

3-15-1992

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Recommended Citation

Debra Cassens Moss, *Judges Under Fire - ALJ Independence at Issue*, 12 J. Nat'l Ass'n Admin. L. Judges. (1992)
available at <http://digitalcommons.pepperdine.edu/naalj/vol12/iss1/3>

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JUDGES UNDER FIRE

ALJ INDEPENDENCE AT ISSUE

Debra Cassens Moss¹

Imagine that you sided with some co-workers who had been treated unfairly. Soon after your secretary and your parking space are taken away; you don't get that transfer you requested; and you are the only employee who doesn't get to attend a training conference in Palm Springs.

Sound fair? Imagine now that you're a judge, and your boss doesn't like your attempts to protect the judicial independence of those who work with you.

Critics charge that the hypothetical is all too real at some federal agencies and executive departments that employ administrative law judges. Even worse, they allege, is that in two recent cases the Social Security Administration and the U.S. Department of the Interior went even further, eliminating the job of one judge and removing another from his supervisory position.

"Agencies exercise control via different ways," says Nahum Litt, the chief administrative law judge at the U.S. Department of Labor, who nonetheless gives his department high marks for judicial independence. He said the administrators' control methods range from "anything as petty as parking spaces, adequate secretarial, adequate law clerks, facilities, where judges are housed, how they're housed. A whole litany of small things."

About 1,100 ALJs preside over adjudications of 31 federal agencies and executive departments, deciding, for example, whether the government wrongly denied social security benefits to applicants. These judges—who are hired on the basis of experience, recommendations and a written practice decision—are supposed to be shielded from retaliation for their decisions under the Administrative Procedure Act of 1946.

Yet, ALJs are subject to more pressures than traditional judges, says attorney Edward Slavin of the Government Accountability Project in Washington, D.C., "because they are employed by the agencies whose cases they decide. Rather than having the independence of a district court judge, they are essentially on the payroll and subjected to the pressure of the agencies."

¹Debra Cassens Moss, a lawyer, is the news editor of the *ABA Journal*. This article first appeared as the cover story in 77 *ABA Journal* 56 (November 1991) and is reprinted here with permission.

The judge whose job was eliminated, Parlen McKenna, now vice chair of the National Conference of Administrative Law Judges, claimed in an appeal to the Merit Systems Protection Board in Washington, D.C., that the U.S. Department of the Interior cut his job in retaliation for his testimony at a grievance hearing and for his formal petition to Congress.

The action, McKenna alleged, was a prohibited personnel practice and a violation of the Whistleblower Protection Act of 1989. *McKenna v. Department of the Interior*, No. DC03519110457.

A hearing on McKenna's complaint began on July 30, 1991, before an administrative law judge. A decision was expected in late October or early November.

McKenna alleges Interior eliminated his position as chief administrative law judge for the Office of Hearings and Appeals because of his support for the Indian probate judges (IPJs) he supervised, who probate Native American estates.

The IPJs were objecting to the department's decision to begin formally appraising their performance. One of their claims was that the ratings process could be used to influence their probate decisions.

During the IPJs' grievance hearing in November 1989, McKenna warned that the then-acting director of Interior's Office of Hearings and Appeals, James Byrnes, had threatened to replace the IPJs if they won their grievance.

McKenna also told the grievance examiner that rating the IPJs would be a "flagrant waste of money," and that he would need to observe many of their hearings for the appraisals to be valid.

The grievance officer partially sided with the judges in April 1990, ruling that "it is impossible to evaluate the performance of IPJs without second-guessing their adjudicatory skills and, indeed, their adjudicatory results."

At the time of the decision, the IPJs were exempted by law from the requirements and protections of the Administrative Procedure Act. Congress passed legislation later last year putting the IPJs under the protection of the act and thereby exempting them from ratings.

As a result, the secretary of Interior did not rule on the grievance recommendations.

McKenna had supported the legislation in a petition to Congress. Byrnes learned of that petition when a copy was faxed to his office in September 1990 addressed to McKenna. His response was to refer the improper use of the fax machine to the inspector general for investigation. Using the fax to circulate the petition, Byrnes contended, was an illegal use of department funds to lobby Congress.

Despite McKenna's earlier warning, the IPJs kept their jobs. But, on January 24, McKenna was informed in a letter that he would be "separated" from his position because the department was implementing a "reduction in force." The decision, he was told, was the result of a study of the organization of the Office of Hearings and Appeals by a blue-ribbon committee.

