

10-15-1983

Administrative Law Judges Under Fire: Association of Administrative Law Judges, Inc. v. Heckler

David J. Agatstein

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>

 Part of the [Administrative Law Commons](#), [Judges Commons](#), [Legal Profession Commons](#), and the [Litigation Commons](#)

Recommended Citation

David J. Agatstein, *Administrative Law Judges Under Fire: Association of Administrative Law Judges, Inc. v. Heckler*, 3 J. Nat'l Ass'n Admin. L. Judges. (1983)
available at <http://digitalcommons.pepperdine.edu/naalj/vol3/iss2/3>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

ADMINISTRATIVE LAW JUDGES UNDER FIRE:
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

v.

HECKLER*

The independent association of administrative law judges in the federal Social Security Administration** brought suit against the agency, alleging that agency officials unlawfully pressured the judges to decide an unrealistic volume of cases, thereby depriving claimants of due process and a fair hearing, and further pressured the judges to decide a fixed percentage of cases in favor of the government. In an opinion filed on March 14, 1983, the District Court (Joyce Hens Green, J.) dismissed the case against the Merit Systems Protection Board, a co-defendant in the action, and directed the principal parties to proceed with the litigation.

The plaintiff's brief, prepared for the Association by former Secretary Elliot L. Richardson, Esq., contains an extensive discussion of the factual and legal background of the case. With Mr. Richardson's permission, selected portions of the brief are reprinted below, in greatly abridged form.

The Court's opinion is primarily concerned with the issue of standing, and related procedural matters.**+ Because these issues are of lesser concern to Journal readers, the opinion has not been reprinted here. Persons interested in obtaining a copy of the opinion, prior to its publication in the law reports, should communicate with the Clerk of Court.

* Dec. sub. nom. Association of Administrative Law Judges, Inc. v. Schweiker, U.S. D. Ct., D.C. Cir., March 14, 1983 (Civ. Action No. 83-0124) (unpub'l.).

** The Association of Administrative Law Judges, Inc. is not affiliated with the National Association of Administrative Law Judges, and NAALJ is not involved in this case in any way.

**+ Which is, of course, entirely proper and judicious in the context of a motion to dismiss. — Ed.

PLAINTIFF'S CONSOLIDATED STATEMENT
OF POINTS AND AUTHORITIES IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

Milbank, Tweed, Hadley & McCloy
Washington, D.C.
Attorneys for Plaintiff

Elliot L. Richardson, Esq.,
Peter E. Halle, Esq.,
D. Stephen Mathias, Esq.,
John M. Adams, Esq.

on the brief.

[Excerpts]

Statement of the Case

The Complaint filed by the Association of Administrative Law Judges, Inc. ("plaintiff") charges that the defendants are engaging in acts, practices, and courses of conduct that pressure Administrative Law Judges ("ALJs") in the Social Security Administration ("SSA") into disposing of large numbers of cases without regard to the amount of time that must be devoted to each case in order to give it adequate legal and evidentiary consideration and in order to render a careful, correct, fair, and impartial written decision, consistent with the ALJ's and SSA's obligation to treat each claimant in accordance with due process, and acts, practices and courses of conduct that pressure ALJs into deciding fewer cases in favor of claimants. The Complaint further charges that the defendants instituted removal proceedings in three cases before the Merit Systems Protection Board ("MSPB") and have threatened ALJs who are members of the Association that they will be "removed or otherwise penalized" if they do not dispose of more cases and/or decide a greater number of cases in favor of the government. Moreover, the Complaint charges that the defendants' acts and practices are injuring ALJs who are members of the Association because they have a "chilling effect on ALJ's independent performance of their duties . . . [including] their duty to give each claimant fair and impartial consideration"

[More specifically], the complaint alleges that defendants have "threatened" ALJs who are members of the Association that they will be "removed or otherwise penalized" if they do not speed up consideration of claimants' cases without regard to their duty and independence to develop a complete record on which to base a decision. Moreover, it is alleged that defendants have threatened the Association's member ALJs that if they do not decide a greater number of cases in favor of the Government, in disregard of their duty and independence to give each claimant fair and impartial consideration, they will be "removed or otherwise penalized." These threats and

other practices alleged in the complaint are injuring the Association's members as well as disabled claimants.

The Social Security Disability Decisional Process —

Case Production Quotas

. . . The Association's members are primarily engaged in the adjudication of claimants' rights to disability benefits under Titles II and XVI of the Social Security Act. (42 U.S.C. Sec. 401 et seq. (1981) and 42 U.S.C. Sec. 1381 et seq. (1974), respectively). Claimants must meet the Act's strict definition of disability to be entitled to benefits as defined in 42 U.S.C. Sec. 416(i)(1) (1981).

A disabled person, however, does not have the opportunity to appear before an ALJ face-to-face to present his or her case until he or she has first been denied benefits by the SSA. 20 C.F.R. Sec. 404.930 (1982). As a result of a tightening of disability criteria made "without any change in the law or any comparable change in the regulations," SSA has been denying an increasing number of permanently disabled claimants their statutory right to benefits. Consequently, appeals to ALJs have increased drastically . . .

In order to meet the tremendous increase in the demand for face-to-face hearings before qualified ALJs, members of the Association have dramatically increased their production:

During the 1974 fiscal year, the average dispositions per ALJ were 13 per month. Over the last seven years, ALJs have been forced to increase their productivity by nearly threefold. As of the end of FY 1981, the average ALJ processed 33 dispositions per month. The Administration wants to increase average monthly output to 50.

