



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ADJUDICATION

PROJECT REPORT

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Title Change for Hearing Examiners?

P1 1972 Cramton-Park Title Change for Hearing Examiners (CP 14)

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A TITLE CHANGE FOR FEDERAL HEARING EXAMINERS?

"A ROSE BY ANY OTHER NAME . . ." +

By

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3/21/72



I. SOME PRIOR HISTORY

The appropriateness of the title "hearing examiner" was first challenged seventeen years ago and the controversy continues today. In 1955 the Hoover Commission's Task Force on Legal Services and Procedures, noting that hearing examiners preside in adjudicatory and rulemaking proceedings "with the degree of independence of judgment which is expected of judges," recommended a new title "with the status of administrative trial judge."^{1/} Congress, however, did not act on the Commission's recommendation of the new title of "hearing commissioner."

In 1963 the Civil Service Commission considered adoption of the title "hearing commissioner" but the title was thought to be productive of confusion with the heads of agencies who are dominated "commissioners." The Commission decided against the suggested change.^{2/}

Three years later a bill was introduced in Congress to change the title of hearing examiners to "administrative judge."^{3/} The Judicial Conference of the United States opposed the legislation, stating that "the designation 'hearing examiner' is well understood and that the proposed change would be inappropriate and confusing."^{4/} Congress did not act on the legislation.



The Administrative Conference of the United States undertook consideration of the title question in 1969 as part of a broader examination of matters relating to the selection and continuing education of hearing examiners. The Committee on Personnel held public hearings for five days in April 1969, surveyed agency views, and considered responses to tentative proposals^{5/}. The Committee concluded that a new title "more clearly reflecting the unique status and responsibilities of these quasi-judicial officers" should be adopted and recommended the title of "administrative chancellor."^{6/} The Committee's recommendation, however, was not supported by the Council of the Administrative Conference, which forwarded the question for consideration by the Assembly with a statement opposing the proposed title of "administrative chancellor" as well as the title of "administrative trial judge." After a spirited debate in the Assembly, the Council position was upheld and the Administrative Conference did not recommend a change in title.

In 1970 the Judicial Conference of the United States reiterated its opposition to a title change for hearing examiners that involved the word "judge." The Conference, after repeating its earlier view, relied on the action of the Administrative Conference in disapproving legislation to re-designate hearing examiners as "administrative trial judges."^{7/}



In July 1971, however, the tide of events shifted in the direction of a change of title. The Section on Judicial Administration of the American Bar Association, with the approval of the House of Delegates, created the Conference of Administrative Law Judges, which is composed primarily of Federal hearing examiners.^{8/} The ABA thus officially conferred the title "judge" upon hearing examiners.

Balancing the judicial designation explicit in this ABA action is the recent report of the Job Evaluation and Pay Review Task Force of the Civil Service Commission.^{9/} This report, the so-called "Oliver Report," recommended "administrative law examiner" as a more appropriate title than "hearing examiner," but opposed as too controversial any title involving the word "judge."

In late 1971 several of the independent regulatory agencies gave consideration to the adoption of rules changing the title of their hearing examiners, at least for certain purposes. An advisory committee on procedures to the FTC recommended in mid-1971 that the FTC refer to its hearing examiners as "Federal Trade Commission Trial Judges" in connection with FTC adjudicative proceedings; and the FTC tentatively adopted a rule to that effect on October 7, 1971. The Federal Power Commission took a somewhat similar action in December 1971.



When word of the tentative actions of the FTC and FPC spread to other independent agencies and to the U.S. Civil Service Commission, the Commission took steps to maintain the status quo pending a full consideration of the question. On January 19, 1972, Chairman Hampton of the Civil Service Commission wrote to FTC and FPC urging the two agencies not to publish their proposed changes but to maintain the status quo until the Commission had an opportunity to (1) "assert whatever jurisdiction we have in this area because of a conviction that a uniform response to this multi-agency problem is far preferable to its piecemeal treatment on an agency-by-agency basis"; and (2) "decide the matter for all agencies after obtaining the current view of the Administrative Conference of the United States, the Judicial Conference, the agency heads who employ most examiners, suitable representatives of the hearing examiner corps such as the Federal Trial Examiners Conference, and the Job Evaluation and Pay Review Task Force within this Commission which conducted a recent survey on the subject." ^{10/} The FTC and FPC acceded to Chairman Hampton's request on the understanding that the Civil Service Commission's review of the issue would be conducted as expeditiously as possible.



On March 1, 1972, the Civil Service Commission issued a regulation which preempted the field in the sense that it prevents any agency from making a title change on its own.^{11/} Simultaneously, the Commission announced the initiation of a broad study of the question "whether a more appropriate title than that of 'hearing examiner' should be adopted." Chairman Hampton of the Commission has made a formal request to the Administrative Conference for its "advice on the feasibility and adequacy of [the Commission's] approach [and] your views on the merits of the change."^{12/}

In order to preserve a degree of suspense, I will leave subsequent developments, including the Conference's reaction to Chairman Hampton's request for advice, to the conclusion of this paper. Before reaching that point, it may be useful to summarize the opposing views on the merits of a title change for Federal hearing examiners.

