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**A Breach Too Far: The Assault on Judges'
Professionalism by the Office of Hearings and Appeals**

Honorable Edd Wheeler*

In a book about wartime Holland, a flawed campaign by inept planners plays its course.¹ The mistakes of leadership result in failure and in resentment by professionals toward those responsible. The actions of some leaders in the adjudicatory arm of the Social Security Administration suggest that ineptitude can still affect professionals and professionalism.

The following will show that the Office of Hearings and Appeals has abused the complaint process against judges, has attempted to enforce wrongheaded sign-in-and-out policies, and has struck at the fabric of professionalism by launching a project which in large part would replace administrative law judges with agency-appointed adjudication officers. An unspoken objective of this project is to pay down the backlog of a half-million disability cases. Some of these actions are merely unseemly. Others erode organizational infrastructure. The proposed Adjudication Officer program may prove to be a time-wise but billions-foolish effort which undercuts the solvency of the Social Security trust funds. In any event, professionalism is being breached, and in some cases it has been a breach too far.

Before describing what I see as an assault on the professionalism of administrative law judges in the Office of Hearings and Appeals, it might be helpful to define professionalism. I elsewhere have offered that: "Professionalism is the coalescence of knowledge, technical skill, commitment to client, and dedication to the law and the public good, all in furtherance of providing salutary services for

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¹See Cornelius Ryan, *A Bridge Too Far* (1974).

those who require them."² This definition has obvious limitations in its application to judges, yet it makes clear that professionalism partakes of expertise but goes beyond expertise.

Shrewd practitioners of law may or may not hit the mark of professionalism. For example, the defense team for Orenthal J. Simpson was praised in some quarters for its flashiness and seeming command of the courtroom. Some might argue that Simpson's lawyers proved their mettle as consummate professionals. Others would pass on any lionization of lawyers perceived as polecats.

But if professionalism cannot be defined with precision, neither is it wholly situational. It can be addressed in descriptive language and this in fact is done in model codes of conduct. These codes typically speak not only to standards of behavior but to the ideals and first principles of the profession. The first imperative, for example, stated at Canon 1 of the Model Code adopted in 1995 by the National Conference of Administrative Law Judges is recognizable as a central tenet in similar judicial codes: "An independent and honorable judiciary is indispensable to justice in our society."³ It is axiomatic that professionals are to be independent and trustworthy. They are expected to embody a higher standard of integrity and fair dealing than is required in the ordinary transactions of life.⁴ In preparation for the rigors of service, professionals are to gain "an intellectual technique acquired by special training."⁵ Professionalism climbs, and takes with it the practitioner, by

²Report of the Committee on Professionalism, Ga. State Bar J., August 1986, at 15.

³A Model Code of Judicial Conduct for State Administrative Law Judges, 15 *Journal of the National Association of Administrative Law Judges (JNAALJ)* 251, 253 (1995). By announcement, one of the documents upon which this code was based was the 1989 Model Code of Judicial Conduct for Federal Administrative Law Judges.

⁴A. Carr-Saunders & P. Wilson, *Professions*, 12 *Encyclopedia of the Social Sciences* 479 (1933).

⁵ *Id.* at 476.

formal and measured step.

There is nothing magical or obscure in all of this. Judges are expected to act like judges, avoiding not only impropriety but the suggestion of impropriety. They are expected to be competent and honorable. Judges are not to trifle with the hallmarks of our system of law and experience. Nor are judges, even administrative law judges, to be trifled with. The latter is important not for reasons of station or imperiousness but because of the need to maintain independence and civility in the chief business of the judge, which is, as Francis Bacon reminded, "to interpret law, and not to make law, or give law."⁶ It was also Bacon who pointed to the mainstay of judicial professionalism: "Above all things, integrity is their portion and proper virtue."⁷ It might be inappropriate, for instance, to assume that a judge was Absent Without Leave (AWOL) if he was visiting the urinal. This is not a situation which likely would have occurred to Bacon. Unfortunately, the example is lifted not from the theater of the absurd but from recent experience.

