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## Panel Discussion on Independence and the Federal ALJ

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## **PANEL DISCUSSION ON INDEPENDENCE AND THE FEDERAL ALJ\* : Fried, Bernowski**

**Arthur Fried\*\***

Thank you very much for inviting me to this conference. I am extremely happy to be here today, in fact the opportunity to talk with you was so important to me that I broke off in the middle of my vacation to come here, and I will be returning to my vacation later this afternoon.

Hopefully I will be able to start this panel discussion off on the right foot, by clarifying some issues and answering some questions that have been raised. I have heard that some of you have expressed concerns or reservations when the commissioner issued the memo prepared by my office, the office of the general counsel, in conjunction with the office of hearings and appeals, concerning the duty of impartiality in the hearing process and its applicability to administrative law judges. When the Commissioner issued that memo, one of our goals was to end some of the confusion surrounding the meaning of what is commonly called an ALJ's decisional independence. After having interviewed many knowledgeable individuals from every component as they say—it was abundantly clear to me that many differing impressions of the meaning of an ALJ's independence existed within SSA. A GAO study reached the same conclusion. A letter written by Judge Bernoski on behalf of your association suggested that some misunderstandings still exists. This letter raised some issues that ALJ Bernoski described as in conflict with the Commissioner's memo, perhaps causing even more confusion. I am here today to try to try to clarify those issues.

First, let me make clear that the SSA fully supports, as it always has, the ALJ's role as independent adjudicator, as well as the protection of claimant's due process rights in the hearing process. It is also clear that there is no inherent conflict between the duty of impartiality owed

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\*Panel presentation, Chicago, August 1997, Annual Meeting of Administrative Law Judges.

\*\*General Counsel, Health & Human Services.

to claimants in our hearings and the appropriate exercise of management authority with respect to administrative law judges.

Please note that I said appropriate management authority over ALJs. That does not mean that SSA intends to, or has plans to, implement rules that would influence the outcome of individual cases heard by ALJs. It does mean, however, that there is an appropriate level of management authority over ALJs, as well as over other SSA employees; that SSA has both the right and the responsibility to exercise in order to effectively administer the claims adjudication process.

As I stated earlier, the Commissioner's memo was an attempt to clarify some often confusing issues in the area of managerial authority over ALJs. Congress charged the Commissioner of Social Security with the responsibility of administering the nation's social security programs. I am sure you will all agree that as part of that responsibility to the public, whom we all serve, SSA must oversee the performance of all of its employees including its administrative law judges.

Among all SSA adjudicators, however, ALJs have a unique status. Congress has structured the ALJ's position in a manner different from that of other Agency employees, in order to ensure that the ALJs are free to impartially find the facts in individual cases and that Agencies are not in a position to inappropriately influence the outcome of cases pending before its ALJs.

Some of the confusion has arisen because some individuals, including some ALJs, erroneously believe that the Commissioner's memo as well as policy statements such as Social Security Ruling 96-1P state SSA's intention to "non-acquiesce" in circuit case law. Nothing could be further from the truth. Let me be clear. SSA does not carry out policies that are contrary to law or ignore circuit court cases that conflict with its interpretation of the Social Security Act or Regulations. Quite to the contrary. Our regulations require us to follow within a circuit that court's decision if it conflicts with SSA's interpretation of statute or regulation. As you know, in the vast majority of circuit cases acquiescence is not an issue. The court simply applies the Agency policy to the facts of the case and decides whether substantial evidence supports the Agency's decision.

Occasionally however, a court will issue a decision that does

conflict with SSA's interpretation of the statute or regulations. When that happens, SSA will issue an acquiescence ruling that directs adjudicators to apply the court's holding and provide instructions to the adjudicators on how to do that in individual cases. Until an acquiescence ruling is issued though, the Agency's regulations recognize that the fairest and perhaps the only way to administer the program in a consistent and uniform manner is for all adjudicators to apply SSA's national rules while SSA decides whether a holding conflicts with SSA's interpretation of the statute or regulations, and then decides to which cases does the holding apply and how to apply the holding to those cases. Without such a process SSA would be unable to ensure the consistent application of Agency policy to SSA's customers. Moreover, there would be no mechanism for claimants and the public to determine what standards were being applied to adjudicate SSA's cases.

Once the acquiescence ruling is issued, the regulations also provide a mechanism for individuals whose claims were decided between the effective date of the court's decision and the effective date of the ruling to have that decision applied to their cases. The promulgation of these acquiescence regulations and obviously the implementation of their policy virtually ended criticism of Social Security's approach in that area. No court has found that these acquiescence rules conflict with the law.