II. THE OPPOSING ARGUMENTS

The dispute over what to call hearing examiners appointed under section 11 of the Administrative Procedure Act encompasses two distinct issues: (1) the desirability of a new title, and, if one is desirable, the selection of the appropriate title or titles; and (2) the question whether uniformity in title for all hearing examiners is desirable despite variations in examiners' tasks in different agencies and the explosive growth



in the number of hearing examiners required by the Department of Health, Education, and Welfare.

A. A Title Change for Hearing Examiners?

1. Accuracy in description of function.

Those who favor a change in title to "administrative trial judge" believe that the present title of "hearing examiner" is not descriptive of the function performed by APA hearing examiners. They assert that "administrative trial judge" more accurately describes the initial decision-maker in the Federal administrative process and is sufficiently unique to avoid confusion with Federal and State judges.^{13/} As the Wall Street Journal has said:

"An examiner's job is similar in many ways to that of a trial judge * * *. He presides over court-like hearings, complete with harried steno-typists, bickering lawyers and nervous witnesses. He makes rulings -- called initial or recommended decisions -- that are subject to review by the agency's governing body." ^{14/}

While the examiner's job varies with the agency that employs him, the examiner's basic function is the same in almost all agencies: to build a factual report and make a decision supported by legal reasoning. In performing this function, hearing examiners are armed with broad powers to control the conduct of proceedings, to rule on evidence, and to issue subpoenas for the production of testimony or documents.



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Opponents of a title change, especially one involving the word "judge," stress the limitations on the examiners' exercise of these powers. Hearing examiners perform the functions delegated to them by the agencies by which they are employed in accordance with agency rules and subject to the agency's ultimate power of decision. They also preside at rulemaking and other proceedings of a "legislative" character and in many proceedings which lack the adversary quality that tends to be characteristic of courtroom litigation.

2. Confusion with other jobs.

The title "examiner" has long been used by Federal administrative agencies, even before the present role of the APA examiner was established. Proponents of a change in title maintain that the public is unable to distinguish between an APA hearing examiner and the many other "examiners" employed by Federal, State and local governments, who have administrative, investigative, or clerical functions markedly different from the decisional function of the hearing examiner. There are at least eight types of "examiners" employed by the Federal Government alone, ranging in GS grade from GS-5 to GS-11, and the job qualifications and duties of these examiners have little in common with the APA hearing examiner. It is argued that lay misunderstanding about who the hearing examiner is and what he does is widespread and that it impairs the



performance of adjudicatory functions. Participants and witnesses may not fully understand the seriousness of the proceeding; or they may view the examiner as a representative of the prosecuting wing of the agency rather than as an independent deciding officer. Misunderstanding of the hearing examiner's function is said to adversely affect the public's respect for administrative proceedings and to limit the availability of idle State and Federal courtrooms in many parts of the country.

The problem of confusion with other jobs, of course, is most likely with respect to hearing examiners who are involved in proceedings involving members of the general public, such as social security disability proceedings, and less likely with hearing examiners who deal with a specialized bar or a few industry groups. Opponents of a title change, however, find any title involving the word "judge" inappropriate for both kinds of hearing examiners. Social security proceedings are viewed as lacking an essential adversary quality because the claimant is represented in only a portion of the cases and staff lawyers do not ordinarily participate. And the large economic and regulatory proceedings of other agencies have traditionally been viewed as involving "legislative" functions that could not be delegated to constitutional courts.



Some purists also argue that the title of "judge" should be reserved, at least insofar as the Federal Government is involved, to the judges of constitutional courts created pursuant to Article III.^{15/} Although the long historical experience with "legislative courts" created under Article I provides support for the use of "judge" in connection with legislative functions, legislative courts have tended to become constitutional courts over the course of time, a step only recently completed with the Court of Claims and the Court of Customs and Patent Appeals.^{16/} In the view of some opponents of a title change, if hearing examiners want to be called "judges," they should be appointed by the President with the consent of the Senate and removed only by impeachment.

3. Need for increased status, dignity and respect.

Although we live in a democratic society, titles continue to impart dignity, authority and honor. A title containing the word "judge" arguably would promote public understanding of the examiner's role in conducting an impartial hearing in a judicial atmosphere. While the public recognizes what a court is and what a judge stands for, the public generally does not recognize the status of an examiner, particularly if he holds forth in the chapel of the local YMCA or in a hotel room. Moreover, calling an examiner "judge" will further public acceptance of the impartiality and objectivity of the administrative process.



Those who favor a change in title buttress their argument by citing the rigors that must be survived in order to become a hearing examiner.^{17/} Qualification for an appointment requires membership in the bar and seven years of legal experience, including two years in administrative law. An applicant must also undergo a five-hour test of his ability to write an examiner's decision. Only one-tenth of those who apply end up on the register and even fewer are actually appointed. Further, many individuals in the Federal hearing examiner corps have demonstrated a degree of professional skill and attainment that rivals that of their brethren in the Federal judiciary.

