of the Office of Federal Labor-Management Relations, Director of the Division of Operations, and Director of the Division of Regulations and Appeals and sometimes a representative of the Assistant Secretary's office. 1/

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1/Since completing our review work in November 1977, Labor is proposing a change to its unfair labor practice proceedings that will provide for the Assistant Secretary to accept the recommendations of ALJs to the extent they are consonant with law and regulations of other appropriate authorities unless timely exceptions are filed.

An internal study at ICC points out that section 17 of the Interstate Commerce Act "mandates a cumbersome appellate process resulting in repetitious reviews." With the exception of railroad cases, current procedures at the agency provide as many as four administrative appeals before an ALJ's decision becomes administratively final. ICC has been unsuccessful in having the Congress amend the legislation to generally allow only one administrative appeal after the ALJ's initial decision and a further appeal only if ICC finds the case involves an issue of general transportation importance, new evidence or changed circumstances.

The review process at OSHRC is also extremely cumbersome. The Office of Central Review, staffed with seven people, prepares an initial memo summarizing the facts, identifying problems or issues, and recommending whether the Commissioners should direct the case for review. Central Review sends the memo to the Commissioners who have their staffs (each Commissioner has 11 people on his staff) review the decision, Central Review's initial memo, and a Petition for Discretionary Review, 1/ if filed. The staff then recommends whether to direct the case for review. Directed cases are returned to Central Review which after about a year, prepares a decision memo recommending how Central Review believes the Commissioners should decide the case. A year was taken because the Commissioners, specifically one Commissioner, directed so many cases for review. (In 1976, 92 percent of the ALJ decisions were directed for review but now the Commissioners intend to use more discretion and to limit review primarily to cases where one of the parties objects to the ALJ decision.) Since a year has gone by, Central Review must, however, analyze the case again. Central Review then sends the decision memo to the Commissioners, who give it to their staffs for review.

One Commissioner's staff:

- Limits review to issues the parties raised in the Petition for Discretionary Review, including reviewing the record.
- Applies limited review standards to ALJ findings of fact.
- Reviews extensively the Central Review memo because they believe it contains many errors.

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1/A party uses a Petition for Discretionary Review to ask the Commissioners to review certain aspects of the case.

--Prepares a separate decision memo for the Commissioner.

The other commissioner's staff: 1/

--Reviews all significant issues raised in the hearing, and the ALJ's findings of fact and conclusions of law.

--Applies preponderance of evidence standards to ALJ findings of fact, and, except for credibility determinations, does a complete review of the record.

--Usually prepares a supplementary memo for the Commissioner.

After the staffs have completed their review, the Commissioners' Chief Counsels meet to reach agreement on the final decision. If they cannot agree, the Commissioners must meet to reach a final decision.

Agencies review ALJs' decisions primarily because (1) they want to maintain decision and policymaking authority and (2) in some instances, because agencies have little assurance that some ALJs' decisions are reasonable and in accordance with agency policy. (Ch. 3 discusses the reasons for agency lack of confidence in ALJs in more detail.) While agencies have the authority to review ALJ decisions, it would seem that less expensive review alternatives are available. For example, NLRB reviews ALJ decisions on unfair labor practice cases only when one of the parties files exceptions. From fiscal years 1975 to 1977, parties have filed 693, 824, and 910 exceptions, respectively. Since the number of exceptions are increasing, NLRB is trying to change its procedure to review only those exceptions deemed to have merit. A provision of the Labor Reform Bill will allow NLRB to summarily affirm ALJ decisions in appropriate cases.

In 1968 the Administrative Conference of the United States recommended that the Congress amend the APA to authorize an agency to accord finality to the ALJ's decision in the absence of a prejudicial procedural error, a clearly erroneous finding or an exercise of discretion or decision of law or policy which is important and which the agency should review. While the Congress has not amended the APA, it has taken some steps in this direction.

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1/The third Commission position was vacant at the time of our review.

In November 1977 the Congress passed Public Law 95-164, which among other things, created the Federal Mine Safety and Health Review Commission. This law gave the decision of the Commission's ALJs greater finality by limiting the agency's review authority to cases which (1) are appealed, (2) may be contrary to law or Commission policy, and (3) present a novel policy question.

#### Effects of extensive agency review

Extensive agency review cost money. For example, at OSHRC the personnel cost to review is approaching the cost to make the initial decision. In fiscal year 1976, review personnel cost at OSHRC was \$1.38 million; ALJ personnel cost \$2.125 million. Considered in relation to the total annual Federal appropriations for regulatory agencies of about \$3 billion (see ch. 1), and the extensive agency review processes previously identified, it is readily apparent that large sums are directly related to the review process.

Further, when agencies take hundreds, even thousands of days to reach final decisions, the impact is felt in other ways. For example, unfair labor practices may continue to exist, licenses may not be granted to operate businesses, health and safety violations may go uncorrected, and rightful claims for benefits may not be granted individuals.

The Congress designed the APA to assure

"that those who hear the case \* \* \* are an important factor in the decision process \* \* \* that the views of agency personnel are not unduly emphasized or secretly submitted and that the official record alone is the basis of decision."

The current agency review process, however, raises questions as to whether this is in fact being achieved. For example, as reported in ICC's July 6, 1977, study "Improving Motor-Carrier Entry Regulation:"

"There is a general feeling that many initial decisions, and even appellate division decisions which are not administratively final, are reopened upon petition not because the decision below is clearly erroneous, but the judgement of one decisional unit of the Commission has been substituted for that of another. \* \* \*"

## OVERFORMALIZATION CAUSES DELAY

The July 1977 Senate Committee on Governmental Affairs report concluded that formal adjudicatory proceedings also unnecessarily delay decisions in many cases. The report listed 23 types of administrative disputes that could be decided through modified or less formal judicial procedures and estimated that for every resultant 10 percent reduction in time taken to resolve the 1,300 cases involving such disputes in 1975, a savings of 172 years would accrue. As previously noted, such delays are very costly to the Government, consumers, and industry.

### Less formal procedures can satisfy due process requirements

Efforts to simplify the process used to resolve administrative disputes have in the past been resisted, primarily on the basis that formality is required to guarantee due process. While this is a concern, recent court decisions confirm that using less formal procedures can be consistent with due process requirements.

Due process, guaranteed by the 5th and 14th amendments to the Constitution, imposes constraints on administrative agencies regarding the manner in which they may render decisions or rulings which affect protected property interests of individuals. Where a protected property interest exists, due process requires notice and an opportunity to contest any deprivation of the interest, which generally requires some form of a hearing. 1/

However, due process does not require applying inflexible rules or complex procedures. Rather, it is flexible and calls for only such procedural protections as the particular situation demands. 2/ Accordingly, resolution of whether any given administrative procedures are constitutionally sufficient requires an analysis and balancing of the governmental and private interests that are affected. As stated in the Matthews v. Eldridge case, 3/

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1/Matthews v. Eldridge, 424 U.S. 319 (1976).

2/See Morrissey v. Brewer, 408 U.S. 471 (1972).

3/Matthews v. Eldridge, supra at 335.

"\* \* \* identification of the specific dictates of due process generally requires consideration of three distinct factors:"

\* \* \* \* \*

"\* \* \* first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Other than the broad general guidelines of notice and opportunity to be heard, there are no fixed due process requirements which administrative adjudicative proceedings must satisfy. The intricacies of this requirement necessarily depend upon given circumstances and a balancing of the governmental and private interests concerned.

As to the specific relation between the basic due process requirements and the procedural requirements of APA, Supreme Court decisions indicate that due process does not require the application of the formal adjudicative procedures of the APA in all types of administrative hearings. 1/ Instead, it is required that hearings be "fundamentally fair," within the context of the above-described balancing test. 2/ Nor does due process require that ALJs, appointed under section 11 of the APA (5 U.S.C. 3105), preside over every administrative hearing in which a claim, benefit, or other matter is contested. Under appropriate circumstances a qualified individual other than an ALJ may well handle a contested matter consistent with due process requirements.

Finally, highly formalized procedures that contribute to delaying final resolution of certain administrative disputes can deny effectively rather than guarantee due process. For example, one court 3/ ruled that the extensive time required for citations claimants to obtain a hearing before an ALJ and

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1/Goldberg v. Kelley, 397 U.S. 254, 267-70 (1970).

2/Richardson v. Perales, 402 U.S. 389 (1971).

3/White v. Mathews, 559 F 2d. 852 (2d. Cir. 1977).

notification of the decision in various social security benefit cases constitutes unreasonable delay and can be in violation of the Social Security Act, which requires that any claimant be afforded a reasonable opportunity for a hearing.

Simplified proceedings can be used to adjudicate certain APA cases

Among the Senate Committee's recommendations to reduce delays in the administrative process was to amend APA to clarify the power of an agency to adopt "streamlined" procedures for deciding certain APA cases. Such simplified procedures include

- restricting or eliminating oral testimony and both oral and written cross-examination which are not essential to resolve specific factual issues on which the case may turn;
- allowing oral, direct and cross-examination only when the witness' perceptions, memory, or honesty is at issue;
- permitting agencies to develop routine case procedures under which the agency staff receives and organizes written evidence and submits it directly to agency members, and employee board, an ALJ or other appropriate decisionmaker;
- allowing agencies, by rule, to explicitly direct ALJs to use a firmer hand in guiding adjudicatory proceedings and to establish deadlines for parties to submit evidence; and
- permitting agency rules to provide that only written evidence will be accepted unless oral testimony or cross-examination is essential.

On February 6, 1978, the Committee introduced the Regulatory Procedures Reform Act (S-2490) to place these and other recommendations into law. While passage of this bill could help alleviate the problem of delay in adjudicating APA cases, two other processes which, with some modification, appear to be viable alternatives to the highly formalized procedures are now being used to adjudicate some cases at OSHRC and Social Security Administration's Bureau of Hearings and Appeals (BHA). These alternatives are the simplified case procedures used at the U.S. Tax Court to resolve tax disputes and the procedure followed by the Board of Veterans Appeals for benefit claims.

## Simplified case procedure and OSHRC disputes

The procedure used by the U.S. Tax Court offers people contesting Internal Revenue Service tax rulings of \$1,500 or less the option of appearing before a special trial judge in a less formal environment or at a formal hearing before a tax court judge. The decision in the simplified procedure is final, but many people nonetheless select this alternative and, on an average, their cases are completed in less than half the time required under the formal process.

A similar procedure could be used for some OSHRC cases. Although some of its cases involve significant and complex issues, many are relatively simple and lend themselves to less formal procedures--possibly not even requiring an ALJ's involvement. For example, in some cases the only issue being contested is the penalty amount or the time being given to abate the violation. It would also appear that cases involving a single issue such as whether "hard hats" should be worn, whether fire extinguishers were empty and in their proper location, or where safety and health records are maintained at industrial plants, could be adjudicated using simplified procedures.

Both the current and former OSHRC Chairmen agree that the adjudication process for many cases should be simplified. Several proposals to effect such changes have been made, but have not yet been adopted. During our review, the two remaining Commissioners were awaiting appointment of a new Commissioner before reconsidering adoption of simplified procedures.

While the procedure used by the U.S. Tax Court was not among those OSHRC previously considered, the Chief ALJ indicated he would like to see it adopted. The current Chairman who also favors simplified procedures, indicated that he would still review those cases where employees did not participate in a case.

A number of ALJs responding to our questionnaire also indicated the simplified tax procedure might be appropriate for use at other agencies. Of the 680 ALJs commenting on the possible use of this procedure at some agencies, 29 percent said yes, 9 percent said no, and 62 percent said they did not know. Among the agencies most frequently mentioned were OSHRC, NLRB, SSA, and ICC.

## BVA procedure and its applicability to BHA cases

Although the Veterans Administration benefit cases are for the most part similar to those BHA handles, the former are

not subject to the formalized procedure specified by the APA. As a result, BVA cases are processed more expeditiously and at less cost to the taxpayer. For example, in fiscal year 1976, BVA took an average of 3 months to resolve cases which were appealed from the Veterans Administration regional office process. This is in contrast to the 10 months that BHA took to resolve the claims from its regional process.

The Veterans Administration maintains a number of regional offices throughout the United States, each having an adjudication division to handle the claims of veterans or their dependents. This division develops the record, holds a hearing if the claimant desires, and makes a decision on each claim. In instances where an adverse decision is made, there is a right to an appeal to the Administrator of Veterans Affairs. BVA, composed of panels of three individuals supported by seven or eight attorney advisors, processes each appeal. It processes about 25,000 to 30,000 appeals each year. Its decisions are final and not appealable to any court.

Only 20 percent of the 750 ALJs responding to our questionnaire believed the informal BVA system could be used to adjudicate SSA disability cases. The primary objection to its use was the provision that claimants could not appeal BVA's final decision. This lack of appeal right should not, however, foreclose using the Veterans Administration system. Modifications, including reinstatement of appeal rights, can readily be made to the system to make its use acceptable in other individual benefit type cases.

#### Guidelines for applying the APA

The former Chairman of CSC and others have expressed concern about the increased number of cases requiring formal adjudication and the lack of standards or parameters for the Congress to use in determining when the APA provisions should apply. In a letter to Senator Eastland, Chairman, Committee on the Judiciary, the former CSC Chairman Hampton expressed his concern about a recent "\* \* \* rather unusual departure from one of the fundamental concepts underlying enactment of the APA." He went on to state that during the first 20 years after passage of the APA, the number of regulatory agencies subject to its coverage did not change significantly, but that recently "\* \* \* the basic concept underlying APA and the lines that have limited the agencies (and the types of cases) subject to its provisions have become blurred \* \* \*." In commenting on a tendency to extend provisions akin to those of the APA to a variety of new programs, the Chairman said:

"The language of the bills which have been of particular concern to the Commission is undoubtedly intended to insure that due process is extended to all classes of claimants through fair hearing procedures. However, the basic procedural safeguards which constitute due process do not require the application of the APA to all types of administrative hearings."

The former Chairman also noted that a proliferation of congressional committees now propose APA-oriented bills without any apparent overall coordination and that several recent statutes are unclear or ambiguous as to whether the proceedings should be conducted under APA provisions. He further added that this latter situation places the Commission in a untenable position. If it concludes erroneously that ALJs are required by an agency, the Commission would contribute to overjudicialization. Conversely, a decision that ALJs are not required when in fact they are, could lead to readjudicating vast numbers of cases.

The Research Director of the Administrative Conference of the United States expressed similar concerns. He believes some cases now adjudicated formally by ALJs may not need the formality of the APA to provide due process, while others now adjudicated informally may need the additional formality. He believes this is a significant issue because criteria does not exist for the Congress to use in deciding when to apply formal APA provisions. He also noted that applying the APA to cases in which it is not needed is overjudicialization, which results in delays and higher costs than necessary to provide due process. Too little formalization, on the other hand, leads to inadequate due process protections.

The testimony of Robert G. Dixon, Jr., Professor of Law at Washington University of St. Louis, Mo., before the Subcommittee on Social Security, House Committee on Ways and Means, on September 26, 1975, is further indication of the problem. He stated:

"\* \* \* The handling of benefits and awards to millions of people is a feature of the welfare state unknown to past generations and not well-handled simply by applying the highly formalized procedures of the ICC and other regulatory agencies. We need a fresh approach to procedure and to concepts of basic fairness in this developing era of mass justice. A tendency simply to expand the coverage of the old Administrative Procedure Act is not the answer."

Professor Dixon went on to quote Judge Henry J. Friendly of the Second Circuit, U.S. Court of Appeals, who said:

"As government impinges more and more upon the citizen and the citizen demands more and more from the government, our traditional systems of adversary administrative hearings and full-scale judicial review has become unworkable. If we persist in it, the country will become ungovernable. Yet we cannot abandon it without devising substitutes that will assure the citizen, not of perfection but of reasonable fairness."

Professor Dixon concluded:

"It is time for the Congress, with all the aid it can muster, to rise above the traditional piecemeal approach to welfare benefit determination, and applications of the Administrative Procedure Act, and grade assignments for hearing officers, and engage in new thinking and tidying up."

#### Effect of a lack of guidelines

The lack of guidelines or criteria has resulted in (1) a significant increase in the number and types of cases subject to formal APA adjudication, (2) an increase in the number of ALJs required to hear them, and (3) extensive delays. For example, in 1947, 15 agencies employed 196 ALJs, while in April 1977, 28 agencies employed 826 permanent and 199 temporary ALJs. Most of the increase is attributed to SSA, which employs more than 615 ALJs--over half the total.

The number of ALJs is continuing to increase. CSC, in November 1977, was acting on requests for ALJs from SSA (105), Labor (3), the Interior (5), and the International Trade Commission (1). While NLRB has not yet made a formal request, it is seeking 30 more ALJs to handle its increasing workload. Further, the Congress has increased the number of supergrade ALJ positions by 100, and statutes have been enacted creating the Federal Energy Regulatory Commission and the Federal Coal Mine Health and Safety Commission. Both statutes will require more formal adjudications and more ALJs. Other major programs enacted since 1970, which require formal hearings and appointment of ALJs include occupational safety and health cases, consumer product safety cases, longshoremen and harbor workers compensation cases, and water pollution cases.