Interior Secretary Manuel Lujan wrote in a letter to the American Bar Association's National Conference of Administrative Law Judges that the committee's recommendation to eliminate McKenna's job "was not personal in nature and was not directed at the incumbent or any individual."

The major reason for the cut, Interior says in its response to McKenna's appeal, was that McKenna would no longer be required to rate the IPJs' performance since they were converted to ALJs.

In an unsuccessful petition to intervene in McKenna's case, seven Indian probate judges claimed that the findings of the blue-ribbon committee, of which McKenna was a member, were manipulated to justify the job cut.

They say McKenna's workload was not reduced because he had never rated the IPJs in the past.

McKenna refused comment on his hearing, but some other ALJs agree there is a connection between McKenna's testimony and the reduction in force. "We do operate in a wholly vindictive and retaliatory environment," says one ALJ who is employed by the Department of the Interior. "McKenna threatened the political status quo at the agency and lost."

Judge Francis O'Byrne didn't testify in a grievance hearing, but one ALJ who worked for him in the Chicago South hearings office of the Social Security Administration did testify before Congress. About three months after the June 13, 1990, hearing held by the House Subcommittee on Social Security, O'Byrne was removed as chief administrative law judge.

Ironically, the hearing concerned judicial independence for ALJs. The subcommittee now is investigating whether the SSA, which employs more than 700 ALJs, retaliated against O'Byrne for failing to prevent the judges in his office from testifying.

Much of the testimony of the Chicago judges centered on O'Byrne's supervisor, Theodore Haynes, who at the time was chief administrative law judge for several Midwestern states known as Region V. One ALJ, Richard F. Sprague, testified that a union official told him that Haynes, in an effort to boost productivity figures for the Chicago West office, had ordered payment for "a filing cabinet full" of Medicare cases without examining the record.

The union official denied he ever made such a statement, but O'Byrne signed an affidavit that he also heard him make the allegation. Five days later, on September 6, 1990, "I was discharged on the phone by Ted Haynes," says O'Byrne. "I was removed not because of the operations of this office," he alleges, "but because of Sprague's testimony in the House."

At last year's June 13 hearing, a number of judges claimed that Social Security uses several punishments to increase productivity of judges. Judge William Bonham of the Oak Park, Michigan, hearings office testified that "ALJs who do not meet the targets are assigned more difficult cases, assigned less desirable travel dockets."

Those who meet the targets, however, are "assigned easier cases, given more desirable travel assignments, allowed freedom to abuse attendance standards, allowed to engage significantly in personal matters during the weekday. Of course, no attempt is made to evaluate the professional quality of the work."

Judge Dennis Runyan testified that Haynes threatened in 1989 to close the Flint, Michigan, hearings office if each judge did not meet the goal of scheduling 40 hearings and deciding 37 cases a month. Three other judges submitted testimony that Haynes reduced the clerical staff for the Lansing,

Michigan, office to six persons for five ALJs, when the national average was five clericals for one judge.

The problem with forcing Social Security judges to increase their workload, says Earl Thomas, immediate-past chair of the National Conference of Administrative Law Judges, is that ALJs then are forced to depend on agency decision writers, who are more likely to be influenced by the viewpoint of their employer. "The decision writers are supervised by agency personnel," he says. "They know which side their bread is buttered on. You see the potential for problems."

The three Lansing judges who testified at last year's hearing had filed an action with the Merit Systems Protection Board in August 1989 challenging the workload goals and the reduced staffing. "We asked that they, in effect, cease and desist," says Allen C. Youngblood, one of the ALJ complainants. The board held that it did not have jurisdiction to hear the case, and in April the U.S. Court of Appeals for the federal Circuit affirmed.

Despite the setbacks on the judicial battleground, Youngblood and the other Lansing ALJs do have additional clerical help now. Social Security authorized additional staff two months after the judges filed their initial complaint, he says.

In a spirited telephone interview, Haynes denied that he removed O'Byrne because of the testimony by Sprague. "I was not pleased with the way the office was functioning; I removed him," he says. "There was no loss of pay, no reassignment. He was simply taken out of the management structure. That's been done by chief judges since the office was established."

Haynes, who is black, speculates that racism entered into O'Byrne's criticism of his decision. He believes O'Byrne would not have complained had he been removed by a white.

Haynes calls the story that he paid for a filing cabinet full of cases "a categorical lie" and points out he was vindicated on this point by a Government Accounting Office investigation. He also questions why Congress did not invite him to testify at the June 13 hearing.