Now let me turn to the Administrative Procedure Act. The APA was passed in concern over administrative impartiality in certain agency decision making. Congress sought to achieve two fundamental goals: to eliminate agency control over the classification, discipline and conflict with hearing examiners, which is what ALJs were formerly called, and to separate the prosecutorial and adjudicatory functions, which previously had resided in the same person in some agencies.

At that time proposals also were made to separate hearing examiners from the agencies. But instead Congress chose to make the hearing examiners a special class of semi-independent employees, giving the civil service commission control of their salaries, promotion and tenure, while retaining most aspects of employer-employee relationships with the agencies. In this regard Congress sought to create a balance. The Hearing Examiners would have the independence necessary to ensure impartial decision making in the cases before them.

The agency heads would have the freedom to promulgate rules regarding the examiners' role as federal employees. What this means is that as long as the duty of impartiality is not impinged, the agency has the right and the responsibility to expect, even to demand, the same professional behavior and dedicated work that it requires from all its employees.

Moreover, administrative law judges are not policy independent. There can be no serious dispute that the Commissioner, and not the 15,000 or so agency adjudicators, has the responsibility for interpreting the law in order to carry out the programs that Congress has assigned to the Social Security Administration. In matters of law and policy the ALJs are subordinate to the Commissioner's responsibility to interpret and apply the statutes and set rules in case of adjudication. While ALJs are delegated the authority to make decisions in individual cases on behalf of the Commissioner, it is the Commissioner who has the responsibility to ensure that ALJ decisions comport with the law and the Agency's rules and policies. If this were not the case, agency rules could be subject to conflicting and varied interpretations and the coherence of the administrative program would be seriously impaired. Different individuals could have different rules applied to their cases without knowing it, based on which ALJ had adjudicated their case, or whether their case was decided at the DDS or the ALJ level.

ALJs apply the adjudicatory rules as set by the Commissioner to the facts of the cases before them as the administrative law judges find those facts. Unlike Article III judges, ALJs do not have discretion to decide what the appropriate interpretation of the law is. Indeed, even Article III judges are limited in this regard. Article III judges are required under well established principles of administrative law to defer to the agency's reasonable interpretation of the statute and are not free to substitute their own interpretation for that of the agency. This constitutionally and statutorily required consistency and accountability would be impossible to attain if each ALJ decided cases according to his or her own individual interpretation of the law.

Of course, the APA does limit the Agency's authority to take disciplinary action against an ALJ in order to protect impartial decision making in individual cases. With certain exceptions an agency may take specified types of disciplinary action against an ALJ, only for good cause established and determined by the Merit System Protection

Board after an opportunity for a hearing before the board. The MSPB has defined good cause to include appropriate managerial actions that do not impact impartial decision making. One question that has been raised in this regard concerns an agency's authority to establish and enforce productivity standards for administrative law judges. Again, it is clear that an agency may establish reasonable productivity goals for ALJs. However, as I stated earlier any productivity goal must be carefully designed to ensure that the ALJ's ability to render impartial decisions is unimpeded.

In sum, as far as the claims review role is concerned, the agency has the paramount role in formulating substantive and procedural rules in case of adjudication. ALJs have statutory protections that enable them to be independent of their employing agencies in making determinations in individual cases.

Finally, as the Commissioner's memo makes clear, both the Agency and the ALJ are bound by law to a duty of impartiality. And while the APA seeks to preserve the ALJ's independence as an impartial finder of fact—that duty is for the benefit of plaintiffs. Therefore, the concept of decisional independence actually denotes an ALJ's responsibility to exercise impartiality in each case, in accordance with agency rules, free from agency pressure to decide any individual case one way or the other.

I would like to close by quoting Aesop the saying goes: "Beware lest you lose the substance by grasping at the shadow." Hopefully my remarks and further discussions that we will have this morning will replace your concerns with substantive answers. Once again thank you very much for the opportunity to speak with you today. We will have some time for questions at the end of all of our remarks, but for now I will turn the podium over to George Lowell.

## Judge Ronald G. Bernoski\*

I will address my remarks to the memorandum from the Office of the General Counsel of Social Security which is titled "Legal Foundations of the Duty of impartiality in the Hearing Process and its Applicability to Administrative Law Judges. Our Association has been concerned with that document since the first time that we read it.