The following table showing the number of requests for hearings at SSA is further indication of the growth in the number of cases being formally adjudicated.

Social Security Administration  
Requests For Hearings

<u>Fiscal year</u>	<u>Requests for hearings</u>
1970	42,573
1971	52,427
1972	103,691
1973	72,202
1974	121,504
1975	154,945

The increased number of cases subject to formal APA adjudication coupled with the limited agency resources to process such cases will inevitably lead to even greater administrative cost and delays unless steps are taken to simplify the process. As stated by Professor Dixon during his congressional testimony (see p. 22):

"There is a need for Congress to give more attention to the significant difference between the adjudication to benefit claims, where the intake numbers millions per year, and the older and more familiar type of regulatory administration exemplified by the Interstate Commerce Commission and later independent commissions. Our perceptions of the administrative process, of administrative laws, and of the proper content of the Administrative Procedure Act have been drawn almost exclusively from the leisurely, low-volume, high visibility, rich-litigant world of regulatory administration.

"We have all heard the expression: 'you get the justice you pay for.' The unspoken premise is that in a properly organized society there would be enough resources to pay for all the justice desired. Only when pushed as we are being pushed, I suggest, in the rapidly expanding field of claim adjudication, do we begrudgingly face the question: how nearly judicial should administrative claims determination be? Is it feasible to give every one of the millions of claimants annually in the programs I have mentioned an attorney, a full evidentiary hearing, an administrative appeal, and court review? Indeed, is it

necessary, in order to achieve an acceptable level of accuracy and consistency in treatment of similar claimants? An even more serious question is whether such high formality does achieve the virtues of accuracy and consistency among claimants. The answer is no, according to some provocative evidence I gathered for my book, Social Security Disability and Mass Justice: A Problem in Welfare Adjudication (Praeger, 1973).

"And yet, despite the problems and doubts suggested by this series of questions, I feel that it is the high-formality model developed for regulatory administration, and sanctified by the Administrative Procedure Act, which many feel to be part of the American birthright for all benefit program claimants against the government. I number here the American Bar Association, the so-called Public Interest Group firms, and private-client-oriented lawyers generally. I too, have a thirst for perfection. But resources of both time and talent are not in infinite supply."

## CHAPTER 3

### AGENCY PERSONNEL MANAGEMENT SYSTEMS

#### ARE NOT PARTICULARLY EFFECTIVE

Although Administrative Law Judges' decisions impact on the national economy and the claims for administrative justice from thousands of citizens, little is being done to monitor ALJ performance. ALJs are agency employees and, one would expect subject to agency management control--which in the case of ALJs, is exercised by a chief ALJ designated by the agency head. However, the Administrative Procedure Act specifically precluded agency evaluation of ALJ performance and omitted assigning this responsibility to any other organization.

The above omission has, in effect, prevented agencies from establishing effective ALJ personnel management systems. The lack of performance evaluations, including development of objective standards, 1/ has adversely affected agencies in (1) ascertaining ALJ needs, (2) providing the Civil Service Commission information regarding its ALJ recruiting and certifying efforts, (3) establishing ALJ training and development programs, and (4) identifying those ALJs whose performance might warrant the initiation of adverse action proceedings. Moreover, the situation sheds some light on agencies' proclivity to extensively review ALJ decisions. Although not a particularly efficient or economical alternative to an effective personnel management system, such review nonetheless appears to be the sole feasible vehicle for agencies to assure the quality of ALJ decisions.

#### PERSONNEL MANAGEMENT AND THE ALJ

Among the more significant personnel management areas applicable to most Federal employees are:

- Planning for personnel requirements.
- Recruiting and selections.
- Making economical and effective use of staff.

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1/The work results or accomplishments expected in terms of objective units which are the expressed measures of the quality, quantity, timing, and level of achievement expected by management of an individual's work results.

- Evaluating employee performance.
- Developing and motivating employees.
- Separating unsatisfactory employees.
- Establishing effective and appropriate management reviews, reports, and feedback to ascertain the effectiveness of the personnel management system.

While each of the above is important, performance evaluation--including development of work standards--is critical. Without such evaluation it is extremely difficult to effectively accomplish any of the remaining items.

APA, section 11, however, contains provisions which set ALJs apart from other Federal employees. The Congress intended to make ALJs "a special class of semi-independent subordinate hearing officers" by vesting control over their compensation, promotion, and tenure in CSC to a much greater extent than other Federal employees. It was hoped that this would insulate ALJs from agency pressure and prevent agencies from unduly influencing their decisions. Section 11 of APA also excludes ALJs from agency ratings by exempting them from the provisions of the Classification Act of 1923, which provide for in-grade promotions on the basis of employee efficiency ratings made by the employing agency. 1/ APA, however, did not provide an alternative method of evaluating ALJs' performance.

The ALJs' semi-independent status was reinforced by the Supreme Court in Ramspeck v. Federal Trial Examiners Conference (345 U.S. 128). The Court ruled that ALJs were not totally independent and held that the objective of the APA was merely to prevent agency abuse of ALJs' integrity. CSC has also held that the APA did not intend to establish ALJs as separate and autonomous agencies within agencies. The Senate Committee on Governmental Affairs also concluded that ALJs are not completely independent of CSC or the regulatory agencies in which they are housed.

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1/Classification Act of 1923 has been superseded by the Classification Act of 1949 (act of October 28, 1949, 63 Stat. 954). The provisions of the act, as amended, which correspond to section 7(b)(2) and (3) and section 9 of the 1923 act, appear in 5 U.S.C. 1121-1123, 2001-2007.

Despite the foregoing, many ALJs continue to contest the view that they are subject to any degree of agency personnel management control. Generally, they feel that they should have the same freedom as Federal judges. 1/ In this regard, the actual degree of ALJ independence was addressed by the Chairman of the Committee on Status and Compensation of the Federal Administrative Law Judge Conference in June 1977 testimony before the Subcommittee on Civil Service, House Committee on Post Office and Civil Service. Appearing for the 500 member conference, in what perhaps is an overstatement of ALJs' legal status, he stated that ALJs do not have superiors and thus are not regulated or supervised; that they cannot be fired for incompetence; and that they are totally independent from their agency and for this reason ALJs "don't have to curry their (agency's) favor because they (the agency) can't fire us." The strong stand taken by ALJs, relative to their being totally independent, has been a major contributor to agencies' reluctance to institute effective ALJ personnel management systems.

#### The role of the Chief Administrative Law Judge

Most agencies have designated a chief to supervise the ALJs' work. One of the chief's major responsibilities is to ensure agency hearings are conducted efficiently, expeditiously, and in accordance with professional standards. His/her specific duties include

- maintaining standards of performance;
- assigning work;
- administering a budget and approving expenditures;  
and
- providing leadership, guidance, training, and direction.

A 1964 Attorney General's opinion 2/ cited the above mentioned duties and called the chief one of the agency's principal administrative officers. The Senate Committee on Governmental Affairs recommended 3/ establishing performance

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1/Page 3 points out a significant distinction between ALJs and Federal judges.

2/42 OP Att'y Gen 19 (1964).

3/Study of Federal Regulation, Vol. IV--Delay in the Regulatory Process, July 1977.

standards and noted that the chief's most important duty is overseeing ALJ's productivity and quality of work. However, even when a chief attempts to oversee ALJ performance, he/she is frustrated by a lack of (1) standards detailing what is expected of ALJs and (2) authority to evaluate ALJ performance. As a result, he/she has little basis for counseling, training, or initiating adverse action proceedings.

#### Managerial authority exercised by chiefs

The chiefs at the four agencies we reviewed--which employ about 25 percent of all ALJs--varied significantly in the degree of control they exercise over ALJ productivity and work quality. The chiefs at ICC, Labor, NLRB, and OSHRC, while having access to productivity data, have not established objective performance standards in terms of either quantity or quality of work.

Without such standards, productivity data is of limited value. For example, although ICC has developed information on individual ALJ time spent on cases and the number of cases adjudicated, it is not used to evaluate the ALJ. The chief believes that formal evaluation of ALJ performance would violate the APA and infringe upon their independence. He believes the most effective procedure to improve performance is to provide "dignified encouragement" to those ALJs who are not as productive or effective as he would like. He also believes productivity can be increased most effectively by selecting highly motivated candidates, providing a work environment where ALJs are treated as professionals, and encouraging under-achievers, who are eligible, to retire.

The chief at OSHRC maintained information on individual ALJ productivity. He believed that ALJ output can and should be measured. Accordingly, he informed each ALJ in writing of officewide productivity and how their performance compared with the office average. In these letters, the chief complimented those ALJs performing to his satisfaction and encouraged better performance by the remainder. The majority of the ALJs did not consider this process an infringement on their independence. For those who did not object, the chief also reviewed their decisions and critiqued their writing style. However, he did not comment on the substance of their decisions because he believed this would constitute interference with the ALJ decisionmaking process.

The chief at NLRB also attempts to assess ALJ productivity. He calculates an office average based on the number of cases the ALJs have decided and every 3 months he

advises the ALJs of their productivity and how it compares to their peers and the office average. He does not, however, read the ALJs' decisions to evaluate their writing style.

The chief at Labor manages differently. He recently reserved a room specifically for a series of charts which are intended to maintain control over case assignments and ALJ productivity. The chief expects the ALJs to visit the chartroom to ascertain how their productivity compares with their peers. The chief also stated he has occasionally discussed the writing style of some decisions with certain ALJs.

While productivity information is available at all four agencies, only OSHRC used it to evaluate individual ALJs. When the chief was not satisfied with the performance of some ALJs, he notified them that he planned to take further action if they did not improve. However, he stated that the exercise had not been particularly successful. The productivity of some ALJs had not reached acceptable levels and he was reluctant to take further action because an ALJ had never been removed for poor performance.

In contrast, the Bureau of Hearings and Appeals, Social Security Administration, has established production goals and monitors and evaluates an ALJ's work. The chief ALJ said that while management cannot interfere with the decisional process, it has the responsibility to manage the ALJ's work to achieve agency goals. While we have not looked at the BHA system in detail, we were advised that each judge should be able to complete 26 cases per month and maintain the quality BHA expects.

The Center for Administrative Justice points out in its BHA study 1/ that the judges have

"complained bitterly about the statistical information compiled concerning ALJ production and reversal rates. In all these areas some ALJs characterized BHA's actions or powers as attempts to undermine ALJ independence."

The Center, however, makes the point that if BHA does not have information on how and how fast judges decide cases, the agency is denied the capacity to evaluate the performance of its employees. The Center concludes that

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1/Final Report Study of the Social Security Administration Hearing System, October 1977, Center for Administrative Justice.

"If the agency's responsibility to manage the hearing process, and its ability under the APA to remove ALJs for cause, mean anything, they must include collecting the information necessary to exercise judgment."

The chief ALJ informs us that BHA has made some judgments concerning ALJ effectiveness. Recently BHA initiated actions with CSC to remove an ALJ because he had not been meeting the productivity standards. The chief also said that BHA is considering taking action against other judges for this reason.

#### ALJ PRODUCTIVITY

In June 1973, CSC established a committee, chaired by its Deputy General Counsel, composed of 5 ALJs and 6 chiefs to study the overall effectiveness of the ALJ program in the 22 agencies in which they were then serving. The group's final report, 1/ stated:

"The best efforts of the Committee to quantify ALJ productivity were largely unavailing. Incomplete record keeping and the absence of valid norms against which performance could be measured were at the root of this problem."

\* \* \* \* \*

"The Subcommittee on ALJ productivity was unwilling to accept the view, consensus or otherwise, that production and elapsed time are totally immeasurable and impossible of comparison on the basis of any objective standard \* \* \*. In the view of the Subcommittee two standards of performance are possible of application to ALJ productivity. One is system imposed; the other peer imposed. The latter was favored as generating less antagonism and more cooperation than a standard imposed by management."

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1/Report of the Committee on the Study of the Utilization of Administrative Law Judges--CSC, July 30, 1974.

The gathering of information to determine ALJ productivity still appears to be a problem. The responses to our questionnaire indicated that only 7 of the 13 agencies, with a sufficient number of ALJs responding to allow valid analysis, had a system to monitor individual ALJ productivity. Their responses, however, regarding the systems' benefits and usefulness, varied considerably. While some indicated that the system at their agency increased productivity and improved motivation, there was not a majority view that the systems, as perceived, are clearly valuable and useful. Four of these seven agencies were included in our review and, as stated previously, all four had access to productivity data but none had established objective standards against which to measure performance.

Agency officials, chief ALJs, ALJs, and outside parties have all indicated that while most ALJs perform satisfactorily, others do not. Until objective standards are established and actual performance measured against such standards, no accurate determination as to the extent ALJs are performing satisfactorily can be made.

Notwithstanding our inability to objectively make such a determination, we did note that the productivity of ALJs within agencies varied significantly. For example, in fiscal year 1975, 62 ALJs who were at NLRB the entire year averaged 18 case dispositions; however, when analyzed in terms of the most and least productive, 9 ALJs averaged 29 cases, 30 ALJs averaged 19 cases, and the 23 least productive ALJs averaged 12 cases. In 1976 there was an almost threefold production differential between the most and least productive ALJs. It should also be noted that during fiscal years 1972 to 1976 eight NLRB ALJs consistently performed below each year's office average.

A similar analysis at OSHRC showed that in 1975, 34 ALJs averaged 62 case dispositions: 6 ALJs averaged 95 case dispositions, 15 ALJs averaged 66 cases, and the 13 least productive ALJs averaged 44 cases. Accordingly, there was more than a twofold production differential between the most and least productive ALJs during this period. In 1976 the most productive ALJs nearly doubled the output of their least productive peers. Further, from 1973 to 1976, eight OSHRC ALJs performed below the office average.

The chiefs at NLRB and OSHRC were aware of the wide variations in ALJ productivity and both had spoken to some ALJs and encouraged them to do better. The chiefs also noted

that while individual case complexity can differ significantly, their policy of rotating case assignments, as set out in the APA tends to equalize ALJ workload in terms of case complexity over a period of time.

Although the lack of standards and evaluation precludes determining the extent of the problem, the above-noted comments of individuals involved in the process, the significant variances in productivity of ALJs handling cases of similar complexity, and the consistent low production of certain ALJs indicate that some ALJs are not performing satisfactorily.

#### PROBLEMS ASSOCIATED WITH THE LACK OF STANDARDS AND ALJ PERFORMANCE MEASUREMENTS

As indicated in chapter 2, one reason agencies extensively review ALJ decisions is they have little assurance that some ALJ's decisions are reasonable and in accordance with agency policy. Without performance standards and ALJ appraisal, agencies cannot be confident that ALJs are settling disputes equitably and expeditiously and, practically speaking, have little alternative, short of review, to assure that individual decisions are reasonable and in accordance with agency policy.

The lack of standards and appraisal of ALJ performance also inhibits agencies from effectively performing other major aspects of personnel management. They cannot (1) accurately determine the number of ALJs needed to accomplish their objectives, (2) provide CSC with objective assessments of ALJ performance to be used in determining CSC adequacy in recruiting and certifying ALJs, and (3) provide performance feedback to ALJs essential for their development. In addition, they have no objective basis to initiate adverse action proceedings.

#### ALJ productivity and need assessments

Despite a lack of standards to objectively measure the performance of ALJs currently on board, officials at NLRB, Labor, and OSHRC expressed a need for additional ALJs to handle increased caseloads. As previously noted there is a wide variation in the number of cases disposed of by individual ALJs at NLRB and OSHRC. At ICC we also found that cases normally handled by agency attorneys were being diverted to ALJs to increase their workload. While agencies may in fact need additional ALJs to accomplish their objectives, the aforementioned situations must be considered. Otherwise, as caseloads increase--which has been the case in recent years--agencies may seek more ALJs than necessary.

## Recruiting and certification

CSC is responsible for recruiting and certifying individuals for ALJ positions. As discussed in the following chapter, however, CSC receives little or no objective feedback regarding the performance of those individuals subsequently selected by the agencies to occupy these important positions. As a result CSC has no assurance that it is recruiting and certifying the best possible people.

Another method, suggested by various agency management officials, to obtain the best possible people as ALJs is to do away with initial absolute appointments. While these officials believe that most ALJs do a good job, some do not and the present system for removing an ALJ is cumbersome and time consuming. Rather than provide a person with a guaranteed job from the outset, these officials would like to see a trial period of up to 3 years, where the person can demonstrate through actual work his/her capabilities to do the job. The person's capabilities would then be evaluated by a panel of independent chief ALJs who would recommend that the person be given status as an ALJ or terminated. Information concerning the person's capabilities could be provided by the chief ALJ in charge at that individual's agency, agency management officials, lawyers practicing before the ALJ, claimants with cases before the ALJ, and peers.

If the chief ALJs recommends the ALJ be given status, any future personnel action would have to be initiated through the current procedures as outlined in the APA. If the panel recommends termination, a Federal employee should be allowed to return to his/her previous job. If a trial or probationary period were adopted for ALJs, this practice would be similar to current practices for most Federal employees and to those being recommended in the President's reorganization plan for middle- and top-management levels.