The opposing view is that the title of "hearing examiner," which has been in use for many years, is a familiar designation that imparts dignity and status to the office with which it is associated. No more honorific title is necessary. While it is recognized that "judge" is a more prestigious title than "hearing examiner," it is argued that many hearing examiners have yet to earn their wings through outstanding performance. Other opponents of a title change, conceding the high quality of many hearing examiners, assert that a single title such as "administrative trial judge" would confer inappropriate formality upon proceedings, such as social security hearings, that benefit from their very informality. This argument has



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led some observers to call for a distinction in title between GS-15 and GS-16 hearing examiners, with the title of "administrative trial judge" reserved for the latter group.

4. Effect on performance of hearing examiners.

Proponents of a title change argue that it will result in improved performance by hearing examiners. Justice Tom Clark stated "... as you put the robe around a judge or give him the title of 'judge', he seems to take on a different perspective from the standpoint of the responsibility he has in discharging the duties of his office." ^{18/} Human behavior is influenced greatly by self-image, professional expectations, and the indicia of title and office. If a change in title adds to the decorum of the hearing, to the significance of the oath, to the ability of the hearing examiner to obtain truthful testimony, and to the respect shown by participating lawyers, those changes would contribute to improved performance by the examiner. While financial rewards are important, the morale and pride provided by professional status and recognition are a vital incentive to improved performance.



Opponents of a title change rely on the commonly held belief that status and respect do not flow from titles or labels but rather from first-rate performance. The only way the hearing examiner will increase his status and the respect for his position, in this view, is by putting out a better work product, conducting more dignified hearings, and comporting himself in a manner befitting his office. A change of name will not produce these desired effects; only a concerted effort by the hearing examiners themselves will earn them the status and dignity they believe they deserve. The best public relations, in this view, is to do a good job. "A rose by any other name would smell as sweet."^{19/}

5. Effect on recruitment.

One of the central factors emphasized by those favoring a change of title is the difficulty in recruiting qualified persons for the position of hearing examiner.^{20/} It is difficult to keep the current hearing examiner registers adequately filled with highly qualified applicants to meet current demands. The likelihood that many new positions for hearing examiners will be created in the near future will accentuate the problem. New agencies and functions, such as the Occupational Health and Safety Review Commission, need to be staffed with hearing examiners. The Social Security Administration now has 347 examiners but anticipates



an increase to 682 by June 1973. Pending welfare reform legislation would require about 1,000 additional hearing examiners in HEW. A title of more dignity that was better understood by the general public would help attract a larger number of qualified applicants. While a successful lawyer may be willing to change employment and even relinquish some remuneration to become a state judge, he is unwilling to change his living circumstances for a job entitled "hearing examiner."

Moreover, a period of heavy incidence of retirement is affecting a number of agencies that have not had recruitment difficulties in the past. If these agencies are to avoid an inbred, agency-staffed corps of examiners, they must find qualified applicants from the private sector.

The opposing argument minimizes the effect on recruitment of a title change or finds any such effect outweighed by other considerations. Officials of the Civil Service Commission state that both the GS-16 and GS-15 hearing examiner registers have an adequate number of names. In their view, the basic difficulty in recruiting hearing examiners is that of finding the requisite number who can meet the exacting requirements. A change in title by itself may have only a limited effect.



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6. "Overjudicialization."

Opponents of a title change believe that agency control of policy and agency supervision of hearing examiners will be adversely affected if examiners are called "judges." A "judge" may feel freer to act independently of established agency policy than a "hearing examiner." The essential characteristics of the administrative process may be lost as administrative behavior becomes more and more judicialized. Moreover, reviewing courts may give more effect than is warranted to initial determinations of administrative judges, to the detriment of agency authority and policy-making.

Proponents of a title change reply that the degree of judicialization of the administrative process is independent of the title given presiding officers in formal proceedings; and that a change in agency authority or judicial review is neither intended nor probable. Agencies will still feel free to review, rewrite, amend or modify the examiner's decision. Most hearing examiner decisions, even now, become the final decision of the agency. 21/



B. The Issue of Uniformity

In addition to whether there should be a title change, there is also the question of whether all hearing examiners should have the same title. Some Government officials cite the variations in the examiner's job from agency to agency as support for letting agencies choose designations for their APA hearing examiners. Other officials see a logical cut-off point for title distinctions in the GS rating system: they advocate the title "administrative trial judge" for all those having a GS rating of 16 or above and retention of the "hearing examiner" designation for examiners with a GS rating of 15 or below.

