

# Becoming a U.S. Administrative Law Judge

*Hon. John C. Holmes*

Should your long-term career plans include consideration of the role of federal administrative law judge?

I highly recommend a career as a federal administrative law judge. Where else can one earn a decent living with a good retirement program while daily concentrating on doing what is right? I served for 27 years as a judicial officer for the U.S. Department of Labor, 5 as a hearing officer for “black lung” cases, and 22 as an administrative law judge (ALJ). Thereafter, I was appointed chief ALJ at the U.S. Department of Interior, responsible for 9 branch offices, 11 administrative law judges, and a staff of 65. During this 29-year period I traveled to over 230 towns and cities throughout the United States and Puerto Rico. I heard and decided over 2,500 cases, all requiring full written decisions in addition to ruling on motions such as granting or denying requests for continuances,

withdrawals, remands, and attorney fees. Travel was not always to exotic places (try Hazard, Kentucky), but usually pleasurable and interesting and the caseload was heavy but rewarding, providing a sense of accomplishment and fulfillment. More of this later.

## WHY ALJS?

Administrative law judges are often referred to as “Article I” judges since their legitimacy arises under the executive powers set out in Article I of the U.S. Constitution, rather than those judges who compose the third branch of government under Article III who are relatively equal in power to the executive and legislative. The specific delegation of independent judicial hearing and decision-making authority to ALJs arises from the Administrative Procedure Act (APA) enacted in 1946. A primary purpose then and still today is to relieve the Article III district judges of a burdensome number of disputed cases, while still maintaining agency expertise in the presiding judge but with independent judicial decision-making authority.

Historically, this need had arisen because of the prolific expansion during the Franklin D. Roosevelt “New Deal” years of government agencies such as the Securities and Exchange Commission (SEC), the FCC, and the now defunct Interstate Commerce Commission. Prior to the enactment of the APA, decisions that came under the jurisdiction of an agency or cabinet department were made by agency personnel, often called hearing examiners or hearing officers, who did not have the protections set out in the APA to guarantee independent decision-making authority uninfluenced by other agency superiors.

Thus, the early appointment of ALJs was largely to economic regulatory agencies. The trend, however, has slowly but definitely gone toward appointment to agencies, particularly Social Security, whose primary purpose is to award benefits to deserving applicants under their programs. The intent of the APA to ensure due process in hearings (or rulemaking) and the independence of ALJs has been firmly secured through the years, exemplified by the Supreme Court’s recognition that their decisional powers were not dissimilar from Article III judges. (*Ramspeck v. Trial Examiners*, 345 U.S. 128 (1953)). ALJs cannot be removed from office except for good cause after the right to a hearing.

## QUALIFICATIONS

One's set of qualifications to become a federal administrative law judge will be formally evaluated in a program administered through the Office of Personnel Management (OPM). An applicant must fulfill four requirements:

1. Seven years of trial experience;
2. Recommendations of fellow lawyers and/or judges;
3. Written examination; and
4. Oral examination.

The seven years of trial experience must be specifically demonstrated with cases cited and days and hours worked set out in detail. Moreover, the time claimed must be significantly related to trial work. Thus work on divorce cases, real estate closings, and similar matters are not qualifying. On the other hand, clerking for a judge or appellate body is most often qualifying and is a basis for many applicants. The seven-year trial experience requirement is mandatory and nonnegotiable.

Questionnaires are sent by OPM to at least 20 adversaries, judges, or others affiliated with cases and legal work the applicant has furnished in summarized form as a part of his application. The written examination is a four-hour exercise, using computers although handwritten answers may be permitted. Given a hypothetical fact pattern with laws to be applied, the applicant is instructed to write the ALJ decision to be rendered. The oral structured interview is before three individuals: a representative from OPM, an attorney practitioner, and an ALJ (active or retired). The four requirements are graded on a strict but complex formula, and the applicant is given a final score. OPM takes extreme care to make all testing and grading as objective and fair as possible. Nevertheless, an appeal process is provided, again with strict and extensive processing requirements. Meeting an established minimum score permits the applicant to be placed on the register from which individual agencies may hire. Generally speaking, the highest three applicant scores are those from which the agency must hire. However, the applicant must be willing to be assigned to the geographical location to which the agency has a vacancy. Since nearly all the hires off the register during at least the last three years have been with Social Security, it frequently happens that a hire—for example, in Ottumwa,

Iowa—might be from significantly further down the list of those applicants available. Of course, agencies where a vacancy appears may, with permission of OPM, hire ALJs from other agencies. Chief ALJs seem to have an uncanny ability to determine the best of the Social Security ALJs and to attempt to hire them when in need. Similarly, the agencies with the highest or most sophisticated legal analysis in large-money and high-profile cases have usually been able to successfully recruit from other agencies. While most ALJs have been satisfied with the agency they originally were hired by, others have actively sought a diverse experience through work at different agencies.