CHAIRMAN OF HOUSE SELECT COMM. ON THE AGING, 97th Cong., 2d Sess., REPORT ON IMPACT OF THE ACCELERATED REVIEW PROCESS ON CESSATIONS AND DENIALS IN THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 35 (Comm. Print Oct. 1982) ("Report on Impact") at 41.

A Senate Report highlights an ALJ's testimony regarding the continuing effort by ALJs to hear the tidal wave of claims by disabled persons:

I issued about 31 decisions per month in 1981. During the first four months of 1982, I have averaged 41 dispositions per month. In April, I closed 59 cases.

* * *

I cannot maintain this level of average monthly decisions for any extended period of time. . . . I have come to the office

early, have worked on Saturday, traveled to out of state hearings sites on my own time, and worked a 70-hour week on a hearing trip to Wisconsin. Judges all over the country have been making this extra effort because we wish to accommodate the claimants waiting for a hearing The speed at which the acceleration process has been implemented has caused needless misery across the land. There are not enough ALJs on duty to quickly cure the problem. The problem must be cured at its source.

SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT, SENATE COMM. ON GOVERNMENTAL AFFAIRS, 97th Cong., 2d Sess., REPORT ON OVERSIGHT OF THE SOCIAL SECURITY ADMINISTRATION DISABILITY REVIEWS 28 (Comm. Print Aug. 1982) (footnote omitted).

According to the Senate Committee on Government Affairs, another ALJ testified that a source of the problem is SSA's own failure to fully develop the record of a claimant's disability at the DDS level. A faulty or incomplete record many times results in the denial of benefits to disabled claimants which, in turn, results in increased appeals to qualified ALJs who are duty bound to carefully develop a complete record on which to base a fair and impartial decision:

With regard to the speed in which such review of termination cases are performed, we have found in a vast majority of the cases that there has been poor development of the medical record at the state agency level. In all fairness to the state agencies, we believe that such poor development is due in large part to an extremely large state agency workload, under-staffing of the state agencies, and arbitrary time constraints imposed on the state agencies for processing cases. . . . The Administrative Law Judges often feel that the hearing level has become the "dumping ground" for the hurried state agency process.

Id. at 29 (footnote omitted) (emphasis supplied).

The HHS defendants' response to this very real problem is simplistic and unrealistic. "Given the number of hearing requests and the number of ALJs, it is a matter of simple arithmetic to calculate the number of dispositions per ALJ needed. . . ." (HHS def' mem. at 33). The product of this reasoning is continuing pressure on ALJs to hear cases without regard to the quality of the record or of the decision.

A Quota for Allowances of Benefits Favorable to Claimants

In 1980, Congress became concerned with the rise in the number of cases in which ALJs were granting benefits to claimants and the variance among ALJs in this regard. Congress found that "i/n the past there . . . had been fairly extensive review of ALJ allowances and denials through own-motion review" and "t/his own-motion review has almost been eliminated in recent years." H.R. REP. NO. 944, 96th Cong., 2d Sess. 57 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1405.¹

In response, Congress enacted a law, commonly known as the "Bellmon Amendment," that required SSA to implement a program of Appeals Council "own motion review" of ALJ decisions and to report to Congress on the progress of the program. Section 304(g) of the Social Security Amendments of 1980, Pub. L. No. 96-265 (discussed at 42 U.S.C.A. Sec. 421, historical note, (West's 1982 Supp.)).

The HHS defendants have taken the position in their memorandum that this amendment gave them carte blanche to single out high allowance judges and to threaten them with removal or other penalties unless they decide more cases against claimants. The only authority they cite for this extreme position is a statement made by Senator Bellmon on the floor of the Senate:

Much of the problem has to do with the administrative law judge decision-making process itself, which is highly individualized. The judges are independent and differ in their procedural methods on hearings. According to the Finance Committee's report, the judges develop and decide cases in very different ways, some relying heavily on medical examinations and others not, and some using vocational specialists a great deal in deciding cases while others do not. This has led to a great degree of variation in reversal rates among judges. Some have become known as "easy" judges, others as "hanging" judges. There seem to be more "easy" judges than "hanging" judges, however. The Finance Committee report points out that 87 percent of the judges reversed 46 percent or more of the cases they heard. This seems to be an exceptionally high number of judges who reverse, on the average, almost half the cases that come before them.

26 CONG. REC. S702 (daily ed. Jan. 31, 1980) (cited twice in HHS defs' mem. at 5-6 and 42). Nothing in Senator Bellmon's remarks, of course, justifies the threatening of high allowance judges by HHS.

¹ ALJ decisions are reviewable by the Appeals Council, 20 C.F.R. Sec. 404.967 (1982). A party who disagrees with an ALJ's decision can appeal, or the Appeals Council may, on its "own motion," review the action of an ALJ. 20 C.F.R. Sec. 404.969 (1982).