Practically speaking, the Social Security Administration examiners are the focal point of this particular controversy. It is asserted that the 345 social security examiners do not have as much responsibility or judicial character as the GS-16 examiners in the major regulatory agencies. Social security hearing examiners primarily preside over disability claims; generally only one claimant appears at each hearing; only about one-third of the claimants engage the services of an attorney; and a staff lawyer does not ordinarily participate.^{22/}

In addition to this alleged non-adversary quality, it is



feared that the massive present and prospective size of the social security hearing examiner corps, which may ultimately grow to 1,500 - 2,000 examiners, would unduly dilute any new title.

Those who favor the use of the same title for all APA hearing examiners regardless of GS rating or agency believe that the examiner's function is basically alike for all agencies despite these differences. The differences that do exist are generally in terms of the substantive issues involved and their complexity. The rendering of a written decision on a record which becomes a final decision unless appealed and the holding of evidentiary hearings are common denominators for most agencies. While disability determinations involve individual citizens, so do petty criminal cases in the courts, in many of which the parties are unrepresented and the case turns on issues of fact relating to a single individual.

While there are different GS ratings for examiners, there are also different kinds of judges, yet all claim the same title. A wide variety of state and local officials who man tribunals of limited jurisdiction and significance are given the title of "judge. It is asserted, therefore, that all those who qualify under the APA can be called by the same title even if their functions do vary slightly. To differentiate in title would only make it more difficult to find able people to fill the GS-15 examiner positions. And in many respects social security disability cases are more adjudicatory in character than the policy-oriented proceedings in the major regulatory agencies.



III. CONCLUSION

It is time to bring this paper to a close by stating some conclusions. Where do I come out? What is the position of the Administrative Conference of the United States?

A. Personal Views

My personal view, as distinct from that of the Administrative Conference, is that it is desirable to change the title of all or most Federal hearing examiners to "administrative trial judge." The change would put an end to a vexing controversy and would have a number of beneficial effects without, in my view, any substantial negative consequences. Higher standards and improved performance on the part of hearing examiners would be likely to follow. Titles, self-image, and expectations of performance are important influences on the behavior of professional groups and do tend to be self-fulfilling. People tend to joke about other people's concern with titles, but they do not joke about their own titles or status, which are invariably regarded as terribly important. Title change would also have a beneficial effect on recruitment of hearing examiners in a period of substantial growth of the hearing examiner corps.

I do not give great weight to the opposition of the Federal judiciary or to the somewhat metaphysical arguments



based on Article III. A number of conversations with individual Federal judges have indicated that the principal bases of the Judicial Conference position are: (1) a fear that the status of Federal judges will be diluted if administrative hearing officers are included within the term "judge," even though qualifying language ("administrative trial judge") clearly differentiates the task and the institutional context; and (2) the assertion that the present title of "hearing examiner" is sufficiently honorific, well understood, and that a case for a change has not been made. I think that the first argument will not withstand public statement and scrutiny, while the second is outweighed by the opposing arguments.

Whether a single title should be applied to all hearing examiners raises a different set of issues. I do not believe that discrimination against social security examiners on grounds of the non-judicial character or relative unimportance of their function is easily justified. The function is clearly adjudicatory in character and at least as important to the individuals affected as the repetitive personal injury and petty criminal cases on which Federal and State judges spend much of their time. Why should lower status or dignity be accorded to proceedings in which citizens press their claims, highly important to each individual, of entitlement to governmental benefits? Moreover, it is in this area that



public confusion is a problem and that the beneficial effect of title change on recruitment and performance is likely to have the greatest effects.

There is room, however, for a compromise position on this question. The potential explosion of the need for hearing officers in the Department of Health, Education and Welfare, when combined with the administrative difficulties of supervising such a large number of "independent" hearing officers, suggests the possibility of utilizing "administrative trial judge" for a substantial number of senior HEW hearing officers (perhaps as many as 200); while retaining the present title or a new one such as "referee" for the remainder of the HEW hearing examiner corps. An approach of this kind might provide HEW with greater control over the selection, promotion and conduct of "referees," while retaining APA independence for the "administrative trial judges" who would supervise their work.

A final issue is whether individual Federal agencies should be permitted to change the title of their own hearing examiners for purposes of dealing with the public in cases of an adjudicatory character. The present General Counsel of the U.S. Civil Service Commission concluded in 1969 that, although it might be undesirable as a matter of policy, individual agencies had authority to use a title other than the official civil service class title for purposes of internal administration, public convenience, law enforcement and the like. When the



FTC and FPC, however, sought a few months ago to exercise this authority, the Civil Service Commission moved to block such independent action and stressed the desirability of a uniform Government-wide position.

I believe that one's attitude on this question of individual agency action is very much influenced by one's position on the merits of the title-change question. Those who favor a title change are apt to emphasize the diversity and freedom that the controlling statute appears to contemplate.^{23/} After all, the NLRB for sometime has referred in its rules to its "Trial Examiners" as individuals who act as "administrative trial judges" and it has asked members of its staff to address them as "Judge." Although an individual agency cannot affect the title established by the Civil Service Commission for personnel, budget, and fiscal purposes, why should it not be free to take steps which it thinks desirable for other purposes?

