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**ALJ Support Systems: Staff Attorneys and Decision Writers\*****Russell L. Weaver\*\***

Most federal administrative law judges (ALJs) are assisted by decision writers and other legal support staff, but agencies vary regarding how they hire and manage these staff. Variances extend to job description, salary, tenure and function. At some agencies, ALJs are supported by staff attorneys or law clerks. At other agencies, they are supported by technical assistants, legal assistants or paralegal. At some agencies, staff are hired on a permanent basis while at others they are hired on a temporary basis.

This article examines how nine different agencies manage their decision writers. The following agencies are included: Social Security Administration (SSA), Environmental Protection Agency (EPA), Department of Transportation (DOT), Department of the Interior (DOI), United States Postal Service (USPS), Department of Labor (DOL), Federal Communications Commission (FCC), Nuclear Regulatory Commission (NRC), and United States Department of Agriculture (USDA). Information was gathered through interviews with ALJs and support staff in the affected agencies during 1992 and 1993.<sup>1</sup>

**I. Staffing Levels**

Agencies vary significantly regarding their staffing of ALJs, decision writers and technical assistants. The following chart demonstrates the variances.

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<sup>1</sup> In order to encourage interviewees to speak confidentially, all speakers were offered anonymity. Some interviewees declined this offer. Most did not.

Agency	# of ALJs	Decision Writers	Technical Assistants
SSA	850	925 <sup>2</sup>	
EPA	7	2 <sup>3</sup>	7
DOT	4	4	
DOI	4 <sup>4</sup>	3 <sup>5</sup>	
DOI	Probate ALJs	-0-	2 per judge <sup>6</sup>
USPS	1 <sup>7</sup>	-1-	
DOL	80	-5	
FCC		-0-	9 <sup>8</sup>

<sup>2</sup>At the time of the interviews, the SSA had approximately 650 staff attorneys and 275 paralegal specialists. Interview with Acting Chief Administrative Law Judge J. Anglada, Office of Hearings and Appeals, Social Security Administration (Falls Church, VA, February 17, 1993) (hereafter "**Anglada Interview**"). Currently, the SSA has approximately 1,067 ALJs, and 1,259 "decision writers" (the term "decision writer" includes both staff attorneys and paralegal.) Telephone interview with Mr. William DeBardelaben, SSA Public Affairs Officer (February 1, 1996).

<sup>3</sup>The EPA's decision writers were staff attorneys. Since there are seven ALJs and only two staff attorneys, the EPA's attorneys are assigned to judges on a case-by-case basis. The ALJs would like to have a staff attorney for each ALJ, and submitted a budget request seeking the additional attorneys. Telephone interviews with Chief Administrative Law Judge Henry B. Frazier, III, U.S. Environmental Protection Agency (January 21, 1993) (hereafter "**Frazier Interview**"). Currently, the EPA has seven ALJs (one ALJ just resigned) and five staff attorneys.

<sup>4</sup>The ALJs referred to here are the DOI's ALJs who handle cases.

<sup>5</sup>At the time of the interviews, the DOI's Salt Lake City ALJs wanted to hire a third staff attorney - one for each judge. The ALJs believed that the workload demanded additional personnel, and felt that it would be more economical to hire an additional law clerk than another ALJ. The new attorney would write motions and decisions. Telephone interview with an anonymous DOI ALJ (February 17, 1993) (hereafter "**Anonymous DOI ALJ**").

<sup>6</sup>Each judge is given a paralegal and a clerical assistant. Interview with second anonymous DOI ALJ (February 17, 1993) (hereafter "**Second Anonymous DOI ALJ**").

<sup>7</sup>At the time of the interviews, the USPS was in the process of hiring a second ALJ. Interview with Judge James Cohen, Judicial Officer, United States Postal Service (Washington, D.C., February 10, 1993) (hereafter "**Cohen Interview**"). Since then, the USPS hired an additional ALJ. However, the Chief ALJ resigned and the USPS currently has another vacancy.

<sup>8</sup>Technicians perform secretarial services and quasi-paralegal functions. The

NRC	1	-0. <sup>9</sup>
USDA	5	2 <sup>10</sup>

## II. Decision Writer Functions

Agencies also vary regarding how they use their decision writers. Some agencies limit these personnel to decision writing. Other agencies give them greater, and sometimes lesser, responsibilities.

### A. SSA

The SSA's 925 staff attorneys and paralegal specialists are used primarily as decision writers. They read and evaluate hearing transcripts, and prepare the initial drafts of decisions. They also do legal research as necessary. The SSA has experimented with the idea of giving staff attorneys more substantial responsibilities. Recently, the SSA concluded a pilot program which allowed supervisory attorneys and some senior staff attorneys to handle prehearing conferences.<sup>11</sup> This program, which began in March, 1992 and was used in nineteen hearing offices, ended in September, 1992. At the time of the interview, the SSA

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office also has an administrative officer who handles personnel matters, records, statistics and general administrative matters. *Frazier Interview, supra* note 3.

<sup>9</sup>The agency used to have law clerks which it used extensively in reactor licensing and operating cases (which involved extremely large records). For example, the Seabrook case produced a record that ran into the hundreds of thousands of pages. Since licensing and operating cases are on the wane, there is less need for law clerks now. At the time of the interviewing, some of the judges wanted law clerks to help them with research and other tasks, but the office is suffering budgetary constraints. The office did have some staff attorneys who assist the ALJs. Telephone interview with an anonymous NRC ALJ (February 24, 1993) (hereafter "**Anonymous NRC ALJ**").

<sup>10</sup>At the time of the interviews, one of the positions was unfilled. However, the USDA had advertised for a replacement. The office wanted to hire a third law clerk. Telephone interview with Chief ALJ Victor Palmer, U.S. Department of Agriculture (September 29, 1992) (hereafter "**Palmer Interview**"). The USDA now has only one law clerk, but the office has permission to hire a second clerk. It has not done so because of a lag in work.

<sup>11</sup>In fact, this pilot program was the second of two programs. The SSA was unable to draw statistically valid conclusions from the initial study and decided to conduct the second pilot. *Anglada Interview, supra* note 2.

was in the process of reviewing the program and drawing conclusions about its effectiveness. The program was ultimately abandoned. However, the SSA did create the position of "Senior Attorney/Adviser" which allowed attorneys to dispose of certain matters: reversals and fee petitions. Appointments to senior status were on a temporary basis and designed to help the SSA deal with its immense case backlog.

### **B. EPA**

The EPA has two staff attorneys who do research and draft orders of a substantive nature. They also draft a few decisions for ALJ review. The staff attorneys are not assigned to individual judges, but rather work with all judges on a case-by-case basis.

The EPA also has seven legal staff assistants who are assigned to individual judges on a full-time basis. These assistants, who are not attorneys, perform a myriad of functions. They answer routine questions from lawyers, and they assume some secretarial duties. Assistants do not write legal decisions although they are sometimes asked to prepare routine orders for a judge's signature (e.g., they monitor cases, and prepare show cause orders for the judge's signature in cases where the parties are delinquent).