The memorandum is very harsh and it delivers two major points; first, that administrative law judges must follow all agency policy and, second, agency authority to discipline low producing judges. We believe that the memorandum disregards the strong rich history of administrative law and the administrative law judge system. It instead takes an unyielding approach towards the judges. We believe that the memorandum is lacking in the manner in which it cites the case law. In particular, the memorandum fails to cite the case of *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474 (1951) where Justice Frankfurter clearly stated that one of the important purposes of the Administrative Procedure Act was to enhance the function of the trial examiner, (now the administrative law judge). *Butz v. Economou*, 438 U.S. 478 (1978) was also not relied upon but only cited in a footnote. *Butz* clearly stated that an administrative law judge was functioning comparable to that of a trial court judge. Rather than build upon those two great cases, the memorandum is more focused, in our opinion, on limiting or tearing down the administrative law judge function.

More importantly, the memorandum does not pay proper respect to the constitutional basis of the administrative law judge hearing. The words "due process" are barely mentioned in that document. There is no mention that the due process hearing is a constitutional right provided under the fifth and fourteenth amendments of the United States Constitution. There is no mention or consideration of the proud history and heritage of due process that relates back to the Magna Carta of 1215 and the *Dr. Bonham's* case, 8 Rep. 118a (C.P. 1610) and which was carried forwarded to our Constitution. As lawyers and judges, we

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Comments made as President of the Association of Administrative Law Judges, Inc. and do not reflect either the policy or the views of the Social Security Administration.

know that without due process law is really meaningless. I refer your attention to the Constitution of the former Soviet Union, which contained some of the greatest liberties ever made available to mankind, but without the protection of equal protection and due process those liberties and that law were meaningless.

The memorandum confuses the Administrative Procedure Act with the Constitution and does not distinguish that the substance of the due process hearing is provided by the Constitution and is implemented by the Administrative Procedure Act. The memorandum scrambles, the Social Security hearing process. For example, it cites the case of *Richardson v. Perales*, 402 U.S. 389 (1971), with reference to agency procedures as the basis for the Social Security hearing, when in fact, the court clearly stated that the Social Security hearing is based upon the Social Security Act. The court went on to say, which is not stated in the memorandum, that the Administrative Procedure Act is "modeled upon the Social Security Act," and that Social Security Procedure does not "vary from that prescribed by the Administrative Procedure Act." That very significant Supreme Court decision in fact holds that social security claimants have more protection than claimants in another forum because they not only have the benefit of the Administrative Procedure Act but they have the protection of the Social Security Act. I also note that the Social Security Administration has elected to have his hearings conducted by administrative law judges who are appointed under the Administrative Procedure Act. These judges only conduct hearings according to the Administrative Procedure Act.

Now the memorandum completely fails to acknowledge that it is the first duty of the judge to conduct a due process hearing and that impartiality is only part of that responsibility. With regard to agency rules, we understand completely that within the framework of administrative law, that it is both the duty and the responsibility of the agency to promulgate rules under the Administrative Procedure Act. We also understand that administrative law judges are bound to follow these rules. But we have difficulty with agency rules that are not consistent with the law.

We are concerned with the ethical conflict that this may cause the judge. Because as judges and lawyers, and as members of various local bar associations, we are subject to the canons of professional responsibility of these local regulatory groups. These professional

canons generally provide that lawyers have a responsibility to follow the law, as does our Federal oath of office. If the Commissioner requires that established circuit law not be followed in the promulgation of an agency rule, does that not cause the judge to elect between either following the law or the Commissioner? If this conflict should occur, and judicial misconduct is filed against a judge in a local bar association, what position will the agency take? Is the agency going to defend the judge in the disciplinary proceeding? Will the agency pay for the cost, which can be substantial? If the judge loses in the disciplinary proceeding, will the agency make the judge whole, because the license to practice law is of particular and substantial value to the judge.

These questions are no longer academic. I recently saw a letter from a lawyer in which he raised these very issues. This lawyer maintained that as lawyers and judges, we have the responsibility to follow the law. But he went one step further, he contended that we not only have the duty to follow the law, but we also have the duty to report violations of the law, of which you have knowledge. We view this as a potential problem, because we are concerned that a complaint of this nature may in the course of time be filed against one of our judges.

The last issue that I am going to discuss is the issue of judicial discipline which is the second major point of the memorandum, primarily disciplining low producing judges. The authority which the agency cites for that position, is the case of *SSA v. Goodman*, MSPD No. HQ752 18210015 (1983). However, this is a case which the agency lost and it is poor authority for that contention. In that case, the Merit Systems Protection Board specifically held that raw case statistics to measure the productivity of a judge is not sufficient for the agency to meet its burden of proof to establish unprofessional work performance. This is because of the substantial mix of cases that judges across the country hear and which render these statistics unreliable. The Board held that if these statistics are going to be used, they must be properly validated. OPM, which is the lead agency as Mr. Fried indicated on this issue, refers to the *Goodman case* as follows: "Notwithstanding the exemption of administrative law judges from formal performance appraisals, a few administrative law judge disciplinary cases have been brought before the Board in which good cause for removal was recommended by the employing agency for