Senator Bellmon's remarks themselves, however, were not faithful to the Finance Committee Report to which he referred. That Report indicated Senatorial concern with variations in the decisions of hanging judges, easy judges and average judges alike, as well as variations in the denial rates by State DDS agencies. According to the Committee Report, 33 percent of the ALJ corps was made up of "hanging" judges, while only 21 percent were "easy." Yet, the SSA decided to study and threaten only "easy" ALJs. The Senate Report indicates that Congress did not intend to give them authority to do so:

A person who requests a hearing may be assigned to what have been referred to as either "easy" or "hanging" judges. In the period January-March 1979, 33 percent of ALJs awarded claims to from zero to 46 percent of the disabled workers whose cases they decided, 46 percent of ALJs awarded claims to from 46 to 65 percent, and 21 percent of ALJs awarded claims to from 65 to 100 percent. . . .

The committee is concerned about these State-to-State, ALJ-to-ALJ variations and about the high rate of reversal of denials which occurs at various stages of adjudication, for it indicates that possibly different standards and rules for disability determinations are being used at the different locations and stages of adjudication.

S. REP. NO. 408, 46th Cong., 2d Sess. 53 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1331.2

The Independence of the ALJ to build a complete
record and decide cases

"The conduct of the hearing rests generally in the examiner's discretion."¹⁷ Richardson v. Perales, 402 U.S. 389, 400 (1971). "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." United States v. Shaughnessy, 347 U.S. 260, 266-267 (1954). Current Social Security regulations indicate that ALJs have broad discretion. But such discretion, without the independence to exercise it within the bounds of the law, is meaningless.

A Social Security disability hearing is a de novo proceeding open to the parties and other persons that the ALJ "considers necessary and proper." 20 C.F.R. Sec. 404.944 (1982). The ALJ "looks fully into the issues" and may

² The State-to-State variation that concerned the Committee was the difference in the rate of allowance of benefits by state DDS agencies. In FY 1978, for example, the Alabama DDS allowed 22.2 percent of claims, while the New Jersey DDS allowed 53.1 percent. Id.

stop the hearing "if he or she believes" there is material evidence missing. Id. The ALJ may decide "when the evidence will be presented and when the issues will be discussed." Id. Even if a claimant waives his or her right to appear, an ALJ may notify them to appear if the ALJ "believes" that a personal appearance is necessary to decide the case. 20 C.F.R. Sec. 404.950(b) (1982). An ALJ may issue subpoenas at the request of a party or on his or her "own initiative." 20 C.F.R. Sec. 404.950(d)(1) (1982). An ALJ may ask the witnesses at the hearing any question material to the issues. 20 C.F.R. Sec. 404.950(e) (1982). The ALJ has an obligation to make a complete record of the hearing proceedings including any prehearing and post hearing conferences held to facilitate the hearing or the hearing decision. 20 C.F.R. Secs. 404.951, 404.961 (1982). Lastly, the ALJ is required to issue a written decision that sets forth findings of fact and the reasons therefor that "must be based on evidence offered at the hearing or otherwise included in the record." 20 C.F.R. Sec. 404.953 (1982). The decision is binding unless appealed to the Social Security Appeals Council. 20 C.F.R. Sec. 404.955 (1982).

The Appeals Council can review an ALJ's decision only if:

- (1) There appears to be an abuse of discretion by the administrative law judge;
- (2) There is an error of law;
- (3) The actions, findings or conclusions of the administrative law judge are not supported by substantial evidence; or;
- (4) There is a broad policy or procedural issue that may affect the general public interest.

20 C.F.R. Sec. 404.970 (1982). On review, the Appeals Council may consider new and material evidence, but claimants do not have the right to appear in person for face-to-face consideration. 20 C.F.R. Sec. 404.976(c) (1982).

After review, the Appeals Council is required to decide the case or remand it to the ALJ. The Council may affirm, modify or reverse the ALJ's decision. 20 C.F.R. Sec. 404.979 (1982). When a case is remanded, the ALJ is bound to take any action ordered by the Appeals Council and may also take any other action that is not inconsistent with the Appeals Council remand order. 20 C.F.R. Sec. 404.977(b) (1982).

This procedure is in conformity with the requirements of the Administrative Procedure Act³ . . . Section 11, of the APA 60 Stat. 237, 244 was enacted to protect ALJs from agency interference and pressures. It, together with Section 7(b) of the Act, protects the ALJs' independence to exercise their discretion to build a complete record and to decide cases fairly and impartially. The two functions are inseparable if independent exercise of discretion is to have any meaning. Section 7(b) of the Act, now 5 U.S.C. Sec. 556(c) (1976 & Supp. IV 1980), provides:

- (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may--
 - (1) administer oaths and affirmations;
 - (2) issue subpoenas sic authorized by law;
 - (3) rule on offers of proof and receive relevant evidence;
 - (4) take depositions or have depositions taken when the ends of justice would be served;
 - (5) regulate the course of the hearing;
 - (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
 - (7) dispose of procedural requests or similar matters;
 - (8) make or recommend decisions in accordance with section 557 of this title; and
 - (9) take other action authorized by agency rule consistent with this subchapter.

Section 7(b), 42 U.S.C. Sec. 556(c), corresponds to the current Social Security Regulations discussed supra.

The Senate Report on the bill clearly shows Congress' intent in Section 7(b):

This subsection does not expand the powers of agencies. It is designed to assure that the presiding officer will perform a real function

³ Richardson v. Perales, supra, 402 U.S. at 409 held that an earlier version of these regulations "does not vary from that prescribed by the APA." HHS defendants concede, for purposes of the motion to dismiss, that Social Security proceedings are subject to the APA.

rather than serve merely as a notary or policeman. He would have and should independently exercise all the powers numbered in the subsection. The agency itself - which must ultimately either decide the case, or consider reviewing it, or hear appeals from the examiner's decision - should not in effect conduct hearings from behind the scenes where it cannot know the detailed happenings in the hearing room and does not hear or see the private parties.