Opponents to any title change for hearing examiners are likely to emphasize the "nose of the camel in the tent" or "divide-and-conquer" themes that may be the practical results of adoption by individual agencies of a changed title. There is no doubt that such steps would create pressures for similar



efforts by other agencies. An agency's failure to respond to those pressures would be likely to create serious morale problems among its hearing examiners and difficulty, relative to agencies that had so responded, in recruiting new examiners. Thus opponents of a title change also tend to oppose any opportunity for different agencies to handle the problem in their own way.

If it is not possible to persuade the Civil Service Commission to change the title of all or most Federal hearing examiners, I would at least attempt to preserve the authority of individual agencies to act independently. But I recognize that, if a person is opposed to title change, the same person is likely to be opposed to independent agency action.

B. Views of the Administrative Conference

My personal views, however, are less important than the institutional position of the Administrative Conference of the United States. I have already mentioned the opposition of a majority of the Conference in 1969 to a title change involving the word "judge." As a quasi-legislative body, of course, the Conference is not bound by the past failure of a proposal to carry. On the other hand, it would not serve a useful purpose to reconsider a question after little more than two years unless new information is available or there is reason to



believe that the result would be different. As you will see, I am unable to give any assurance that that is the case.

As I indicated at the outset of my remarks, the Civil Service Commission has initiated a broad review of the title question. As part of that study the Commission has asked the Administrative Conference for its views. The Council of the Conference considered this request at length at its meeting on March 10, 1972. On March 20, 1972, at the request of the Council, I communicated the following response to Chairman Hampton of the Civil Service Commission:

"Dear Mr. Chairman:

"On February 29, 1972, you wrote me to inquire concerning (1) the feasibility and adequacy of the Civil Service Commission's proposed course of action to study the question of the appropriate title or titles for Federal hearing examiners, and (2) the views of the Administrative Conference of the United States on the merits of this question.

"The Council of the Administrative Conference discussed this matter at length at its regularly scheduled meeting on March 10, 1972. The Council was confident that the study described in your letter would provide a careful and balanced review of the relevant issues.

"On the merits of a change of title for some or all hearing examiners employed under the provisions of section 11 of the Administrative Procedure Act, the Council is divided. Five members of the Council (Charles D. Ablard, Walter Gellhorn, Marion Edwyn Harrison, Edward L. Morgan, and Richard C. Van Dusen) adhere to the position taken by the Council and the Assembly of the Administrative Conference in October 1969 that a title change which



includes the word "judge" is inappropriate and undesirable. Three members of the Council (Roger C. Cramton, Dale W. Hardin and Harold L. Russell) believe that "administrative trial judge" (or similar title) should be applied to Federal hearing examiners. Richard B. Smith would also favor such a title change if it were part of a larger shift of adjudicatory functions to an "Administrative Court." G. Harrold Carswell and Ralph E. Erickson did not participate and have expressed no opinion.

"Under these circumstances, with a plurality of the Council opposed to a title change, the Council was unanimous that it would not serve a useful purpose for the question to be reconsidered by the Assembly of the Administrative Conference at this time.

"A memorandum prepared in my office for the Council's use (1) discusses the arguments for and against a title change, (2) summarizes the discussion of the question on the floor of the Assembly in October 1969, and (3) summarizes the prevalent attitudes -- informally and unofficially -- of a number of Federal agencies on the question. Since this information may illuminate the 1969 action of the Administrative Conference and the present action of the Council, copies are enclosed for consideration by the Commission.

"If I or my office can be of further assistance to you on this matter, please let me know."

"Sincerely yours,

[s] Roger C. Cramton
Chairman"

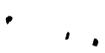
There is no use pretending that this posture of events provides any assistance to those who seek a change in title for hearing examiners. But candor and honesty and openness have great values. Understanding the realities that one faces is the beginning of wisdom. And the first reality is that the Civil Service Commission's study of this question is likely to



be determinative of the result for the time being. Information, views and argument should be made available to the Commission so that it may reach a thoughtful and informed decision.

Wholly apart from the question of title change, I would urge hearing examiners and their friends to consider other issues which may improve hearing examiner status and performance in equal or greater degree than a title change. Improvement in the quality of hearing rooms available for the use of hearing examiners in many parts of the country has begun, but there is still an enormous distance to ^{24/}go. Continuing effort and pressure are required if adequate--to say nothing of dignified--hearing rooms are to be available. In some agencies an improvement in the physical space and supporting services provided to hearing examiners is also badly needed. Finally, the provision of law clerks is a step that a number of agencies should now consider. We can make much more productive use of the high talents of many hearing examiners if they are armed with qualified personal assistants.

Hearing examiners are a vital element in the Federal administrative process. The quality of administrative justice, as perceived by the citizens who are affected by Government, is greatly influenced by their actions. Federal hearing examiners enjoy great respect in the agencies and from the bar due to their general high quality and excellent performance



over the years. During the next quarter-century under the Administrative Procedure Act we can expect even larger accomplishments to flow from the men who hold this high office.

