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**The Evolution and Role of the Administrative Law Judge
at the Office of Hearings and Appeals
in the Social Security Administration***

*Charles N. Bono***

I. ROLE OF THE ADMINISTRATIVE LAW JUDGE

The role of the Federal Administrative Law Judge is described and outlined in the Office of Personnel Management Official Position Description (PD), the Administrative Procedure Act (APA), Federal Regulations (CFR) Statutes (USCA), decisions of the Supreme Court and other courts of the land. It has also been discussed in many Congressional hearings.

The re-engineering proposals, which are the subject of this article, and the Short Term Disability Project (STDP) recently implemented by Social Security Administration (SSA) transfer a significant number of the administrative law judge functions to someone in SSA, other than an APA protected ALJ, i.e. Senior Staff Attorneys and ultimately Adjudicative Officers (AO). SSA refers to all such individuals as "adjudicators", as it has administrative law judges.

Some administrative law judges in SSA were unaware that they had an official PD. Others were aware they had a PD, but had never taken the time to read it. Their understanding of their positions in such cases was based upon their own opinions, and or perhaps what the agency told them their role and functions were.

* Speech presented in Washington DC April 7,1995, by Judge Charles N. Bono at the National Conference of Administrative Law Judges 20th Annual Symposium.

** Charles N. Bono is an Administrative Law Judge for the Office of Hearings and Appeals, Social Security Administration. Judge Bono is a past chair of the National Conference of Administrative Law Judges and a past president of the Association of Administrative Law Judges, Inc. The views and opinions expressed herein are solely those of the author. They do not represent any official position of any part of the United States Government.

The provisions of the APA, the CFR, the USCA and the PD clearly establish administrative Law Judges as a special protected class of employees in federal government service. They are employees of the agency, but their positions carry certain exclusive protection no other federal employee is granted, and for good reason. Those protection are designed to afford them decisional and functional independence.

Administrative Procedure Act

The Administrative Procedure Act (APA) was enacted in 1946. Within the provisions of that legislation, the role of the administrative law judge is clearly defined, although at that time the hearing examiners or presiding officers were not titled administrative law judges. It is important to remember that the Act also provides that such individuals are empowered to carry out those enumerated functions and that they may not perform duties inconsistent with those functions. Even if the agency in which they are employed directs them to carry out duties inconsistent with their roles as independent decision makers, the Act implies a lack of authority to do so.

Nine functions of an administrative law judge are set forth in the APA itself, they are as follows:

- 1) Administer Oaths and Affirmations;
- 2) Issue Subpoenas;
- 3) Rule on Offers of Proof of Evidence;
- 4) Take Depositions;
- 5) Regulate the Course of the Hearing;
- 6) Hold Conferences for settlement of issues;
- 7) Dispose of Procedural Requests;
- 8) Make, or recommend decisions;

9) Take Other Actions Authorized by Agency Rule Consistent with the subchapter;

Recent amendments to the APA expanded the originally stated functions to include those involving "alternative dispute resolution"(ADR). It added two functions connected with ADR that had not previously been mentioned. Thus, 11 functions of administrative law judges are derived from the APA.

Official Position Description

The Position Description in SSA expands on the original nine in the APA to nineteen. That position description was drafted, proposed and implemented after the approval of it by Office of Personnel Management as the official position description, as recently as August of 1994. Thus, by agency rule the position description adopts the APA functions and expands them to 19. We can now infer those functions to be 21 with the addition in the APA of the two new functions dealing with alternative dispute resolution.

The Social Security Administration has promulgated and implemented regulations, describing what an administrative law judge does, and what an administrative law judge is empowered to do in the hearings and appeals process in SSA, specifically 20 CFR Sections 404 and 416. Section 404 dealing with Title II (Disability Insurance Cases), and Section 416, dealing with Title XVI (Supplemental Security Income).

Court Decisions

The decisions of the courts have, on many occasions, described the position and function of the administrative law judges, and their importance as well. They have expanded the function, duties and responsibilities to the

position of administrative law judges, particularly in the case of SSA judges to evidence gathering functions and record development responsibilities beyond those usually required of Article III judges. The function and responsibility of an SSA judge also goes beyond those of administrative law judges for other agencies who primarily preside over adversary proceedings where both parties are represented. The additional burdens placed on the administrative law judge in SSA are dictated by the non-adversarial nature of the SSA hearings presided over by SSA judges.

The following are a list of cases, addressing the importance of administrative law judges.

- *Ramspeck vs. Federal Trial Examiners Conference* 343 U.S. 128 (1953)
- *Butz et al vs. Economou* 438 U.S. 478 (1978)
- *Heckler vs. Campbell* 461 U.S. 458 (1983)
- *Stieberger vs. Heckler* 615 F. Supp. 1315 (D.C.N.Y.) 1985
- *Echeveria vs. Secretary* 685 F.2d 755 (2nd Circuit) 1982

In the *Echeveria* case, the court distinguished the difference between an administrative law judge and a trial judge by stating.

"The administrative law judge, while the functional equivalent of a trial judge, must obtain evidence to fully develop the record, and is therefore unlike a trial judge."

As previously stated, this extra burden of evidentiary development is dictated by the fact that SSA administrative law judge hearings are non-adversarial. Past attempts to make them adversarial, both recommended and in some instances tried by SSA, have met with much opposition and have failed.

Thus, the SSA judge still carries the burden of both parties, as well as the judge. This is so even though many of the applicants in such hearings

are represented by attorneys or other legal representatives. The famous "Three Hat Theory" is no stranger to any of you, I am sure. It is SSA's exclusive phenomena.

Important to remember in all of this is that whatever his or her functions, and authority as perceived by anyone, the administrative law judge is empowered to perform only functions consistent with the provisions of the subchapter in the APA.

Section 3105 of the APA provides an agency may not assign an administrative law judge any duty inconsistent with the functions so set forth, and thus an ALJ cannot perform duties or functions inconsistent with the APA.