Although it is a setting to be desired, professionalism cannot always be pursued within a decorous venue. Human relations are not immune from highhandedness or misunderstandings. Professionalism is not only to be enjoyed. Sometimes it may be contested and occasionally it must be asserted. The trick of course is to assert without self-righteousness or undue contentiousness. Professionalism is to be served by actions rather than by mere words. The following discussion assumes importance only if it proves to deal with events that are more than atypical

OF COMPLAINT AND SOLICITATION

In a waiting room of 10-by-20 feet, claimants and representatives await disability hearings in Atlanta. On the bulletin board is an 8 1/2-by-11-inch notice on bright yellow paper. Three lines of bold black print advertise it as an

⁶Bacon's Essays 138 (F.G. Selby, ed. 1964).

⁷Id.

IMPORTANT NOTICE TO SOCIAL SECURITY CLAIMANTS. The message in part reads:

If you think you have been treated unfairly in a Social Security hearing, you should tell us about it and ask us to look into it. You can ask at any time, even while we are deciding your claim for benefits. For more information, ask for a copy of the fact sheet, *How To File An Unfair Treatment Complaint* (Publication No. 05-10071).⁸

The Atlanta office is not unique. The Administration has directed that the same notice be displayed prominently throughout the Office of Hearings and Appeals. Claimants of course must have a fair hearing and they should perceive fairness. Most of them are represented by counsel who assumedly know the meaning of due process.

Whatever the intent of the notice, it points at least to the possibility that claimants may be treated unfairly in the hearing. This is a remarkable document, or advertisement, to be displayed within the venue of a judicial proceeding. It would be interesting to know if the notice has registered more fully for parties denied benefits than for those receiving them. In any event, the notice is an affront to the professionalism of the judge responsible for insuring fairness in the hearing.

However, one of the more egregious incidents spawned by the present complaint process was a case in which benefits were awarded.

The claimant in question equivocated at the first hearing about whether she wanted an attorney. The hearing was canceled and the claimant was told unambiguously that it would be rescheduled and that she was either to obtain counsel or be ready to proceed at the second hearing without equivocation. All of this occurred on the record and was recorded on tape. The claimant obtained counsel and was awarded disability benefits after the rescheduled hearing. She

⁸Social Security Administration, SSA Publication No. 05-10602, Feb. 1993.

apparently afterward experienced pause about the attorney's payment. She ostensibly alleged that counsel had been forced upon her and that the judge, among other transgressions, told her that she must have counsel and that she would be arrested if she tried to represent herself. She was said to want the attorney's fee returned to her. The ostensible complainant refused to sign a complaint because she was said to fear that she might be required to appear again before the judge.

District personnel passed along the "complaint" to the regional chief administrative law judge with an acknowledgment: "All of our instructions indicate we need a signed complaint to send the case to the next level."⁹ The taped recording of the first hearing was not consulted. Instead, the regional judge processed the matter as a bona fide complaint. I rejected the allegations as false and scurrilous. I have received no further information on these reputed charges. My request for the SSA Inspector General to investigate the matter yielded nothing.

One might interpret the entire episode as an unfortunate administrative miscue. Or it might be interpreted in terms of power and professionalism. The latter frankly seems the more plausible interpretation. We deal in present events, of course, not so much with power as pretensions to power. The instinct of the bureaucrat without answers is to make others answerable. Is it easier to try to call on the carpet a professional reputedly accused or to listen to a five-minute tape? The answer depends on whether there are other agendas involved.

The allegations actually did not rise to the level of a complaint because, of signal importance, the claimant refused to sign the allegations. Nonetheless, the matter was processed as a bona fide complaint. Of course, pursuant to common law, pleadings in writing, to include complaints signed by plaintiff or counsel, have been required for almost 500 years.¹⁰

⁹Social Security Administration, Region IV Memorandum on OHA Irregularities, Feb. 22, 1995.

¹⁰See W. Craies, Pleading, 21 Encyclopedia Britannica 832 (1911).