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APPENDIX

NUMBER OF HEARING EXAMINERS EMPLOYED BY FEDERAL
AGENCIES, GRADE OF POSITION, AND PROSPECTIVE VACANCIES
(February 1972)

<u>Agency</u>	<u>Grade of^{1/} Position</u>	<u>Number of Examiners</u>	<u>Prospective^{2/} Vacancies</u>
Department of Agriculture	GS-16	6	0
Atomic Energy Commission	GS-17	1	0
Civil Aeronautics Board	GS-16	22	1
Federal Communications Commission	GS-16	17	1
Federal Maritime Commission	GS-16	6	0
Federal Power Commission	GS-16	19	0
Federal Trade Commission	GS-16	11	2
Food and Drug Administration, Department of Health, Education and Welfare	GS-15	1	- <u>3/</u>
Office of the Secretary, Department of the Interior	GS-15	12	- <u>3/</u>
Office of the Secretary, Department of the Interior (Indian Probate)	GS-13	12	- <u>3/</u>
Internal Revenue Service, Department of the Treasury	GS-15	1	- <u>3/</u>
Interstate Commerce Commission	GS-16	78	15 <u>4/</u>
Department of Labor	GS-16	3 <u>4/</u>	2
Maritime Administration, Department of Commerce	GS-16	3	- <u>3/</u>
National Labor Relations Board	GS-16	100	10 <u>4/</u>
National Transportation Safety Board, Department of Transportation	GS-16	6	- <u>3/</u>
Occupational Safety and Health Review Commission	GS-16	10	13
Postal Rate Commission	GS-17	1	- <u>3/</u>
Post Office Department	GS-16	2	- <u>3/</u>
Securities and Exchange Commission	GS-16	6	- <u>3/</u>
Social Security Administration, Department of Health, Education and Welfare	GS-15	345	340
U. S. Civil Service Commission	GS-16	1	- <u>3/</u>
U.S. Coast Guard, Department of Transportation	GS-15	<u>17</u>	- <u>3/</u>
		<u>680</u>	<u>384</u>

Source: Office of Hearing Examiners, U.S. Civil Service Commission

1. With 10 or more hearing examiners, Chief is one grade higher. In addition the single hearing examiners of the Atomic Energy Commission and the Postal Rate Commission are GS-17's.
2. Includes imminent retirement and expansion of hearing examiner corps.
3. Unknown.
4. Estimated.



FOOTNOTES

+ This paper is an elaboration of remarks prepared for delivery at the Ninth Annual Seminar of the Federal Trial Examiners Conference on Tuesday, March 21, 1972, Washington, D.C.

* Chairman, Administrative Conference of the United States. Formerly, Professor of Law, University of Michigan.

Except as indicated to the contrary, the views expressed are those of the author and not necessarily those of the Administrative Conference of the United States.

The author acknowledges the able assistance of Lynda S. Zengerle in the preparation of this paper. Needless to say, she is not responsible for my views or errors.

1. Task Force on Legal Services and Procedure, Report on Legal Services and Procedure to the Executive Branch of the Government 197-98 (March, 1955).
2. Report of Advisory Committee for Hearing Examiners to United States Civil Service Commission (undated), presented to the Commissioners in July, 1963.
3. H.R. 16550, 89th Cong., 2d Sess. (1966)
4. Proceedings of the Judicial Conference of the United States, p. 40 (Sept. 1966). The Committee report in support of this action is not available to the public.
5. The transcript of the public hearing held by the Committee on Personnel was published in an abridged form by the Federal Trial Examiners Conference. Federal Trial Examiners Conference Committee on Title Change, The Case for Administrative Trial Judge (1969) [hereafter cited as "The Case for Administrative Trial Judge"].
6. Administrative Conference of the United States, full text of debate on the recommendations of the Committee on Personnel on Proposed Change of Title of Hearing Examiners 17 (Oct. 21-22, 1969).



7. Proceedings of the Judicial Conference of the United States 11 (Sept. 1970).
8. 16 American Bar News No. 12, at 4 (Dec. 1971).
9. U.S. Civil Service Commission Job Evaluation and Pay Review Task Force, Model of Attorney Evaluation System and Pay Structure (1971).
10. Letter from Robert Hampton to Roger Cramton, Feb. 29, 1972.
11. 47 Fed. Reg. 4375 (March 2, 1972).
12. Letter from Robert Hampton, supra note 10.
13. If it is thought that the term "administrative trial judge" is susceptible to confusion with the "administrative judges" that have managerial functions in some court systems, the use of the name of the administrative agency, as in the FTC's proposed title of "Federal Trade Commission Trial Judge," would eliminate that problem.
14. Wall Street Journal, Sept. 16, 1969 at I, Col. I.
15. D. Currie, Federal Courts 105-131 (1968); C. Wright, Law of Federal Courts 24-36 (2d ed. 1970).
16. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). In the Glidden case the Supreme Court held that the Court of Claims and the Court of Customs and Patent Appeals are "constitutional" courts and that the assignment of judges of these courts to sit with courts which are "constitutional" is valid.
17. United States Civil Service Commission Announcement No. 318 (Hearing Examiner) (July 1970).
18. The case for Administrative Trial Judge.
19. W. Shakespeare, Romeo and Juliet, Act II, Sc. 2, Line 33:

"What's in a name? That which we call a rose
By any other name would smell as sweet."
20. An Appendix to this paper contains current data on the number of hearing examiners currently employed by Federal agencies and the number of prospective vacancies.