## ALJ training and development

The lack of standards and appraisals also inhibits establishing effective ALJ training and development programs. Without standards, agencies cannot objectively determine specific areas requiring improvement or provide appropriate feedback including training opportunities to correct deficiencies. In this regard, about 75 percent of the ALJs responding to our questionnaire indicated that certain types of training would be beneficial in doing their jobs more expeditiously and effectively. Among the training areas most frequently mentioned were: hearing procedures,

administrative law and regulations, agency policy and procedure, and decision writing.

### Adverse actions

The Congress recently increased the number of GS-16 ALJ positions (P.L. 95-251, 92 Stat. 183, Mar. 27, 1978). CSC, however, is expected to be "tight fisted" in allocating these new positions. The criteria to be followed by CSC in creating these new ALJ positions include eliminating nonproductive members of the current ALJ corps. Without performance standards and appraisals, neither CSC nor the agencies employing ALJs can objectively identify nonproductive ALJs. Accordingly, there is little likelihood that CSC will be able to comply with congressional criteria.

### LACK OF AN EFFECTIVE REVIEW SYSTEM FOR ALJ FINANCIAL DISCLOSURE STATEMENTS

Financial disclosure regulations apply equally to ALJs as well as other Federal employees. Financial disclosure statements, however, are generally not being reviewed by the person making case assignments to see if ALJs might be in a possible conflict-of-interest situation. If an ALJ is in a conflict-of-interest situation questions can then be raised about the fairness with which he/she makes decisions. Analysis of the ALJs' response to our questionnaire shows that over 95 percent of the 323 who responded either said no or don't know to "are financial disclosure statements used in assigning cases?"

In 1965 the President issued Executive Order 11222 which prescribed standards of ethical conduct for Government officers and employees. The President directed CSC to establish guidelines and administer the financial disclosure reporting system for Presidential appointees. The order replaced Executive Order 10939 issued in 1961 as a guide for Presidential appointees and members of the White House staff.

Key provisions of the order state that:

--"Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment." (Section 203.)

- "An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or apparent conflict, between the private interests of the employee and his official Government duties and responsibilities \* \* \*." (Section 202.)
- "\* \* \* no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which:
- "(1) has, or is seeking to obtain, contractual or other business or financial relationship with his agency;
  - "(2) conducts operations or activities which are regulated by his agency; or
  - "(3) has interests which may be substantially affected by the performance or nonperformance of his official duty." (Section 201.)

CSC developed a financial disclosure form for use throughout the executive branch for all levels of employees. The form requires the disclosure of financial interests (business entities in which an interest is held), outside employment, creditors, and interests in real property owned as of June 30 of each year. The amount of financial interest or indebtedness, or the value of real property, is not required to be disclosed. In 1975 the CSC form was revised to require disclosure of financial interests affected or restricted by agency and statutory prohibitions.

In this regard CSC requires that each agency design its financial disclosure system so that it is effective in disclosing conflicts or apparent conflicts of interest. The chief at NLRB does review the ALJ's financial statements but not for the purpose of assigning cases. At Labor, ICC, and OSHRC, however, the ALJs fill out the statements but send them to officials not involved in case assignments. The chief, who is responsible for case assignment, does not review the statements. As a result, the effectiveness of the systems in disclosing conflicts or apparent conflicts is questionable. Disclosure of any interest they own which could conflict with any cases assigned to them is left to the discretion of the ALJs. While most ALJs would no doubt disqualify themselves from cases in which they had an interest, the agencies should insure, to the extent possible, that

cases are not assigned to a judge where a possible conflict of interest may exist. We believe the chief ALJ is in the best position to make this determination when assigning cases by reviewing the ALJ's disclosure statement.

## CHAPTER 4

### THE CIVIL SERVICE COMMISSION'S

#### ROLE NOT CLEARLY DEFINED

The Administrative Procedure Act distinguishes Administrative Law Judges from other Federal employees to provide them with a measure of independence in reaching decisions. A major provision of the APA specifically assigns the Civil Service Commission the responsibility to determine ALJ qualification, compensation, and tenure--functions normally vested with employing agencies. The APA, however, makes no mention as to whether these specific functions are in addition to those Federal personnel functions for which CSC is normally responsible--issuing specific personnel management guidelines and periodically evaluating agency compliance with such guidelines. As a result, CSC has been reluctant to perform these normal functions and has not been as helpful as it could in assisting agencies employing ALJs to resolve their personnel management problems noted in chapter 3. Moreover, there is also a question as to whether CSC can effectively fulfill its specific ALJ responsibilities as required by APA.

#### THE CSC'S ROLE

CSC, as the personnel management agency of the President, is generally responsible for issuing personnel management guidelines and subsequently evaluating agencies' compliance with such guidelines. With regard to ALJs, however, CSC, by virtue of section 11 of the APA is assigned specific personnel management responsibilities normally delegated to the agency for which the employee works. These specific responsibilities assigned to CSC to protect ALJ decisional independence primarily involve determining ALJ qualifications and compensation and the basis for actions affecting ALJ tenure. CSC is also responsible for approving agencies' requests for additional ALJs and temporarily reassigning ALJs to agencies which need their services.

CSC has delegated all of its ALJ responsibilities to its Office of Administrative Law Judges. This office is staffed with four professionals who spend most of their time determining initial qualifications of prospective ALJs (including processing 400 applications annually as well as maintaining registers of ALJ eligibles), and arranging temporary interagency ALJ assignments.

Although the Director of the Office of Administrative Law Judges maintains personal contact with the chiefs and

individual ALJs, the feedback he receives on the agency personnel management efficiency is often second hand, sporadic, and anecdotal. He receives no regular agency caseload data and limited information on ALJ productivity or use.

The Executive Director of CSC said he believes that agencies have interpreted section 11 of the APA to the point that many ALJs believe they are totally independent. Accordingly they are reluctant to exercise personnel management control of ALJs. While recognizing that agencies are not doing all they should, he also acknowledged that CSC could be subject to similar criticism. CSC, as is the case with other agencies, however, is unsure as to the extent it can or should be involved in ALJ personnel management and has been reluctant to assume an active role. In this regard CSC plans, after its Advisory Committee on ALJs 1/ issues its final report, to meet with officials of agencies employing ALJs to discuss the responsibilities of the agencies and CSC regarding ALJ personnel management. While this endeavor should help both parties identify those personnel management areas for which they believe they are responsible, there is no assurance that their views will be in agreement with the intent of the Congress. Accordingly, the APA may have to be amended to be more specific with the parties involved in each aspect of personnel management.

PROBLEMS ASSOCIATED WITH CSC'S RELUCTANCE  
TO ISSUE GUIDELINES AND CONDUCT  
PERSONNEL MANAGEMENT EVALUATIONS

One purpose of the APA is to provide ALJs protection from undue agency influence--to give them a measure of independence. To accomplish this, the legislation excludes ALJs from agency performance ratings and assigns CSC responsibility for ALJ qualification, compensation, and tenure. The APA is, however, silent with respect to who is responsible for the remaining elements of personnel management.

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1/A 13 member committee composed of CSC and agency personnel, ALJs, chief ALJs, circuit court judges, law professors, an assistant attorney general, and officials of the ABA and the Federal Judicial Center. Its purpose is to make recommendations to CSC for improvements in the management and use of ALJs.

## Effect of nonspecificity of the APA

Because the APA is silent regarding responsibility for most aspects of ALJ personnel management, including the party responsible for ALJ evaluation--critical to the effective accomplishment of all other personnel management elements--neither agencies employing ALJs nor CSC is sure as to the extent they can or should institute personnel management controls. If attempted, such action might be interpreted as constituting an unwarranted abridgment of ALJ impartiality. As a result, as indicated in chapter 3, agencies allow ALJs to function virtually unsupervised. They are free to do as they please with little fear of consequence.

CSC, although aware of agencies' difficulties, has not been particularly helpful in developing solutions. It has not issued written guidelines or periodically evaluated and recommended improvements to agency personnel management systems as is the case with other Federal employees. This inactivity on the part of CSC--which is not involved in the administrative decisionmaking process and therefore less likely to be criticized for interfering with ALJ independence--tends to make agencies, which are involved, even more likely to believe that limited agency involvement in ALJ personnel management is justified.

## INADEQUATE DATA TO EVALUATE AGENCY REQUESTS FOR ADDITIONAL ALJs

CSC is responsible for allocating GS-15 and GS-16 ALJ positions to the various agencies using their services. However, CSC receives little information regarding ALJ use and productivity and accordingly has virtually no basis to evaluate agency requests for additional ALJs. Generally, CSC accept whatever justification the agency provides. An internal CSC memorandum from the Office of Administrative Law Judges to the Bureau of Executive Manpower relative to a Securities and Exchange Commission request for an additional GS-16 ALJ position noted "As in most other cases, this office is in no position to question the justification presented." Notwithstanding the above, CSC granted the position.

Without appropriate productivity data, CSC is unable to assure that ALJs are being used effectively. At ICC, for example, cases normally handled by an internal group of GS-12 and GS-13 attorneys were diverted to the ALJs because their workload was low. At the same time, NLRB was discussing with

CSC the possibility of obtaining 30 additional ALJs to handle what it termed "its increased workload." Since CSC receives little information regarding ALJ use or productivity, it was unaware of ICC's situation and accordingly had no basis to discuss with ICC and NLRB the possibility of reassigning ICC ALJs to the NLRB or any other agency needing their services. Similarly, CSC did not know the extent to which ALJs currently employed by NLRB were effectively doing their jobs, and thus did not have a basis for assessing whether the NLRB request for additional ALJs was reasonable.

Federal Agency Hearings: A Proposed Caseload Accounting System, a 1974 report prepared by a member of the Administrative Office of the U.S. Courts and issued by the Administrative Conference of the United States, suggested a possible solution to the above-noted problem. It recommended that a uniform weighted caseload system be implemented to assure that ALJs were being assigned to agencies where they could be used most effectively. The Conference has published its first report containing caseload and processing time statistics for ALJ proceedings at 23 agencies during fiscal year 1975. 1/ It is hoped that a continuation and refinement of this system may eventually be used to develop a uniform weighted caseload system for all agencies. Such a system, used by the Administrative Office of the U.S. Courts to evaluate the workload of U.S. district courts, assigns a weight to each type of case handled by a judge. The weight is based on the amount of time it usually takes to adjudicate that type case. By implementing such a system at each agency employing ALJs, the Congress, CSC, and other agencies would receive information regarding ALJ use and productivity on a consistent basis and could make comparisons and with some degree of accuracy determine how best to allocate ALJs. Both the La Macchia study and ALJ response to our questionnaire indicated that implementation of a uniform weighted caseload system is feasible. As stated in the La Macchia report:

"The Committee concludes that a caseload accounting system along the lines of the system prepared for the Administrative Conference of the United States is feasible."

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1/Federal Administrative Law Judges Hearings--Statistical Report for 1975, Administrative Conference of the United States (1977).

In our questionnaire we asked whether such a system would be helpful to the Congress in determining which agencies have the greatest need for ALJs. Of the 731 ALJs responding, 52 percent believed it would be helpful.

SELECTIVE CERTIFICATION--A PRACTICE WHICH IF  
USED EXTENSIVELY CAN ADVERSELY REFLECT ON THE  
ADMINISTRATIVE PROCESS

Selective certification is used by 11 of the 28 agencies employing ALJs. This process allows agencies, with prior CSC approval, to hire individuals with special skills or experience in a particular area. For example, NLRB generally hires individuals with labor law experience to fill their ALJ positions. Individuals possessing these special skills or experience most commonly acquire them by working at or practicing before the agency using selective certification to hire its ALJs. The result is that many ALJ positions are filled by agencies appointing attorneys from their own staffs. In this regard, 417 (58 percent) of the 718 ALJs responding to our questionnaire indicated that they were selected as an ALJ through selective certification. We also inquired into the extent that the ALJs believed selective certification contributed to the selection of the most qualified applicant. The 596 responses received indicated a difference of opinion: 263, or 44 percent, believed that selective certification made a minor contribution in selecting the most qualified applicant, while 223, or 37 percent, believed it made a major contribution. These responses indicate that some of the 417 ALJs appointed through selective certification believed the practice did not contribute to selection of the most qualified applicant.

Most of the agencies have had the authority to use selective certification for over 20 years without having to justify the continued need for such authority. While this process provides the agencies with a method to hire ALJs with special talents and qualifications and who can be productive immediately, it can also lead to doubts about the impartiality of the administrative adjudication process. In this regard the La Macchia study reported:

"The majority of agencies utilizing selective certification strongly favor the practice because of the need for subject matter expertise in the ALJ, and the view that on-the-job training is excessively time consuming and overly expensive. Those who oppose the practice argue that it results in inbreeding, that those selected have been imbued with the agency's point of view which may affect the

independence of their judgment, that the appearance of justice is lost when yesterday's staff attorney becomes today's 'impartial' judge, and that, most of all, its use effectively excludes from meaningful listing on the CSC registers many able and willing private practitioners and general attorneys in government service. In this connection, it should be noted, that certain ABA officials have urged abolition of the practice or its rigorous limitation."

The report contained a conclusion that the use of selective certification should be limited to specifically authorized appointments based on written CSC standards.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### CONCLUSIONS

ALJs play a pivotal role in the administrative process, which costs the Federal Government millions of dollars each year and significantly impacts on the national economy and lives of thousands of citizens.

Although the formal adjudicative process was established to resolve conflicts promptly and fairly, timely decisions are not being made because the process is burdened with extensive agency review of ALJ decisions and, in many instances, overformalization. In addition to adversely affecting the timeliness of decisions, these factors have also served to increase costs and raise questions regarding the impartiality of agency decisions and the need for a highly formalized mechanism to resolve what could be categorized as relatively simple disputes.

The Administrative Procedure Act is not specific regarding the party responsible for most ALJ personnel management functions and accordingly little is being done to monitor ALJ performance. Agencies are reluctant to attempt to manage ALJs for fear it will be interpreted as an infringement on ALJ independence and tend to resort to extensive review of ALJ decisions in order to have some assurance that ALJ decisions are reasonable and in accordance with agency policy.

Because of the nonspecificity of the APA, CSC has similarly been reluctant to become actively involved in ALJ personnel management. CSC has not performed those personnel management functions it normally performs for other Federal employees and has not been as helpful as it could in assisting agencies employing ALJs to resolve their personnel management problems.

These criticisms are not new. For the past 30 years, committees, studies, and advisory groups have said substantially the same things. Yet little has been done by the Congress, employing agencies, or CSC to significantly improve the situation. The results have been (1) costly delays in the administrative adjudicatory process which was intended by the Congress to expedite the adjudication of disputes and (2) less than desirable performance by an undetermined number of ALJs.

## THE ADJUDICATION PROCESS

Cumbersome agency review of ALJ decisions and unnecessarily formal procedures to adjudicate some cases delay final administrative decisions and may deny due process to the parties involved. Additionally, they can result in the inefficient and ineffective use of agency resources, including ALJs, the unnecessary expenditure of millions of dollars and cause the impartiality of the process to be questioned. Such delay, as calculated by the Senate Committee on Governmental Affairs, costs the Government, the parties involved, and the general public millions of dollars. In addition, it casts doubt on one of the essential objectives of the APA, that ALJs be an important factor in the decision process and that the views of agency personnel be not unduly emphasized or secretly submitted.

No criteria exist to determine what types of cases require APA formality. As a result, the number of cases being adjudicated formally and the number of ALJs required to accomplish the task has significantly increased since the Congress enacted the APA. Formal APA procedures are used to adjudicate some cases when simple and more expeditious procedures, consistent with due process requirements, offer viable alternatives.

## ALJ PERSONNEL MANAGEMENT

ALJs are unique among Federal employees. The Congress, through enacting the APA, created a semiindependent group of ALJs and enforced their status by precluding employing agencies from evaluating ALJ performance. APA, however, omitted assigning the evaluation responsibility to any other organization, thereby in effect making ALJs totally rather than semiindependent. In this regard, analysis of agency data and discussions with parties involved in the process, indicates that the performance of some ALJs is less than satisfactory. The extent of this problem cannot be determined until objective standards are established and ALJ performance is evaluated against such standards.

The chief ALJs, who are responsible for supervising the quality and quantity of ALJ's work and who are a part of agency management, exercise varying degrees of managerial authority. Although productivity statistics are available, they are of limited use because most agencies have not established objective performance standards. The lack of ALJ performance evaluations, including developing of objective standards, has also adversely affected agencies in (1) determining the number of ALJs needed to accomplish

their missions, (2) providing CSC input regarding its recruiting efforts, (3) developing ALJ training programs, and (4) identifying ALJs whose performance might warrant initiation of adverse action proceedings.

Agencies employing ALJs have also not implemented effective ALJ financial disclosure systems. At the four agencies we reviewed, financial disclosure statements were not considered by the chiefs in assigning cases to ALJs.