This is important to remember. Unfortunately, it is often overlooked both by the agencies, and even by some of the judges, as will be evident from some of the events that have occurred in the evolution of the administrative law judge position in SSA.

With all of the particular descriptions of functions, duties, responsibilities of SSA administrative law judges, there is an overriding role of SSA ALJs, which was described by Senator William Cohen of Maine June 8, 1983, at hearings before the Subcommittee on Oversight of Government Management. The topic of that hearing was the role of the administrative law judge in SSA. He stated:

"The ALJ has the dual responsibility of protecting the claimants rights and at the same time of insuring that benefits are not paid to those who fail to meet the requirements of the law."

II. EVOLUTION OF THE ADMINISTRATIVE LAW JUDGE POSITION IN SOCIAL SECURITY ADMINISTRATION

Let us go back 49 years – that should be enough history of the evolution.

In 1946 when the APA, was passed, individuals working for federal agencies who held hearings, and made decisions were not called administrative law judges.

They were referred to as trial examiners, referees, presiding officers, or hearing examiners. There was no uniformity in the titles utilized by the agencies for such positions. Additionally, some of the decision makers made only recommended decisions, while others made final decisions, subject only to agency head reversal.

Whatever the agencies chose to call such individuals, there were problems. The APA was passed in part to address long standing problems in the manner and method in which agencies were utilizing the people that held these positions, held hearings and made decisions, either final or recommended. Being employees of the agencies, with no evident protection from agency pressure, the public was justifiably suspicious of their impartiality.

There were those who advocated removing the hearing examiners from the employment of the agencies to solve the problems, which seemed to be connected to the administrative oversight control the agencies had of them. The agencies opposed such suggestions, even as they do today when passage of a separate unified corps of administrative law judges is considered.

How could the agency be sure agency policy was followed, if cases were decided by other than those expert with the subject matter, and in touch with the agency itself as being one of it's employees? The controversy of whether agency policy or the law prevailed. The agencies believed unless the decision makers were in their employment and had the

specialized experience necessary they would not enforce agency policy. The issue was one of control, no matter what they called it.

The compromise struck with passage of the APA was to leave the examiners in the employment of the various federal agencies, so that agency policy could be observed. Additional provisions were made for their insulation from agency pressure and control in performance of their functions and in decision making. The idea was to give them both functional and decisional independence, even though they continued to be employees of the agency.

The provisions of the APA were thus designed to insulate the position from the agency control that had led to a public mistrust of administrative law hearings in the agencies. The APA was praiseworthy legislation. In the perception of the public it caused an immediate improvement over what had been. Clearly, it may have been more naive than effective, as subsequent events would demonstrate in SSA.

Provisions designed to insulate the position contained in the APA, position descriptions and regulations are the following:

- 1) Cases were to be assigned in strict rotation, wherever practical. (This prevented hearing examiner shopping by the agency, which could determine the outcome of the case by simply picking the trial examiner who was more disposed to take the agency position).
- 2) Performance evaluations of the position were prohibited. Standards for removal were different, therefore, for these positions than any other in government service. For instance, efficiency of the service standard could not be applied or found to be good cause for the removal of anyone holding these positions. (In this manner the decision makers were protected from agency threats

of removal on the basis of efficiency, or refusal to follow agency directives).

- 3) The official position descriptions reflected the protected nature of the position by providing, as in the SSA PD specifically that such employees were subject only to general office management supervision, and that they performed their duties and responsibilities under the APA.

Improved status of the position, the examiner was one of the major goals of the APA, without doubt. In *Universal Camera Corp. vs. National Labor Relations Board* 340 U.S. 474,494-5 (1954) it was stated:

"...enhancement of the status and functions of the trial examiner was one of the important purposes of the movement for administrative reform.....Section 11 of the APA contains detailed provisions designed to maintain high standards of independence and competence in examiners. "

In *Federal Trial Examiners Conference vs. Ramspeck* 345 U.S. 128 144 (1953) the court stated:

"The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be very nearly the equivalent to judges, even though operating within the Federal system of administrative justice".

Indeed Section 11 of the APA was referred to as a Federal Bill of Rights for federal hearing examiners. A reading of it clearly justifies such a conclusion as it provides:

- examiners are to assigned cases in rotation (as far as practicable);
- examiners shall perform no duties inconsistent with their duties and responsibilities as hearing examiners;
- shall be removable only for "good cause" established by the Civil Service Commission;

- only after an opportunity for an oral hearing and upon the record thereof;
- shall receive compensation prescribed by the commission independently of agency recommendations or ratings;

These protections are for the most part reflected in the official position description of SSA judges. Congressional intent was clear. Congress wanted to change the employee status of the hearing examiners position from an unprotected position, to a protected position. By doing this Congress hoped it would allay concerns that there was no justice in administrative hearings before agency employees who by reason of their employment position appeared to be subject to decisional control by the agency. They wanted to eliminate the "palace guard" perception. So as we can see the role of the examiner as employee of the agencies, evolved by reason of the APA into a protected position. Often it is heard that such protections are not for the judges. Whether they are or not is immaterial. The protections are necessary to insure the citizenry of fairness.

The Social Security Act itself requires the determination of disability claims on the record, after an opportunity for an agency hearing and thus the protection of the APA clearly applies. The APA does not require an agency to provide a hearing, but when by law or policy it does so, the hearing provided must be by an APA protected individual if not the head of the agency itself.

The Secretary or head of the agency may hold the hearing itself and indeed has the authority to hold hearings, but the APA provides that, if that authority is delegated, it must be delegated to an APA protected hearing examiner, trial examiner, whatever the title is. (*Borg-Johnson Electronics*

Inc. vs. Robert K. Christenberry Postmaster, N.Y.N.Y. U.S.D.C.) 169 F.Supp 746)

In the PD of the SSA administrative law judges the Secretary directly delegates the authority of her office to the administrative law judge to hold the hearing. SSA is not mentioned as derivative delegate, or otherwise. In fact, while the judge is the employee of the Social Security Administration, he or she is the Secretary's delegate and holds such hearings under the provisions of the APA.