### **C. DOT**

The DOT has four attorney-advisors who provide support to its ALJs. They do research and draft decisions for the ALJs, and they also perform other functions.<sup>12</sup>

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<sup>12</sup> The Office of Hearings describes the function of its attorney-advisors as follows:

The major responsibilities of the Attorney-Advisors are assisting the Judges in analyzing substantive and procedural issues in hearing cases; receiving records and organizing materials filed by parties; doing legal research and organizing materials filed by parties; doing legal research and obtaining needed court decisions, statutes and regulations; assist in drafting notices, orders and initial or

#### D. DOI

The DOI's ALJs, the ones who handle land cases, use their law clerks in different ways. The Salt Lake City ALJ office has two staff attorneys who do research and draft decisions. At the time of the interview, one of the Salt Lake City ALJs had been assigned to work on probate cases, and one of the law clerks had been assigned to work with him on those cases.<sup>13</sup> The Knoxville ALJ is supported by a staff attorney and by a secretary who does docket work.

The ALJs' who handle probate ask their paralegals to prepare the initial drafts of simple decisions thereby allowing the ALJs to focus on more complicated issues.

#### E. FCC

The FCC's ALJs each have a technical assistant assigned to them.<sup>14</sup> The technicals are not attorneys, and generally do not engage in decision writing. However, they are sometimes asked to prepare short orders in routine matters (*e.g.*, requests for extensions of time) for a judge's signature.

#### F. USDA

The USDA asks its law clerks to perform a variety of functions including

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recommended decisions; reviewing notices, orders and decisions prior to their issuance to assist in eliminating inaccuracies, errors or deficiencies; ensuring that notices, orders and decisions are properly served; serving as clerk of court for the Judges in such matters as responding to telephone inquiries by the parties or the public with respect to status or procedural aspects of a proceeding; attending prehearing conferences and hearings, and assisting in related matters.

Fax from Peggy Spina, Administrative Officer, at 2 (Jan. 26, 1993)(on file with author)(hereafter "**Spina Fax**").

<sup>13</sup> The ALJs allocated one of the law clerks to the ALJ handling probate cases because such cases are time intensive. **Anonymous DOI ALJ**, *supra* note 5.

<sup>14</sup> In the early 1980s, the office had three law clerks who worked on major market cellular cases. These law clerks assisted in the hearing of cases and the preparation of decisions. Telephone interview with Chief ALJ Joseph Stirmer, Office of Administrative Law Judges, Federal Communications Commission (January 26, 1993) (hereafter "**Stirmer Interview**").

research, decision writing, etc. However, unlike the SSA's ALJs, most of the USDAs ALJs draft their own decisions.

### **III. Other Comparisons**

Agencies differ in other respects regarding their use of decisions writers. This section offers some insight into those variations.

#### **A. Pools v. Clerks**

One way in which agencies differ is in how they organize their decision writers. Some decision writers are assigned to particular judges as law clerks while others are organized into staff attorney pools. The SSA's Louisville office uses the latter approach. Decision writers work for different ALJs depending on the cases to which they are assigned. The Hearing Office Chief ALJ (HOCALJ) assumes ultimate responsibility for staff attorney performance, but delegates day-to-day management authority to a supervisory attorney.<sup>15</sup> The USDA has five judges and two law clerks, and its clerks are not assigned to particular judges either.

Some agencies do not organize their decision writers into staff attorney pools. Rather, they treat their decision writers as law clerks under a system like that used by the federal judiciary. The Executive Office for Immigration Review (EOIR), for example, allows each judge to hire a clerk who works for and with that judge. The same is true at the Department of Labor. That department has a shortage of clerks (eighty ALJs but only thirty-five to forty law clerks) due to budget restrictions, but does not pool its clerks. They are assigned to work with individual judges.

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<sup>15</sup> The ratio of ALJs to opinion writers varies somewhat from agency-to-agency. At the time of the interview, Louisville's SSA office had seven ALJs and eight opinion writers. However, the office was expecting to receive an eighth ALJ. Telephone interview with an anonymous SSA ALJ (February 16, 1993) (hereafter "**Anonymous SSA ALJ**"). At the moment, the office has eight ALJs with thirteen opinion writers. Of the opinion writers, eight are attorneys and five are paralegals. Telephone interview with Louisville SSA Supervisory Attorney Steve Slahta (January 25, 1996) (hereafter **Slahta Interview**).

### B. Permanent v. Fixed-Term

Agencies also vary in regard to how they hire decision writers. Some hire writers on a fixed-term basis while others hire them on a permanent basis. The SSA hires its decision writers on a permanent basis. If the decision writers do a good job, they can stay until they retire or decide to change jobs. Some staff attorneys do, in fact, remain with the SSA for very long periods (*e.g.*, ten to fifteen years). The EOIR, the DOI and the DOL tend to hire their decision writers on a short-term basis. Labor's clerks cannot remain more than two years. DOL does have five permanent staff attorneys. The following chart illustrates how agencies hire their clerks.

Agency	Office	Position	Appointment
DOI	Salt Lake City ALJ Office	Staff Attorney	2 years
DOI	Knoxville	Staff Attorney	2 years
DOI	ALJs (who handle probate cases)	Paralegal Spec.	Permanent
SSA	Hearing Offices	Staff Attorney	Permanent
SSA	Hearing Offices	Paralegals	Permanent
EPA	ALJ Office	Staff Attorney	Permanent <sup>16</sup>
DOL	ALJ Office	Law Clerk	2 years
DOL	ALJ Office	Staff Attorneys	temporary <sup>17</sup>
EOIR	ALJ Office	Law Clerk	1-2 years
DOT	ALJ Office	Legal Assistants	Permanent & Temporary <sup>18</sup>

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<sup>16</sup> However, few clerks stay more than two to four years. **Frazier Interview**, *supra* note 3.

<sup>17</sup> However, unlike the law clerks who must leave after two years, the staff attorneys can remain for long periods (albeit on short term contracts). After the first year, staff attorneys are eligible for a variety of benefits including pension benefits. Interview with Deputy Chief ALJ John Vittone in Washington, D.C. (July 6, 1993) (hereafter "**Vittone Interview**").

<sup>18</sup> The DOT prefers to hire temporary legal assistants. However, at the time of the interviews, two DOT assistants had been hired by the Civil Aeronautics Board (CAB) on a permanent basis. Since the CAB's ALJs provided the nucleus for the



USDA	ALJ Office	Law Clerks	1-2 years <sup>19</sup>
Commerce	ALJ Office	Staff Attorney/Law Clerk <sup>20</sup>	Temporary
FCC	ALJ Office	Technicals	Permanent

### C. Pay Levels

Decision writers pay levels vary considerably from agency-to-agency. The following chart illustrates the differences:

Agency	Office	Position	Grade Level
SSA	ALJ Offices	Staff Attorney	GS-11- GS-15
	ALJ Offices	Paralegal Specialist	GS-9 To GS12 <sup>21</sup>
DOL	ALJ Office	Law Clerk	GS-11
DOL	ALJ Office	Staff Attorneys	GS-13 to GS-15
DOI	ALJ Offices	Staff Attorney	GS-9 & 11 <sup>22</sup>
DOI	IP ALJ Office	Legal Assistants	GS-9 & 6
EPA	ALJ Office	Staff Attorney	GS-12 & 13
DOT	ALJ Office	Legal Assistants	GS-11 & 14 <sup>23</sup>

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DOT's Office of Hearings, the legal assistants were kept on a permanent basis when the ALJs and assistants transferred to the DOT. Interview with Chief ALJ John J. Mathias, Director, Office of Hearings, U.S. Department of Transportation in Washington, D.C. (January 3, 1993) (hereafter "**Mathias Interview**").