Another way in which the APA sought to provide ALJs a measure of semiindependence involved assigning CSC responsibility for determining ALJ qualifications, tenure, and compensation--functions normally assigned to employing agencies. The APA, however, makes no mention as to whether these specific functions are in addition to those for which CSC is normally responsible--issuing specific personnel management guidelines and periodically evaluating agency personnel systems. As a result, CSC has been reluctant to perform these normal functions and accordingly has not been as helpful as it could in assisting agencies employing ALJs.

The lack of ALJ performance standards and evaluation has also precluded agencies from providing CSC with meaningful reports on ALJ productivity and use; information which is critical in determining the propriety of agency requests for additional ALJs. Without this data, CSC is in no position to approve or disapprove such requests. In this regard, the current efforts of the Administrative Conference of the United States in gathering ALJ productivity data to develop a uniform ALJ caseload accounting system is a step in the right direction and should be continued.

We also noted that selective certification, a practice which generally results in agencies hiring their own staff attorneys to be ALJs, may be adversely reflecting on the impartiality of the administrative adjudication process.

#### RECOMMENDATIONS TO THE CONGRESS

To improve the administrative adjudication process and permit the establishment of effective ALJ personnel management systems, the Congress should amend the APA to:

- Clearly assign the responsibility for periodic evaluation of ALJ performance to a specific organization. The responsible organization could be CSC by itself or as part of an ad hoc committee composed of private attorneys, Federal judges, chief ALJs,

agency officials, and the Administrative Conference of the United States.

- Clarify the extent to which CSC can, in the case of ALJs, perform its normal personnel management functions--issuing personnel management guidelines and periodically evaluating agency compliance.
- Establish an initial probationary period of up to 3 years and thereby eliminate immediate, virtually guaranteed appointment and tenure.

The Congress should also:

- Establish parameters or criteria to use in deciding what degree of formality is required to provide fair decisions in different types of administrative disputes and, as recommended by the Senate Committee on Governmental Affairs amend the APA and other legislation as necessary to clarify the agencies' power to adopt streamlined adjudication procedures.
- Amend legislation as necessary to provide for standards of review along the lines outlined in Public Law 95-164 (91 Stat. 1290, 1314) which afforded ALJs' decisions at one Commission greater finality.
- See that each agency employing ALJs has taken steps to establish performance standards so that nonproductive ALJs can be identified before any additional ALJs are given to agencies.

#### RECOMMENDATIONS TO HEADS OF AGENCIES

We recommended that the heads of agencies employing ALJs (see app. I):

- Establish procedures which would preclude extensive review of ALJ decisions in cases where the parties have not filed exceptions and where the case does not involve compelling public interest issues or new policy determinations.
- Establish one control body to conduct case reviews when necessary so as to avoid, to the maximum extent, duplication and inefficiency.
- Establish in cooperation with the chief ALJ and the ALJs themselves, objective performance standards delineating what is expected of all ALJs in terms of quality and quantity of work.

- See that an effective financial disclosure system is implemented, including a requirement that chief ALJs be familiar with ALJ disclosure statements to avoid possible conflict-of-interest situations.

In addition, the chief ALJ at each agency, commission, or board should review the procedures by which cases are formally adjudicated to determine if simplified procedures can be used. The accomplishments and progress toward meeting each of the above recommendations should be reported to the appropriate congressional committee.

#### RECOMMENDATIONS TO THE CHAIRMAN, CSC

We also recommend that the Chairman:

- Encourage and assist the Administrative Conference in its efforts to develop an ALJ caseload accounting system. In the interim, CSC should make full use of the productivity data being accumulated by the Conference to determine the propriety of agency requests for additional ALJs.
- Reexamine the need for selective certification at the agencies where it is currently in use and evaluate future requests for its use on a case-by-case basis.

DEPARTMENTS AND AGENCIESEMPLOYING ADMINISTRATIVE LAW JUDGESAPRIL 1977

	<u>Number of ALJs</u>
Alcohol, Tobacco and Firearms, Department of the Treasury	1
Civil Aeronautics Board	17
Civil Service Commission	1
Department of Agriculture	5
Department of the Interior	32
Department of Labor	43
Federal Communications Commission	14
Federal Power Commission	21
Federal Trade Commission	12
Food and Drug Administration	1
Interstate Commerce Commission	62
Maritime Administration	4
National Labor Relations Board	96
Securities and Exchange Commission	9
Social Security Administration	615
Permanent    416	
Temporary    199	
Coast Guard	15
Commodity Futures Trading Commission	4
Consumer Product Safety Commission	1
Drug Enforcement Administration, Department of Justice	1
Environmental Protection Agency	8
Federal Maritime Commission	7
Department of Housing and Urban Development	1
International Trade Commission	1
Nuclear Regulatory Commission	1
National Transportation Safety Board	6
Occupational Safety and Health Review Commission	43
Postal Rate Commission	1
U.S. Postal Service	<u>3</u>
 Total	 <u>1,025</u>

QUESTIONNAIRE DESIGN,  
ADMINISTRATION, AND RESPONSES

In late August 1977, we sent a questionnaire to all permanent Administrative Law Judges in the Federal Government. The questionnaire was built from earlier surveys of this group of Federal officials (particularly the La Macchia study 1/), on ideas contained in scholarly analyses by leading jurists (particularly those contained in papers by Fauver, 2/ Hollaran, 3/ Pfeiffer, 4/ Ruhlen, 5/ and Zwerdling, 6/) and finally on field research performed in four agencies. 7/

Our questionnaire differed from the questionnaires used in earlier surveys in a number of respects. Unlike those used in the La Macchia study or the one used in a study conducted for the American Bar Association Section on Administrative Law, our questionnaire was almost completely checklist or multiple-choice in format rather than essay. There were three reasons for choosing the "close-ended" over the "open-ended" format. In the first place, it minimized the demands on the respondents' time. In the second place, the state of knowledge about the topics covered in the questionnaire, we felt, was sufficiently developed to warrant a close-ended survey. With respect to this second point, it should be noted that social science researchers generally concede open-ended questions are more appropriate for the beginning stages of inquiry into an area when

- the depth of respondents' knowledge of the area is unknown,
- the area is so poorly understood that appropriate response options cannot be defined in advance, and
- potentially biasing differences among respondents have not been identified and assessed.

Close-ended questions, on the other hand, are more appropriate for later stages of inquiry after the area has been illuminated by earlier research.

The third reason for preferring the close-ended question is its relation to the first two. For a number of years, certain beliefs have thought to be commonly held by ALJs--viz, those having to do with causes of case backlogs and with benefits of potential improvements to the practice of administrative law. We wanted to assess the extent to which those beliefs, in fact, prevade the corps of ALJs. Thus, we

had to receive responses back from as many of them as possible. We believe the 91 percent rate of return we experienced by the La Macchia committee was, in large part, because our questionnaire was close-ended and thus much more economical of respondents' time. Moreover, the responses of judges could only be unambiguously counted and compared across agencies--and thus, the pervasiveness of attitudes determined--if close-ended questions were used.

In designing the questionnaire we were helped greatly by three leading administrative law jurists who conducted two separate reviews of the technical quality of the questions. 8/ In addition, four other judges participated in pretests of the questionnaires. 9/

### RESPONSES

The questionnaire was mailed to 826 permanent ALJs (as of April 1977) and responses were received from 754, or 91 percent of the group. As can be seen in table 1 below there were five times as many responses from the Social Security Administration as there were from the National Labor Relations Board--the agency with the second highest number of responses.

TABLE 1

#### Questionnaire Return Percentages

<u>Agency</u>	<u>Number returned</u>	<u>Cumulative percent return</u>
Social Security Administration	358	47
National Labor Relations Board	77	57
Interstate Commerce Commission	43	63
OSHRC	36	68
Labor	28	72
Federal Power Commission	18	74
Federal Communications Commission	13	-
Federal Trade Commission	13	78
Interior	12	80
Coast Guard	11	81
Civil Aeronautics Board	11	82
Securities and Exchange Commission	5	-
National Transportation Safety Board	5	83
Agriculture	4	-
Environmental Protection Agency	4	85
Federal Maritime Commission	4	-
Other (note a)	112	100

a/No agency indicated or less than four respondents from the agency or questionnaires received too late for inclusion in analysis.

Analysis of responses

To protect the identity of respondents, we asked them to indicate whether they were the only ALJs in the agency or whether their agency employed two to four ALJs. 10/ Those not meeting either condition were asked to identify the agency in which they worked. From the group of those who identified their agency, we selected, for more intensive analysis, those employed by agencies where five or more judges responded to the questionnaire. This latter selection was done to further insure confidentiality and to produce results which would be more reliable. It resulted in focusing analyses on 630 ALJs in 13 agencies.

Because of the disproportionate number of ALJs in a few agencies and because we expected differences in responses depending on the agency, we performed a test to determine whether the differences found were statistically significant. The criterion used in the test was that any differences as large or larger than we found among the 13 agencies must have a probability of occurring no more than 1 time in 100 by chance.

In the following pages we will describe the responses as they relate to (1) suggestions for improvement, (2) factors affecting productivity, and (3) characteristics associated with case backlogs.

SUGGESTIONS FOR IMPROVEMENT

There have been many suggestions for improving the administrative process. Some of the most frequently offered ones were listed in our questionnaire and the judges were asked to rate the extent to which each one would contribute to improvement. Figure 1 on the next page shows there was considerably more variability than uniformity in the judges' responses to these suggestions. There was a consensus on only two of the suggestions. For those two, there were no significant differences of opinion among judges in the 13 agencies about the extent of improvement to be obtained by

- delegating complaint making and settlement authority in regulatory agencies (see question 7-3 in figure 1) and
- relaxing rules of procedure which force hearings at certain stages (see 7-7 in figure 1).

On an average, judges felt that more extensive delegation of authority had moderate potential for improving the

Figure 1. Suggestions for Improvement

POSSIBLE INNOVATIONS

7. Over the years there have been many suggestions about how to improve the administrative process. Some of these are listed below. Please indicate the extent to which you believe each one would contribute to improvement.

Very great extent  
 Great extent  
 Moderate extent  
 Some extent  
 Little or no extent  
 Don't know

- (7-1) Establishment of an independent corps of ALJs, separately housed and administered, and rotated with due regard to their expertise among circuits concerned with Transportation, Licensing and Rate Regulation, Consumer Protection, Labor Problems, and so on. FTC [5] ~~[4]~~ ~~[3]~~ [2] [1] [9] INTERIOR
  
- (7-2) Attaching greater finality to ALJ decisions. FCC [5] ~~[4]~~ [3] [2] [1] [9] SSA
- (7-3) Delegating authority to issue complaints, to investigate, and to initiate settlement in regulatory agencies to enforcement bureau or division chiefs or to appropriate field officials. [5] [4] ~~[3]~~ [2] [1] [9]
- (7-4) Establishment of an administrative court system. NTSB [5] ~~[4]~~ [3] [2] [1] [9] SEC
- (7-5) Removing certain statutory provisions that now require formal APA hearings for certain programs. FCC [5] [4] ~~[3]~~ ~~[2]~~ ~~[1]~~ [9] USCG
- (7-6) For the question 7-5, if you checked "Very great," "Great," "Moderate," or "Some" please cite the specific statutory provisions. \_\_\_\_\_
  
- (7-7) Relaxing rules of agency procedure which tend to force a matter to hearing once a certain stage is reached. [5] [4] [3] [2] ~~[1]~~ [9]
- (7-8) For question 7-7, if you checked "Very great," "Great," "Moderate," or "Some" please cite the specific agency rules of procedure. \_\_\_\_\_
  
- (7-9) Provision of increased and/or improved administration or technological support by agency to adjudicatory (e.g., automated calendar management and topical retrieval system, work-processing systems, legal clerks, secretaries, clerk-typists, administrative officers). NLRB [5] ~~[4]~~ ~~[3]~~ ~~[2]~~ [1] [9] SEC
- (7-10) Increase or establish, use of "per curiam" and oral decisions or other shorthand decisional formats. NTSB [5] ~~[4]~~ ~~[3]~~ ~~[2]~~ [1] [9] SEC
- (7-11) Increase the number of Administrative Law Judges. NLRB [5] ~~[4]~~ ~~[3]~~ ~~[2]~~ [1] [9] OSHRC
- (7-12) Other. (Please specify and indicate extent of improvement.) \_\_\_\_\_

administrative process. Relaxing rules of procedure was felt to have even less potential for improving the process.

For those suggestions on which the judges disagreed, figure 1 shows, at the right, the agency whose judges thought the suggestion to be least helpful and, at the left, the agency whose judges thought the suggestion to be most helpful. Thus, on the question for which there was least agreement (7-10), the Security and Exchange Commission judges assigned an average value halfway between some improvement and little or no improvement to the potential benefit of innovations in the area of decisional formats and this was the lowest value assigned to this suggestion by any group. The highest value was assigned by judges from the National Transportation Safety Board who gave it just under the highest possible rating.

Examination of figure 1 also shows that SEC judges appear to be less optimistic about improvements which would result from adopting some of the suggestions, while judges from the FCC, the NLRB, and the NTSB appear to be more optimistic about the gains to be made.

### PRODUCTIVITY

Most organizational psychologists hold the view that productivity is a joint function of (1) worker motivation, job-related ability, and understanding of work role and (2) the extent to which the work routine is automated. Put simply, these theorists have suggested that, where machines do not set the workplace, the following equation describes the level of an individual's performance:

$$\text{Performance} = f (\text{ability} \times \text{motivation} \times \text{role perception})$$

The form of the relationship means that if any term is zero, then performance will be zero. Thus the assumption is made that a person could be tops in ability to perform a job and could adequately understand how to do the work, but without motivation will not perform well. By the same token, a person could be turning out a lot of whatever the organization produces and still not be rated high in performance because he misperceived the importance of quality in fulfilling his role requirements.

A commonly used definition of the term "ability" includes all the training, experience, and aptitude necessary to perform well in a given situation. Of these, aptitude is considered to be a relatively stable and unchanging characteristic and from the organization's point of view is determined by the type of selection procedures used to bring

new members into the organization. Once in the organization, a person's ability to adequately perform the job can be modified by the type of training and experience he is provided.

A number of items were included in our questionnaire which were designed to provide parametric information about the level of motivation, role pressure, training, and performance of the ALJs.

### Motivation

The method we used to measure ALJs' motivation has been used to study a wide variety of organizational phenomena during the last decade. It is based on the assumption that man is rational. Thus he will work hard to get something he values. Moreover, he will work harder the more he values it and the more likely he sees it as dependent on his working hard.

We asked the judges to tell us how much value they placed on each of 10 possible outcomes of superior performance. There were significant differences in value ratings for only 2 of the 10 outcomes as can be seen in figure 2. For the eight outcomes on which there was a consensus, the most valued was an increase in pay commensurate with what ALJs feel to be their special status in government. The least valued outcomes had to do with agency modification of ALJ decisions and with pressures to decide more cases in a shorter time.

We also asked for ratings on how frequently the judges experienced each of the outcomes when they performed at a superior level. In providing their answers, the judges were asked to think of superior performance as rendering the best possible decisions in the shortest period of time. As can be seen in figure 3 there was more variability in the judges' ratings of frequency than in their ratings of value. There were particularly large differences among the agencies on whether superior performance was likely to result in (1) production pressures, (2) frequent modification of decisions, and (3) pleasant office surroundings.

Typically, the value ratings and the frequency ratings are looked at together to measure motivation by the method we adopted. When this is done the differences between agencies disappear. Thus, by the statistical criterion we established, there are no differences among the agencies in the motivation of ALJs. On the average, ALJs report either (1) oftentimes receiving desirable outcomes from superior performance or (2) only occasionally receiving undesirable outcomes.

