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H.M.
STATEMENT OF
H. L. KRIEGER, DIRECTOR
FEDERAL PERSONNEL AND COMPENSATION DIVISION

BEFORE THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
UNITED STATES HOUSE OF REPRESENTATIVES

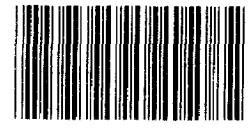
HSE 2900

ON
H.R. 6768, A BILL TO REFORM THE SELECTION
AND OVERSIGHT OF ADMINISTRATIVE LAW JUDGES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

We are pleased to be here to testify on H.R. 6768, a bill which reforms the process for selection and evaluation of Administrative Law Judges. GAO has testified several times before on similar bills. Today I want to address specifically the need for changes in how the Administrative Law Judges (ALJs) are managed, as well as our view of the bill's proposed solutions. The Federal Personnel and Compensation Division has issued two reports about management of the administrative law process and ALJs. The first was published in May 1978,

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and the second, a follow-up, was issued a year ago. 1/
I have with me one of the staff members who worked on those reviews. She will be able to provide answers to any questions the committee may have.

We appreciate the opportunity to be able to present your views on this important issue of ALJ management and accountability. I will begin by discussing our view of ALJ management problems and will then discuss the specific solutions to the problems contemplated in the bill.

ADMINISTRATIVE LAW JUDGE
MANAGEMENT PROBLEMS

As you know, the ALJs are a small but unique group of Federal employees. At the moment, there are about 1,100 of them who work in 29 agencies. Most of them, 60 percent, work for the Social Security Administration hearing benefit claims cases. The ALJs are primarily GS-15s; 348 are GS-16s. There are 10 GS-17 ALJs who serve as chief judges in their agencies.

I mention these data to provide perspective to the ALJ issue. In terms of a total Federal civilian employment of about 3 million people, they are insignificant. What

1/"Administrative Law Process: Better Management Is Needed," (FPCD-78-25, May 15, 1978), and "Management Improvements In The Administrative Law Process: Much Remains To Be Done," (FPCD-79-44, May 23, 1979).

makes ALJs different from other Federal employees and thus significant from a personnel management perspective, is that agencies are precluded by statute, the Administrative Procedure Act, from appraising the ALJ's performance. This protection exists to guarantee the ALJ decisional independence from his or her employing agency. The ALJ must be free from even the appearance of bias toward the agency side of cases he or she hears.

Responsibility for decisions about ALJ qualifications, pay, and tenure rests with the Office of Personnel Management. This further insulates the ALJ from agency interference. The Civil Service Reform Act of 1978 maintains that insulation, exempting ALJs from its performance appraisal, merit pay, and Senior Executive Service (SES) provisions.

This ALJ "uniqueness" we found causes management problems. Because of the separation of responsibility for ALJ personnel matters, and because of the need for ALJ decisional independence, both the agencies employing them and the Office of Personnel Management have had a "hands off" approach to ALJs. Yet without evaluating ALJ performance, agencies are unable to

--make the most effective use of ALJs so that judges are not hindered by the organization in doing their best work;

- plan for ALJ requirements to meet caseload, so that case backlogs are controlled, or at least anticipated;
- aid the ALJs in continuing to do their best work through appropriate development, since the agency has no way of knowing where problems exist or improvements are possible;
- identify unsatisfactory performers, so that they can be counseled or removed; or
- let the Office of Personnel Management know how its selection process is working.

ALJs are key personnel in a regulatory process burdened by costly delays. We found one of the major contributors to long cases is agency review of ALJ initial decisions. Current regulatory reform proposals get at that problem by affording ALJ decisions greater finality. But, if ALJ decisions are to have greater finality, there is a need to ensure, short of agency review of ALJ decisions, that those decisions are timely and of a high quality.

A basic question underlying solutions to these management problems is "Are the ALJs agency employees?" We believe they are. Precedent supports our belief that ALJs are subject to appropriate agency management control. We therefore also believe that personnel management practice for ALJs essentially should be no different from that for other civil

servants, as long as they are not interfered with in making decisions. I would like to emphasize here that we found no evidence in our work of agency attempts to interfere with judges in making decisions.