21. Macy, The APA and the Hearing Examiner: Products of a Viable Society, 27 Fed. B.J. 386-389 (1967). See also Administrative Conference of the United States Recommendation No. 6 -- Delegation of Final Decisional Authority Subject to Discretionary Review by the agency, 1 A.C.U.S. 122 (1970).
22. Dixon, The Social Security Disability Program: An Heretical Report (Report prepared for the Committee on Grant and Benefit Programs of the Administrative Conference of the United States, Second Draft, March 8, 1972).
23. See 5 U.S.C. § 5105(c) (1970): "The official class titles established under subsection (a) (2) of this section shall be used for personnel, budget, and fiscal purposes. However, this requirement does not prevent the use of organizational or other titles for internal administration, public convenience, law enforcement, or similar purposes." See also the Case for Administrative Trial Judge at 66-67.
24. Administrative Conference of the United States Recommendation No. 1 -- Adequate Hearing Facilities, 1 A.C.U.S. 45 (1970):

Administrative hearings of the Federal government should be conducted in dignified, efficient hearing rooms, appropriate as to size, arrangement, and furnishings. . . . The General Services Administration could advantageously arrange for the service and the space needed by departments and agencies in which administrative hearings occur.



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MEMORANDUM

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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WASHINGTON, D.C. 20506

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March 3, 1972

TO: The Council
FROM: Roger C. Cramton, Chairman
SUBJECT: Change of Title of Hearing Examiners

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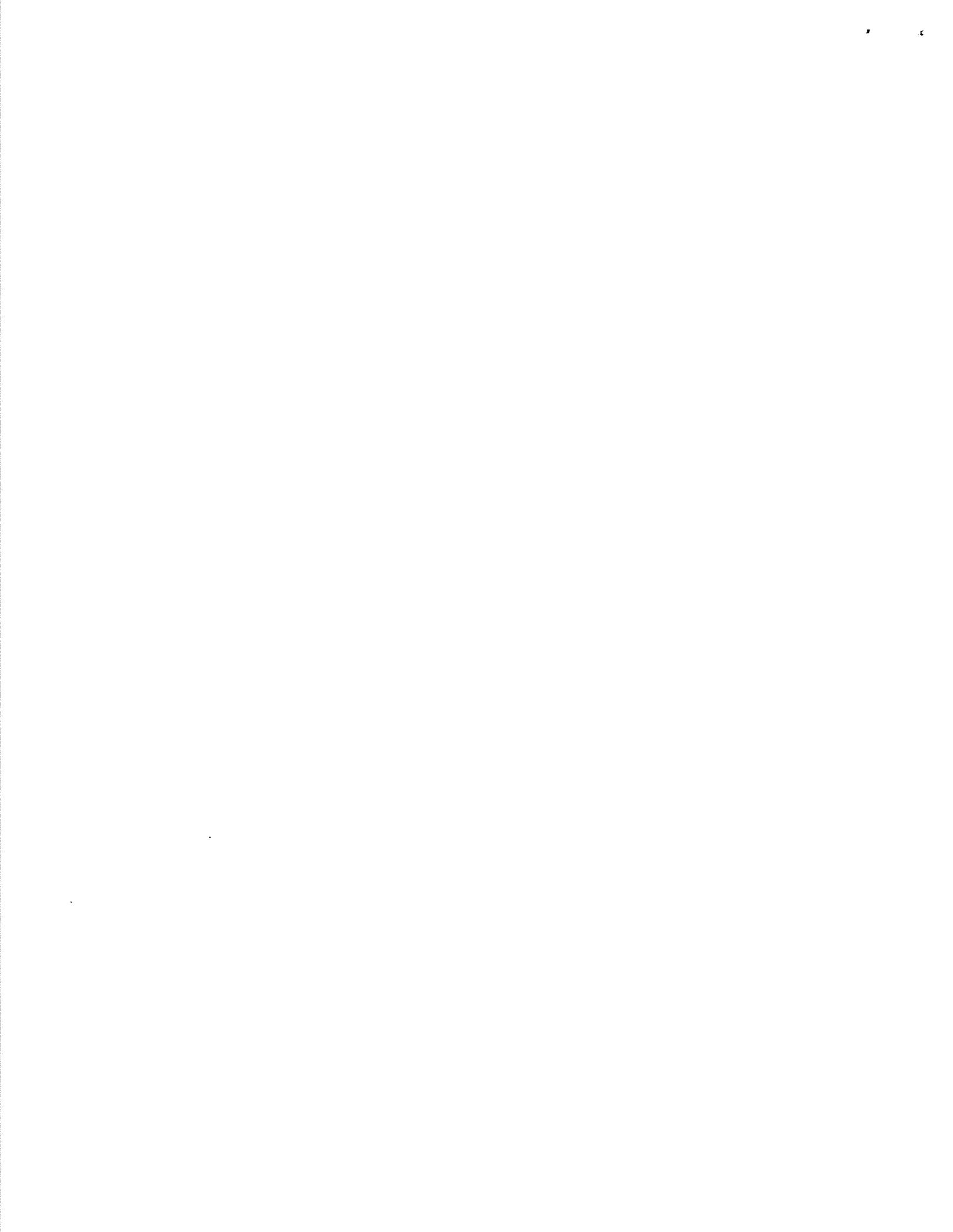
I. INTRODUCTION