### **ALJ ASSIGNMENTS AND AGENCY FUNCTIONS**

As of March 2008, OPM reported that there were 1,318 active ALJs dispersed over 30 agencies. Of these, fully 1,066 were assigned to the Social Security Administration (SSA). Two agencies had an unfilled vacancy, while eight had only one ALJ. Only five agencies in addition to Social Security had 10 or more ALJs on board; they were Department of Interior, 11; Federal Energy Regulatory Commission (FERC), 14; National Labor Relations Board (NLRB), 41; DOL, 42; and Department of Health and Human Services/Office of Medicare Hearings and Appeals, 69.

The operations and activities as well as legal scope of ALJs assigned to these different agencies and the agencies' authority are as varied as imaginable. As the name "judge" incorporates individuals presiding over traffic cases as well as those sitting on the Supreme Court (even though called justices), so too are ALJs assigned a wide variety of cases for hearing. Similarly, while administrative law professors and other academicians may attempt to develop a rational and uniform system for explaining "administrative law" in books, treatises, and to their students, the truth as faced by U.S. ALJs is far different. Each agency has its own culture, rules and regulations, judicial structures, histories, and limitations. In some agencies, for example, initial decisions by ALJs become final unless appealed; others may retry the matter on appeal, including facts. Many agencies—for example, the DOL—house the hearings division separately from the reviewing authority, and from the agency itself, in order to further the perception as well as reality of independence. Labor ALJs have final decision-making authority, the same as Article III judges.

The Department of Interior, on the other hand, has its hearings division housed under the Office of Hearings and Appeals headed by a nonjudicial director along with three separate reviewing boards, one of which, the Land Appeals Board, has some original jurisdiction. Both Labor and Interior's reviewing boards are well staffed with administrative judges, attorneys, and clerks. In many agencies, particularly those who have only one or a few ALJs, agency review of ALJ decisions is by a nonjudicially appointed agency employee. At so-called quasi-judicial agencies often focused on primarily one area such as FERC, the International Trade Commission (ITC), NLRB, the Federal Labor Relations Administration (FLORA), and the FCC, ALJ decisions are reviewed by the commissioners themselves. The degree of deference granted ALJs may vary from agency to agency and administration to administration.

The policy in some agencies of having administrative judges (AJs) serving as reviewing authorities, whether individually or on boards, can be a cause of disgruntlement or even conflict. Given the title of judges by the agency, AJs, nevertheless, are seldom required to demonstrate their judicial bona fides and in particular need not take the merit selection requirements of ALJs. They are often appointed by agency leaders on a political or personal basis or elevated from previous positions as staff attorneys within the agency. Nevertheless, AJs often opine that by their very position, as reviewing authorities of ALJs' decisions, they should be accorded higher prestige and salary. Such status problems are rare under the Article III system since appeals judges are most often selected from the generally perceived most experienced and best of the district, or trial judges. Additionally, some agencies, such as the Departments of Energy and Agriculture, use AJs for decision making that some observers suggest should be done by ALJs because of their decisional independence.

## WHAT ALJS DO

Young lawyers who will be the future prospective ALJs should recognize a few examples of the actual workings, expectations, scope of activity, and experiences of ALJs. FERC administrative law judges are all housed in Washington, D.C., and rarely travel to hear cases. While deregulation has eliminated or diminished the need for ALJs elsewhere, the volume of cases at FERC has not significantly decreased since

deregulation of energy was initiated some 10 years ago. Many controversies over utility rates or licensing, for example, are settled often after protracted negotiation that may include orders issued by the ALJ such as setting the parameters of discovery or ruling on the admissibility of parties. Settlement is encouraged at FERC. One of the longest and most contentious involved California's utility rates: then Governor Davis claimed the state was owed around \$9 billion. Cases that do go forward are often complex and high profile, with large amounts of money at issue. Appeals from ALJ decisions are to the FERC itself, which has shown deference to ALJ findings generally.

Similar complex issues and high-profile cases are determined where huge sums of money may be involved at the ITC. The ITC deals with international trade disputes. Currently, four ALJs are on staff at ITC. Its courtroom is jumbo-sized, permitting it to sit the 60 attorneys who appeared at one hearing, plus room for onlookers. ALJ decisions, regardless of size, must be written within 120 days of the record closing. Appeals again are to the Commission, which is politically appointed and may take a free trade or protectionist leaning, depending on the party in power. One retiring commissioner complained of the general counsel having too much influence on the course and outcome of proceedings.