Equity is the governing criteria in the civil service system, as this Committee knows. Thus, aside from the need for good management practice, ALJs should be accountable for their performance as are other Federal employees.

We also believe there is a danger of "over-judicialization" in ALJ personnel management matters as there is that danger in the regulatory process. The concern for regulatory over-judicialization was thoroughly addressed by the Senate Governmental Affairs Committee in its landmark study of Federal regulation.

PROPOSED SOLUTIONS TO ALJ
MANAGEMENT PROBLEMS

H.R. 6768, and its companion, H.R. 3263, which we have testified on to the Subcommittee on Administrative Law and Governmental Relations, address these ALJ management and accountability issues. We support the provisions of H.R. 3263 which afford ALJ decisions greater finality.

We support as well this bill's provisions for increasing the number of qualified candidates referred to agencies for selection as ALJs, while exempting ALJs from Veterans Preference.

This eliminates an important impediment to the employment of minorities and women as ALJs. We do not, however, favor continued use of selective certification criteria, which have in the past raised doubts about ALJ impartiality. H.R. 6768 appears to continue that practice by allowing categorical candidate referral.

H.R. 6768 answers the problem of ALJ performance evaluation by assigning responsibility for ALJ performance appraisal to the Administrative Conference of the U.S. We have several concerns about this provision, although we support the assignment of the ALJ performance appraisal function to an organization outside the agencies.

As I mentioned, there has been little active personnel management for ALJs. H.R. 6768 partially remedies the current "hands-off" situation by clearly assigning ALJ performance appraisal to one organization outside the agencies employing ALJs. However, this provision does not relieve the agencies or the Office of Personnel Management of their responsibility for other ALJ personnel management functions. Although semi-independent from their agencies, ALJs are civil service employees. Both the agencies as employers and the Office of Personnel Management as policymaker and evaluator should have clear authority to actively manage and oversee ALJs. Without that clarity ALJ personnel management functions could become further diffused, since the number of organizations involved

will have increased from two to three with the Administrative Conference's new role. We specifically recommended clarification of the Office of Personnel Management's performance of its normal personnel management functions in our May 1978 report.

We are also concerned that the management role of the chief ALJ should not be diluted by assignment of the formal appraisal function outside the agency. We support the latter, but would note that this in no way relieves the chief ALJ of his managerial responsibility to oversee the performance of ALJs on a daily basis.

The ultimate objective of any performance appraisal system should be improvement of the quality of service provided to the public. Frequent feedback about expectations, and about performance and how it might be improved is best provided by someone in direct daily contact with the employee.

We strongly believe that effective employee performance appraisals serve many purposes, only one of which is discipline of non-productive personnel. This is the belief that underlies the Civil Service Reform Act of 1978, which this Committee, to its great credit, saw enacted. We did not find evidence of major problems of ALJs not working. However, appraisal is the crucial foundation of any personnel management system as we pointed out in our May 1978 report.

H.R. 6768 could be improved by clearly stating the purpose of ALJ performance appraisal, similar to the statement provided by Section 4302 of the Civil Service Reform Act. As it currently is written, H.R. 6768 proposes to evaluate ALJ performance for the purposes of discipline and of paying judges performance bonuses.

We have in the past recommended that performance appraisal systems should include four basic principles:

- First, that work objectives be clearly spelled out at the beginning of the appraisal period so that employees will know what is expected of them.
- Second, that employees participate in the process of establishing work objectives thereby taking advantage of their job knowledge as well as reinforcing the understanding of what is expected.
- Third, that there be clear feedback on employee performance against the pre-set objectives.
- Fourth, that the results of performance appraisals be linked to such personnel actions as promotion, training, assignment, and reassignment, as well as to discipline.

Establishing an effective system for the ALJs will require complex links between the Administrative Conference, the agencies and the Office of Personnel Management.

As an example, in order for performance appraisal by the outside evaluator to be effective, it will be necessary for agencies to have established their own performance criteria, since ALJ performance should be considered in the context of the ALJ's employing organization. We believe, therefore, that the proposed legislation also would be clarified by noting that agencies may establish such standards for ALJ performance.

We are concerned about three other provisions of H.R. 6768-- limited ALJ terms of office, ALJ bonuses, and establishment of an Administrative Law Judge Career Service.