Figure 2

Values assigned to possible outcomes of superior performance

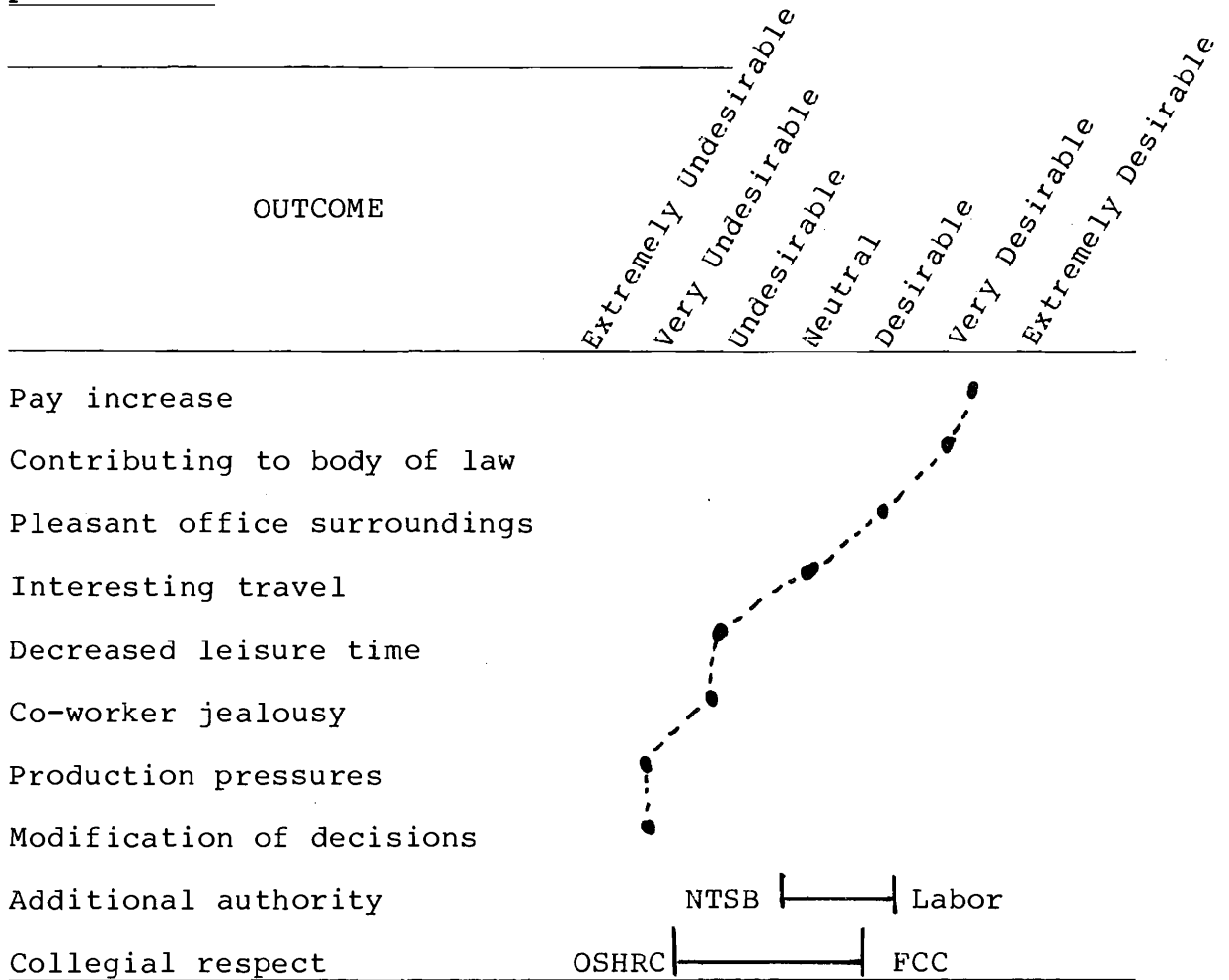
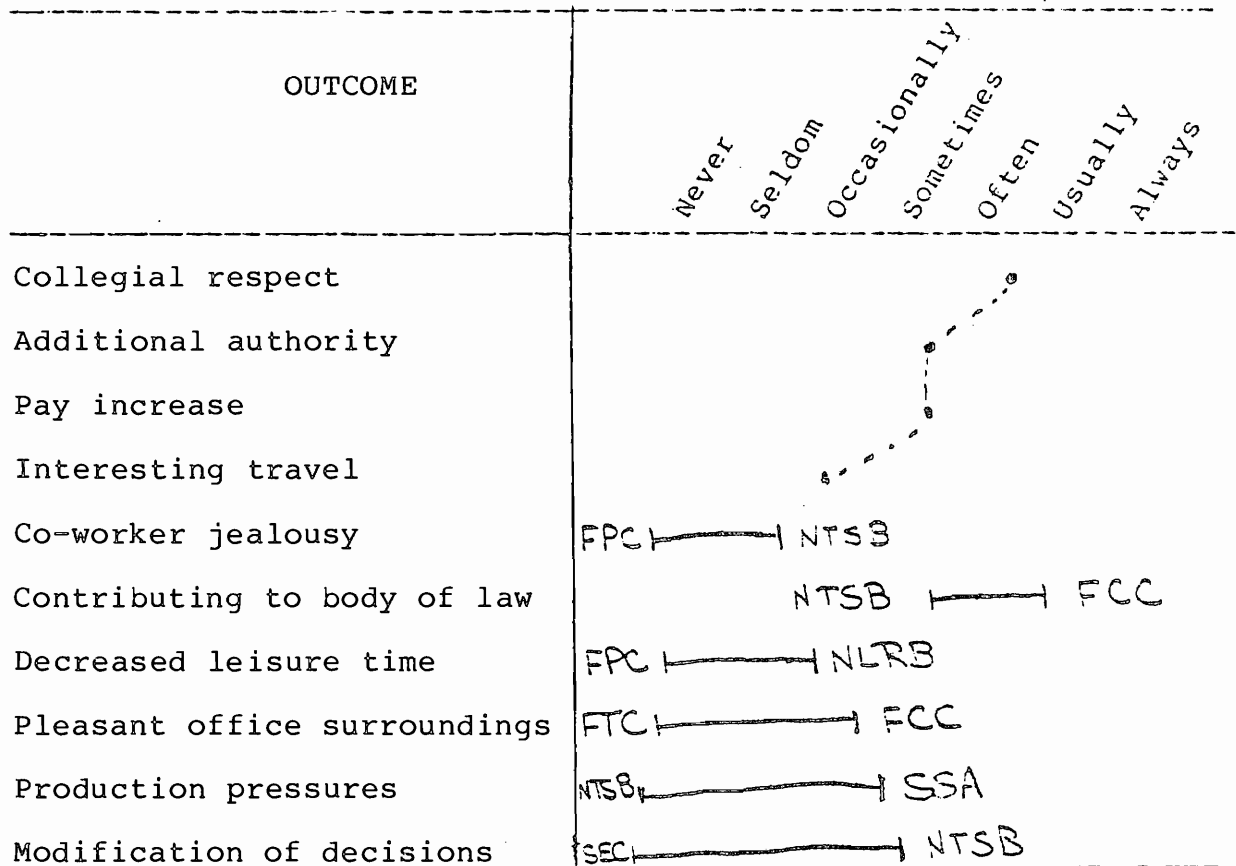


Figure 3

Ratings of the frequency with which superior performance leads to certain outcomes



Role pressures

The questions used to measure the extent of role pressures on ALJs were similar to those used in a nationwide survey conducted several years ago. They were concerned principally with work overload and role conflict and ambiguity. Each of these has been shown to reduce productivity.

Figure 4 presents the responses of the judges to the questions about role pressures. As can be seen from the figure, judges at SSA and ICC experience the most pressures from their role. Interestingly though, the types of pressures at the two agencies appear to be different. At SSA, the

pressures have to do with the amount of work and the time and resources available to do it. On the other hand, pressures at ICC have to do with agency review of ALJ decisions. Role pressures are least for Coast Guard judges who report rarely or almost never being bothered by 4 of the 10 pressure producing role characteristics.

Everyone occasionally feels bothered by certain kinds of things in their work. Below is a list of things that might sometimes bother Administrative Law Judges. Please indicate how frequently you feel bothered by each of them.

	Almost never	Rarely	Sometimes	Rather often	Nearly all the time
(44-1) Thinking that the amount of work you have to do may interfere with how well it gets done.	SEC [5]	[4]	[3]	[2]	[1] SSA
(44-2) Feeling that you have too little authority to carry out the responsibilities assigned to you.	USCG [5]	[4]	[3]	[2]	[1] NTSB
(44-3) Feeling that you can't get information needed to carry out your work.	USCG [5]	[4]	[3]	[2]	[1] SSA
(44-4) Thinking that there are too many reviews of your work by agency officials.	LABOR [5]	[4]	[3]	[2]	[1] ICC
(44-5) Feeling that you have to do things in your work that are against your better judgment.	FTC [5]	[4]	[3]	[2]	[1] FCC
(44-6) Feeling that your job tends to interfere with your family life.	USCG [5]	[4]	[3]	[2]	[1] NLRB
(44-7) Feeling that you're not fully qualified to handle your work.	[5]*	[4]	[3]	[2]	[1]
(44-8) Feeling that you have too heavy a work load.	USCG [5]	[4]	[3]	[2]	[1] SSA
(44-9) Thinking that agency officials who review your work aren't nearly as qualified as you are.	LABOR [5]	[4]	[3]	[2]	[1] ICC
(44-10) Thinking that others who perform your type of work (e.g. District Court Judges) are accorded more deference than you are.	[5]	[4]	[3]*	[2]	[1]

Case processing characteristics

Judges in the 13 agencies selected for more intensive analysis differ most among themselves in factors closely associated with the unique type of cases settled in each agency. Thus, the amount of time required to decide a typical case in FPC, CAB, FTC, and FCC (over 390 days on the average) is four times longer than the time required to decide a case in SSA, the Coast Guard, or the Department of Labor (56 to 98 days). There are even more striking differences in the number of transcript pages and number of witnesses typically involved in cases at the agencies. As can be

seen in table 2, there are 30 times more pages of transcript in a typical FCC or FTC hearing than in an SSA or Coast Guard hearing, and there are almost eight times as many witnesses in an FTC hearing as in an SSA hearing.

TABLE 2  
Characteristics of Typical Cases

Agency	Days to decision	Transcript pages	Number of witnesses
FCC	569	2,542	12
FTC	477	2,367	23
FPC	444	425	5
CAB	390	794	16
Interior	345	347	7
ICC	247	421	14
SEC	240	399	6
NLRB	186	403	10
OSHRC	181	226	6
NTSB	173	162	7
SSA	92	77	3
Labor	98	175	5
USCG	56	77	4

We asked a number of questions about the characteristics of cases with which ALJs were personally involved and which varied in length from unusually short through unusually long. There were 19 characteristics on which data were collected for short, typical, and long cases. Many of these are characteristics hypothesized by the Administrative Conference to effect judicial productivity or are intended to apply to "the typical formal administrative proceeding." In order to simplify discussion of case processing characteristics, we performed a special statistical analysis designed to identify the minimum number of dimensions needed to describe the judges' responses. 11/

The results of the analysis are presented in table 3 and can be interpreted as follows: the characteristics listed under a dimension tend to occur together--so that when one is present, the others tend to be present too; and when one increases in value, the others tend to increase also. Thus, using dimension 4 as an example, as the number of parties involved in a short case increases, the number of witnesses increases as well. Moreover, the number of parties and witnesses are somewhat unique in that they are closely related to each other but are not related to any other case characteristic we measured.

TABLE 3

Case Processing Dimensions (note a)


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<p>DIMENSION 1:</p> <p>Long-PreHearing Conference            Typical-PreHearing Discovery            Long-PreHearing Discovery            Long-Extensive Discovery            Long-Contested Discovery</p> <p>DIMENSION 2:</p> <p>Typical-Number of Parties Involved            Short-Number of Contested Motions            Typical-Number of Contested Motions            Long-Number of Contested Motions            Typical-Number of Witnesses            Typical-Days of Hearing</p> <p>DIMENSION 3:</p> <p>Short-Advance Written Testimony            Typical-Advance Written Testimony            Long-Advance Written Testimony</p> <p>DIMENSION 4:</p> <p>Short-Number of Parties Involved            Short-Number of Witnesses</p> <p>DIMENSION 5:</p> <p>Short-Opinion Preparation Interrupted            Typical-Opinion Preparation Interrupted            Long-Opinion Preparation Interrupted</p> <p>DIMENSION 6:</p> <p>Short-Case Processing Time            Short-Number of Transcript Pages            Short-Number of Witnesses</p>	<p>DIMENSION 7:</p> <p>Long-Number of Transcript Pages            Long-Number of Witnesses            Long-Days of Hearing</p> <p>DIMENSION 8:</p> <p>Short-Travel Required            Typical-Travel Required            Long-Travel Required</p> <p>DIMENSION 9:</p> <p>Short-PreHearing Discovery            Typical-Hearing Discovery            Short-Extensive Discovery            Typical-Extensive Discovery</p> <p>DIMENSION 10:</p> <p>Short-Issues Stipulated            Typical-Issues Stipulated            Long-Issues Stipulated</p> <p>DIMENSION 11:</p> <p>Short-PreHearing Conference            Typical-PreHearing Conference            Long-PreHearing Conference            Short-Settlement at PreHearing</p> <p>DIMENSION 12:</p> <p>Short-Case Processing Time            Typical-Case Processing Time            Long-Case Processing Time            Typical-Number of Witnesses            Typical-Extensive Discovery            Typical-Contested Discovery</p>
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a/These are the variables whose loadings exceeded .30 in the factor analysis. Most of the loadings exceeded .60 and were fairly uniform for each factor.

There appear to be three types of dimensions underlying case processing. The first is a dimension whose presence or absence is independent of case length. In table 3, these are dimensions 3, 5, 8, and 10, respectively, having to do with whether (1) written testimony was filed in advance, (2) the judge's preparation of an opinion was delayed by having to hear or terminate another case, (3) travel was required incident to the case, and (4) major portions of the facts were stipulated by the parties. As an example of what this type of dimension indicates, dimension 8 shows that if a judge reported having to travel for a short case, he or she reported having to travel for a typical and a long case as well.

The second type of dimension has to do with characteristics uniquely associated with cases of a certain length. Again in table 3, these are dimensions 4, 6, 7, and perhaps 1. Dimension 4 was discussed previously. Dimension 6 also describes a short case and indicates that the processing time increases as the number of transcript pages and witnesses increase. Dimension 7 is similar to 6, except that it is concerned with the long case, and processing time is replaced by number of hearing days as the characteristic associated with the number of witnesses and pages. Dimension 1 appears to be principally concerned with the nature of the discovery proceedings.

The third type of dimension which describes case processing characteristics is a mixed factor containing both cases of a certain length and processes of a certain type. In table 3, these are dimensions 2, 9, 11, and 12. For the last of these mixed dimensions, number 12, the statistical analysis indicated that the typical case processing time and much less closely related to the nature of discovery used for that length of case.

Notes

- 1/CSC. Report of the Committee on the Study of the Utilization of Administrative Law Judges. July 30, 1974.
- 2/William Fauver. "The role and functions of federal administrative law judges in the United States of America". Statement of the Federal Administrative Law Judges Conference to the 1975 World Conference on World Peace Through Law. Washington, D.C., October 12-17, 1975.
- 3/Norbert A. Holloran. Federal Agency Hearings: A Proposed Caseload Accounting System. Washington, D.C.: Administrative Conference of the United States, January 1974.
- 4/Paul N. Pfeiffer. "Hearing cases before several agencies-Odyssey of an Administrative Law Judge." Administrative Law Review, 1974.
- 5/Merritt Ruhlen. Manual for Administrative Law Judges. Washington, D.C.: Administrative Conference of the United States, 1974.
- 6/Joseph Zwerdling. "Reflections on the Role of an Administrative Law Judge". Administrative Law Review, 1974.
- 7/OSHRC, NLRB, Department of Labor, and ICC.
- 8/Judge Naham Litt, FPC and Chairman of the Federal Administrative Law Judge's Conference; Judge William Fauver, Department of the Interior and former Chairman of the Federal Administrative Law Judge's Conference; Judge Ernst Liebman, FPC.
- 9/Judge Fredrick Dolan, Interstate Commerce Commission; Judge Myron Renick, International Trade Commission; Judge William Robbins, Social Security Administration; Judge \_\_\_\_\_ NLRB.
- 10/The cutoff of at least four respondents is typically used in organizational research to insure anonymity.
- 11/We performed a factor analysis using the principal factoring method and rotated 20 factors, accounting for 73 percent of the variance in the original responses, to a varimax criterion for improved stability. The 12 factors discussed in table 3 account for 85 percent of the variance in the rotated factor matrix.

United States General Accounting Office  
 SURVEY OF ADMINISTRATIVE LAW OPERATIONS



INSTRUCTIONS

This questionnaire is an integral part of our study of administrative law and is designed to result in recommendations which will relate to all Administrative Law Judges. It is important to you and others like yourself who may be affected by recommendations we make that you answer every question to the best of your ability and return the completed form within 5 days.

Most of the questionnaire is in check-list form so as to minimize the time you will need to complete it and to allow for an examination of whether differences in fact and opinion exist among agencies. Thus, almost all of the questions can be answered by checking the appropriate box. These boxes contain numbers for key-punching purposes which you should disregard. The preferred manner of responding is to place a check mark in the box indicating your answer.

Example: 

[1]
<input checked="" type="checkbox"/> [2]
[3]

We realize, of course, that some of the issues we ask about are highly complex and a few may be considered sensitive, so we would welcome your additional comments on any question we have asked or any related issue. Please provide those comments to us on a separate sheet after you have completed the questionnaire.

When you have completed the questionnaire, please return it in the enclosed postage-paid envelope. Also please return the post card telling us you have mailed the questionnaire.

Your views are greatly appreciated. Thank you.