<sup>19</sup>The office gives clerks an initial one year appointment which can be renewed for a second year. Further renewals are possible, but are granted only when the ALJs are very happy with a clerk's performance. **Palmer Interview**, *supra* note 10.

<sup>20</sup> The staff attorneys usually begin as GS-5 law clerks during law school. Once they graduate and pass the bar, they become staff attorneys and must leave within a year. Telephone interview with Chief ALJ Hugh J. Dolan, U.S. Department of Commerce (March 9, 1993) (hereafter "**Dolan Interview**").

<sup>21</sup> In order to qualify for a GS-12, the paralegal must be certified. **Anglada Interview**, *supra* note 2.

<sup>22</sup> The ALJs are trying to arrange for their most senior staff attorneys to be promoted to the GS-12 level. However, at the moment, the promotion is not permitted since the attorneys are temporary employees. **Anonymous DOI ALJ**, *supra* note 5.

<sup>23</sup> At the time of the interviews, DOT's 2 permanent assistants were serving

USDA	ALJ Office	Law Clerk	GS-11 & 12
FCC	ALJ Office	Technical Asst.	GS-8 & 9
Commerce	ALJ Office	Staff Attorney/ Law Clerk	GS-5 to GS-12

#### **D. Attorneys v. Non-Attorneys**

Most agencies tend to hire attorney decision writers. Included are the EPA, the USDA and the DOL. Several agencies hire significant numbers of non-attorneys. The DOI hires legal assistants to support its ALJs who handle Indian probate cases, the FCC hires technical assistants, and the SSA hires paralegals.

The SSA provides the most interesting example. The SSA's hearing offices have hired a large number of paralegals over the years, and are presently hiring more. The paralegals often start as clericals in other The SSA offices. The SSA hopes to hire paralegals who have graduated from junior college or college, but some supervisory attorneys complain that many paralegals hold only high school diplomas. Paralegals perform many of the same functions as staff attorneys. In general, both analyze hearing records and draft decisions for ALJs.

Until recently, the SSA had hired far more staff attorneys rather than paralegals. As a result, some hearing offices were staffed almost completely by staff attorneys, and the remaining offices generally had far more staff attorneys than paralegals. However, the OPM recently reviewed the decision writer position and concluded that it could not justify hiring attorneys merely to write decisions. The SSA is now required to identify those functions for which an attorney is essential, and those that can be performed by either a paralegal or an attorney. The SSA must then evaluate each hearing office to determine how many staff attorneys can be justified for each office. To the extent that an office has too many staff attorneys, the

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at the GS-14 level, while its temporary assistants were serving at the GS-11 level. Mathias Interview, *supra* note 18.

SSA will achieve balance through attrition and restrictions on future hirings.

These restrictions are already beginning to have an impact. At the time of the interview, the SSA had about 200 paralegals compared to 650 or so staff attorneys. Six months later, the agency had 275 paralegals and roughly the same number of staff attorneys. The SSA's Acting Chief ALJ anticipated that hearing offices will hire many more paralegals in the future,<sup>24</sup> and that has happened. The SSA's Louisville office, which had only one paralegal at the time of the interviews, now has five.<sup>25</sup>

#### **E. Management of Decision Writers**

Decision writers are managed in different ways in different agencies. At most agencies, decision writers are reviewed by the judges for which they work. This is true at the DOL<sup>26</sup> and the DOT. There are, however, some variations. At the SSA, staff attorneys and paralegals are managed and evaluated by GS-13 supervisory staff attorneys. The HOCALJ serves as the reviewing official. Supervisory attorneys are evaluated by the HOCALJ, and the regional chief ALJ (RCALJ) serves as the reviewing official. The USDA's law clerks generally remain for such short periods that they are not reviewed. However, to the extent that review is required, the Chief ALJ conducts it.

#### **IV. Advantages and Disadvantages of the Various Systems**

Is one decision writer system preferable to another? There is no simple answer. Each system has its own strengths and weaknesses.

##### **A. Pools v. Clerks**

Those agencies that have adopted the pool system have generally done so

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<sup>24</sup> **Anglada Interview**, *supra* note 2. From the time of the initial interview until the study's completion, the SSA increased its paralegal staff by seventy-five (from 200 to 275). The SSA expects to continue hiring paralegals rather than attorneys. *Id.*

<sup>25</sup> **Slahta Interview**, *supra* note 15.

<sup>26</sup> The ALJs review their own clerks. The Chief ALJ serves as the reviewing official. The Chief ALJ does performance evaluations for the administrative officer and legal technician. **Vittone Interview**, *supra* note 17.

for reasons of efficiency. Louisville's SSA office uses the pool system because decision writers differ in terms of their expertise, proficiency, and productivity. The pool system allows the office to assign more complex cases to more able decision writers while assigning less complex cases to less able writers. In addition, the system insures that an individual ALJ's productivity will not suffer merely because the ALJ has a new or less able clerk.

Agencies that assign decision writers to particular judges use that system for a variety of reasons. In many instances, the judges prefer to personally train their clerks. From the decision writer's perspective, the clerk system also has advantages. It allows the writer to learn the judge's idiosyncracies and preferences, and to carry out more effectively the judge's will. Of course, if there is a bad fit between the clerk and the judge, the clerk system can create problems.

Interestingly, whether decision writers are organized into pools or are assigned to individual ALJs, most ALJs seem relatively content with the system used in their offices. Few ALJs expressed concerns about their own system, or a preference for the opposite system. Also, few decision writers complained either.<sup>27</sup> Indeed, the only complaints received came from some of the SSAs ALJs who were concerned about the fact that they do not manage the SSA staff attorneys.<sup>28</sup>

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<sup>27</sup> The DOL's law clerks stated that they like being assigned to a single judge because they prefer to have a personal connection with that judge. Only a few clerks have had trouble getting along with their judges. When that has happened, the clerks have been reassigned to another judge. Telephone interviews with anonymous DOL law clerks (February and March, 1993) (hereafter "**Anonymous DOL Law Clerks**").