S. REP. NO. 752, 79th Cong., 1st Sess. 21 (1945); reprinted in Administrative Procedure Act — Legislative History, S. DOC. NO. 248, 79th Cong., 2d Sess. (269) (1946)/ hereinafter cited as ("Legislative History") (emphasis added); see also, H. REP. NO. 1980, 79th Cong., 2d Sess. 35 (1946) reprinted in Legislative History. ("They would have and independently exercise all the powers listed in the section.")

Once the foundation of a complete record has been built, the ALJ decides the case.

The cornerstone of the formal administrative process is the principle that the decision of the Administrative Law Judge is an independent intellectual judgment, based solely upon the applicable law (including agency regulations and precedent) and the facts contained in the record. . . . It is the Judge's duty to decide all cases in accordance with agency policy.

However, if the parties have introduced evidence or arguments not previously considered by the agency, or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the Judge has not only a right but a duty to consider such matters and rule accordingly.

Although the Judge should follow agency policy and the law he must always be aware that he may have the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. If the Judge is wrong he can easily be reversed, but if he is correct he may prevent substantial inequity and injustice.

M. Ruhlen, Manual For Administrative Law Judges 78-80 (1982) (Prepared for the Administrative Conference of the United States.)

Argument

Plaintiff Has Standing To Bring This Action

Plaintiff has standing as an association to bring this action because its members have suffered a legally cognizable injury at the hands of the defendants, because proof of the claim asserted will not require individual ALJ participation in the case, and because the requested relief will inure to the benefit of all ALJs.

The well-pleaded allegations in the complaint show that plaintiff has standing on the basis of injury suffered by its members in four respects. In addition, plaintiff has standing to challenge the denial of the disabled claimants' due process rights.

First, the complaint alleges that three ALJs are the subjects of on-going removal proceedings before the MSPB. The loss of employment and wages that would result from their imminent removal is a direct and concrete economic injury sufficient to confer standing. . . .

Second, the complaint alleges that the defendants have threatened ALJs that they will be removed or otherwise penalized if they fail to obey defendants' illegal policies. These threats must be viewed as credible in light of the proceedings currently pending before the MSPB. See Segar v. Civiletti, 516 F.Supp. 314 (D.D.C. 1981) (selective discipline of certain employees sets a lesson for others). The fact that no other ALJs are currently facing proceedings before the MSPB does not minimize the impact of this threat. . . .

Third, the complaint alleges that the acts, practices, policies and courses of conduct of the defendants violate the statutory right of its members to decisional independence under the provisions of the Administrative Procedure Act. In Nash v. Califano, 613 F.2d 10 (2d Cir. 1980), the Second Circuit found that ALJs have standing to challenge the alleged infringement of their decisional independence by HHS.

In Nash, an ALJ filed suit contending that an arbitrary monthly production quota, the establishment of "acceptable" reversal rates, institution of a peer review program and the use of clerical and managerial personnel for certain judicial responsibilities constituted an impermissible interference with the ALJs' statutory independence. The Second Circuit found that the ALJ had standing to assert the claim:

The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decisionmaking. Since that independence is expressed in terms of

such personal rights as compensation, tenure and freedom from performance evaluations and extraordinary review, we cannot say that ALJs are so disinterested as to lack even standing to safeguard their own independence.

613 F.2d 10, 16 (2d Cir. 1980) (per Kaufman, J.). The holding in Nash that ALJs are entitled to decisional independence has been adopted by the Fifth Circuit in Rivers v. Schweiker, 684 F.2d 1144, 1149 (5th Cir. 1982). See also N.L.R.B. vs. Permanent Label Corp., 657 F.2d 512, 527 N.10 (3rd Cir. 1981).

The defendants' acts, practices, policies and courses of conduct have a chilling effect on the exercise by ALJs of their right to decisional independence. This chilling effect in and of itself is a sufficient injury in fact to provide standing: but for the defendants' threats to impose sanctions, ALJs would exercise fully their right to decisional independence. . . .

Fourth, the complaint alleges that the defendants' acts, practices, policies and courses of conduct constitute injury because they interfere with the statutory obligation imposed on ALJs under the APA to impartially administer full and fair hearings. See United States v. Federal Maritime Commission, No. 79-1299, slip op. (D.C. Cir., Nov. 16, 1982); 7 citing Coleman v. Miller 307 U.S. 433, 441-42 (1939) 7. . . .

The ALJs have standing to raise the constitutional rights of disabled claimants, because the activities of ALJs are inextricably bound to the due process rights of the claimants and numerous obstacles and practical difficulties prevent the claimants from asserting their own rights. Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wolff, 428 U.S. 106 (1976). . . .

Moreover, SSA claimants may never discover 7 that their rights have been violated 7 because the initial impact of the unlawful actions is on ALJs. . . .

This Court Has Jurisdiction Over the Subject

Matter of This Action

7omitted7

The Well-Pleaded Allegations of the Association's

Complaint State a Claim Upon Which Relief Can be

Granted.

Defendants' Rating of ALJs' Performance

and Establishment of Production

Quotas Violate the Administrative

Procedure Act.