1/ N - Number of Judges responding

BACKGROUND INFORMATION

1. Are you the only ALJ in your Commission, Board, or Agency? N-740 1/  
 1.5% [2] Yes (Go to Question 4)  
 98.5% [1] No (Continue)

2. Are there four or less ALJs in your Commission, Board, or Agency? N-731  
 3.7% [2] Yes (Go to Question 4)  
 96.3% [1] No (Continue)

3. What is the name--or what are the initials--of the Commission, Board, or Agency in which you adjudicate cases?

See page 51 of Appendix II

4. How old are you? N-746  

.6% [1] 35 or under	21.2% [5] 51-55
4.3% [2] 36-40	18.8% [6] 56-60
11.5% [3] 41-45	13.1% [7] 61-65
20.0% [4] 46-50	10.5% [8] more than 65

5. Do you maintain a private law practice? N-745  
 .5% [2] Yes                      99.5% [1] No

6. Does your agency require you to complete financial disclosure statements? N-747  
 3.6 [9] Don't know (Go to Question 7)  
 52.1% [1] No (Go to Question 7)  
 44.3% [2] Yes (Continue)

How often are you required to complete these statements? N-384

3.2% [1] Don't know
38.0% [1] Annually
8.3% [1] Whenever change in financial interest occurs
1.2% [1] Other (Please specify) _____

Are these statements reviewed and used in assigning cases to ALJs? N-342

4.4% [2] Yes    45.9% [1] No    49.7% [9] Don't know

POSSIBLE INNOVATIONS

7. Over the years there have been many suggestions about how to improve the administrative process. Some of these are listed below. Please indicate the extent to which you believe each one would contribute to improvement.

	<i>Very great extent</i>	<i>Great extent</i>	<i>Moderate extent</i>	<i>Some extent</i>	<i>Little or no extent</i>	<i>Don't know</i>
(7-1) Establishment of an independent corps of ALJs, separately housed and administered, and rotated with due regard to their expertise among circuits concerned with Transportation, Licensing and Rate Regulation, Consumer Protection, Labor Problems, and so on. N-736	[5] 55.3%	[4] 17.9%	[3] 5.8%	[2] 5.6%	[1] 12.4%	[9] 3.0%
(7-2) Attaching greater finality to ALJ decisions. N-740	[5] 51.1%	[4] 23.3%	[3] 11.2%	[2] 4.3%	[1] 8.1%	[9] 2.0%
(7-3) Delegating authority to issue complaints, to investigate, and to initiate settlement in regulatory agencies to enforcement bureau or division chiefs or to appropriate field officials. N-714	[5] 17.0%	[4] 9.2%	[3] 9.2%	[2] 8.8%	[1] 15.2%	[9] 48.6%
(7-4) Establishment of an administrative court system. N-737	[5] 59.3%	[4] 13.0%	[3] 5.9%	[2] 3.8%	[1] 10.7%	[9] 7.3%
(7-5) Removing certain statutory provisions that now require formal APA hearings for certain programs. N-711	[5] 3.9%	[4] 2.7%	[3] 2.5%	[2] 4.0%	[1] 61.3%	[9] 25.6%
(7-6) For the question 7-5, if you checked "Very great," "Great," "Moderate," or "Some" please cite the specific statutory provisions. N-78	See Attachment I					
(7-7) Relaxing rules of agency procedure which tend to force a matter to hearing once a certain stage is reached. N-718	[5] 4.2%	[4] 3.2%	[3] 2.7%	[2] 5.4%	[1] 51.7%	[9] 32.8%
(7-8) For question 7-7, if you checked "Very great," "Great," "Moderate," or "Some" please cite the specific agency rules of procedure. N-68	See Attachment I					
(7-9) Provision of increased and/or improved administration or technological support by agency to adjudicatory (e.g., automated calendar management and topical retrieval system, work-processing systems, legal clerks, secretaries, clerk-typists, administrative officers). N-723	[5] 39.6%	[4] 23.6%	[3] 15.6%	[2] 10.0%	[1] 8.2%	[9] 3.0%
(7-10) Increase or establish, use of "per curiam" and oral decisions or other shorthand decisional formats. N-732	[5] 25.4%	[4] 17.8%	[3] 19.5%	[2] 15.5%	[1] 19.1%	[9] 2.7%
(7-11) Increase the number of Administrative Law Judges. N-721	[5] 20.2%	[4] 15.9%	[3] 15.4%	[2] 17.8%	[1] 21.4%	[9] 9.3%
(7-12) Other. (Please specify and indicate extent of improvement.) N-193	See Attachment I					

8. The U.S. Tax Court uses a small case procedure for cases which involve tax violations of \$1500 or less. The violator can elect this procedure with an informal hearing before a special trial judge rather than a formal hearing before a tax court judge. One of the duties of the special trial judge is to assist the violator, if unrepresented, in presenting all of his/her evidence. The decision rendered by this procedure is final and not appealable.

(8-1) Do you believe such a procedure could be used by all agencies which use ALJs? N-740

- 13.1% [2] Yes
- 36.3% [1] No
- 30.1% [9] Don't Know

(8-2) Could such a procedure be used by some agencies which use ALJs? N-680

28.8% [2] Yes Please specify which ones: See Attachment II

9.3% [1] No 61.9% [9] Don't know

9. The Veterans Administration through its Board of Veterans Appeals informally adjudicates disability cases without a hearing unless it is requested by the individual seeking the disability benefits. After the case has been processed and decided at the regional office level, it can be appealed to the Board. At the Board the case is adjudicated by three member panels, generally made up of two attorneys and a doctor. Each panel has seven attorneys who assist them. The decision of the Board is final and not appealable to the U.S. Federal Courts.

Do you believe this type of informal system could be used to help you adjudicate the following types of cases? (Check only if Yes.) N-422

(9-1) Social Security disability cases 19.6% [1]

(9-2) Longshore and Harborworkers Compensation Act cases 12.8% [1]

(9-3) District of Columbia Workers Compensation cases 13.5% [1]

(9-4) Other. Please specify. See Attachment III

10. What is your reaction to the idea of having the work of ALJs periodically reviewed by an independent panel of attorneys and Civil Service Commission personnel who would have the authority to recommend adverse action if deemed appropriate? N-740

- 6.3% [5] Strongly agree
- 9.2% [4] Moderately agree
- 11.9% [3] Neutral
- 7.6% [2] Moderately disagree
- 65.0% [1] Strongly disagree

11. The Attorney General's Report on Administrative Procedures in Government Agencies (1941) suggested a set term of office (e.g. 7 or 12 years) for ALJs. N-742

What is your reaction to this suggestion?

- 75.3% [1] Strongly disagree
- 9.6% [2] Moderately disagree
- 5.5% [3] Neutral
- 4.2% [4] Moderately agree
- 5.4% [5] Strongly agree

12. What would be your reaction to a set term of office which would be renewable upon review by an independent panel of lawyers and Civil Service Commission personnel? N-740

- 7.8% [5] Strongly agree
- 10.3% [4] Moderately agree
- 7.3% [3] Neutral
- 9.3% [2] Moderately disagree
- 65.3% [1] Strongly disagree

CASE PROCESSING CHARACTERISTICS

Please answer the following questions about each of three cases in which you were involved and in which your agency reached a decision in the past 12 months. The first case should be one which took an unusually short amount of time to decide. This case may have been decided by withdrawal or consent in a pre-hearing conference or it may have been decided at a hearing where your decision became final without further review. Regardless of how or when it was decided, please tell us, by answering the questions below, about that case which took the least amount of time to finally decide after it was assigned to you.

After reporting on this first case, please tell us about a case which took the usual or typical amount of time for your agency to decide. This case may be one you decided at a hearing and no appeals were taken or it may be one where your decision was reviewed by the agency for final action. Regardless, it should be that case which in your experience has taken the typical amount of time to finally decide.

After reporting on this second case, please tell us about a case which took an unusually long amount of time to decide. This case probably, but not necessarily, involved agency review of your decision. Regardless, it should be a case decided in the last 12 months which required a long time to decide.

In answering a few of the questions, you may need to refresh your memory by consulting your records or agency files. We encourage you to do that to provide the most complete information possible.

	SHORT	TYPICAL	LONG
(13-1) Approximate amount of time between assignment to you and final agency decision. (Indicate whether time shown is months <u>OR</u> days <u>OR</u> hours.)	N-506 R-1-1001 <u>M-57.7 Days</u> N-449	N-501 R-1-2160 <u>M-158 Days</u> N-435	N-482 R-1-1140 <u>M-380.5 Days</u> N-419
(13-2) How many pages of transcript resulted from the hearing? See Attachment VI	R-1-5000 <u>M-183 Pages</u> N-585	R-1-9999 <u>M-302 Pages</u> N-580	R-1-25000 <u>M-1122 Pages</u> N-562
(13-3) How many parties were involved in the case?	R-1-40 <u>M-2</u> N-482	R-1-24 <u>M-2.6</u> N-473	R-1-97 <u>M-4.8</u> N-453
(13-4) How many contested motions were involved?	R-0-17 <u>M-.4</u> N-501	R-1-40 <u>M-1.3</u> N-496	R-1-97 <u>M-3.9</u> N-476
(13-5) How many witnesses were heard?	R-1-99 <u>M-1.7</u> N-493	R-1-99 <u>M-5.7</u> N-496	R-1-263 <u>M-16.1</u> N-475
(13-6) How many days of hearing were required?	R-1-15 <u>M-1</u> N-604	R-1-44 <u>M-2</u> N-599	R-1-120 <u>M-7</u> N-583
(13-7) Was a pre-hearing conference held on this case?	Yes No 15.6% 84.4%	Yes No 20.9% 79.1%	Yes No 43.9% 56.1%
(13-8) Was settlement reached during the pre-hearing conference?	N-532 8.8% 91.2%	N-540 .4% 99.6%	N-543 .6% 99.4%
(13-9) Did the parties to the case use pre-hearing discovery?	N-583 10.3% 89.7%	N-577 21.5% 78.5%	N-570 38.9% 61.1%
(13-10) Was discovery extensive?	N-487 5.3% 94.7%	N-493 11.0% 89.0%	N-503 33.2% 66.8%
(13-11) Was discovery contested?	N-472 2.3% 97.7%	N-479 8.6% 91.4%	N-491 21.8% 78.2%
(13-12) Were major portions of the facts stipulated by the parties?	N-575 27.1% 72.9%	N-577 16.8% 83.2%	N-570 16.8% 83.2%
(13-13) Was written testimony filed in advance?	N-588 24.1% 75.9%	N-585 27.4% 72.6%	N-573 33.2% 66.8%
(13-14) Were witness lists and synopses of expected testimony exchanged?	N-589 12.6% 87.4%	N-585 20.7% 79.3%	N-576 31.9% 68.1%
(13-15) Were the issues stipulated by the parties?	N-580 34.5% 65.5%	N-579 31.8% 68.2%	N-565 33.5% 66.5%
(13-16) Did the nature of the case require you to do extensive research on agency policies, legal precedents, or technical issues?	N-595 7.6% 92.4%	N-586 28.7% 71.3%	N-577 22.4% 77.6%
(13-17) Were you required to travel away from your official station to conduct conferences, hearings, or an investigation related to this case?	N-600 37.3% 62.7%	N-591 59.9% 40.1%	N-579 64.1% 35.9%
(13-18) Was your preparation of an opinion in this case delayed by a requirement to hear or terminate another case?	N-587 27.4% 72.6%	N-588 53.2% 46.8%	N-579 57.9% 42.1%
(13-19) Were exceptions to your opinion in this case appealed to the Commissioners or agency head?	N-575 11.0% 89.0%	N-574 50.3% 49.7%	N-564 71.5% 28.5%

14. The previous question was designed to help us understand the reasons why some cases take longer to process than others. Looking back over the information we requested for each case, are there any other case characteristics not listed which you believe would explain variances in processing times? If so, what were they? N-446

See Attachment IV

15. Do you believe there is unnecessary delay in the administrative adjudication process? N-692

33.5% [1] No (Go to question 17.)

66.5% [2] Yes (Continue.)

16. Please rank the following factors as you believe they contribute to delay in the administrative adjudication process. (Place 1 next to the factor which you believe contributes the most to delay, 2 next to the factor which contributes the next most to delay, and so on.) See Attachment V

(16-1) [ ] Too many complex and technical cases involving numerous participants.

(16-2) [ ] Agency review of ALJ decisions.

(16-3) [ ] Agency failure to set priorities thereby wasting resources on less urgent issues.

(16-4) [ ] Intentional delay by parties or protesters to a case.

(16-5) [ ] Lack of penalties for parties or protestors who do delay.

(16-6) [ ] Formal nature of oral hearings and the pre- and post-hearing routine.

(16-7) [ ] Lack of deadlines, standards, and/or schedules for case processing.

(16-8) [ ] Agency failure to establish clear policy.

SELECTION OF ALJs

17. To what extent do you believe the following application requirements or selection practices contribute to selection of the most qualified applicants?

	<i>Very great extent</i>	<i>Great extent</i>	<i>Moderate extent</i>	<i>Some extent</i>	<i>Little or no extent</i>	<i>Don't know</i>
(17-1) Written examination N-736	28.3%	26.1%	26.2%	10.7%	6.3%	2.4%
(17-2) Oral panel interview N-723	22.1%	26.6%	26.1%	15.8%	6.5%	2.9%
(17-3) Veteran's preference N-716	1.5%	2.6%	6.7%	13.0%	68.9%	7.3%
(17-4) "Rule of Three" (Requirement that selection be made from among three highest ranked applicants on CSC register) N-725	8.4%	13.5%	18.3%	21.1%	25.7%	13.0%
(17-5) Selective certification N-714	15.3%	16.0%	15.4%	13.7%	23.1%	16.5%
(17-6) Trial experience N-736	46.9%	25.9%	13.6%	8.7%	2.7%	2.2%
(17-7) Recommendations of partners, opposing attorneys, presiding officers, etc. N-731	21.1%	25.4%	24.8%	14.6%	10.5%	3.6%

18. Immediately prior to becoming an ALJ, where were you working? N-684
- 22.0% [1] Same Federal agency at which I became an ALJ
- 33.0% [1] Another Federal agency
- 36.0% [1] Private law practice (i.e. working for yourself or some other private business)
19. Were you initially selected as an ALJ through a selective certification register? N-718
- 58.1% [2] Yes
- 33.3% [1] No
- 8.6% [9] Don't Know
20. Did you receive a Veteran's Preference in the certification process? N-726
- 74.5% [2] Yes
- 21.8% [1] No
- 3.7% [9] Don't Know
21. In terms of preparing applicants for duties as an ALJ, how adequate is the requirement of 7 years experience as an attorney? N-723
- 3.9% [3] Excessive
- 78.5% [2] Adequate
- 17.6% [1] Insufficient
22. In terms of preparing applicants, how adequate is the requirement for 2 years of experience as an attorney in administrative law or in trial work in courts of record? N-720
- 4.9% [3] Excessive
- 62.5% [2] Adequate
- 32.6% [1] Insufficient
23. Should interviews with applicants' references replace the current CSC procedure of obtaining written evaluation of applicants' qualifications (i.e. vouchering)? N-707
- 50.4% [2] Yes
- 49.6% [1] No

24. How likely do you believe it is that the present application process favors government attorneys over attorneys in the private sector? N-722
- 40.0% [5] Very likely
- 25.1% [4] Somewhat likely
- 23.4% [3] Neither likely nor unlikely
- 3.5% [2] Somewhat unlikely
- 8.0% [1] Very unlikely
- If you checked either "Somewhat" or "Very likely," which of the following describes the reason you feel that private attorneys are disadvantaged? (Check only one.) N-53:
- 20.7% [1] The application process requires too much paperwork.
- 9.2% [1] Securing references from partners and clients is too costly to the applicant in the event he or she is not selected.
- 21.3% [1] Selective certification is abused.
- 19.6% [1] Other. (Please check the box and specify.)
- See Attachment VII \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
25. What type of experience did you have prior to becoming an ALJ? (Check only if Yes.)
- 32.4% [1] Trial experience N-618
- 43.3% [1] Staff attorney experience (e.g., experience as an assistant to a board member or commissioner, as an assistant general counsel, as an attorney analyzing cases and writing decisions) N-325

26. How would you assess the importance of trial experience to an ALJ? N-728
- 73.1% [5] Very important
  - 20.1% [4] Somewhat important
  - 5.8% [3] Neither important nor unimportant
  - .6% [2] Somewhat unimportant
  - .4% [1] Very unimportant

27. How would you assess the importance of staff attorney experience to an ALJ? N-718
- 15.5% [5] Very important
  - 46.5% [4] Somewhat important
  - 24.8% [3] Neither important nor unimportant
  - 6.0% [2] Somewhat unimportant
  - 7.2% [1] Very unimportant

28. If you had complete authority to change current application requirements or selection practices, would you make any changes? If so, please describe them.

See Attachment VI

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CASE MONITORING SYSTEMS

29. At the agency at which you are employed as an ALJ, is there a management information system which gives the status of each case assigned to an ALJ? N-718
- 90.5% [2] Yes (Go to question 31.)
  - 9.5% [1] No (Continue)

30. Should this type of management information system be established in your agency? N-102
- 47.1% [2] Yes
  - 31.4% [1] No
  - 21.5% [9] Don't know  
(Go to question 33.)

31. Is the system based primarily on the Chief ALJ's knowledge of the caseload (or your knowledge of it) rather than statistical data? N-663
- 35.0% [2] Yes
  - 65.0% [1] No

32. Does the system monitor cases at each step of the process to maintain case flow? N-645
- 74.7% [2] Yes
  - 25.3% [1] No

33. Is there a system to monitor the number of cases adjudicated by each ALJ to determine ALJ productivity? N-701

- 12.0% [1] No (Go to question 35.)
- 88.0% [2] Yes (Continue.)