<sup>28</sup> One of the SSA ALJ's expressed the following concerns:

The Staff Attorney program has been mismanaged for many years by agency administrators. The office configurations that removed the attorneys from direct supervision and control of the individual judges has created inefficiency, alienation and consequent demoralization. The Staff Attorneys should be placed in apprenticeship positions assigned to an individual judge and utilized in all areas of their job descriptions. If this means the agency has to hire more lawyers, then that should be done. I do not see the solution in an expansion of paralegals for decision writing, as many

### **B. Fixed-Term v. Permanent**

Whether decision writers should be hired on a fixed-term or a permanent basis presents a more vexing problem. Many ALJs expressed very strong feelings on this issue. With some exceptions, ALJs who have temporary law clerks seem to prefer that approach. Many of these ALJs do not want permanent clerks. ALJs who have permanent staff attorneys/law clerks have very mixed views on the subject. Some of the SSAs ALJs expressed a preference for temporary staff attorneys rather than the permanent staff they currently have.

On the surface, it would seem that agencies would benefit from hiring permanent rather than temporary clerks. The DOI's Salt Lake City office provides a good example. That office has hired clerks on a two-year basis, but the ALJs would prefer to make permanent appointments.<sup>29</sup> The ALJs complain that new clerks must go through a training period during which they learn a variety of things (*e.g.*, the DOI's regulatory scheme, as well as how to write decisions). In addition, law clerks must adapt to the judges with which they work. Once trained, clerks are available to DOI for only a short period of time. During the latter part of their terms, when the clerks are fully trained, they must aggressively seek employment elsewhere thereby diminishing their effectiveness. Once the clerks leave, the training process begins all over again. DOI ALJs view the system as inefficient and would like to hire their clerks on a more permanent basis.

Some within the SSA agree that permanent staff attorneys are preferable. One the SSA supervisory attorney argues that it would be a disaster for SSA to hire short-term decision writers.<sup>30</sup> He claims that it takes about a year to train a new staff

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judges are reluctant to accept decision writers who are not legally trained.

Letter from Judge Charles N. Bono to Author, at 8 (Aug. 30, 1993) [hereafter **Bono Letter**].

<sup>29</sup> But the OHA's Directors have been unwilling to approve permanent appointments. **Anonymous DOI ALJ**, *supra* note 5.

<sup>30</sup> Telephone interview with an anonymous SSA supervisory staff attorney

attorney to handle cases of moderate complexity. If staff attorneys were hired on a temporary basis, and the office faced a constant turnover of staff attorneys, office productivity would decline. This supervisory attorney, who generally likes to hire staff attorneys than paralegals, would prefer to have permanent paralegals than temporary staff attorneys.

But most ALJs who hire short-term clerks discount the inefficiencies. They recognize that short-term clerks must go through a training period, but argue that it does not take all that long to train a new clerk. In addition, agencies that hire large numbers of temporary clerks (*e.g.*, the DOL) have established training programs that help ease the transition. Some of these agencies have law school intern programs that allow students to learn about their regulatory schemes, and that allow the agency to "try out" prospective clerks.

The DOL provides an interesting example of an agency that hires short-term clerks.<sup>31</sup> The DOL's ALJs claim that they are able to hire highly-qualified individuals for two year appointments. The DOL hires recent graduates, and requires clerks to commit themselves to the job for at least a year, but forces them to leave by the end of the second year. The DOL has a week-long training program that begins in August or September. It involves training tapes, as well as lectures by older clerks and by ALJs. Lecturers use decisions illustrating the work, and explain to new clerks what they will be expected to do and why. Lecturers try to inform clerks about what the regulations require, and what they ought to be looking

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(July 13, 1993) (hereafter "**Anonymous SSA Supervisory Staff Attorney**").

<sup>31</sup> At the time of the interviews, the DOL had approximately thirty-five to forty law clerks who were assigned to work with individual judges. The DOL's Deputy Chief ALJ stated that clerking provides a wonderful experience for recent law school graduates, but he also stated no one should clerk for more than a year or two. The Deputy does not believe that clerks learn much after that point, or that they continue developing as lawyers. In addition, he thinks that it is good for ALJs to have short term clerks. It forces them to become teachers. The Deputy Chief downplayed the importance of expertise. *Vittone Interview*, *supra* note 17.

for when they review records.<sup>32</sup> The DOL is very satisfied with its program.<sup>33</sup>

The DOL's program has some obvious inefficiencies. Every summer, the DOL has to run a training program during which it gets no productivity from its new clerks (as well as reduced productivity from those who train the new clerks). Once the training session ends, the DOL has decision writers who are not yet proficient and must spend the next several months learning their job.<sup>34</sup> Moreover, since the DOL's clerks can only stay two years, they usually begin looking for a job after their first year. By the end of eighteen months, they can spend a significant amount of time looking for a new job. The problem is compounded by the fact that, historically, the DOL's clerks leave after eighteen to twenty months. The DOL then must choose between leaving a clerk position vacant until the next summer and hiring a new clerk in mid-year when there is no training program. This problem is mitigated somewhat by the current recession which has made it more difficult for clerks to find jobs, and has meant that more clerks stay until nearer the end of the two-year period. But the recession has a downside as well. Some clerks believe that it is a bit harsh to make them leave after two years.

Even though short-term law clerk/staff attorneys have their disadvantages, permanent decision writers can involve equally serious, if not more serious, drawbacks.<sup>35</sup> The SSAs staff attorneys suffer from a high level of dissatisfaction.

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<sup>32</sup> Over time, the program has evolved. At first, it was too intensive. Now, the DOL tries to provide clerks with an introduction to the major substantive areas and introduce them to opinion writing, but to do so with the expectation that the clerk cannot learn everything in the training session. Some on-the-job training is necessary. One ALJ believes that a new clerks' learning curve is about three months. *Id.*

<sup>33</sup> Telephone interviews and personal interviews, with the DOI's ALJs and staff attorneys during 1992 and 1993 (hereafter **DOI Interviews**).

<sup>34</sup> Some of the DOL's law clerks stated that, in the beginning, they relied heavily on those clerks who had been there a year or so. When those clerks left, the new clerks felt that they had lost a valuable resource. The DOL does have a few permanent attorneys, but they are assigned to particular projects and are not always available to help the clerks. The clerks would like to have more permanent attorneys available. **Anonymous DOL Law Clerks**, *supra* note 27.

This dissatisfaction is due to two major factors. First, the SSA work is fairly repetitive. This is particularly true of disability cases. For the first one to three years, decision writers get increasingly complex cases, and can be both stimulated and challenged by their jobs. But, as the years pass, the job becomes repetitive, and the repetitiveness takes its toll. After ten or fifteen years, the work can become numbing. In the last year or so, this situation has been alleviated by creation of the Senior Attorney position, but this is a temporary position.<sup>36</sup>

The repetitiveness is compounded by the fact that staff attorneys are caught in dead-end jobs with few promotional or career options. A few staff attorneys get promoted to supervisory positions, but the number of such positions is limited and vacancies are infrequent. Virtually all decision writers would like to become ALJs. But, in most instances, they have little hope of doing so because they lack sufficient qualifying experience. As a result, most staff attorneys stay in their positions for very long periods of time. They do so because they receive decent pay (most are GS-12s),<sup>37</sup> benefits and annual leave in a low stress environment,<sup>38</sup> as well as because many believe that they do not have highly-marketable skills that allow them to make as much outside the SSA.<sup>39</sup> This situation, in which decision

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<sup>35</sup> Permanent decision writers must also go through a learning curve, but they remain with their agencies longer thereby requiring fewer hires. For example, the SSA's hearing offices have permanent decision writers with a great deal of experience (e.g., ten to fifteen years). In some respects, this longevity is a plus. Staff attorneys develop a high level of expertise, and hopefully they get better and more productive over time. **Anonymous SSA Supervisory Staff Attorney**, *supra* note 30.