In my opinion the newly established independent Social Security Administration headed by a Commissioner therefore will predictably have to delegate her authority to the administrative law judges as the Secretary has historically done, and may not delegate such authority to non-ALJs or employees who do not fall under the protection of the APA, any more than the Secretary could have.

In this way it can be assured that the person, other than the Secretary or Commissioner deciding the case, or recommending a decision in the case is impartial and independent. Of course the Secretary or other head of the agency may not accept the decision of the independent delegate, but it does not change, in my opinion, the fact that the power delegated must be to an APA protected individual to conduct the hearing or any other procedure involved in the case after a request for hearing has been filed.

Recent developments have raised concerns that SSA is questioning the necessity of an APA hearing, and indeed has made references to SSA's only adopting the APA model as an optional one. This will be discussed later.

In 1972 the title of hearing examiners was by official act of Congress changed to "Administrative Law Judge". This was a further indication of

Congressional intent to emphasize the importance of the position. In effect it was a restatement that agencies holding hearings must not only utilize independent hearing examiners, but their titles should be changed to truly reflect the importance of their position as judges and their actual independence.

SOCIAL SECURITY ADMINISTRATION - ADMINISTRATIVE LAW JUDGES EVOLUTION

"A DIFFERENT STORY FROM THE REST"

In 1975 an increasing volume of applications for disability, and requests for hearings before administrative law judges, due in part to SSAs having agreed to take on the additional burden of hearing Black Lung Cases for the Labor Department, raised concern.

Congressional Hearings in 1975 addressed the concerns about the growing backlog of disability cases in the Bureau of Hearings and Appeals of the Social Security Administration.¹ The number of cases on hand causing the concern was reportedly 113,000. cases. That number is a long way from the reported 500,000 cases reported today.

James B. Cardwell, the then Commissioner of Social Security, promised Congress additional staff would be hired to help the judges, that judges would be freed up to hear and decide more cases by removing from them certain administrative functions, and that additional equipment and other resources would be added to the hearing offices.

He also announced an " Informal Remand" process designed to send certain profile cases, much as the profiles presently being designed to be

¹ "Delays in Social Security Appeals" Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives 94th Congress, First Session, Sept. 19, 26; Oct. 3, 20, 1975. U.S. Gov. Printing Office , 59-762-0.

utilized in the proposals of re-engineering, back to the state agencies to be re-evaluated to see if they could be allowed without a hearing.

The cases while physically sent back remained on the docket of the appeals office, and were included in the offices case count. That remand program proved to be unsuccessful for the most part and the major effect of the program was to delay the hearing and decision in the case.

In the present Short-Term Disability Project (STDP) implementation a similar plan is implemented. This time it is called a "re-reconsideration determination", as it is not informally remanded anywhere but stays in the hearing office.

He praised a newly appointed Director of the Bureau of Hearings and Appeals Robert Trachtenberg who he credited with reducing a previous backlog of 113,000 cases to 107,000 cases. He didn't specify what Mr. Trachtenberg had done to accomplish this, but later events were to prove a new era was dawning for the role of the administrative law judge.

At the same time he expressed his concern that the allowance rate of disability applications at the hearing level presided over by the administrative law judges had risen to an unprecedented 50 %. He was concerned by what he perceived to be a lack of "consistency" in the application of the law evidenced by a high allowance rate at the hearings and appeals level by the administrative law judges, as compared to the low allowance rates at the earlier stages of initial and reconsideration determination level.

This inconsistency he blamed on the hearings and appeals process. He promised Congress that SSA was taking steps to correct this inconsistency, and mounting allowance rate among the judges. This same

Commissioner in a *Federal Times* article published in July 1976 entitled "Meet the Candid Bureaucrat", expressed his displeasure with the judges.²

He indicated in that article that he would just as soon do away with administrative law judges in the hearings and appeals process. He complained that they were too unpredictable and had too many "judicial trappings", whatever that may have meant. He felt that Bureau of Hearings and Appeals, now Office of Hearings and Appeals, had strayed too far from the parental unit. He expressed a desire to replace them with pre-APA presiding officers who would be more in tune with "agency policy".

Mr. Trachtenberg, the newly appointed Director of the Bureau of Hearings and Appeals, and the one that Commissioner Cardwell praised so much, expressed no such desire to eliminate the judges at the hearings in 1975. Rather, he assured Congress he was implementing other procedures to increase the production of the administrative law judges. One of them was setting of numerical goals in decisions per month per judge to be met by the judges and that he was relying upon the judges to solve the mounting case load problem.

He was questioned by Congressman Archer with respect to the propriety of setting production guidelines for judges. Mr. Trachtenberg admitted that he was setting numerical goals for the judges to meet in monthly dispositions, but defended the practice stating:

"I don't think the setting of goals and finite quotas are the same thing. What we have I think any organization needs. You need to shoot for a goal".

He also assured the committee that the management efforts he had started were designed to get the ALJ to his high water mark, and he

² "Meet the Candid Bureaucrat." *Federal Times*, July 16, 1976.

assured Congress they were responding adequately and there was no problem. He had instituted a practice of setting a certain number of dispositions and hearings to be accomplished by each judge each month as goals and was content that the judges would accomplish them.

The goal in numbers he set was 26 per month per judge, although he had stated that 20 decisions per month per judge even with a staff attorney to help draft decisions was a "heavy load". Obviously the numerical goal was arrived at by simply dividing the number of cases by the number of judges on hand and not based on any other factors.

Besides setting what he called goals, he instituted tracking procedures to record the judges individual production and then compared it to other judges, offices, and to what was determined to be a national average which was simply arrived at by dividing the number of cases disposed of by the number of judges. This was his management style.

He assured the subcommittee "They (the ALJS) know what the crisis is and they are responding without the need for finite quotas where you "bang people over the head to meet them." His management style and introduction of the numerical goals were to cause the judges to respond in a much different way than he expected.