The complaint alleges that HHS defendants are collecting statistics on ALJs' production rates and allowance rates; that they are using those

statistics to rate and evaluate ALJs' performance; that they have used these ratings to initiate actions before the MSPB and to threaten ALJs with removal or other penalties; and that defendants are engaging in these and other practices "all of which pressure ALJs to ignore their duty to give each claimant fair and impartial consideration and have the effect of making ALJs, once again, mere tools of SSA in violation of the comprehensive scheme of administrative adjudication established in the APA."

For purposes of a motion to dismiss for failure to state a claim, the well-pleaded allegations of the complaint are taken as admitted. . . .

1. Defendants' Attempted Justifications of Their Practices Are Not Persuasive

Defendants argue that they are not rating and evaluating ALJs in violation of the law because the phrase "performance appraisal" is a term of art (HHS defs' mem. 35). They state that, even though ALJs are excluded from performance appraisals under 5 U.S.C. Sec. 4302, SSA may nevertheless collect data to rate and evaluate their performance in order to initiate removal proceedings pursuant to 5 U.S.C. Sec. 7521. Moreover, they assert that "inefficiency or incompetence" is "good cause" for removal. Of course, the question on a motion to dismiss is whether the allegations of the complaint, not defendants' characterizations, fail to state a claim.

The defendants' argument principally relies on dicta in In re Wanda P. Chocallo, 2 MSPB 23, 27 (1978), aff'd, 2 MSPB 20 (1980), aff'd sub nom. Chocallo v. Prokop, Civil Action No. 80-1053 (D.D.C. Oct. 10, 1980), cert. denied, 51 U.S.L.W. 3256 (U.S. Oct. 4, 1982), and comments in a House Ways and Means Committee report on a bill that did not become law, H.R. REP. NO. 617, Part 1, 95th Cong., 1st Sess. 2-3 (1977) (HHS Defs' mem. 37-38).

Defendants' argument must fail. First, even if one adopts defendants' semantic quibble that "performance rating" is a term of art under 5 U.S.C. Sec. 4302, which exempts ALJs from performance appraisal, defendants have not addressed 5 C.F.R. Sec. 930.211 (1982), which expressly states: "An agency shall not rate the performance of an administrative law judge." Moreover, defendants have not addressed the legislative history of the APA. (See, Defendants' Threats and Pressures Directed at High Allowance Judges Violate the APA, infra.) Second, despite defendants' reliance, Chocallo did not consider whether "incompetence" was "good cause" for dismissal.

The Office of Hearings and Appeals of the Social Security Administration sought plaintiff's removal on June 20, 1977. Its Letter of Charges made three claims: (1) the defiance of an Appeals Council's order, (2) refusal to relinquish a case file when requested to do so, and (3) a lack of judicial temperament.

Chocallo, supra, Slip. Op. at 2. Moreover, the court did not cite any authority for its statement, in dicta, that an ALJ is not immune from review for

"incompetence. . . in the performance of his or her duties." *Id.* at 3. Thus, defendants' reliance on Chocallo is misplaced, particularly in light of the complaint in this case, which has nothing to do with incompetence. Third, the statement in COMMITTEE ON WAYS AND MEANS, REPORT ON CONVERSION OF TEMPORARY ADMINISTRATIVE LAW JUDGES, H.R. REP. NO. 617, Part 1, 95th Cong., 1st Sess. 3 (1977), which defendants cite as approving their actions, in no way authorizes or legalizes them. The legislation referred to did not pass and did not concern the issue of "good cause" removal under 5 U.S.C. Sec. 7521. Moreover, another report on the bill is contrary. COMMITTEE ON POST OFFICE AND CIVIL SERVICE, REPORT ON CONVERSION OF TEMPORARY ADMINISTRATIVE LAW JUDGES, H.R. REP. NO. 617, Part 2, 95th Cong., 1st Sess. 2-3, 6 (1977) provides that:

An ALJ appointment is, in essence, a life time job. Removal of an ALJ whose performance is not up to par is extremely difficult, if not impossible (in the past 30 years, two ALJs have been removed).

Thus, the authorities upon which the defendants principally rely do not support their argument with respect to performance appraisals.

2. The APA was Enacted to Safeguard ALJs From Pressures and Threats Such as Those Alleged in the Complaint.

Defendants attempt to state the legal issues in this case as whether HHS can "encourage" its ALJs to decide more cases per month and whether an ALJ can be removed for incompetence. In fact, however, defendants do not even address the allegation that is at the heart of plaintiff's claim: that by establishing production quotas and removing and threatening ALJs for failing to meet those quotas, HHS has eroded the independence of ALJs to conduct and decide disability claims in violation of the APA and the Social Security regulations themselves. . . .

The roots of this independence requirement are found in the history of the APA. As more fully indicated below, one of the most important decisions made by Congress in enacting the Act was to prohibit agencies from controlling or influencing ALJs by using efficiency standards to rate them and to remove them.

Prior to the 1946 enactment of the APA, hearing examiners (the forerunners of today's ALJs) were mere agency employees subject to the same influences as other employees. They, like other federal employees, were covered by the Classification Act of 1923, ch. 265, 42 Stat. 1488. That act provided in section 9 that "dismissals for inefficiency shall be made by heads of departments in all cases whenever the efficiency ratings warrant. . . ." The Civil Service Board was to develop a uniform system of efficiency ratings setting forth the degree of efficiency constituting grounds for dismissal. *Id.* Sec. 9, 42 Stat. 1490-91. Promotions and salary increases were also based on efficiency. See Act of August 1, 1941, ch. 346, Sec. 2, 55 Stat. 613, 614 (amending Classification Act of 1923). Hearing examiners were thus dependent

upon their employer, and "many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." Ramspeck v. Federal Trial Examiners Conf., 345 U.S. 128, 130-31 (1953). See also Wong Yang Sung v. McGrath, 339 U.S. 33, 36-41, modified, 339 U.S. 908 (1950).