<sup>36</sup> **Slahta Interview**, *supra* note 15.

<sup>37</sup> Staff attorneys with no experience enter at the GS-9 level. After one year, they qualify for promotion to the GS-11 level. A year later, they can qualify for a GS-12. *Id.*

<sup>38</sup> Experienced staff attorneys claim that they find the job relatively easy once they become accustomed to it. In addition, they are able to keep regular hours. Telephone interviews with anonymous SSA staff attorneys conducted during 1992 and 1993 (hereafter ("**Anonymous SSA Staff Attorneys**")).

<sup>39</sup> Some ALJs believe that staff attorneys could make a good income on the outside if they were willing to establish their own SSA practices. **Anonymous SSA ALJs**, *supra* note 15. But this prospect is daunting to staff attorneys because it involves



writers are bored and lack sufficient promotional opportunities, creates a deadly environment. Many staff attorneys are confronted daily by the difference in status between themselves and the ALJs.<sup>40</sup> Some staff attorneys, as they develop expertise in the social security area, become increasingly angry. They are frustrated by the dead-end nature of the job and their inability to become ALJs, and they compare themselves to the ALJs in their offices. Some staff attorneys believe that they compare favorably to some of those ALJs.<sup>41</sup> For example, one decision writer openly stated that some of the judges in his office were not fit to "carry his briefcase."<sup>42</sup> These comparisons tend to fuel staff attorney anger and frustration about the inability to gain promotion, and to create morale problems within hearing offices.<sup>43</sup>

This situation has an undeniable effect on staff attorney morale and productivity. The SSA hearing offices presently have a huge case backlog.<sup>44</sup> While it is unfair to blame the staff attorneys for the backlog, the fact remains that some attorneys do only a minimal amount of work - the amount they have to do to avoid recriminations.<sup>45</sup> This problem was underscored by a supervisory attorney's response to a question about whether decision writers have personal computers at their disposal. The supervisor stated that the OHA has budgeted for computers and

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significant startup costs, coupled with the loss of a guaranteed salary. **Anonymous SSA Staff Attorneys**, *supra* note 38.

<sup>40</sup> The problem was aggravated when the ALJs were upgraded from the GS-15 level to the ALJ scale. Staff attorneys remained at the GS-12 level. **Anonymous SSA Staff Attorneys**, *supra* note 38.

<sup>41</sup> *Id.*

<sup>42</sup> Telephone interview with anonymous SSA staff attorney (July 13, 1993) (hereafter **Anonymous SSA Staff Attorney**).

<sup>43</sup> **Anonymous SSA Staff Attorneys**, *supra* note 38.

<sup>44</sup> At the time of the interviews, SSA's Louisville office had 900 cases that had not been heard, and there were 100 cases backed-up in typing. At one point, there were 200 opinions waiting to be typed. **Anonymous SSA ALJ**, *supra* note 15.

<sup>45</sup> **Anonymous SSA Supervisory Staff Attorney**, *supra* note 30; **Anonymous SSA ALJ**, *supra* note 15.

that they would arrive soon. But the supervisor also stated that computers would have little effect on productivity. The most experienced decision writers, the ones who could benefit the most from computers, would probably not produce any more decisions. They suffer, not from a lack of equipment and resources, but from a lack of will.<sup>46</sup> This morale problem affects not only the dissatisfied staff attorneys, but also other staff attorneys who work with the dissatisfied attorneys on a daily basis (and, to a lesser extent, the ALJs). The SSA's staff attorney problem may be unique to it. Other agencies who hire permanent staff attorneys do not have the SSA's problems. The EPA's ALJ office hires its staff attorneys on a permanent basis, but they do not suffer the same morale problems as the SSA's staff attorneys.<sup>47</sup> The morale difference may be attributable to two factors. First, the EPA's caseload is more varied and more interesting than the SSA's. Second, the EPA staff attorneys are more marketable. If the EPA staff attorneys become dissatisfied with their jobs, they can obtain other positions within the EPA or in the private sector.<sup>48</sup>

Other agencies that also have repetitive work tend to hire their clerks on a temporary basis. For example, some DOL cases, particularly Black Lung cases, can get a bit repetitive.<sup>49</sup> But the DOL clerks remain with the DOL for only a short period of time and therefore do not have time to develop the severe morale problems

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<sup>46</sup> Anonymous SSA Supervisory Staff Attorney, *supra* note 30.

<sup>47</sup> Telephone interviews with anonymous EPA ALJs conducted during 1993 (hereafter **Anonymous EPA ALJs**).

<sup>48</sup> The EPA's Chief ALJ stated that EPA attorneys with experience have no difficulty finding jobs in the private sector. Congress is always rewriting the environmental statutes, and the agency is always producing new or revised regulations. As a result, experienced environmental attorneys are in demand. **Frazier Interview**, *supra* note 3.

<sup>49</sup> One clerk stated that it took her about a month to feel comfortable doing Black Lung cases. She still sees some new wrinkles, but the cases have become somewhat repetitive. Clerks who handle traditional cases complained that, even with substantial experience, they still find some cases difficult. Traditional cases involve a range of subject areas, and it is difficult to learn all the areas in a short period of time. Interview with an anonymous DOL staff attorney (July 20, 1993) (hereafter "**Anonymous DOI Staff Attorney**").

developed by the SSAs staff attorneys.<sup>50</sup>

Do agencies that hire permanent clerks have an advantage in terms of recruitment? One might suspect that they do. Prospective decision writers may be more interested in permanent positions even if they do not intend to remain permanently. The permanency relieves them of the pressure of finding another job in the near future. But, interestingly enough, none of the agencies surveyed encountered any difficulties recruiting high-quality personnel. For example, the EOIR hires short-term clerks, but is able to recruit them from the Justice Department's Honors Program. Of course, since EOIR hires recent graduates, it gets decision writers with less experience who may suffer through a longer learning curve.

But even the SSA has generally been able to recruit high-quality individuals. Some of the SSAs staff attorneys ranked fairly high in their law school classes, and also have large law firm experience. Whether the SSA will continue to be able to recruit quality individuals, once economic conditions change, is unclear. Many current staff attorneys were attracted to the position by the hope that they would eventually become ALJs.<sup>51</sup> Since it is now clear that staff attorneys have little chance of doing so, the SSA may have more difficulty recruiting top-flight individuals in the future. The SSA may only be able to recruit individuals who are attracted by decent pay and low-stress environment who are willing to accept the boredom and repetitiveness of the job as a tradeoff.