However, even where personal agenda might dominate, it is unacceptable when complaints against judges are solicited. Such fishing expeditions are not conducive to the maintenance of professionalism. The complete angler is hardly an appellation to be sought within a judicial setting by an honorable professional.

TIME: PAST, PRESENT AND MISSPENT

Although malice plays some part in human conduct, OHA's frequent indifference to professionalism seems traceable chiefly to miscalculation and mismanagement. It is unnecessary here to attempt a detailed analysis of these reasons. Suffice it to say that attacks on professionalism appear to be anything but novel occurrences. In 1970, the director of what was then the Bureau of Hearings and Appeals allegedly was removed for refusing to appoint a certain person as hearing examiner.¹¹ The candidate came with political references but the bureau director judged him to be unqualified.¹² The next 15 years, among other things, witnessed judges defending their decisional independence when production goals and then quotas were set under the guise of standards and the enhancement of efficiency.¹³

Nevertheless, the recent policy which preoccupies judges with demands that some of them sign in and out is unseemly. The time and energy expended on this sideshow are misspent. The Administration is sorely taxed by a ponderous backlog of cases. There exists a significant threat of future insolvency in the Social Security trust funds. Yet judges are distracted by those who would hold them answerable to the whittle of a time clock. Some would call this butt-in-the-seat

¹¹The title of hearing examiner was changed to that of administrative law judge in 1972. Prior to 1959, the title had been that of referee. A key reason for changing the title to judge was to adorn and protect the position with the mantle of professionalism.

¹²See T. Capshaw & C. Robinson, *A Quest For Quality, Speedy Justice* 15 (1991).

¹³See Charles N. Bono, "The Evolution and Role of the Administrative Law Judge at the Office of Hearings and Appeals in the Social Security Administration," 15 *J.N.A.A.L.J.* 213, 224-235 (1995).

bureaucracy at its worst.

This selectively enforced policy cannot be analogized to the contest for billable hours in law firms. The tribunal is not a partners' meeting. Judges assumedly are not junior associates. In one surreal case, later remedied, a judge who visited the urinal upon arrival in the office was initially reported as AWOL. Such treatment is a gross breach of professionalism. It is erosive of the good order of the workplace to say nothing of the dignity of the professionals involved.

Administrative law judges are conventionally, and legally, considered to be salaried employees as opposed to hourly-wage employees. Judges, therefore, are exempt from Fair Labor Standards Act requirements which govern areas such as overtime pay and compensatory time-off. But in docking judges' pay for alleged AWOL and alleged fractions of hours not at work, OHA manifestly has treated the judges as hourly-wage employees. The abuse registers not only in terms of equity but in terms of the Fair Labor Standards Act as well. Arguably, OHA stands to lose its exemption for judges, meaning that the agency could be held responsible for paying judges on the basis of hours worked including overtime. This outcome almost certainly was not the purpose of OHA's ill-conceived effort to coerce some judges into signing in and out, but such a result seems quite possible. For example, one labor case paints broadly, but within borders uncomfortable for OHA, that:

Payment on salary basis is thought to identify executive, administrative, and professional personnel precisely because it indicates employees who are given discretion in managing their time and their activities and who are not answerable merely for the number of hours worked or number of tasks accomplished. Employees paid under a system that subjects them, even theoretically, to docking for absences by the hour lack one of the characteristics explicitly identified ...

[for] salaried pay.¹⁴

The breaches by OHA were actual not theoretical. They were repeated despite judges' protests grounded on fact, equity, and professionalism. Thus, the agency may be invited to ride the whirlwind of its choosing.

WHY ADJUDICATE AT ALL?

The agency has a problem. It is a massive problem and OHA must be credited for searching for dramatic solutions. The agency faces an unprecedented backlog of a half-million requests for disability hearings. In the 1994 fiscal year, OHA received 70 percent more hearing requests than received just four years prior.¹⁵ Many judges, however, doubt that the solutions presently sought are the correct ones.