Despite the widely perceived need for reform, different proposals were before Congress for more than ten years prior to passage of the APA. H.R. REP. NO. 1980, 79th Cong., 2d Sess., reprinted in APA Legislative History, 235, 241 ("Legislative History"). More than a dozen different bills were considered. S. REP. NO. 758, 79th Cong., 1st Sess. (1945), reprinted in Legislative History, supra, 187, 188. All recognized that hearing examiners should be accorded some measure of independence from the agencies for which they decided individual cases. But there was disagreement as to how to structure it. See, e.g., Report of Attorney General's Committee on Administrative Procedure, summarized in Legislative History, supra, at 68, 70 ("Attorney General's Report"). The many differences among the various reform proposals are irrelevant except insofar as they relate to proposed grounds for removal of hearing examiners.

Bills containing forerunners of section 11 of the APA can be divided into two categories. The first group is well illustrated by the Celler Bill, H.R. 184, 79th Cong., 1st Sess. Sec. 302(5), reprinted in Legislative History, supra, at 131, 135:

(a) Upon charges, first submitted to him, by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty. . . .

Accord H.R. 1206, 79th Cong., 1st Sess. Sec. 308(c)(3)(b), reprinted in Legislative History, supra, at 161, 172. The second category contains language that was ultimately enacted:

Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission. . . .

APA Sec. 11, 60 Stat. at 244; accord H.R. 339, 79th Cong., 1st Sess. Sec. 6(a)(3)(4), reprinted in Legislative History, supra, at 139, 142; H.R. 1203, 79th Cong., 1st Sess. Sec. 7(a), reprinted in Legislative History, supra, at 155, 158; H.R. 2602, 79th Cong., 1st Sess. Sec. 8(a)(1)(D), reprinted in Legislative History, supra, at 176, 182 ("To insure the impartiality of hearing or deciding officers — (1) the case shall be heard by — (D) examiners who . . . shall be removable only after hearing for good cause shown. . . .").

The first category, which clearly would have allowed removal based on charges of inefficiency, paralleled the language and standards of the Classification Act of 1923, supra. One of the evils that Congress sought to remedy by enacting the APA, however, was the agencies' exercise of unhealthy

control over hearing examiners. The Classification Act of 1923 was responsible for the dependence of the examiners in the first instance, and the APA therefore specifically exempted examiners from being rated according to efficiency standards by their agencies as provided in the 1923 act. See APA Sec. 11. Congress considered and rejected bills that would have allowed agencies to remove hearing examiners on the grounds of inefficiency.

Congressman Francis Walter, a member of the House Judiciary Committee and intimately involved in the drafting of the APA, stated that section 11 of the APA was "one of the Act's most controversial proposals." Remarks of Rep. Walter, May 24, 1946, reprinted in Legislative History, supra, at 371. He continued:

It is often proposed that examiners should be entirely independent of agencies, even to the extent of being separately appointed, housed, and supervised. At the other extreme there is a demand that examiners be selected from agency employees and function merely as clerks. In framing this bill we have rejected the latter view, as the Attorney General's Committee on Administrative Procedure throughout the greater part of its final report rejected it, and have made somewhat different provision for independence. Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service Commission.

Id.

Thus, language that would have allowed agencies to continue to control their examiners by rating their efficiency was dropped by Congress in favor of the "good cause" standard, and agencies were specifically barred by section 11 of the enacted APA from applying the Classification Act's efficiency standards of their hearing examiners.

Regulations implementing the APA were promulgated in 1947. Section 34.8 of title 5 of the Code of Federal Regulations provided that agencies shall not rate the efficiency of hearing examiners. 12 Fed. Reg. 6321, 6323-24 (1947). Current regulations are essentially identical. 5 C.F.R. Sec. 930.211 (1982). Thus, the APA has consistently been interpreted to exempt ALJs from being rated by their agencies under efficiency rating schemes established for other federal employees.

In 1980, bills were introduced into Congress as part of President Carter's regulatory reform effort. One bill, H.R. 6768, 96th Cong., 2d Sess.,

proposed to repeal 5 U.S.C. Sec. 7521 and to institute instead a comprehensive system for the selection, appraisal and removal of ALJs. The proposal would have amended title 5 by adding a chapter related solely to ALJs. Section 807(c) of the proposed chapter would have allowed removal based on a charge of inefficiency or underproductivity:

(c)(1) The performance appraisal system established by the Board shall provide for --

(A) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the administrative law judge position being evaluated;

(B) communicating to each administrative law judge, at the beginning of each appraisal period, the performance standards and the critical elements of the judge's position;

(C) evaluating the performance of each administrative law judge at least once every 6 years;

(D) assisting administrative law judges in improving performance; and

(E) procedures for ordering the re-assignment, reduction in grade or pay, suspension, or removal of administrative law judges for unacceptable performance.