While he assured the Congressional subcommittee in 1975 that he did not think in any judicial system numerical quotas..."are adequate or appropriate, because they tend to interfere with due process", he had nonetheless established numerical goals that many judges and other interpreted as being quotas. Much unrest and conflict in Bureau of Hearings and Appeals between the judges on the one hand and the agency management officials on the other ensued. Later continuing tension between agency administrators and the judges was a direct result of the

numerical goal setting and the management style of the agency that made the distinction between goals and quotas meaningless.

SSA ALJS SUE AGENCY

In 1977 this tension resulted in a lawsuit being filed in Kansas City, Missouri by five administrative law judges assigned to the Kansas City hearing office, I was one of them. Filed in the United States District Court in the Western District of Missouri it sought declaratory judgment and relief from the numerical goal setting, failure of the agency to assign cases in rotation, establishment of rating and evaluating mechanisms of individual performance of administrative law judges.³

In 1979, while this case was pending trial, Congressional hearings into the unrest in the agency resulted in the publishing of a survey and issue paper by the Staff of the Subcommittee on Social Security.⁴ The conclusion was stated in the report that the agency, because of these management tactics, and goal setting in numbers had become an agency at war with itself, and that the emphasis under Mr. Trachtenberg's management had been more to quantity than to quality and that the quality of justice had suffered.

In July 1979 the Kansas City litigation was settled by agreement between the agency and the parties and in that settlement the agency agreed not to set quotas, and or goals in numbers of cases to be scheduled, heard or decided in given periods of time, assign cases in strict

³ *Charles N. Bono et al. vs. United States of America*. United States District Court for the Western District of Missouri, Western Division Civil Action No. 77-0819-CV-4.

⁴ "Social Security Administrative Law Judges: Survey and Issue Paper," Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives 96th Congress, First Session. U.S. Gov. Printing Office WMCP 96-2.

rotation, re-assign cases only with the consent of the judge who was originally assigned the case, abandon a criticized quality review system that would have permitted the agency to rate and evaluate the individual performance of administrative law judges, shelved a proposed hearing office manager position that would have permitted removal of control of the staff from the judges to a management official. This case as settled came to be known as the "Bono Settlement". It bears my name by reason of the alphabet. I am nonetheless proud that it does.

As the result of the settlement agreement, the case was dismissed, and the agency appeared to back off of the former management practices for a while. It moved both the Regional Chief Judge of the Kansas City Region, who Trachtenberg had referred to as the most effective numerical goal enforcer, and the Director of the Bureau of Hearings and Appeals Robert Trachtenberg, the author of the criticized numerical goal setting from their jobs to other positions in SSA.

A succession of Associate Commissioners followed heading up the Office of Hearings and Appeals. First Donald Gonya, then Andrew Young, then Frank L. Smith, then Louis B. Hayes, then Eileen Bradley, and finally the present Associate Commissioner Daniel Skoler succeeded to the office.

BONO SETTLEMENT -- DID IT HOLD ?

Many questions were to follow whether or not the agency was, in fact, following the terms of the settlement agreement. Attempts at interpreting the terms of the settlement, which were simple enough to need no interpretation, indicated the agency was having difficulty living with the agreement it had entered into.

As early as 1980 the agency management officials began questioning the meaning of the settlement terms seeking to re-interpret the terms of the

agreement. In many instances the judges themselves, some of them being judges in charge of the offices failed to abide by the terms of the agreement and conducted business as usual. The settlement agreement that was to be the solution to the tension was often observed in the breach and the tension continued. Some offices were assigning cases in rotation, some were not. Numerical goals in performance for individual judges were continued as a management policy.

THE CARTER ERA TERM LIMITS

A new challenge to the existence of the federal administrative judiciary was presented to the administrative law judge position during the Carter administration. It was for a time to divert the attention of the judges. A bill was proposed in Congress to limit the appointment of administrative law judges to a ten year term, with re-appointment at the discretion of the agency. This was opposed in most circles, and particularly because it permitted the agencies to decide whether or not to permit a judge to serve a second term. The proposed legislation failed for obvious reasons.

But it was also during the Carter administration that concern was again raised in Congress about the difference in allowance rates between the initial and reconsideration determination and that occurring at the administrative law judge level. As early as 1975, SSA was concerned about a 50% allowance rate. That percentage was steadily increasing. The state agencies steadfastly maintained that their determinations were 97 percent accurate, so how was it possible that the judges were allowing so many cases they had denied?

The answer was obvious, the judges were applying the law and the regulations to the facts of the case, new evidence was also considered. The state agencies on the other hand were operating by policy manuals

that often did not reflect the state of the law and often had nothing to do with the law. It was like comparing apples with oranges and everyone knew it. SSA, nonetheless, was instructed in the legislation to conduct a study to explain the difference and report back to Congress. That portion of the legislation came to be referred to as the Bellmon amendment.

It was in this same time period that Government Accounting Office issued a report indicating many people were on the disability roles that should not be as their cases had never been re-examined by SSA once they were allowed benefits. Congress became concerned with the number of people on the disability roles and the fact that SSA was not re-examining their disability status once they were placed on the roles. Legislation to encourage SSA to re-visit cases every three years was passed and the resulting program was called Continuing Disability Review (CDR). Thus, the seeds for the later Bellmon Review, and the Continuing Disability Review that were to bloom during the Reagan administration were planted. Those seeds were to bear bitter fruit for the administrative law judge system in SSA.

THE REAGAN ERA

In 1980 with the election of President Reagan a new Associate Commissioner Louis B. Hayes was appointed to run what was now re-titled the "Office of Hearings and Appeals", it was no longer a Bureau. It was a sign that the autonomous structure of the hearings and appeals system was ended, and that the mission of Commissioner Cardwell to bring the Bureau of Hearings and Appeals back into the parental fold was beginning.

It was clear that the new Associate Commissioner had read only part of the settlement agreement as his management style was to renew setting

of numerical goals, as if the agency had never agreed to stop that practice and had only agreed not to set quotas.