The Social Security Administration in 1995 implemented a controversial project to help reduce the backlog. SSA appears to be attempting to pay down the backlog. Its Short-Term Disability Project and an intended addition, the Adjudication Officer program, are structured to enable SSA personnel, other than judges, to issue favorable rulings on disability claims. SSA is using attorneys and analysts on "a temporary basis" to pay benefits.¹⁶ It plans to pay an additional 100,000 cases over two years.¹⁷ Use of non-judges will continue with the follow-on Adjudication Officers, a permanent cadre of paralegal specialists who with staff will number in the thousands.

But these SSA initiatives seem to be in conflict with the position description of OHA judges, which in pertinent passages states:

[I]n conformity with the Administrative Procedure Act ... the administrative law judge has full responsibility and authority to

¹⁴Kinney v. District of Columbia, 994 F. 2d 6, 11 (D.C. Cir. 1993) (footnote omitted).

¹⁵Social Security Administration: 20 CFR Parts 404 and 416, 60 Federal Register Proposed Rules 19008 (April 14, 1995).

¹⁶Id. at 19009.

¹⁷Charles Bono, "Evolution and Role," supra note 13, at 245.

hold hearings and issue decisions ... and (1) dismiss or allow requests for hearings and rule on requests for extensions; (2) identify problems and issues to be solved; (3) analyze all previously developed evidence and appraise ... adjudicative processes by the administrative agency; ... (18) fully consider all the evidence of record and issue decisions within the requirements of the Administrative Procedure Act, which decisions are completely independent and final, signed only by him, and published to parties in interest without prior review;....¹⁸

Common sense indicates that the agency is transferring significant adjudicatory and functional authority from OHA judges to agency appointees. The professional credentials and independence, and perhaps the legal standing as well, of the appointees in the pay-down brigade are not established. The professional in adjudication has been told to stand down. The surrogate, trained by parts but without the professional gravity of the judge, is appointed to stand in. Many OHA judges view these initiatives as a rupture of the Administrative Procedure Act and as a frontal attack on the rationale for judges under our system of administrative justice. I believe that the objections are justified and that they amount to something far more than professional pique.

The issue is not merely one of turf, and it would be a profound error to trivialize it as such. Bailiwicks come and go. Job descriptions can be revised. The Administrative Procedure Act itself can be revised, although of key importance in the above context that has not occurred. The essence of the problem, though, reduces to the question, Why adjudicate at all? I submit that the reason is not to distribute benefits but to distribute justice. It is fundamental, of course, that deserving claimants must be identified according to the evidence and paid as soon as possible. But the central task of the OHA judge is to gather, hear, sift and decide the case, as opposed simply to paying the claim with all speed. The professional role of the OHA judge is to determine in a measured but expeditious way whether

¹⁸SSA/OHA, AL 3 Standard Position Description, Aug. 12, 1994, at 2.

benefits are warranted. It is not the judge's purpose to expedite payment with one eye on the clock and the other on the accelerator. A judge is the keeper of evidence, not the purse. Still, this fact does not mean that decisions should flow without thought to the solvency of the Social Security trust funds.

I realize that, for claimants in need and personally convinced of the rightness of their case, talk of professional gravity or distributing justice, as opposed to money for rent, may sound smug or hollow. Yet not every mention of principle is Pecksniffian. If the reservoir cracks, the canteen soon becomes irrelevant. Of concern, for example, there is recent evidence that Medicare's Hospital Insurance Trust Fund is on less sound footing than once thought, losing over \$35 million last year rather than increasing by an anticipated \$4.7 billion.¹⁹

Let me return, though, to the question, Why adjudicate at all? There is another possible response aside from distributing justice. It is a compelling response: to serve the public interest. But this answer prompts a further question, How do we serve the public interest? At this point, the polarities of the subject are exposed. The new OHA Associate Commissioner has stated that there is "no doubt" that the public interest would be served if the approval rates of the states' disability adjudication sections were in line with the OHA approval rate, i.e., about 75 percent.²⁰ However, others might contest this proposition. One might well argue that there is nothing that intrinsically serves the public interest in paying three-quarters of the millions of disability claims considered by the states each year under the Social Security program. Rather, the objective should be to pay only those claims which are determined to be deserving of benefits after a conscientious and professional review of the evidence. This might be termed conservatism; it might as

¹⁹"Shortfall Posted By Medicare Fund Two Years Early," New York Times, Feb. 5, 1996, Section A, p.1, col.6.