### **C. Pay Levels**

As noted earlier, pay levels vary significantly from agency-to-agency. Some support staff serve at the GS-11 level. Others serve at the GS-14 or GS-15 level. It is difficult to draw conclusions about the appropriateness of these pay

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<sup>50</sup> Telephone interviews and personal interviews, with the DOL's ALJs and staff attorneys conducted during 1993.

<sup>51</sup> Anonymous SSA Staff Attorney, *supra* note 42.

differentials. Staff attorneys/law clerks vary significantly in their experience and responsibilities, and some agencies have more complex work than others.

Some comparisons are, however, noteworthy. The SSA's Appeals Council (AC) uses primarily non-attorneys (analysts) as decision writers. By contrast, the SSA's hearing offices use primarily staff attorneys. Both the AC analysts and the hearing office staff attorneys work on the same types of cases. Nevertheless, the AC analysts are generally paid more than hearing office staff attorneys. The hearing office staff attorneys generally serve at the GS-12 level after they have been with SSA for a couple of years. The AC analysts typically serve at GS-12 and GS-13 levels.

At the time of the interviews, the situation within the SSA was under audit both with regard to the hearing office staff attorneys and the AC analysts. There was some question about whether the AC analysts would continue to be eligible for promotion to the GS-13 level and about whether SSA hearing offices would be required to hire more paralegals. Both questions were ultimately answered in the affirmative so that the AC analysts continue to be eligible for the GS-13 level and the hearing offices have been forced to hire more paralegals. However, under a program established in late 1993, the SSA began hiring some staff attorneys on a two-year appointment. Some have later been converted to permanent staff.

#### **D. Attorneys v. Non-Attorneys**

Whether it is preferable to hire attorneys or non-attorney decision writers depends on the agency, and the type of work that its ALJs handle. In some instances, the work is sufficiently complex that attorneys are necessary. In other instances, non-attorneys are fine. For example, the DOI's ALJs who handle probate cases tend to hire paralegals. In addition, as noted earlier, the SSA's AC has hired significant numbers of paralegals.

#### **E. Management of Decision Writers**

Whether one management system is preferable to another is debatable.

Some of the SSA's ALJs complain that they lack supervisory authority over the staff attorneys in their offices.<sup>52</sup> These ALJs believe that they need to retain management control in order to make sure that their work is completed in a timely and quality fashion. These claims are difficult to evaluate. There is little question but that the SSA has severe morale problems with its staff attorneys, but it is doubtful whether these problems are due to the SSA's management system. As suggested earlier, there are many other reasons for staff attorney discontent.

#### **IV. Conclusions**

The study reveals that several changes would be desirable. They are as follows:

##### **A. The SSA Is In Desperate Need Of Change**

Most agencies appear to have no major difficulties with their decision writers. The SSA, on the other hand, has major problems. As noted, the SSA decision writers suffer from low morale that significantly affects their productivity.<sup>53</sup> These problems result from a combination of many factors: the SSA hires attorneys, it does so on a permanent basis, the work is repetitive, and staff attorneys have limited career options.

There are several ways the SSA might deal with its staff attorney problem. One solution is to stop hiring staff attorney decision writers. Because of the OPM's recent audit, the SSA will have no choice but to hire more paralegals in the future.

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<sup>52</sup> **Anonymous SSA ALJ**, *supra* note 15.

<sup>53</sup> Although most of the SSA's ALJs and staff attorneys agreed with this assessment, there was some disagreement:

While I would agree that there is a degree of demoralization, I cannot accept the premise that the Staff Attorneys are under performing in productivity of drafted decisions, or that their demoralization is so significant that it is the cause for the backlog of cases. Your paper and the conclusion of under productivity ignores the increasing complexity of drafting decisions that will be acceptable in the appellate courts since the Disability Reform Legislation of 1984.

**Bono Letter**, *supra* note 28, at 8.

Indeed, during a recent six month period, the SSA hired an additional seventy-five paralegals. Many of the SSA's ALJs and supervisory attorneys oppose the idea of hiring more paralegals. One supervisory staff attorney stated that paralegals do not perform as effectively as attorneys. Others agree. The ALJs fear that their own productivity will suffer, and supervisory attorneys worry about the overall impact on productivity. One supervisory attorney noted that the SSA has a backlog of more than 200,000 cases (the backlog is, in fact, much higher<sup>54</sup>), and the backlog is rising rather than falling. If paralegals write fewer decisions than staff attorneys, the backlog may get worse. The ALJs also worry about whether paralegals can handle the most complex cases, and whether the addition of more paralegals will further demoralize the SSA's staff attorneys. These supervisors point to the fact that paralegals are eligible for promotion to GS-12, the same level available to hearing staff attorneys who are already frustrated about their lack of promotional opportunities.

But a fairly strong argument can be made in favor of the SSA's decision to hire more paralegals. The AC hires large numbers of non-attorneys to review decisions written by hearing office staff attorneys, and to prepare drafts of decisions for the AC. The AC has been able to recruit high quality non-attorneys, and they have performed effectively without serious morale problems.<sup>55</sup> To the extent that the

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<sup>54</sup> The SSA's Chief ALJ stated that the OHA had a backlog of 220,000 cases at the end of FY 1992, and its backlog was more than 338,000 at the time of the interviews. *Anglada Interview*, *supra* note 2.

<sup>55</sup> Although the AC's analysts have some morale problems, their morale seems to be much higher than that of the SSA's staff attorneys. This is true even though analysts are also hired on a permanent basis, remain with the AC for long periods (some analysts have been with the AC for twenty years), and handle the same type of cases as hearing office staff attorneys. Nevertheless, because most analysts are not attorneys, and cannot aspire to become ALJs or AAJs, they do not seem to be as frustrated as the SSA's staff attorneys. Nevertheless, the AC's analysts have some morale problems due to the repetitive nature of the work and case production pressures. Anonymous interviews with the SSA's Appeals Council's Staff Attorneys at the Appeals Council Offices, Virginia (March 17, 1993).

SSA's hearing offices also hire non-attorneys, they might solve many of their morale problems. Non-attorneys cannot aspire to the ALJ position, and therefore might not be as frustrated by the lack of promotional opportunities. Of course, non-attorneys will still have to deal with the repetitive nature of the job, but non-attorneys may more easily cope with this problem than attorneys because they cannot aspire to become ALJs. Interestingly enough, when the supervisory staff attorney who expressed concern about hiring more paralegals was reinterviewed in 1996, after his office had been forced to hire substantially more paralegals, he was generally satisfied with their performance.<sup>56</sup> He felt that the SSA's decision to hire more paralegals had been vindicated.<sup>57</sup>

One caveat regarding the use of non-attorneys is in order. Some the SSA's ALJs and supervisory staff attorneys are concerned that, unlike the SSA's Appeals Council (AC), hearing offices may not be able to attract high quality individuals as decision writers. They contend that the SSA might, instead, use the decision writing position as a promotional opportunity for clericals. In other words, hearing offices would not get the higher-quality managerial types that the AC presently recruits. If this happens, then hearing office productivity may in fact suffer.