All types of artifices of interpretation were employed to excuse this obvious violation of the settlement agreement when it was pointed out that the settlement agreement specifically prohibited setting numerical goals as well as quotas to be performed by the judges. When challenged the agency would assert the goals were office goals, and not individual ALJ goals. It was obviously not an office goal, and an individual goal for each judge to meet, and to achieve on the average nationally.

In appearance before Congress in 1982 to address what was a steadily increasing backlog, despite the agencies claim that they had freed judges from ministerial tasks, added support staff, and equipment, Mr. Hayes told them the judges could and would produce 45 decisions per month. Again, the figure was arrived at by simply dividing the number of cases on hand by the number of judges on hand. So in a span of 6 years the "goal" which was no "goal" or quota, which was no quota was raised from 26, then to 37, and then promised to be 45.

The management style of the agency reverted to what it had been in the Trachtenberg years. Indeed, Mr. Hayes performance plan and one upon which he would be evaluated indicated he had to increase the production of the individual judges.

Even more elaborate tracking systems of individual judges performance resulted, with in many instances less than diplomatic feed back to the judges. To compound this re-appearing problem, rotational assignment was again deviated from in many instances, travel policies were again established setting a minimum number of cases that had to be scheduled for hearing in a given period of time.

***CONTINUING DISABILITY REVIEW PROGRAM
ACCELERATION DISASTER***

Mixed in with all of this resurrection of the same problems was the compounding problem created by the Continuing Disability Review Program (CDR). President Reagan, by executive memorandum, in his zeal to show what he could do accelerated the review program by one year to take place in 1981, rather than 1982. Later SSA was to be blamed for the acceleration, as if the President had nothing to do with it, but it was his action that prompted SSA to accelerate the program of review.

Unprepared to do it right, SSA blundered into removing hundreds of thousands of people off of the disability roles, and increased enormously the case load at the hearings and appeals level. The press had a field day with the horror stories that came out of that ill advised acceleration and the judges were right in the middle of a very bad situation

The overwhelming number of appeals from such CDI actions further aggravated the backlog, which in turn prompted more and more pressures on the judges to decide more cases and to meet the agencies numerical goals, which were in reality quotas once again.

Alarmed the Senate Subcommittee on Oversight Of Government Management held hearings in May of 1982.⁵ Senator Cohen spoke of reports from all over the country of truly disabled individuals being dropped from the program.

Senator Levin of Michigan described the whole procedure as a debacle, and called for a halt immediately stating " We in the Congress and the Social Security Administration should admit we made a mistake". He

⁵ "Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, U.S. Senate 97th Congress, Second Session, May 25, 1982. U.S. Gov. Printing Office 97-866-0.

further stated "requiring reviews is fine; it's appropriate. But not unless and until, there is a fair system in place."

SSA judges had to deal with this crisis, until sometime in 1983 when the Secretary of Health and Human Services did, in effect, admit a mistake was made and issued a moratorium of the cessations, putting thousands of people back on the disability rules by administrative fiat.

SSA FILES MSPB CHARGES

In 1982, while all of the CDI problems were swirling around the SSA judges, Associate Commissioner Louis B. Hayes directed that charges for removal be filed against three administrative law judges with the Merit Systems Protection Board, and the charge was failing to achieve a production goal of 20 decisions per month. Thus, the finite numerical quota was a reality. The numerical goal had been turned into a quota by making failure to meet it a ground for discharge from the ALJ position. Mr. Trachtenberg himself admitted finite quotas would be an interference with due process.⁶

1983 SENATE HEARINGS

In June of 1983 a hearing was held before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs in the United States Senate, previously referred to.⁷ The purpose of the hearing was to examine the problem of the CDR Social Security

⁶ "Delays in Social Security Appeals" Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives 94th Congress, First Session, Sept. 19, 26; Oct. 3, 20, 1975. U.S. Gov. Printing Office, 59-762-0.

⁷ "Social Security Disability Reviews: The Role of the Administrative Law Judge," Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, U.S. Senate 98th Congress, First Session, June 8, 1993. U.S. Gov. Printing Office 24-067-0.

Disability Reviews and particularly "The Role of the Administrative Law Judge".

In the commencement of the hearing Senator Cohen stated that the agency had indeed established a production goal of 45 decisions per month per administrative law judge and even identified judges who were low producers and proceeded to counsel and retrain them to increase their productivity.

He also discussed in his opening the Bellmon Review procedure whereby the agency was identifying high allowing judges and attempting to modify their behavior. He concluded that all of these practices once again raised troubling questions and they were delved into at that hearing. Nothing came of the hearings however, aside from a public airing of the problems and it is not revealed what if anything the subcommittee did about the problems they discovered as the result of the hearing.

ASSOCIATION VS. HECKLER

The problems continued unabated. In September 1983, the Association of Administrative Law Judges, Inc., a voluntary membership organization consisting of approximately 500 administrative law judges employed by HHS filed an action for declaratory judgment and relief against the agency for violations of the Bono settlement, removal of supervision and control of support staff.⁸

Shortly after the case was filed Associate Commissioner Louis B. Hayes issued a memorandum to the judges announcing a "Bellmon Review" of judges who had allowed more than 66 2/3 % of their cases as it was determined that these judges in allowing more than that percentage

⁸ *Association vs. Heckler*, U.S.D.C.D.C. 620 F. Supp. 1132, 1984.

were aberrational and needed to be studied to determine how to counsel them.

Certain judges had been selected and notified to appear for "counseling". The judges who were about to be "counseled" called upon the Association for help and their cause was included in the litigation. The court issued a protective order and the judges never had to appear for their behavior modification training, but the issue of Bellmon Review remained.

So not only was it obvious to the judges that they had a numerical quota to meet, but a new twist had been added to caution them that if they allowed to many cases, as compared to the national average, they would be identified, and counseled. It was later in the trial of the case learned that in the performance plan of the Associate Commissioner Louis B. Hayes, one of his charges was to reduce the allowance rate overall in the hearings and appeals system.