H.R. 6768, 96th Cong., 2d Sess. Sec. 807(c) (1980), reprinted in H.R. REP. NO. 1186, 96th Cong., 2d Sess. 3 (1980). (Subsequent citations will be to the bill's section number and the report's page number).

In its statement on the bill, the House Committee on Post Office and Civil Service, which recommended passage, stated:

Existing law has created an undesirable void in federal personnel management, as it affects ALJs, especially in the area of performance accountability. In an understandable attempt to insulate ALJs (who are charged with being fair and impartial in their official actions) from any possible pressure by their employing agencies, the Administrative Procedure Act and later related laws exempted them from normal agency personnel management procedures, including agency performance appraisal systems, but failed to assign many

of these functions—especially performance appraisal—to any other body. So, today, the agencies do not evaluate the performance of their ALJs, and neither does anyone else.

H.R. REP. NO. 1186, *supra*, at 6-7. Thus, at least in Congress' view, the current version of the APA does not permit agencies to rate ALJs and to seek their removal based on unsatisfactory performance. In the committee's view, section 807 would have provided "for the first time since enactment of the Administrative Procedures Act, a system for periodic appraisal of, and disposition of complaints about, administrative law judge performance." *Id.* at 15 (emphasis added). However, the bill did not pass.

The legislative history of section 11 of the APA shows that Congress intended to insulate ALJs from any agency attempts to control them through disciplinary actions based upon agency ratings. Proposals to modify current law further support the conclusion that current law prohibits agencies from seeking to remove or discipline ALJs based upon agency efficiency standards.

Of course, Congress did not intend to protect grossly inefficient judges, but rather, it intended to enact remedial legislation to safeguard the ALJs' independence to develop a complete record pursuant to APA section 7(b), 42 U.S.C. Sec. 556(c), and to render an independent decision free from the types of agency threats and pressures alleged in the Complaint. Subsequent judicial consideration confirms that view of Congressional intent.

Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973), involving the question of whether the forced retirement of an ALJ required the opportunity for a hearing set forth in section 11 of the APA. In discussing section 11, the court stated that "one of the principal problems sought to be corrected by section 11 was the power of an agency to exert pressure on a hearing examiner by threatening his removal or discharge." *Id.* at 1022. The court also stated that "the APA was a sweeping piece of remedial legislation [that] . . . should be given a broad and generous interpretation in light of the objectives sought to be accomplished." *Id.*

The Supreme Court again addressed the purpose of the APA in Butz v. Economou, 438 U.S. 478 (1978), a case concerning, *inter alia*, the scope of judicial immunity to be accorded to ALJs. The Court observed that "the role of the modern [ALJ] . . . is 'functionally comparable' to that of a judge." *Id.* at 513. Provisions in the APA such as section 11 were "designed to guarantee the independence of hearing examiners." *Id.* at 514; accord NLRB v. Permanent Label Corp., 657 F.2d 512, 527-28 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1432. (1982).

In Nash v. Califano, 613 F.2d 10 (2d Cir. 1980), the court held that an ALJ had standing to challenge an agency's attempts to improve productivity and remove underproductive ALJs. The court remarked that "the APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decisionmaking." *Id.* at 16.

Defendants' Threats and Pressures Directed
at High Allowance Judges Violate the APA.

HHS defendants' second argument asserts that their Bellmon review program authorizes them to threaten and pressure high allowance judges. "The Bellmon Amendment was intended to study this problem and, if warranted, correct high reversal rates more directly." (HHS defs' mem. 44) (emphasis added). The Complaint, however, does not mention Bellmon review. It alleges that "OHA has threatened other ALJs who are members of the Association that they will be removed or otherwise penalized if they do not . . . decide a greater percentage of cases so as to deny benefits to claimants."

The Bellmon amendment, as offered and passed on the Senate floor reads:

(g) The Secretary of Health, Education, and Welfare shall implement a program of reviewing, on his motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act; he shall report to the Congress by January 1, 1982 on his progress, in his report, he shall indicate the percentage of such decisions being reviewed and describe the criteria for selecting decisions to be reviewed and the extent to which such criteria take into account the reversal rates for individual administrative law judges by the Secretary (through the Appeals Council or otherwise), and the reversal rate of State agency determinations by individual administrative judges.

126 Cong. Rec. S719 (daily ed. Jan. 31, 1980). The amendment was modified by the conference committee that resolved differences between the House and Senate versions of the bill. As enacted, the amendment reads:

The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by ALJ's . . . and shall report to Congress by January 1, 1982, on his progress.

Social Security Disability Amendments of 1980, Pub. L. No. 96-265, Sec. 304(g), 94 Stat. 441, 456.

In support of his amendment, Senator Bellmon remarked "we need a method to review the decisions made by the judges so that there is greater consistency among different judges and better assurance that disability awards are not being granted inappropriately in a large number of cases." 126 Cong. Rec., supra, at S720. Senator Bellmon continued:

The Secretary already has authority to review and reverse . . . decisions by Federal administrative law judges. By regulation, the Secretary has set up an appeals council to handle this responsibility. This council reviews cases appealed beyond the ALJ level by applicants who are turned down by ALJ's. Until 1975, the appeals council also reviewed a selection of ALJ decisions that were not appealed. In other words, the council selected and reviewed some decisions in which ALJ's reversed State denials. The appeals council could reinstate the State decision if it found the ALJ's reversal to be inappropriate.

The appeals council stopped making these so-called "own motion" reviews in 1975, apparently because of workload problems.