A second option is for the SSA to continue hiring staff attorney decision writers, but to hire them on a fixed-term basis. Other agencies have successfully used this approach. Under this arrangement, the SSA would try to recruit bright young law school graduates with the expectation that they will leave within a year or two. This proposal is supported by some the SSA's ALJs. One ALJ argues that, because ALJs know that they can rely on staff attorneys, some ALJs tend to become lazy and do not learn the SSA's rules and regulations well enough or keep up with new developments. This ALJ believes that, if staff attorneys were hired on a short

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<sup>56</sup> Telephone re-interview of an anonymous SSA Supervisory Staff Attorney (February 1, 1996).

<sup>57</sup> *Id.*

term basis, ALJs would be forced to be more responsible.

Many of the SSA's ALJs and supervisory attorneys believe that it would be undesirable to hire staff attorneys on a short-term basis. Indeed, some argue that it would be disastrous and inefficient. The SSA would lose the expertise of those that have already been trained. In addition, the SSA would have to constantly train new decision writers. One supervisory staff attorney claims that it takes a year or more to train a new staff attorney to work independently on cases of moderate complexity.<sup>58</sup> If attorneys were hired on a short-term basis, so that the agency faced a constant turnover of personnel, the agency's productivity and work product would be affected. This supervisory attorney stated that he would prefer to hire paralegals on a permanent basis than staff attorneys who left after two years. Nevertheless, if the SSA did hire staff attorneys on a short term basis, it would eliminate a major source of discontent that seriously affects productivity. Moreover, those agencies that hire temporary clerks discount the problems and are relatively satisfied with the system.

The SSA's problems could also be solved by providing staff attorneys with opportunities for career advancement. If staff attorneys had career possibilities which give them hope, and which encourage them to continue working hard, the SSA might get improved productivity from its staff attorneys. The SSA has developed a partial career ladder for staff attorneys which allows them to be promoted to GS-13 supervisory staff attorney position. However, there are problems with the supervisory attorney position. Even though most supervisory attorneys are relatively content with their jobs, they too are concerned about their inability to gain promotion to ALJ. Moreover, few staff attorneys are able to gain promotion to the supervisory position. There is only one such position per office, and supervisory attorneys rarely resign or become ALJs. Instead, they remain in

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<sup>58</sup> Anonymous SSA Supervisory Staff Attorney, *supra* note 30.



their positions for very long periods, thereby reducing the promotional opportunities of other staff attorneys.<sup>59</sup> In order to obtain a supervisory position, staff attorneys are often forced to compete for available positions in other cities. Some staff attorneys, especially those with families, find this option unacceptable.<sup>60</sup>

At present, the OHA is thinking about the possibility of developing other career opportunities for staff attorneys. The OHA has recently experimented with using staff attorneys to handle alternative dispute resolution proceedings. In a pilot program, the OHA allowed staff attorneys to conduct prehearing conferences. The OHA hoped that these conferences would result in more settlements, would streamline the issues in cases that did not settle, and identify cases that can be decided without a hearing. The OHA is the process of evaluating the pilot program to see whether it should be made permanent.

The SSA is also considering other possibilities. The Associate Commissioner for Hearings and Appeals has considered allowing staff attorneys to hear and decide Medicare Part B cases (which involve amounts of less than \$5,000).<sup>61</sup> If this happens, staff attorneys would be able to gain additional

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<sup>59</sup> *Anonymous SSA Staff Attorneys*, *supra* note 38.

<sup>60</sup> *Anonymous SSA Staff Attorneys*, *supra* note 38; *Anonymous SSA ALJ*, *supra* note 15.

<sup>61</sup> The Staff Attorney Magistrate program was described as follows: the agency will establish a senior staff attorney position with magistrate-type hearing authorities to hear and decide cases which at present are heard by an ALJ; these will initially be Medicare Part B cases involving less than \$5,000. Later, the plan is to include Titles II and XVI disability cases as well as Part A cases.

Association of ALJs Newsletter, at 6 (July-Aug. 3, 1993). The Association of ALJs opposes the program:

The Association is quite concerned about the potential for non-APA hearings by staff attorney magistrates.... While we wish to work with staff attorneys to use their talents more widely and provide broader, more rewarding experience for them, our position is that such a program is subject to much abuse unless sufficient supervisory controls are implemented as well. Such procedures would involve, for example, assignment to the ALJ in the first instance, and management

experience, thereby giving them a better chance to qualify for ALJ positions. They would also have more interesting work, and promotional potential to a GS-13 or GS-14. However, this program may require statutory authorization.

Staff attorneys have a number of suggestions about how they might be given additional responsibilities. Some staff attorneys believe that they should be used to defend federal court challenges to the SSA decisions.<sup>62</sup> They also suggested that the SSA could use staff attorneys at the reconsideration level.

Of course, many staff attorneys would like to be promoted to ALJ.<sup>63</sup> But, historically, staff attorneys have not fared well in the ALJ selection process.<sup>64</sup> The OPM has generally preferred ALJ applicants who have a range of litigation experience - obtained either as a judge or as a litigator.<sup>65</sup> Many staff attorneys join

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of the case by the staff attorney with the ALJ's advice and approval. One wonders whether the agency is not simply trying to end-run the merit selection system required by hiring through the register supervised by OPM?

*Id.*

<sup>62</sup> **Anonymous SSA Staff Attorneys**, *supra* note 38. SSA decisions are currently defended by U.S. Attorney offices. Some staff attorneys argued that the U.S. Attorney's offices are not particularly interested in SSA work. Some of the SSA's staff attorneys have applied for U.S. Attorney positions, especially positions involving SSA cases, but SSA attorneys rarely get the positions. They are disadvantaged by their grade level, vis-a-vis recent graduates who can be hired for much less, as well as by their lack of litigation experience. *Id.*

<sup>63</sup> **Anonymous SSA Staff Attorneys**, *supra* note 38; **Anonymous SSA ALJ**, *supra* note 15.

<sup>64</sup> A 1988 GAO report summarized the situation as follows:  
Of 23 SSA staff attorneys in grades GS-11, GS-12, and GS-13 who applied for ALJ positions in the 1984 competition, OPM placed 8 on ALJ-qualified registers as of July 1988. All of the SSA staff attorney applicants were employed by SSA's Office of Hearings and Appeals. Two were appointed to GS-15 ALJ positions at SSA. Both were male 10-point veterans.

**Administrative Law Judges: Appointment of Women and Social Security Administration Staff Attorneys**, GAO Report to Hon. Sander M. Levin, House of Representatives, at 2-3, GAO/GGD-89-5 (October, 1988) ("GAO Report").