Haynes adds that he did not threaten to close any Social Security offices, but admits that he cut back on clerical personnel at low-producing

offices. "Staff was put in offices where the work was gotten out, he says. "I think that's a wise management decision."

When he took over at Region V, Haynes says, the average decision rate was 26 cases per judge each month. The average had increased to 37 cases when he left in September 1989. "I don't think I have to apologize for that," he says. "The reason these people [who testified] are so outraged is that I made some judges get off their butts and work."

The criticisms voiced at last year's congressional hearing are only the latest controversy plaguing Social Security.

When Social Security in October 1981 mandated agency review of the decisions of all ALJs who granted benefits in at least 70 percent of their cases, an organization of Social Security ALJs sued. U.S. District Judge Joyce Hens Green said the review program could interfere with the ALJs' independence, but, because it was discontinued, she refused to grant an injunction. *Association of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132.

One ALJ, Simon Nash, lost his challenge to several agency policies in *Nash v. Bowen*, 869 F.2d 675 (1989). The 2nd U.S. Circuit Court of Appeals ruled that Nash lacked standing to attack his employer's policy of non-acquiescence in decisions of federal courts other than the Supreme Court. The appeals court also upheld findings that ALJ independence was not hurt by production goals or by the same review program challenged in *Heckler*.

Not all agree that there is a problem with agency control of ALJs. "I know of very few instances where allegations have been raised about agency interference with ALJ independence," says Jeffrey Lubbers, research director for the Administrative Conference of the United States. "Some agencies are worse than others," adds NCAJ's Thomas.

Both Thomas and Lubbers acknowledge that Social Security has been the target of a greater number of complaints in the past. But, says Lubbers, "I think SSA has changed some of their practices. You don't hear allegations they're trying to affect case outcome anymore. You do hear allegations from some of the judges that they have to meet goals that they feel may be in general a little too high."

Many of the complaints about goals "are from judges who are very low producers or who, in addition to productivity claims against them, have conduct claims against them," adds Alan Heifetz, chief administrative law judge at the Department of Housing and Urban Development.

The ABA has proposed a solution to the problem of agency control—create an independent corps of administrative law judges. Sen. Howell Heflin, D-Ala., first introduced a corps bill in the Senate in 1982. His latest proposal, S.826, was introduced on April 16, 1991.

Under the bill, judges would be grouped in eight divisions, according to their expertise. The corps would assign judges to hear cases at the request of the agencies. Judges occasionally could hear cases outside their division of expertise, however.

Craig Baab, former staff director for the ABA Governmental Affairs Office, says ALJs who are employed by a corps "would be insulated somewhat from the influence of political appointees and others in the various federal agencies who may lean on them to decide a case one way or another."

Another benefit, says Thomas, is that caseload would be assigned more evenly. Under the current system, some agencies have a case backlog, while the workload is lighter at others. And, since judges would be dispersed throughout the country, they no longer would have to travel to hear cases.

A third benefit is the money that could be saved by eliminating duplicative facilities and staff. For example, Thomas says, if the Washington, D.C., offices of ALJs could be grouped in one organization, support staff could be pooled and libraries consolidated.

Heifetz, however, is not convinced that a corps would result in any savings. Administrative duties that are now performed by the agencies—such as payroll, travel and computer services—would have to be moved to the new corps. "It would be the largest adjudicatory system in the world," he says. "You create a super bureaucracy."

Heifetz also supports some agency oversight. "You can't have a judge be totally unaccountable to anyone, sitting in his chambers and ruminating on a decision for months on end."

Another lawyer also cautions against giving ALJs too much independence. "We're wrestling with how to deal with judges who are patently unfair, while still trying to make sure they have enough independence so they can act as judges without fear of agency interference," says Richard Weishaupt of Community Legal Services of Philadelphia.

His legal-aid group filed a petition with Social Security to remove an ALJ who allegedly screamed at claimants, refused to admit relevant testimony, and mischaracterized evidence in the record. The petition was denied, but the agency did require remedial training for the judge. More outrageous is the allegation that an ALJ in Florida asked a claimant to pull down his pants so the judge could personally examine his claimed injury.

The solution, says Weishaupt, is to establish a complaint process "driven by claimants." The judge could be reviewed, for example, by a peer panel or through a process established by the Administrative Conference of the United States. "I don't think there's a simple prescription," he says. "But there are ways to police judges who act in totally absurd ways."