²⁰Remarks by Rita S. Geier during an Atlanta OHA meeting, Sep. 20, 1995 [AL 3 partial transcript].

readily be called professionalism or justice.

It is the deserving citizen who suffers most, waiting in a discouragingly long line, when the backlog of cases becomes unmanageable in large part because of marginal and occasionally fraudulent claims. The point was well captured last year by Congressman Jim Bunning:

From 1984 to 1994, the U.S. population grew by 11 percent. In the same ten years, the number of individuals on Social Security disability went up 40 percent, to over 5.5 million. Over \$42 billion in disability benefits will be paid this year. *** [I]n the next fifteen years, as much as \$275 billion could be redirected from the retirement fund to the disability fund.

Individuals who work and pay into Social Security must be able to count on disability benefits to support their families if severe disability strikes. But benefits should only go to those who are truly disabled. *** By awarding benefits to borderline cases that should not be allowed, SSA encourages others who are not truly disabled to apply in the hope that they, too, will be awarded benefits.²¹

OHA is gearing to accelerate the distribution of disability benefits to claimants. But nothing compelling predicts that this approach will moderate the increased rate at which disability claims are being filed. On the contrary, evidence suggests that present initiatives could even have a multiplier effect. During the past 15 years, the number of hearing requests received annually has almost doubled. During the same period, the OHA pay rate for disability cases increased from 56 percent to 75 percent, and the monthly case productivity of judges rose by more than one-third.²² The increased and more efficient distribution of disability benefits

²¹Quoted in 17 National Organization of Social Security Claimants & Representatives Social Security Forum 1 (May 1995).

²²In the mid-1970s, the reversal or pay rate for disability claims in Hearings & Appeals was about 42 percent (156,000 cases were received in 1975). By the early 1980s, the pay rate was about 56 percent (over 270,000 case received in 1981). The cost of the disability program in 1981 was \$17 billion, of which \$2 billion, according to a GAO study, was said to be paid to ineligible persons. See T. Capshaw & C. Robinson,

appears to increase the public appetite for those benefits.

CONCLUSION

It is not my intent to drop a single glove of unproven material by the thorn bush and then exit, but I believe that an initiative different from those presently on the rail might prove more effective in addressing what threatens to become an overwhelming backlog. For example, why might not claimants, upon the second denial of disability benefits at the state level, be asked to pay a \$75 filing fee in order to appeal the decision and to request a hearing before an administrative law judge? A nominal payment toward costs and a test of seriousness. The fee, of course, would be returned, with interest, if the claimant is found to be disabled.

I will not attempt here a detailed defense of the above recommendation, but I must say that I am mindful that \$75 or a similar amount is far from pocket change for many and perhaps most claimants. Those entering a suitable declaration of pauperism could be excused the fee requirement. Attorneys would be strictly barred from underwriting the fee. I believe that such an approach has potential value because it gives at least some attention to winnowing claims for those that might be marginal. The proposed fee does not seem unduly onerous when one considers the magnitude of the present problem in OHA and likely futures. The program would be monitored closely by judges to protect the rights of claimants and to guard against abuse of process.

It is telling that during times which test all, when judges' professionalism might be tapped as an important resource, OHA attempts to circumvent the authority of judges. It is telling also that, at a juncture where judges could be encouraged to cultivate and strengthen professionalism, the agency seeks to attack professionalism. This siege must end and conciliation ensue. Absent the latter, the motto of Verdun

supra note 12, at 23-26. In fiscal year 1994, OHA handled "almost 540,000 hearing receipts and most of these were related to ... disability benefits." See *Federal Register*, supra note 15, at 19009 (which noted a record increase in ALJ productivity in FY 1994).

comes to mind: "**They shall not pass.**"