performance deficiency. These cases were involving inefficiency, low productivity, and the failure to meet agency established productivity goals. The Board has not supported removal in such cases and has held that mere inefficiency does not constitute good cause for disciplinary removal." However, the Board has stated in dicta, that an employing agency is not precluded, as a matter of law, from bringing an action against an administrative law judge, on allegations of unacceptable performance. But such agency action must validly measure the judge's performance and must not improperly interfere with the judicial function of the judge. The law clearly provides that performance standards for administrative law judges are contrary to several distinct parts of the law. The Administrative Procedure Act clearly prohibits performance appraisals for administrative law judges and this is codified in Sec. 4301, title V of the U.S. Code. The case, of *Nash v. Bowen*, 869 F.2d 675 (2nd Cir. 1989), cert. denied, 493 U.S. 812 (1989), prohibits the use of fixed quotas against administrative law judges. The agency, by contract, in the case of *Bono v. Social Security Administration*, U.S. District Court, Western District of Missouri, Civil No. 77-0819-cv-w-y, agreed not to have either goals or quotas against administrative law judges. Commissioner King, in a directive of March 5, 1990 suspended numeric performance goals for all Social Security Administration employees. As social security employees, we are included in the policy directive of that memorandum. The OGC memorandum states that the agency will decide the question of judge productivity on a case by case basis. This is not a correct statement of the law. It is not the responsibility of the agency to decide this issue. This legal issue is within the responsibility and jurisdiction of the Merit Systems Protection Board.

The OGC Memorandum also relies on the case of *Goodman v. Svahn*, 614 F. Supp. 726 (D.D.C. 1985) as authority for the proposition that disciplinary actions can be brought against judges who produce fewer cases. This is clearly not an appropriate reading of that case. This is the second Goodman case, the first case was heard by The Merit Systems Protection Board. The second case was decided by the District Court on a motion to dismiss. The Court never got to the merits in that particular case and it thereby has no value as precedence.

I also refer to the case of *Association v. Heckler*, 594 F. Supp. 1132 (D.D.C.) (1984), phrases such as "targeting", "goals" and "behavior

modification" could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide. The court stated that this created an untenable atmosphere which violated the spirit of the Administrative Procedure Act, if not specific provisions thereof. Now I ask you, is not the singling out of low producing judges a "targeting" within the prohibition of *Association v. Heckler*, supra. I have a document that was used in May 1997 at a social security conference. It states that the regional chief judge is to counsel administrative law judges who do not meet the production standards or goals. The poorest performing judges to be identified, and memorandums sent to the Hearing Office Manager for action. Is this not a "targeting" of judges within the prohibition of *Association v. Heckler*, supra. This regional judge program also fails to meet the Goodman test for statistic validation.

We believe, as Professor Rosenblum said, that the proper standard of conduct for measuring the performance of administrative law judges is the diligence and work effort standard such as those codified in the American Bar Association standards of judicial conduct. We have long advocated that these types of standards be established for all administrative law judges on a uniform basis.

There is another aspect of the OGC memorandum which is troubling, and that is that the part of the memorandum which refers to the conduct of the hearing. The memorandum refers to the case of *Social Security Administration Office of Hearings and Appeals v. Anyel*, Docket No. CB752191009T1 (1993), as authority for quote "a pie for a high rate for adjudicatory error" as grounds for punishing a administrative law judge. The *Anyel* case was settled by the parties after it was remanded back to the administrative law judge by the Merit Systems Protection Board. This case was never fully decided on the merits and does not stand as precedent. The Merit Systems Protection Board in the case of *Matter re Chacallo*, 2 M.S.P.B. 20, 23 (1980) held that in conduct of hearing cases, discipline should be reserved only for "serious improprieties, flagrant abuses and repeated breaches." It is clear that the Board in this type of case gives more latitude to the judge because of the potential of interfering with the judicial independence in the hearing process. This distinction is not considered in the OGC memorandum.

The OGC memorandum stated that it was not an ex-parte

communication for an agency official to consult with a judge in a pending case. That proposition is clearly contrary to *Butz v. Economou*, supra, which stated that a judge cannot consult with any person, party or agency official without notice to all parties.

In summary we believe that the memo is too strident, it does not either correctly state the law or develop the duty of the judge under the existing constitutional system. It is clear that the Administrative Procedure Act was adopted to implement the constitutional due process hearing by making the independence of the judge the very essence of the adjudicatory process. That is the teaching of the *Universal Camera case*. Thank you.