Id. (emphasis added).

The plain language of the Bellmon amendment and the remarks excerpted above make clear that the amendment was only intended to increase "own motion" review of ALJ decisions by the Appeals Council as already provided in SSA's regulations. The amendment simply did not authorize HHS to take steps outside its own regulations to put pressure on ALJs which undermine their independence to decide cases in a fair and impartial manner. The amendment does not provide that HHS can threaten ALJs with whom it disagrees. . . .

Fairness is an essential requirement for decisionmaking under the APA. 5 U.S.C. Sec. 556(b) (1982). "One who stands to gain or lose personally by a decision either way is disqualified by reason of interest to participate in the exercise of judicial functions." 3 Davis, Administrative Law Treatise Sec. 19.6, (2d ed. 1980). Defendants, in attempting to respond to Congressional concern about the allowance rate among ALJs, have created a situation in which an ALJ has an interest in deciding claims a certain way.

HHS' program creates an incentive for an administrative law judge to keep his allowance rate below a certain level, and, therefore, to decide against claimants in a certain percentage of cases irrespective of the merits of the particular claim. It inevitably introduces the self-interest of the ALJ into a situation that should be free of such self-interest. It is, therefore, incompatible with the APA's fundamental requirement that the decisionmaker reach a fair and just result based on the merits. Because the program is designed to result in a higher level of denials by ALJs, its use displays HHS' naked intent to turn ALJs into the sort of agency "tools" that was the purpose of the APA to eliminate. See Nash, supra.

It is clear that defendants' own authorities do not support the legality of their efforts to pressure ALJs into deciding more cases against claimants.

/s/ statistical analysis of error-prone characteristics of judges or cases may suggest that /HHS/ should focus its attention on particular ALJs as prospective sources of errors. If it were decided to reinstitute a substantial measure of own-motion review, a similar focus on the error-prone type of case would also be appropriate. This may give rise to the fear that judges will feel pressured to conform their output to the statistical norm in order to avoid more frequent searching review.

One way to mitigate this problem is to select error-prone cases for review on the basis of the characteristics of the case rather than the characteristics of the ALJ who decided it.

J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals 120 (1978) (emphasis added). These authorities concluded:

We believe, however, that it is likely — except for apparently unacceptable changes, such as . . . use of a reversal quota — that these efforts will leave a substantial residuum of variance among the ALJ Corps.

Id. at xxi - xxii (Summary and Conclusions).

Lastly, defendants assert that 5 U.S.C. Sec. 554(d)(1) is the only "arguable" restraint on their efforts. The allegations of the Complaint, however, are not so limited. They call into question defendants' pervasive efforts to interfere with the independence of ALJs. These efforts, as alleged in the Complaint, state a claim upon which relief may be granted.

Defendants' Practices Violate Claimants'
Rights to Due Process of Law

. . . ALJs continue to do their best to provide claimants with a meaningful hearing, but defendants' actions subject them to pressure not to do so. Abandoning concern for the due process concerns of claimants, HHS simply divides the number of new claims filed per month by the number of ALJs to determine the number of cases that an ALJ must decide. No consideration is taken of whether the system can meet its statutory and constitutional requirements at that level of production.

The due process clause requires more than merely a formal hearing. In Diabo v. Secretary of HEW, the Court of Appeals for this Circuit reversed and remanded a district court's summary judgment affirmance of a denial of social security benefits on the grounds:

that the proceedings before the administrative law judge did not constitute a full and fair hearing of his claim for disability benefits. We hold that the administrative hearing did not comply with basic requirements of fairness and procedural due process. . . . The administrative law judge has the power and duty to investigate fully all matters in issue, and to develop the comprehensive record required for a fair determination of disability. Daniels v. Mathews, 567 F.2d 845, 848 (8th Cir. 1977); Coulter v. Weinberger, 527 F.2d 224, 229 (3rd Cir. 1975); Clemmons v. Weinberger, 416 F. Supp. 623, 625 (W.D. Mo. 1976). Federal regulations prescribing the conduct of disability hearings declare that the "presiding officer shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and documents which are relevant and material to such matters." 20 C.F.R. Sec. 404.927 (1979). This duty to probe and explore scrupulously all the relevant facts is particularly strict when the claimant, as here, is not represented by an attorney. Gold v. Secretary of HEW, 463 F.2d 38, 43 (2d Cir. 1971). . . .

627 F.2d 278, 281-82 (D.C. Cir. 1980). . . .

In addition, the right to due process requires that the circumstances of the adjudication be compatible with the judicial function. The Supreme Court has repeatedly recognized that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." See, e.g., Schweiker v. McClure, 102 S. Ct. 1665, 1670 (1982). As the Court stated in In re Murchison, 349 U.S. 133, 136 (1955): "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." A conflict of interest or other reason for disqualification rebuts the presumption of impartiality. Id. As demonstrated above in the preceding section, defendants' creation of an incentive to reach a particular result on a claim compromises the requisite impartiality.

It is also clear that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Id. . . . Thus, a proceeding must clearly appear to be just as well as be just. Hearings held under extreme productivity and other pressures cannot appear just to disabled Social Security claimants who endure considerable personal hardship to be present at and participate in their hearings. An adjudicative system in which the adjudicators appear to be pressured beyond reason to produce decisions, and in which the judge has an interest in the result, cannot satisfy the requirements of the Constitution.

* * *