The DOL's ALJs, on the other hand, deal almost exclusively with compensation or discrimination cases. The largest volume for years has been black lung and "longshore" disability cases. However, among the 70 or more statutes under which controversies may arise are Davis-Bacon, Whistleblower, Child Labor, and Labor Immigration Certification. Labor currently has seven branch offices, but still requires extensive travel to cities or towns close to where the parties are located. Typically, cases are "bunched" so that, for example, an ALJ traveling to Charleston, South Carolina, might be assigned 12 to 15 longshore cases, of which two-thirds would settle prior to hearing. Similarly, travel to London, Kentucky, might include 20 black lung cases, of which perhaps six would be continued, one withdrawn, and the rest heard. The SSA has ALJ branch offices spread throughout the country, including one or more in every state. Typically, each ALJ has access to an attorney-advisor who will draft all or nearly all decisions. Many SSA ALJs hear and decide 50 or more cases per month, as they are encouraged to do because of the high volume of applicants seeking disability benefits. All or nearly all SSA offices have a courtroom in a location convenient

for most applicants. However, some travel is required for cases more than 50 miles away.

### **WHO ARE ALJS, AND WHO SHOULD APPLY**

A 5- or 10-point Veteran's Preference score on ALJ applications benefited men at the expense of women in the early years. A less weighted score for vets, increase in women graduates from law school, and competition has resulted in a narrowing of the margin. Government attorneys in the long, time-consuming application process have an advantage over private practitioners who are fully aware of the idea that time is money; moreover, by the time the seven-year trial practice requirement has been realized, private attorneys still in the game are probably earning a salary seriously discouraging them from applying. Some, but too few in my opinion, successful attorneys who have earned a substantial living but have tired of the rat race and would like to cap a career by "being fair" rather than litigious have applied.

When I am asked what quality is most needed in a judge, my answer is clear: integrity. Integrity in never accepting anything of value by a litigant (I always gracefully refused even an offer of coffee) is easy. But, importantly, it is in taking whatever time, examination and reexamination of the facts and record, mental concentration, and diligent effort is necessary to reach the unbiased, "correct" (not necessarily "fair" or "just") conclusion. Common sense is also needed, more than intellectual intensity, and the judge should have a calm, judicial demeanor. Arrogance, sometimes described as a judicial disease, is to be avoided. I very much enjoyed and took pride in a well-crafted decision that described in succinct terms the bases on which my determination had been made, the facts that supported it as well as those in opposition, and the arguments made and laws applied. On rare occasions I would, in a closing section separate from the analysis and fact-finding of the decision rendered, under the heading "Comments," list reasons why I thought the decision I felt compelled to make was not fair or did not comport with the purposes of the legislation under which it arose. The reasons, for example, might include that the appellate judicial decisions were headed in the wrong direction, the regulations should be modified, or the attorney did not fulfill his obligations on presentation of evidence.

## A UNIFIED ALJ CORPS

As early as the 1970s, a movement among ALJs, supported by some members of Congress, was to form an “ALJ Corps” that would house all ALJs under one agency. Supporters claimed the problems of perceived agency influence would be eliminated, and that an automatic balancing of ALJ personnel and caseload could be made as judicial work ebbed and flowed in different agencies. Thus, there would be a savings to the government as well as the additional advantage that ALJs would have a variety of cases and freshness of approach to their work while not losing expertise. ALJ support at the time was nearly unanimous. Through the years, however, fears of domination by Social Security due to its very size, or by a chief judge who might not be to an ALJ’s liking, or that Congress in establishing legislation to create the corps would insert language that would give the congressional committees “oversight” power (resulting merely in a shift from potential agency or executive influence on decision making to congressional influence), along with lack of leadership in pursuing this seemingly beneficial concept, has caused the movement to have a slow death, with resurrection in the near future a very remote possibility. Indeed, most ALJs, particularly those other than Social Security, are pleased and secure within their own agency and do not wish to risk a change in their judicial arrangements.

## CONCLUSION

A well-trained, experienced cadre of ALJs is well recognized and respected by practitioners for its judicial integrity, independence, and competence. Not all decisions rendered by federal agencies need be subject to ALJ jurisdiction for hearing. Others are amenable to nonjudicial determinations such as mediation or other alternative dispute resolution. However, when substantive rights of private parties are affected adversely by agency actions and/or controversy arises between private parties because of agency actions, a competent form of independent, impartial final decision-making authority is required. The best manner of obtaining settlement is where all parties are aware that they will obtain a fair, impartial hearing and a relatively prompt decision based on the merits. In my opinion, more ALJ usage should be encouraged or mandated by Congress.