H.R. 6768 proposes an ALJ term of office of 7 years. We do not believe ALJ terms of office are necessary from a personnel management perspective. If an ALJ is not performing, 7 years is too long a time for that condition to exist. We believe it far more important to have some means of appraising ALJ performance as an on-going process, so that ALJs unsuited to the job would be counseled or removed. Terms of office thus would not be needed.

While we did not examine the issue of ALJ terms in our work on the management of the administrative law process, our work proceeded on the premise, supported by precedent, that ALJs are agency employees. As such, personnel management practices for them should not differ significantly from management of other Federal employees. ALJ terms of office would be a major

break with general civil service practice, which in our opinion would serve to reinforce the judicial nature of an adjudicative process criticized by the Senate Governmental Affairs Committee and by us as overly judicial already. Comparisons between ALJ term provisions and the limited tenure of, for example, Senior Executive Service members may be misleading. Senior Executive Service members, as a quid pro quo for limited job security, may receive pay bonuses.

This bill also provides for ALJ pay performance awards, or bonuses. The Chairman of the Administrative Conference is charged with prescribing those ALJs who are to receive pay performance awards based on the results of performance appraisals.

It would be difficult to administer such a pay performance award program on a merit basis. There are currently no criteria for ALJ performance which could guide those decisions. We believe an ALJ performance appraisal process should be developed, implemented, and proven effective before pay performance awards could be paid. The Federal Personnel Management Project recommended this testing before merit pay became mandatory for other Federal employees. Also, H.R. 6768 provides for an ALJ performance appraisal at least once every 7 years. If bonuses are to be paid, they should be based on current appraisals.

We have not evaluated the reasons for ALJ exclusion from merit pay and SES provisions of the Civil Service Reform Act. However, we see no reason to treat ALJ compensation differently from other high level General Schedule employees who are not covered by the SES or by merit pay. Problems in compensation for GS-15 through GS-17 ALJs are the same as pay problems for other GS-15s through 17s. In fact, we issued a report to the Congress last May ("Annual Adjustments - The Key to Federal Executive Pay," FPCD-79-31, May 17, 1979) which discusses problems in Federal executive pay, including recruitment, retention, and morale problems.

Also, in H.R. 6768, the Chairman of the Administrative Conference has the sole authority for approval of bonus payments, as contrasted to SES members, whose bonuses must be reviewed and recommended by a performance review board. If ALJs are to receive bonuses, they, too, should be reviewed and recommended by performance and qualification review boards, to ensure that the awards are made on the basis of merit alone.

It is not clear whether the proposed Administrative Law Judge Career Service is to be analogous to the SES in other provisions as well as performance bonuses. If so, we believe the new Service should closely parallel SES, instead of promulgating another, different personnel management system.

H.R. 6768 assigns the Administrative Conference responsibility for ALJ recruitment, classification and evaluation but does not restructure it to accommodate its increased role in ALJ personnel management. These functions, particularly the ALJ recruitment process, are far beyond the current mission of the Administrative Conference. We recommend the ALJ recruitment, examination, qualification, classification, and compensation functions, as well as the administration of temporary ALJ re-assignments, should remain in the Office of Personnel Management rather than be assigned to the Administrative Conference. Similarly, logic would dictate that the OPM also should administer the proposed Administrative Law Judge Career Service.

If, however, Congress wishes to designate the Administrative Conference as the organization responsible, it will be necessary to restructure and increase the resources of the Administrative Conference as contemplated by S. 262 as reported. Currently, the size of the staff and its research orientation would make it impossible for the Administrative Conference to accomplish the ALJ personnel responsibilities set forth in H.R. 6768. We are concerned that imposing these additional functions on the Administrative Conference would detract from the important function it presently provides to agencies in making recommendations concerning administrative law formulated by an organization with a unique mixture of governmental and private

expertise.

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In summary, we support the general direction taken by your committee in this bill to address issues of Administrative Law Judge management and accountability. However, several provisions of S. 262 as reported are closer to the types of changes we believe are necessary, and would be effective. The issue of the appropriate role of Administrative Law Judges in the regulatory process, whether as agency employees or as an effectively separate administrative judiciary is a public policy issue. We are ready to assist you in any way we can in addressing the matter.

This concludes my statement, Mr. Chairman. We would be pleased to answer questions.