The case was tried for two weeks, taken under advisement by the court, and pending the decision the agency announced by memorandum to the judges that it was discontinuing Bellmon Review. The case was dismissed in 1985 by the court on the basis that the issue was moot, that the Association had reformed the agency, and attorneys fees were paid by the agency.

The cases filed against the three judges with MSPB for failure to meet production standards were ultimately unsuccessful and the MSPB refused to accept the recommended decision of the MSPB ALJ who heard the two cases Goodman, and Balaban. The efforts of the agency to establish performance standards in numbers, thus failed.

DISABILITY REFORM LEGISLATION 1984

The Disability Reform Legislation of 1984 was passed with particular mention of directing the agency to establish uniform standards at all levels of determination, do better medical development of evidence in the cases, re-examine the "non-acquiescence" policy of the agency which permitted the agency to ignore court interpretations of the law.

Unfortunately, the continuing problems of the judges in this scenario were ignored by Congress and no solution to those continuing problems was included in the legislation. The legislation just made the burden of the ALJs heavier by making the development of the evidence even more time consuming, and gave them no relief from the pressures the agency was putting on them.

The agency continued to pursue numerical goal setting for the judges, although Louis B. Hayes was replaced as Associate Commissioner by Frank L. Smith, his tenure resulted in the discontinuation of Bellmon, but finalized plans the agency had been pursuing to "pool" the employees, formerly assigned to judges, and removing from the judges their authority to direct and control the processing of the cases in a system which has come to be known as "reconfiguration."

The court in the Association case previously mentioned did not take up the issue of reconfiguration or the violations of the Bono settlement, because it determined those matters would have to be pursued in the court that approved the settlement agreement in 1979.

Congress did nothing in the Disability Reform legislation to resolve the problems the judges were having. Whatever violations of the Bono settlement and the APA were they remained unresolved.

Time was to prove the agency did not take the necessary steps to reform the initial and reconsideration determination stages to insure that the decisions at those levels were in keeping with the law and interpretation of the courts.

ABA AWARD TO JUDGES IN 1986

In August 1986, an unprecedented award from the President of the American Bar Association was presented to the Social Security Administrative Law Judge Corps, which was received by the Association of Administrative Law Judges on their behalf. I had the honor to be there and receive the award on behalf of the Corps as Immediate Past President of the Association together with others representing the Association.

The language of the award bears repeating:

"For its outstanding efforts during the period from 1982-1984 to protect the integrity of Administrative Adjudication within their agency to preserve the public's confidence in the fairness of governmental institutions and to uphold the rule of law."

The award was given in recognition of the Association's efforts in redressing the wrongs of the CDI program and opposing efforts of the agency to set numerical quotas and instituting measures to make certain judges reduce their allowance rate under the guise of the Bellmon Review.

In spite of the accolades and recognition incident to the award, the problems of the administrative law judges in SSA in major part remain unresolved. The agency continues to move cases based upon numerical goal setting, travel requirements have been implemented requiring judges to schedule a certain number of cases in given periods of time. Now, although the judges national average production has risen from 37 to 45, a tremendous backlog has continued and is reaching crisis proportions. Most

recently the agency has announced a new numerical goal of 50 decisions per month per judge.

1988 SOCIAL SECURITY ATTEMPT TO CHANGE RULES AT HEARING LEVEL FAIL

A draft proposal of SSA regulations, designed to drastically change the hearings and appeals procedure was about to be published in 1988. The details of the draft were disclosed in a New York Times article and a public outcry ensued.

A hearing before the full House and Ways Committee was called. Changes that included strict evidentiary rules to be applied at the hearing level were advocated in the proposed rules. Limitation of the issues to be considered on appeal was also dictated. Evidence was to be required in seven days before the hearing. Harsh penalties for failing to supply evidence within the allotted time were also provided.

A part of that proposal provided for delegation of administrative law judges authority to staff attorneys to hold pre-hearing conferences, limit issues, gather evidence etc. Striking similarities to parts of the Short Term Disability Project now being proposed and the proposals for an adjudicative officer in the overall plan are evident.

Dorcas Hardy, the then Commissioner of Social Security caught by the public outcry and Congressional criticism of the changes by at least 35 Senators who wrote to President Bush to repudiate the policy changes, asserting surprise, claiming to have no knowledge of the draft, and rejecting the draft proposal, preventing their publication in the regulations as final rules. She stated as her reason for withdrawal that the draft proposal "did not meet her criteria of making the system " more equitable, compassionate and efficient".

Interesting to note is the fact that SSA by this draft proposal attempted to change the hearings and appeals process drastically, but seemingly continued to ignore any needed reform at the initial and reconsideration determination level.

UNIFIED CORPS, THE ANSWER ?

Primarily because of the problems experienced in SSA, legislation has been proposed year after year in Congress since the early 1980s to establish a unified corps of administrative law judges removing all administrative law judges from employment of individual agencies.

In 1988 hearings were held before the subcommittee on Administrative Law and Governmental Relations of the Judiciary Committee on the U.S. House of Representatives with regard to such proposal.⁹

Most recently in the 1994 session of Congress it actually passed the Senate and then it stopped. It is as far as the proposed legislation has gone. Supporters of that legislation have argued that it will solve the problem, such as SSA demonstrates, and by establishing a separate corps run by judges, remove the pressures from the judges which are so rampant and obviously agency management driven.

Unfortunately, in the progress of the legislation it's provisions have changed and the present proposed bill that passed the Senate includes authority for systems very similar to those employed by SSA, such as performance and evaluation systems, efficiency standards, and objected to as interfering with due process. For many years the United States General Accounting Office (GAO) has been asserting that productivity norms,

⁹ "Administrative Law Judge Corps Act," Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary on H.R. 1554 and H.R. 2726, U.S. House of Representatives 100th Congress, Second Session, Mar. 17, 1988. U.S. Gov. Printing Office 97-866-0.

production standards and efficiency rules should be imposed on the judges in SSA.