34. Is the system to determine ALJ productivity based on any of the following methods? (Check only if Yes.) N-682

- 61.6% (34-1) Specified number of cases per month [1]
- 11.5% (34-2) Weighting of cases based on time it takes to adjudicate each type of case [1]
- 5.6% (34-3) Time standard for each type of case [1]
- 4.0% (34-4) Time standard for each stage of case [1]
- 8.3% (34-5) Other, please specify [1]

See Attachment VIII

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(Go to question 36.)

35. Is one of the following feasible for determining ALJ productivity in your agency? (Check only if Yes.) N-463
- 24.7% (35-1) Specified number/month [1]
  - 22.3% (35-2) Weighting of cases based on time it takes to adjudicate each type of case [1]
  - 6.3% (35-3) Time standard for class of case [1]
  - 2.4% (35-4) Time standard for each stage of case [1]
  - 6.1% (35-5) Other, please specify [1]  
See Attachment IX
- (Go to question 37.)

36. If your agency has a system for determining ALJ productivity, how often would you say the following statements about it are true?

*Almost always*  
*Frequently*  
*Occasionally*  
*Seldom*  
*Almost never*

- N-579 (36-1) Increases productivity 14.0/40.9/27.8/10.7/ 6.6
- N-515 (36-2) Decreases productivity 1.6/ 3.7/16.7/30.1/47.9
- N-565 (36-3) Increases motivation 11.0/29.6/27.4/18.9/13.1
- N-527 (36-4) Decreases motivation 6.8/ 9.8/19.4/24.9/39.1
- N-582 (36-5) Quality suffers for the sake of quantity 29.2/27.2/24.0/10.5/ 9.1
- N-560 (36-6) Increases quality of ALJ decision .9/ 1.8/ 6.9/27.9/62.5
- N-577 (36-7) Creates peer pressure to increase productivity 20.5/31.4/27.7/12.8/ 7.6
- N-534 (36-8) Does not serve any useful purpose 15.2/14.0/24.2/15.7/30.9

37. In order to assist Congress in determining which agencies have the greatest need for additional ALJs, how helpful do you believe it would be to establish a uniform weighted caseload index, as is used by the Federal District Court, for all agencies which employ ALJs? The index essentially gives more weight to cases which require more time to adjudicate. N-731
- 23.7% [5] Very helpful
  - 28.6% [4] Somewhat helpful
  - 11.2% [3] Neither helpful nor harmful
  - 5.9% [2] Somewhat harmful
  - 5.2% [1] Very harmful
  - 25.4% [9] Don't know

AGENCY REVIEW OF DECISIONS

38. On what basis does your agency review ALJ decisions?
- 8.8% [1] Every case N-66
  - 33.2% [1] On appeals of right N-501
  - 22.9% [1] By certiorari or similar discretionary procedure N-172
  - 2.1% [1] Only cases with significant issues N-16
  - 15.2% [1] Other. Please check box and specify. N-114  
See Attachment x
39. What is the nature of the agency's review of ALJ decisions?
- 58.1% [1] De novo (entire case without another hearing) N-436
  - 7.9% [1] De novo (entire case with another hearing) N-59
  - 35.3% [1] Only what is appealed N-265
40. When the agency reviews one of your decisions, what type of feedback do you get? N-712
- 30.7% [1] None
  - 56.5% [1] Formal (e.g., as a matter of practice, agency officials provide you with verbal or written commentary on your decisions)
  - 7.7% [1] Informal (e.g., you must seek out agency officials or documents to determine the outcome of the reviews)

		Almost always	Frequently	Occasionally	Seldom	Almost never
N-699	(41-1) Misapplication of law	.3	.4/	4.9/20.9/73.5		
N-689	(41-2) Error of fact	.2	.4/	3.3/17.6/78.5		
N-699	(41-3) Using the same facts and reaching different decision	2.6/	3.6/25.6/28.4/39.8			
N-688	(41-4) Using different facts and reaching different decision	2.7/	3.2/22.1/18.2/53.8			
N-679	(41-5) Taking facts out of context to reach preconceived decisions	1.3/	3.1/ 8.7/11.8/75.1			

MOTIVATIONAL FACTORS

Most people would probably agree that motivation is a very important factor in productivity. Most people would also agree that motivation is affected by a great many things. The following questions are designed to identify the effects of some of those things. While the questions may appear to be subjective, our interest is not in the level of motivation of individual ALJs, but rather in how the nature of the work and the level of support provided by the organization effects motivation overall. Thus we would appreciate your particular attention to questions 44 and 45.

		Almost never	Rarely	Sometimes	Rather often	Nearly all the time
N-734	(44-1) Thinking that the amount of work you have to do may interfere with how well it gets done.	20.4%	16.0%	37.2%	20.4%	6.0%
N-738	(44-2) Feeling that you have too little authority to carry out the responsibilities assigned to you.	45.4%	22.9%	19.4%	9.7%	2.6%
N-737	(44-3) Feeling that you can't get information needed to carry out your work.	34.8%	21.0%	28.2%	14.0%	2.0%
N-736	(44-4) Thinking that there are too many reviews of your work by agency officials.	43.6%	24.3%	17.1%	9.3%	5.7%
N-735	(44-5) Feeling that you have to do things in your work that are against your better judgment.	59.5%	20.8%	14.7%	3.9%	1.1%
N-736	(44-6) Feeling that your job tends to interfere with your family life.	56.7%	21.2%	16.7%	3.9%	1.5%
N-750	(44-7) Feeling that you're not fully qualified to handle your work.	2.8%	85.6%	8.1%	3.2%	.3%
N-736	(44-8) Feeling that you have too heavy a work load.	25.2%	20.0%	35.0%	13.0%	6.8%
N-735	(44-9) Thinking that agency officials who review your work aren't nearly as qualified as you are.	21.0%	14.7%	33.1%	16.4%	14.8%
N-732	(44-10) Thinking that others who perform your type of work (e.g. District Court Judges) are accorded more deference than you are.	27.7%	12.3%	27.2%	15.8%	17.0%

42. Have you ever been told by agency officials that you have done any of the following? (Check only if Yes.) N-159			
1.7%	(42-1) Written illogical decisions	[1]	
11.9%	(42-2) Misapplied a law	[1]	
3.9%	(42-3) Been inaccurate in citing facts or laws	[1]	
1.1%	(42-4) Writing poor quality decisions (writing style not decision)	[1]	
2.7%	(42-5) Written bad or wrong decisions	[1]	
43. Would you consider it an infringement upon your independence if you were told that you had done any of the following by agency officials? (Check only if Yes.)			
37.7%	(43-1) Written illogical decisions	[1]	N-287
23.5%	(43-2) Misapplied a law	[1]	N-176
28.1%	(43-3) Been inaccurate in citing facts or laws	[1]	N-211
37.9%	(43-4) Written poor quality decisions (style not decision)	[1]	N-284
15.0%	(43-5) Written bad or wrong decisions	[1]	N-346

- 45. Please read the instructions on the left first and fill in your answers on that side of the page. Then read the instructions on the right and fill in your answers on that side.

Please indicate in the box to the left of each statement below your belief as to how often it is true that "Superior" performance leads to the outcome described by the statement. In providing your answer, please think of "Superior" performance as being defined by "rendering the best possible decisions in the shortest period of time."

Use the following numbers to represent your feelings about how frequently the outcome is dependent on superior performance.

- 1 - Never
- 2 - Seldom
- 3 - Occasionally
- 4 - Sometimes
- 5 - Often
- 6 - Usually
- 7 - Always

For example, if you felt that rendering the best possible decision quickly would ALWAYS result in the respect of your legal peers, then you would place a 7 in the appropriate box. However, if you felt that it would OCCASIONALLY lead to peer respect, then you would place a 3 in the box, and so on.

Now would you rate in a similar manner the frequency with which the following outcomes are dependent on "Superior" performance.

Please indicate in the box to the right of each statement how DESIRABLE each outcome is to you. You can do this by selecting the appropriate number from the following numbering system.

- 1 - Extremely undesirable
- 2 - Very undesirable
- 3 - Undesirable
- 4 - Neutral
- 5 - Desirable
- 6 - Very desirable
- 7 - Extremely desirable

After selecting the appropriate number, place it in the box to the right of the outcome. For example, if the respect of your legal peers is an outcome which you consider neither desirable or undesirable, you would place a 4 in the appropriate box.

Now would you please rate in a similar manner the desirability of each of the following outcomes.

SEE ATTACHMENT

- [ ] - - - - - RESPECT OF PEERS IN THE LEGAL PROFESSION - - - - - [ ]
- [ ] - - - - - FREQUENT MODIFICATION OF YOUR DECISIONS BY AGENCY OFFICIALS - - - - - [ ]
- [ ] - - - - - ADDITIONAL AUTHORITY AND RESPONSIBILITY (E.G. FROM ATTACHING GREATER FINALITY TO ALJ DECISIONS) - - - - - [ ]
- [ ] - - - - - FREQUENT TIME AWAY FROM HOME OR FAMILY AND FRIENDS (DUE TO TRAVEL, WORKING MORE THAN AN 8 HOUR DAY, AND SO ON) - - - - - [ ]
- [ ] - - - - - OFFICE SURROUNDINGS BEFITTING GRADE AND POSITION - - - - - [ ]
- [ ] - - - - - FEELING OF CONTRIBUTION TO THE BODY OF ADMINISTRATIVE LAW - - - - - [ ]
- [ ] - - - - - JEALOUSY OR LESS ACCEPTANCE BY CO-WORKERS - - - - - [ ]
- [ ] - - - - - PRESSURE FROM AGENCY OFFICIALS TO DECIDE CASES IN A SHORTER TIME - - - - - [ ]
- [ ] - - - - - OPPORTUNITY TO TRAVEL TO PLEASANT OR INTERESTING LOCATIONS - - - - - [ ]
- [ ] - - - - - INCREASE IN PAY COMMENSURATE WITH SPECIAL STATUS AND POSITION IN GOVERNMENT (E.G. INCREASE TO 90 PERCENT OF A FEDERAL DISTRICT JUDGE'S SALARY) - - - - - [ ]

45.

Belief that "superior" performance leads to outcome

	No. of judges responding	Never	Seldom	Occasionally	Sometimes	Often	Usually	Always
----- (percent) -----								
Respect of peers in the legal profession	N-719	1.2	2.9	6.7	12.8	16.3	37.6	22.5
Frequent modification of your decisions by agency officials	N-711	26.0	45.9	10.5	9.3	4.1	3.7	.5
Additional authority and responsibility (e.g. from attaching greater finality to ALJ decisions)	N-705	16.5	15.2	7.5	14.3	11.9	19.4	15.2
Frequent time away from home or family and friends (due to travel, working more than an 8 hour day, and so on)	N-711	18.6	22.9	14.6	19.8	12.1	7.8	4.2
Office surroundings befitting grade and position	N-710	28.6	22.7	6.7	12.7	7.4	13.0	8.9
Feeling of contribution to the body of administrative law	N-714	3.1	5.9	9.0	13.1	17.8	24.1	27.0
Jealousy or less acceptance by coworkers	N-711	36.0	34.9	10.6	13.6	3.2	1.3	.4
Pressure from agency officials to decide cases in a shorter time	N-715	24.9	22.2	11.8	14.1	10.2	9.8	7.0
Opportunity to travel to pleasant or interesting locations	N-713	29.5	26.9	13.9	16.0	6.4	4.9	2.7
Increase in pay commensurate with special status and position in Government (e.g. increase to 90 percent of a Federal district judge's salary)	N-693	32.7	12.8	6.1	10.4	6.1	12.7	19.2

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45. Desirability of outcome

	No. of judges <u>responding</u>	<u>Extremely</u> <u>undesirable</u>	<u>Very</u> <u>undesirable</u>	<u>Undesirable</u>	<u>Neutral</u>	<u>Desirable</u>	<u>Very</u> <u>desirable</u>	<u>Extremely</u> <u>desirable</u>
----- (percent) -----								
Respect of peers in the legal profession	N-702	1.3	1.4	.1	6.7	29.3	28.1	33.1
Frequent modification of your decisions by agency officials	N-693	36.5	23.2	21.8	14.7	1.3	1.2	1.3
Additional authority and responsibility (e.g. from attaching greater finality to ALJ decisions)	N-698	1.6	1.6	1.6	14.9	29.8	24.3	26.2
Frequent time away from home or family and friends (due to travel, working more than an 8 hour day, and so on)	N-700	18.3	13.6	40.9	25.3	.7	.5	.7
Office surroundings befitting grade and position	N-699	1.7	2.4	1.2	10.4	36.2	26.6	21.5
Feeling of contribution to the body of administrative law	N-750	1.8	1.2	4.5	21.6	28.8	35.6	6.5
Jealously or less acceptance by coworkers	N-697	33.6	14.8	25.7	22.1	2.1	.6	1.1
Pressure from agency officials to decide cases in a shorter time	N-699	34.8	22.3	27.9	10.6	1.8	1.0	1.6
Opportunity to travel to pleasant or interesting locations	N-698	1.4	1.4	3.0	29.1	42.1	14.2	8.8
Increase in pay commensurate with special status and position in Government (e.g. increase to 90 percent of a Federal district judge's salary)	N-696	2.4	.6	.9	4.7	16.1	21.1	54.2

46. In your opinion, which of the following best defines "Superior" performance by ALJs in your agency? (Check each that applies.)
- 40.0% [1] Writing a large number of decisions in a relatively short period of time. N-300
- 6.7% [1] Achieving a large number of settlements in cases before you. N- 50
- 27.1% [1] Working at a pace which permits the reasoning out of new precedents. N-203
- 36.5% [1] Other. (Please check and specify.) N-274 See Attachment XI

TRAINING OPPORTUNITIES

47. In the past 5 years, what type of training have you participated in?
- 18.0% [1] None (Go to question 48.) N-135
- 26.8% [1] National College of State Judiciary Program for ALJs N-201
- 46.9 [1] Conferences or seminars sponsored by professional associations (FALJC, ABA, FBA, etc.) N-352
- 52.7% [1] In-house orientation to agency policies, procedures, or practices N- 395
- 5.6% [1] External training in specialized areas (e.g., accounting, economics, finance) N-42

48. Are there any types of training which would be beneficial in carrying out your ALJ functions more expeditiously and/or effectively?
- N-636
- 25.0 [1] No
- 74.5 [2] Yes. Please specify. See Attachment XII

49. For those training activities in which you have participated, how satisfied are you with them in terms of helping you better carry out your functions as an ALJ?

	<i>Very satisfied</i>	<i>Somewhat satisfied</i>	<i>Neither satisfied or dissatisfied</i>	<i>Somewhat dissatisfied</i>	<i>Very dissatisfied</i>
N-219 (49-1) National College of State Judiciary Programs for ALJs	42.5%	32.0%	10.5%	9.6%	5.4%
N-378 (49-2) Other conferences or seminars sponsored by professional associations	27.2%	52.4%	14.8%	4.5%	1.1%
N-451 (49-3) In-house orientation to agency policies, procedures, or practices	22.0%	42.8%	12.8%	14.0%	8.4%
N-38 (49-4) External training in an academic discipline	19.3%	39.8%	28.4%	3.4%	9.1%

\*\*\*\*\*

Thank you for your time and cooperation. Again, we welcome any additional comments you may have on these questions and any related issues not covered.

Question 7 (7-6, 7-8, 7-12)--Over the years there have been many suggestions about how to improve the administrative process. Some of these are listed below.

(7-6) For the question 7-5, if you checked "Very Great," "Great," "Moderate," or "Some" please cite the specific statutory provisions.

1. HEW Social Security and SSI Program.
2. Health and Welfare cases under the Social Security Act.
3. 30 USC & 820(a) 110(a) only.
4. Title 5 USC 551 ET SEQ. and its whole thrust and meaning for adjudicating independence.
5. Atomic Energy Act 8189; NRC Hearings should not be under APA.
6. Sect. 205(6) of Social Security Act.
7. Welfare benefit determination should be excluded from APA procedures.
8. While not provided for by statute, HEW claims should not be heard by ALJs in most cases.
9. Title II and XVI of the SSA.

(7-8) For Question 7-7, if your checked "Very Great," "Great," "Moderate," or "Some" please cite the specific agency rules of procedure.

1. 47 CFR 307(b) and companion rule of FCC 1.525(b) (1).
2. 20 CFR 404.9118(b) 416.1427a, 416.1535.
3. A hearing must be held within a definite number of days.
4. HEW rules fail to mandate a pre-trial conference after initial denial. Instead, a "Paper Reconsideration" parrots the rationalization of the initial denial and makes excessive number of hearings inevitable (20 CFR 404.909-916, 917). Support AR 6064 (Levitas Bill) which corrects this.