<sup>65</sup> A GAO report noted that:

OPM data show that few OHA staff attorneys who applied in 1984 have successfully competed for available ALJ positions. The

the SSA relatively early in their career, and never obtain sufficient judicial or litigation experience.<sup>66</sup> Only a few staff attorneys, generally those who are eligible for the veteran's preference, succeed in becoming ALJs.<sup>67</sup>

The SSA's staff attorneys quarrel with the SSA's selection criteria.<sup>68</sup> They recognize that they lack litigation experience, but argue that they compensate for that deficiency by their knowledge of the SSA's regulatory scheme. They argue that this knowledge is devalued in the selection process, and that the SSA's hearings are relatively informal so that litigation experience is less essential. Staff attorneys also argue that they have a good deal of experience in synthesizing and analyzing facts,

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appointment and examination experience, as of July 1988, of 23 OHA staff attorneys (including supervisory staff attorneys) who applied for ALJ positions during the 1984 open period (19 males and 4 females) was as follows:

- Two staff attorneys were appointed to GS-15 ALJ positions in SSA; both were male and 10-point veterans in grade GS-12 with final examination ratings, adjusted for veterans' preference, of 98.43 and 90.52.
- Six other staff attorneys (5 males and 1 female) completed the entire examination and were placed on OPM registers with final ratings, adjusted for veterans' preference, ranging from 90.52 to 80.92, but were not appointed. These applicants were all veterans, four in grade GM-13 and two in grade GS-12.
- Of the remaining 15 staff attorneys or supervisory staff attorneys who were not appointed, 1 male had not yet completed the entire examination, 11 (8 males and 3 females) had projected maximum ratings of 85.24 or below based on their scores from the first part of the examination and thus were not asked to complete the remaining parts of the examination, and 3 other male applicants were considered by the ALJ Office not to meet minimum qualification requirements.

*Id.*, at 7-8.

<sup>66</sup> *Id.* For example, at one SSA office, most staff attorneys have two to four years of private practice experience. **Anonymous SSA Supervisory Staff Attorney**, *supra* note 30.

<sup>67</sup> GAO states that the "veterans' preference and the below average scores of the 1987 SSA staff attorney applicants on OPM's evaluation of their legal experience will continue to hinder the competitive status of women and SSA staff attorneys." **GAO Report**, *supra* note 62, at 3.

<sup>68</sup> **Anonymous SSA Staff Attorneys**, *supra* note 38.

essential skills for an ALJ, because of their staff attorney experience. Finally, they argue that the OPM's current criteria do not result in the selection of quality judges so that some changes are needed.

It is difficult to quarrel with the OPM's selection criteria which gives preference to those with litigation and judicial experience. ALJs are asked to do a variety of things, only one of which involves decision writing. Granted, the SSA's staff attorneys have extensive knowledge of the SSA's rules and regulations, but this knowledge is not enough in and of itself to justify altering the selection criteria.<sup>69</sup> The OPM might legitimately prefer individuals with outstanding backgrounds who do not have SSA specific knowledge, but who can acquire it, on the assumption that they will ultimately make better ALJs. As a GAO report concluded, "... SSA staff attorneys were assigned below average scores on the first part of the examination which was a result, according to the ALJ Office, of their work having less scope, complexity, and impact than the work of many other applicants."<sup>70</sup> Nevertheless, it is difficult to believe that more decision writers are not deserving of promotion to ALJ status. To the extent that the SSA provides more promotional opportunities to

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<sup>69</sup> GAO, in a 1988 report, concluded that:

OHA staff attorneys have requested that they be given extra credit under the ALJ examination for their subject matter expertise in social security law. OPM disagreed with this request on the basis that a particular kind of substantive legal experience is not an essential requirement for becoming an ALJ. According to the Assistant Director of OPM's ALJ Office, to give OHA staff attorneys extra credit, SSA would have to justify to OPM by means of a current job analysis that specialized experience is an important factor for successful ALJ performance. An OPM job analysis made in 1979 among incumbent ALJs, most of whom were employed in SSA, found no justification for basing ALJ selections on their experience in social security or other particular programs, according to the OPM Assistant Director. An OHA official said the office was considering preparing another job analysis since he believed circumstances had changed since OPM's analysis.

GAO Report, *supra* note 60, at 8.

<sup>70</sup> *Id.*, at 10.

staff attorneys, they may be able to develop sufficient qualifying experience to allow them to become ALJs.

### **B. Increased Use of Decision Writers**

Another suggestion that could improve the functioning of ALJ offices is to make increased use of decision writers. Some agencies use decision writers extensively, while others make little or no use of them. Those agencies that use significant numbers of decision writers find that the writers help the ALJs significantly increase their productivity, and allow the agencies to hire fewer ALJs. For the cost of an additional ALJ, an agency can hire two or more law clerks. The SSA's AC provides a good example. It has approximately twelve decision writers per judge.

### **C. Computer Use**

At the time of the interviews, some ALJ offices did not provide computers to either their ALJs or their staff attorneys/law clerks. Other offices made extensive use of computers. At that time, there was no doubt but that many ALJ offices, especially the SSA's offices, could significantly improve their productivity through the use of computers. Some ALJ offices, especially the SSA's offices, complained that they were drowning in a sea of cases.<sup>71</sup> For example, one hearing office's seven ALJs issued 317 decisions in a single month.<sup>72</sup> Nevertheless, the office took in 423 cases that month and fell further behind on its pending docket of 2,284 cases.<sup>73</sup> Nationally, the SSA faced a huge backlog of cases.

Recognizing that the SSA might be able to significantly improve productivity by the simple expedient of providing all ALJs and staff attorneys with

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<sup>71</sup> *Anonymous SSA Staff Attorneys*, *supra* note 38; *Anonymous SSA ALJ*, *supra* note 15.

<sup>72</sup> Interview with an anonymous SSA HOCALJ (July 21, 1994).

<sup>73</sup> *Id.*

personal computers, the SSA moved in that direction. As this article was going to press, all the SSA's ALJs, attorneys and paralegals who want computers have been provided with them. The economics were obvious. Prices of high-quality computers have dropped so that the SSA can outfit a fourteen person office (seven ALJs and seven staff attorneys) for about \$14,000. If the SSA's staff attorneys composed at the keyboard, they could minimize their dependence on secretaries and get work out quicker. Moreover, to the extent that the SSA work is repetitive, staff attorneys could store form discussions on their computers and quickly add those discussions to decisions (making changes as necessary). Of course, in order to get maximum use of the computers, the SSA must first find ways to deal with staff attorney discontent so that attorneys will have incentives to produce more. This move should bring about a significant reduction in the demand for secretarial services. The alternative, to hire additional ALJs and staff attorneys at more cost and perhaps less effectiveness, is clearly less attractive. New ALJs and staff attorneys who do not have computers may drag down the office's overall productivity by further overburdening already backlogged support personnel.

#### **D. The OPM Should Create A Decision Writer Job Series**

The OPM needs to establish a job series for law clerks, staff attorneys and others who provide legal support to ALJs. Agencies vary in terms of how they hire and compensate their decision writers. Some of the variances may be justifiable in terms of the burdens and duties imposed on the writers. Others may not. It would be desirable for the OPM to study this issue and establish criteria which provide some basis for rationalizing the salaries and status of decision writers between agencies.