In 1992 the Administrative Conference of the United States (ACUS) created a firestorm by following suit and implying that the APA and statutes should be amended to permit employing agencies to impose standards of performance on judges.¹⁰ The drummings for moving back the clock to a point prior to the passage of APA has had it's effect in this proposed legislation, resulting in the amendments, and make the legislation as presently amended and as passed by the Senate extremely suspect.

Provisions of the unified corps legislation have been amended from the original proposals that required management of the Corps by judges to permit the separate corps to once again be managed and run by non-judges or non-APA protected employees (referred to as "persons learned in law").

Additionally, it is apparent that the re-engineering proposals raise questions as to whether SSA will continue to use APA judges. Some see in the re-engineering proposals an agenda to move SSA from reliance on administrative law judges, so that if a unified corps is a reality, SSA just won't send any cases to it.

PROBLEMS IN SSA FOR ALJS CONTINUE 1990 HEARINGS REGARDING JUDICIAL INDEPENDENCE

On June 13, 1990 hearings before the subcommittee on Social Security of the Committee on Ways and Means of the U.S. House of representatives commenced regarding the "Judicial Independence of

¹⁰ Recommendation 92-7 as adopted by the Plenary Session of the Administrative Conference of the United States, Dec. 10, 1992.

Administrative Law Judges At The Social Security Administration" were held.

The subcommittee's concern was with Office of Hearings and Appeals management policies that judges were complaining about and referred to a GAO report entitled "Many ALJs Oppose Productivity Initiatives."¹¹

Performance Targets, Organizational Structure, support staff problems were all examined. The hearing confirmed that a controversy was continuing regarding monthly disposition goals, that staff reductions had adversely affected OHAs ability to deal with the mounting case load.

The pages of that Congressional hearing confirmed the problems continued unabated, regardless of the present Commissioner Gwendolyn King's assurances to the subcommittee that steps were being taken to resolve the problem.

She went on record, as Commissioner's before her had opposing any thought of moving the judges out of SSA. No report of findings of that hearing have ever to my knowledge been issued, nor did the subcommittee take any public action to resolve the problems it discovered.

Subsequently she issued a memorandum suspending all job performance reviews in SSA based upon numeric criteria such as numbers of cases processed in given periods of time. Her intent was to address criticism of the agency for numerical performance standards. Ironically, although job performance reviews based upon such criteria are enjoying a moratorium in other levels of SSA, the numerical performance goals by

¹¹ "Judicial Independence of Administrative Law Judges at the Social Security Administration," Hearing before the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives 101st Congress, Second Session, June 13, 1990. Serial 101-117.

individual ALJ continued in Office of Hearings and Appeals because they were not supposed to have performance evaluations anyway.

1992 GAO REPORT CAUSES TROUBLE

In April 1992 the U.S. General Accounting Office issued a report entitled "Racial Differences in Disability Decisions Warrant Further Investigation." A Sept. 1992 Senate hearing delving into the particulars of that report quickly discovered that the GAO report did not establish racial bias, and that no case had been made against SSA ALJs.

The emphasis of that hearing shifted not to racial bias of judges, which the GAO report did not provide an empirical basis for, but to allegations of certain SSA ALJs misconduct in the conduct of the proceedings before them. Allegations of discourtesy to bias on the basis of agency partiality were alleged by certain Legal Aid Societies who were displeased with judges who denied too many of the cases, in their opinion.

Senator Levin of Maine expressed concern about what the agency was going to do about complaints of misconduct, and whether the mechanism for handling these complaints was effective. A mechanism for complaints has always been existent and had over the years been used by individuals who felt they had something to complain about, but the agency argued they were helpless to deal with complaints because of the protected nature of the judges position.

Because of Senator Levin's expressed concern, SSA subsequently established a new complaint procedure, going so far as to post in the office that, if anyone had a complaint against a judge they had forms that they would be supplied. No other employee was so identified as far as complaint procedures were concerned. This procedure of publicly advising people in advance of the hearing that they could file a complaint against a judge who

was discourteous or who they felt was unfair set the stage for further problems for the judges in SSA, and was objected to by many judges. Announcing a complaint department just for the judges seemed a little much in the minds of many judges.

CODE OF CONDUCT

In October 1992 the Division of Regulations and Rulings of the Social Security Administration drafted and distributed a proposed regulatory publication to establish a "Code of Conduct" for SSA ALJs. Various concerns were raised about the proposed code at that time. There was no clear showing of why a separate code of conduct was needed for ALJs, as the agency had always argued that SSA ALJs were subject to the ABA Model Code of Conduct for Judges and had even cited it in Merit Systems Protection Board arguments.

Various issues of directive authority of administrative manager judges were also presented in the proposed code, and judges were concerned that the passage of such a code would subject them to supervision and direction in the performance of their judicial functions by Chief judges, which would have been contrary to their protected status in the performance of their judicial functions.

Although put on the shelf for a time, most recently in March of 1995 a new Draft of a proposed Code of Conduct has been prepared which has been sent to be cleared for publication in the regulations. That new proposed Code has some features the first one did not have, and importantly makes mention of the Unified Corps Bill S.486 and includes in the code of conduct efficiency of case management and extent of cooperation with administrative directives as a criteria for misconduct.

Some see this development as permitting establishment of "efficiency of the service" standards for administrative law judges in SSA, which has heretofore been prohibited by federal regulations as the basis for discipline or removal.

RE-ENGINEERING OR REHASH

To all of this was added the Clinton administration's call to re-engineer or re-invent government. It provided SSA with the opportunity to address the many problems in SSA with regard to the disability program. Congressional hearings had accorded SSA with an F grade in the administration of disability claims, and thus it was obvious that reform was needed.

When President Clinton was the Governor of Arkansas in 1983 he appeared at a hearing of the subcommittee on aging of the House Ways and Means Committee of the U.S. House of Representatives addressing "Social Security Disability Reviews, A Federally Created State Problem"¹²

He pointed to problems in SSA at that time other than the CDI disaster. He said:

"I think that SSA should be held accountable to the law in a manner that all other agencies are.....it appears to me that DDS for it's disability determinations relies on the policy operation management systems , or POMS."