5. BHA hearings are held sometimes before all the evidence is in - cases are docketed when development is not complete.
  6. Requests for hearings are filed with no confrontation between the claimant and the Government to define the issues.
- (7-12) Other. (Please specify and indicate extent of improvement.)
1. Eliminate review of ALJ decisions by boards of GS-14, 15, and 16 employees totally devoid of trial/hearing experience.
  2. Faster review of initial decisions.
  3. On an as needed basis, make provisions for adequate equipment and personnel.
  4. Standardize procedures for hearings before major regulatory agencies and provide absolute independence for ALJs.
  5. Reduce time for hearing and disposition in benefit cases.
  6. Individual calendaring of cases by ALJs applying substantial evidence rule to agency's internal review of ALJs decision.
  7. Adhere to established procedure.
  8. There should be an agency which investigates and eliminates unnecessary delays in the administrative process.
  9. Isolation of contested issues by means of verified pleadings - increased engagement of agency or commission personnel to prosecute the Government's interest will relieve the judge of this burden or increase his or her de facto independence.
  10. Rules of evidenced should be relaxed. Stop fighting the battle against admission of hearsay evidence. This will reduce the number and length of argument by counsel.
  11. Eliminate grade classification discrepancy that now exists (GS-15 & 16).
  12. Better liaison with and/or control over State agencies.

13. Complete independence of judge - no pressures from any source - high or low.
14. Upgrade the standards for ALJ appointment and improve the process of selecting persons for ALJ appointment.
15. Provide para-legal support for judges who demonstrate a capacity to efficiently use such assistance.
16. No development of evidence should be required of ALJ; it should be complete when received and ready for hearing.
17. Increase selection of qualified judges from private bar by increasing independence, finality, pay authority, prestige, office quality and staff support.
18. Improved administrative and technological support should not come from the agency but should be provided within the adjudicatory organization.
19. Increase salaries, have one fixed salary rather than ingrade steps, put salary on 90 percent basis of District Government Judges. It would attract more competent judges.

Question 8--The U.S. Tax Court uses a small case procedure for cases which involve tax violations of \$1,500 or less. The violator can elect this procedure with an informal hearing before a special trial judge rather than a formal hearing before a tax court judge. One of the duties of the special trial judge is to assist the violator, if unrepresented, in presenting all of his/her evidence. The decision rendered by this procedure is final and not appealable. Could such a procedure be used by some agencies; and if yes, which ones?

The agencies which were mentioned as being a good prospect for the use of small case procedure for cases which involve tax violations of \$1,500 or less are; Labor, ICC, Coast Guard, NLRB, Customs, Interior, FTC, FCC, CAB, BHA, NTSB, Federal Maritime Commission, Consumer Product Safety Commission, OSHRC, SEC, Railroad Retirement Board, Occupational Safety and Health Administration, Immigration, EPA, Postal Service, Transportation, Veterans Administration, Food and Drug Administration, Agriculture, Internal Revenue Service, and Commodity Futures Trading Commission.

It was stated that this system is already in use for some of the cases in BHA. Some ALJs feel that rate regulations, civil rights cases, and regulatory agencies could use this system.

Some of the ALJs say the system should be used when monetary considerations are the matters at issue. An ALJ who favors using the system on monetary matters said a \$2,000 limit should be set. Another said the system should be used

when the monetary issue involves a set sum and does not involve people living at the poverty level. No public right on legal precedent should be involved in these cases. Also, cases where only a desist order is sought as opposed to a license suspension or revocation should use the system. Others characterized the types of cases which would benefit from the use of the system as "small" cases. One ALJ said the system should be used when the claimant is challenging the government and the claimant should choose the forum. It was indicated that the system should be used in cases which deal with violations or other specific items rather than indefinite quantities, e.g., benefits. One ALJ warned if the person is unrepresented, the decision could be struck down as unconstitutional or set aside if appealed because of a lack of counsel.

Question 9 (9-4)--The Veterans Administration through its Board of Veterans Appeals informally adjudicates disability cases without a hearing unless it is requested by the individual seeking the disability benefits. After the case has been processed and decided at the regional office level, it can be appealed to the board. At the board the case is adjudicated by three member panels, generally made up of two attorneys and a doctor. Each panel has seven attorneys who assist them. The decision of the board is final and not appealable to the U.S. Federal courts.

Do you believe this type of informal system could be used to help you adjudicate the following types of cases?

(9-4) Other. Please specify.

The majority of the respondents feel that if a decision cannot be appealed to the Federal courts, it is not an APA decision. Vested rights are involved and an APA hearing is required with full review rights in Federal courts. While such a system could be used, it would sacrifice the quality of decisions and due process requirements of APA. The board has been under attack itself and has doubtful validity in adjudicating cases. Appeals to Federal courts should always be available to persons requesting them.

Question 14--Are there any other case characteristics not listed in question 13 which you believe would explain variances in processing time?

The respondents stated the following are characteristics which would explain variances in processing time:

1. The necessity for prehearing or posthearing development.
2. The necessity to develop technical, scientific, medical, economic or personal information after hearings.
3. The use of interpreters.
4. Failure to obtain evidence prior to hearings.
5. Failure to apply proper law and agency regulation.
6. Failure to make proper computation in SSI cases.
7. Inability of state to obtain medical evidence prior to hearing.
8. Slowness in getting necessary info from other agency components.
9. Request for continuances, particularly by Labor Dept. due to heavy workload in solicitor's office.
10. Poor development of evidence at lower levels.
11. Long delays in receiving requested reports from treating physicians and in getting reports of consultative examinations arranged by the State agencies.
12. Lack of agency staff to prepare for case or press for settlement.
13. Complexity of the facts.
14. Necessity to supplement the record with testimony from witness not available on hearing date, particularly MDs.
15. Cases assigned without due regard to prior case assignment.

16. Public interest groups are taking increased interest in agency proceedings which means additional witnesses and issues.
17. Inexperienced counselor.
18. To minimize multiple trips to the same area or city, cases may be held for assignment until two or more cases can be scheduled for the same trip.

16. Please rank the following factors as you believe they contribute to delay in the Administrative Adjudication Process. (Place "1" next to the factor which you believe contributes the most to delay, "2" next to the factor which contributes the next most to delay, and so on)

	<u>Rank</u>	<u>No. of persons responding</u>	<u>Percent</u>
(16-1) Too many complex and technical cases involving numerous participants	1	42	5.6
	2	31	4.1
	3	19	2.5
	4	29	3.9
	5	33	4.4
	6	32	4.3
	7	39	5.2
	8	75	10.0
<hr/>			
(16-2) Agency review of ALJ decisions	1	148	19.7
	2	63	8.4
	3	40	5.3
	4	32	4.3
	5	42	5.6
	6	27	3.6
	7	28	3.7
	8	15	2.0
<hr/>			
(16-3) Agency failure to set priorities thereby wasting resources on less urgent issues	1	61	8.1
	2	57	7.6
	3	36	4.8
	4	41	5.5
	5	40	5.3
	6	34	4.5
	7	28	3.7
	8	14	1.9
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(16-4) Intentional delay by parties or protestors to a case	1	116	15.5
	2	105	14.0
	3	53	7.1
	4	45	6.0
	5	24	3.2
	6	25	3.3
	7	19	2.5
	8	9	1.2

	<u>Rank</u>	<u>No. of persons responding</u>	<u>Percent</u>
(16-5) Lack of penalties for parties or protestors who do delay	1	42	5.6
	2	88	11.7
	3	90	12.0
	4	34	4.5
	5	48	6.4
	6	24	3.2
	7	16	2.1
	8	18	2.4
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(16-6) Formal nature of oral hearings and the pre- and post-hearing routine	1	46	6.1
	2	27	3.6
	3	47	6.3
	4	48	6.4
	5	22	2.9
	6	30	4.0
	7	43	5.7
	8	42	5.6
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(16-7) Lack of deadlines, standards, and/or schedules for case processing	1	37	4.9
	2	32	4.3
	3	39	5.2
	4	37	4.9
	5	25	3.3
	6	46	6.1
	7	42	5.6
	8	32	4.3
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(16-8) Agency failure to establish clear policy	1	39	5.2
	2	49	6.5
	3	36	4.8
	4	39	5.2
	5	37	4.9
	6	36	4.8
	7	28	3.7
	8	41	5.5
	9	1	0.1

Question 24--Do you have comments other than the items listed on why you believe the present ALJ application process favors government attorneys over attorneys in the private sector?

The way the qualification system is set up, Government attorneys possess a greater concentration of the specialized experience required, and it is easier for them to qualify because they seem to have better qualifications, more opportunity to learn of the vacancies, and are more familiar with the way the government's system operates. Some ALJ's mentioned that the current selection system causes inbreeding. It was felt that equivalent experience in the private sector would not be acceptable or would be weighted less than government experience during the qualifying process. There was also a feeling that government attorneys used as references enhance qualifications of the applying government attorneys on the vouchers. Private attorneys' references usually private attorneys themselves, are more honest and less effusive in their voucher recommendations. One ALJ said selection certification most often helps government attorneys. Others said there is too much emphasis on special agency experience. One ALJ pointed out that because "outsiders" must enter at a beginning step, while government lawyers may enter at higher instep levels, the pay spread

is often \$10,000 or more per year. This discourages qualified outsiders. A couple of ALJs said the job has received insufficient publicity in the private sector. It was felt there is too much delay in processing the applications. A few ALJs maintain that CSC is partial or biased in their selection process toward government attorneys.

Many interesting comments were made. Some are as follows:

--Private practitioners have less enthusiasm to become ALJs--they use the political system to become state court or judicial court judges.

--It is easier to maintain integrity and respect as a government attorney.

--Few private practice attorneys can qualify on 2 years of administrative law.

--Moving and other expenses are a deterrent to the private attorney.

--A private attorney's current employer or firm has advance notice on his effort to relocate.

--Qualifying experience such as teaching, arbitration, and trial without record are excluded from consideration.

There were a few comments from the ALJs which seemed to indicate a bias on their part. One such comment was "\* \* \* government lawyers are more adapted to system \* \* \*."

Question 28--If you had complete authority to change current application requirements or selection practices, would you make any changes? If so, please describe them.

It seems to be the general consensus to abolish the voucher system and substitute examination certification by peers rather than CSC. Since there is a voucher system, it should be more selective and personal.

As for examinations, it is stated that the requirement for the written exam or decision and the oral interview be eliminated. It is felt that the appellate-court problems on the written test be replaced with an administrative law trial problem and that a physical as well as psychological exam be given. There should also be more emphasis placed on the ability to analyze evidence, write concisely and reach decisions promptly.

It is felt that one qualification that should be stressed for an ALJ position is more trial experience, and this should be made mandatory with no substitutions. It is stated in several questionnaires that nontrial experience should be eliminated as a qualification and the applicant should have 10 years experience as a lawyer. Others stated that the 400-day application requirements should be lowered and credit for all legal work performed, including experience outside of the Federal Government, should be given rather than trial work alone. Other qualifications should consist

of more inquiry being made about the applicant's temperament and ability to handle hostile witnesses. There are some who think the 2-year trial experience within the last 7 years should be changed to simply 2 years' trial experience enabling older lawyers who once tried cases eligible for appointment.

It was brought out that CSC should have the power of appointment instead of agency heads, whereas others think ALJs should be appointed by the President and approved by the Senate. They also felt that every existing ALJ should be required to at least get Senate approval.

It was stated that CSC should have open processing to public scrutiny and require it to be published and follow objective criteria. The present length of the application and delays in processing time are discouraging many qualified individuals. The application should be substantially shortened and they should be processed promptly (within 2 to 3 months). It was also recommended that the standard form 171 replace the current application.

The experience--evaluating personnel should be brought to a greater understanding of the characteristics and nature of work performed by lawyers in private practices.

The reference check should be done away with and replaced with a more viable interview panel, however, the low-graded CSC representatives should be eliminated.

There are respondents who felt that the experience requirement in administrative law should be eliminated or reduced. However, others feel that extensive experience with administrative law cases should be made an absolute requirement.

There are a number of people who think veteran's preference should be eliminated and the top three choices should be increased to 10 or 15.

It is felt that there should be a division separating GS-16 and GS-15 ALJs. There is a difference between regulatory proceedings heard by GS-16 and those heard by HEW ALJs. One individual stated that he would not permit men or women to be drawn from HEW's list of GS-15 ALJs to fill GS-16 positions.

There are a number of people who feel that the current application requirements or selection practices are great. They wouldn't change a thing.

- Question 34--Is the system to determine ALJ productivity based on any of the following methods? (Check only if yes.)
- (34-1) Specified number of cases per month.
  - (34-2) Weighting of cases based on time it takes to adjudicate each type of case.
  - (34-3) Time standard for each type of case.
  - (34-4) Time standard for each stage of case.
  - (34-5) Other, please specify.

There is a national average established upon past records that all ALJs try to meet each month. When they do not reach the national average, they are reprimanded.

Most respondents stated that ALJ productivity is based on the length of the trial and transcript; whereas, others said it was determined on the number of decisions yearly (with no reference to complexity of cases), quarterly and monthly. Weight is placed heavily on numbers.

One respondent stated that there is a constant check by the chief ALJ to ensure that the work is up to date and the case load is covered.

Question 35--Is one of the following feasible for determining ALJ productivity in your agency? (Check only is yes.)

35-1 Specified number/month.

35-2 Weighting of cases based on time it takes to adjudicate each type of case.

35-3 Time standard for class or case.

35-4 Time standard for each stage of case.

35-5 Other, please specify.

It was stated that there is too much variation in the nature of cases to set a simple criterion. One respondent stated, "Except in extraordinary circumstances, productivity of Judges can not and should not be measured. If high caliber judges are appointed, productivity will take care of itself."

It is felt that productivity should be weighted by type of result, i.e., dismissal, affirmation, reversal, or partial reversal. There should be individual conferences with ALJs concerning productivity and units per year should be reported by quarter with individual's performance compared with peer's averages.

Things which should be considered in determining the productivity of ALJs are case load, analyzation, time standard from request for hearing and receipt of file, and time standard from date the case was assigned to ALJ until the decision is rendered.

Question 38--On what basis does your agency review ALJ decisions?

The majority of the people who answered the question stated that their agency review ALJ decisions based on their own motion review. There is also a request by the claimant and staff recommendations. Others are done on a selective basis depending on the central office evaluation of the ALJ, spot checking, and random sampling.

Lately attempts are being made to review all decisions of low producers. In some agencies, there is a review staff who reviews every case and recommends cases for review by CSC.

Question 46--In your opinion, which of the following best defines "superior" performance by ALJs in your agency?  
(Check each that applies.)

Writing a large number of decisions in a relatively short period of time.

Achieving a large number of settlements in cases before you.

Working at a pace which permits the reasoning out of new precedents.

Other (Please check and specify.)

The following opinions were stated as superior performance by ALJs:

1. Writing as many decisions as possible, provided a full and adequate hearing is held, a well-reasoned decision is issued, and justice and equity are served.
2. Quality and quantity in a reasonable time.
3. Taking whatever time is necessary to be fair to both parties.
4. Well-conducted hearings.
5. Logical arrangement of docket and office duties.
6. Judicial temperament and human concern.
7. Instilling confidence in the person seeking relief before an administrative agency that he and all affected parties have had a fair hearing by an impartial judge who will decide the matter on its merits.
8. Carrying a fair share of the caseload and disposing of the cases as expeditiously as possible.

Question 48--Are there any types of training which would be beneficial in carrying out your ALJ functions more expeditiously? (If yes, please specify.)

#### Synopsis of Answers

Many ALJs said training would be beneficial to them in carrying out their functions. Often mentioned was in-house, regional, or agency workshops of ALJs to exchange ideas, discuss common problems, and provide a vehicle for agency orientation, policy, and procedures information dissemination. The ALJ program at the National College of State Judiciary, Reno, Nevada, was often mentioned as desirable training. Conferences and seminars sponsored by professional organizations, such as Federal Administrative Law Judge Conference, American Bar Association, Federal Bar Association, were listed as helpful training. The judges urged that administrative leave, travel, and per diem be granted by the agency for attendance at these professional conferences and seminars. They added that often the agency is not willing to spend the money for their training.

The subjects the ALJs wanted taught related to law in general, the specialty area they work on within their agency or the efficient accomplishment of their job. Some ALJs wanted refresher courses taught in the applicable law and regulations; others asked for continuing jurisprudence

training. Many ALJs felt seminars to discuss and analyze new statutes, laws, agency regulations, and recent ALJ or court decisions would be quite useful. ALJs also favored courses in administrative law, judicial review, and substantive law.

One training specialty mentioned again and again by the BHA's ALJs is medical training. They said they need medical training in order to more competently determine the disability cases they decide. Other specialty or technical areas in which training is needed are as follows: ratemaking, economics, accounting and finance, bookkeeping, tax law, settlement techniques, industry technology, and vocational matters. ALJs were very much concerned with efficient accomplishment of their job. Continuing education was mentioned and some judges thought they should be granted a sabbatical for pursuit of these studies. However, more often training in the actual mechanics of getting the job done was requested.

Strongly advocated were training in trial and hearing procedures, techniques, evidence as it should be applied in administrative litigation, writing style, decision writing, and executive and managerial techniques.

Finally, rotation to other agencies under the ALJ loan program was mentioned as a good training tool.

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