The Social Security Administration did not follow the Administrative Procedures Act in promulgating POMS; it is not accessible or available to the public. It was never published for comment. Obviously DDS's review is based on POMS compliance....Even worse as I am sure you know and as

¹² "Social Security Disability Reviews: A Federally-Created State Problem," Hearing before the Select Committee on Aging, U.S. House of Representatives 98th Congress, Second Session, June 20, 1983. Comm. Pub. No. 98-395, U.S. Gov. Printing Office 24-760-0.

the record has already been made, SSA has to some extent ignored federal court decisions.

Hearings were held on April 14, 1994, before the subcommittee on Social Security of the House Ways and Means Committee of the U.S. House of Representatives.¹³ The subject of the hearing was the proposal of re-engineering published by SSA. At this hearing Commissioner Shirley Chater outlined the projected changes. Subsequently in the latter part of March 1995 SSA added to the changes proposed the Short Term Disability Project (STDP), and the Senior Attorney Advisors Project.

SSA has projected that it will dispose of 100,000 cases in a two year period by simply letting non judges re-review what has been done on cases at the earlier stages while they are awaiting hearing before an administrative law judge. The Short Term Disability Project (STDP) empowers staff attorneys and analysts employed in the agency to perform functions heretofore exclusively those of APA protected administrative law judges, even granting to them unheard of adjudicatory authority to issue revised or modified reconsideration determinations, after a request for hearing before an administrative law judge has been filed.

CONCLUSION

The role of the administrative law judge is as all can see extremely important and essential to the continued confidence of the citizenry in it's government. Thus, any proposals to change how any agency does business, particularly when it involves the utilization of administrative law

¹³ "A Proposal to Restructure the Social Security Administration Disability Determination Process," Hearing before the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives 103rd Congress, Second Session, April 14, 1994. Serial 103-81, U.S. Gov. Printing Office 82-549 CC.

judges or as in the proposals contained in the re-engineering plans of SSA, delegations of authority to others that formerly was exclusively that of the administrative law judges, must be examined carefully.

As administrative law judges our responsibility continues to guard against undermining of the APA protected process, not for our benefit, but for the benefit of the citizenry that it was passed to protect. As Senator Cohen stated the responsibility of the judges does not end with seeing that benefits are paid, but to see that they are not paid, if the law is not satisfied.

My description of the problems through the years may have sounded more like a story of the devolution of the position. It is however a fact that the authority of the administrative law judges and their functions in SSA have been dramatically reduced by agency management systems. We cannot deny that this has occurred. Whether it should have occurred is no longer the issue. The reality is that it has.

Although there have been a succession of administrations and heads of the Office of Hearings and Appeals since the mid-1970s and the previously mentioned Trachtenberg era, lawsuits, settlements, Congressional hearings, promises of reform, plans to reform, the role of the administrative law judge in SSA has diminished.

Knowing how important the position is, or should be, in SSA, the problems both the agency and the judges have had in settling their differences must be kept in mind when considering proposals for re-engineering such as the Short Term Disability Project and the Adjudication Officer proposals.

It is obvious that the primary motive of many of the new proposals you will be examining is to move more cases, but the way they are going to be moved must concern us.

Will it move the cases they project? Will the review process be fair ?

How will these proposals impact the authority of the administrative judiciary in SSA?

Will SSA judges continue to have the authority to exercise the dual responsibility, mentioned by Senator Cohen?

Do these proposed changes signal the relegation of the administrative law judge position in SSA to a lesser role. I hope that I have supplied you with information that will help you better understand how we have come to the place we are today and that it will assist you in your discussions.

Addendum Update

Since the above presentation was made in April 1995, the regulations pertaining to the Short-Term Disability Project program have been implemented by SSA. Presently Senior Staff Attorneys in the hearing offices in OFFICE OF HEARINGS AND APPEALS are performing many of the functions formerly performed only by administrative law judges.

They are empowered to make fully favorable decisions without administrative law judge oversight. The agency has attempted to justify its' position in giving adjudicative authority to such senior staff attorneys on the basis that cases can be allowed at any stage by the agency, even after request for hearing before an administrative law judge has been filed. Unfortunately, some of the practices being employed give rise to a real danger of bias towards disposition of case numbers by allowing them to meet certain predetermined numerical targets.

The agency also admitted that for some time it has not been assigning cases in strict rotation, as required by the APA and the Bono Settlement. It offers as explanation that such change in assignment policy came about

after "appropriate consultation" with the administrative law judges, implying that it is permissible.

In June 1995, SSA published proposed regulations to establish the Adjudication Officer position thereby further transferring adjudicatory authority, and functional authority from the administrative law judges to this position. Significantly, the role of the AO is performed without control or supervision of the administrative law judges, before the case is assigned to a judge. SSA has given every indication it intends to go forward as well with implementation of the AO position.

in August 1995, the Subcommittee of Social Security held hearings at which "invited witnesses" testified. In their opinion, the appeals system presided over by the administrative law judges had failed, or words to that effect. They proposed that hearing procedures should be placed at the state agency levels, and presided over by employees of the state agencies, who are neither lawyers, administrative law judges, or APA protected employees. One witness testified that "lawyers" could not be "truth seekers" as they are advocates for one position or the other.

On August 9, 1995, the American Bar Association, at it's annual meeting held in Chicago, Illinois, passed a resolution calling on Social Security to continue APA hearings and the protected position of the Administrative Law Judge

H.R. 2020, the U.S. Appropriations Bill which recently passed the House, contains provisions in it that would defund the Office of Personnel Management and permit qualification and hiring of administrative law judges in Federal government by the hiring agencies themselves. This would require an amendment of the APA which presently requires outside

qualification of applicants for administrative law judge positions, independent of agency screening or qualification.

It is clear from the above that the future of the Federal Administrative Judiciary in SSA is being challenged on all fronts. All organizations representing Administrative Law Judges should watch these developments closely to do what they can to prevent dismantling of the APA protection now existing in the Federal Judiciary.