The appropriateness of the title "Hearing Examiner" was first challenged seventeen years ago and the controversy continues today. The failure of the Administrative Conference to take a position favoring the change in 1969 did not have the effect of finally putting the question to rest. Federal hearing examiners have refused to take that action as final, and recent developments have once again brought it to the fore. In early 1971 the Council of the Section of Judicial Administration of the American Bar Association invited Federal hearing examiners to become part of the Section under the title "Conference of Administrative Law Judges." The House of Delegates approved this action in July 1971, and the Conference was formally organized later in the year with the election of a chairman (Herzel H.E. Plaine of the NLRB) and an executive committee.

In late 1971 several of the independent regulatory agencies, responding to inquiries initiated by Chairman Kirkpatrick of the Federal Trade Commission, gave consideration to the adoption of rules changing the title, at least for certain purposes, of their hearing examiners. An advisory committee

on procedures to the FTC had recommended in mid-1971 that the FTC refer to its hearing examiners as "Federal Trade Commission Trial Judges" in connection with FTC adjudicative proceedings; and the FTC tentatively adopted a rule to that effect on October 7, 1971. The Federal Power Commission took a somewhat similar action in December 1971.

When word of the tentative actions of the FTC and FPC spread to other independent agencies and to the U.S. Civil Service Commission, the Civil Service Commission took steps to maintain the status quo pending a full consideration of the question by the Civil Service Commission. On January 19, 1972, Chairman Hampton of the Civil Service Commission wrote to the FTC and the FPC urging the two agencies not to publish their proposed changes but to maintain the status quo until the Civil Service Commission had an opportunity to (1) "assert whatever jurisdiction we have in this area because of a conviction that a uniform response to this multi-agency problem is far preferable to its piecemeal treatment on an agency-by-agency basis"; and (2) "decide the matter for all agencies after obtaining the current view of the Administrative Conference of the United States, the Judicial Conference, the agency heads who employ most examiners, suitable representatives of the hearing examiner corps such as



the Federal Trial Examiners Conference, and the Job Evaluation and Pay Review Task Force within this Commission which conducted a recent survey on the subject." The FTC and FPC acceded to Chairman Hampton's request on the understanding that the Civil Service Commission's review of the issue would be conducted as expeditiously as possible.

On March 1, 1972, the Civil Service Commission issued a regulation which would preempt the field in the sense that it would prevent any agency from making a title change on its own. Simultaneously, the Commission announced the initiation of a broad study of the question "whether a more appropriate title than that of 'hearing examiner' should be adopted." Chairman Hampton of the Commission has made a formal request to me for "your advice on the feasibility and adequacy of [the Commission's] approach ... [and] your views on the merits of the change." [See Hampton letter included in Appendix A.]

The dispute over what to call hearing examiners appointed under section 11 of the Administrative Procedure Act encompasses three issues: (1) the desirability of a new title; (2) the selection of the appropriate title or titles; and (3) the question whether uniformity in title for all hearing examiners is desirable despite variations in examiners' tasks in different

agencies. The purpose of this memorandum is to present information relevant to these issues in as dispassionate and useful a form as possible. An attempt has been made not to color the discussion of factual background and opposing arguments with my personal views, which are briefly stated in a concluding section.

II. THE ROLE OF THE HEARING EXAMINER

The APA §11 hearing examiner has a dual role: he must operate as a competent and impartial adjudicating officer and as a responsible, disciplined member of an administrative agency. Under the APA, the functions of hearing examiners are substantially the same throughout the Government although the subject matter of the cases they hear varies greatly. In fulfilling his duties, subject to relevant legal limitations, the hearing examiner: administers oaths and affirmations; issues subpoenas and affirmations; rules upon offers of proof and receives relevant evidence; takes or causes the taking of depositions; regulates the course of the hearing; holds conferences for the settlement or simplification of the issues by consent of the parties; disposes of procedural requests or similar matters; questions witnesses; considers the facts in the record and arguments and contentions made; determines credibility and makes findings of fact and conclusions of law; recommends decisions or makes initial decisions on the basis of reliable, probative, and substantial

evidence on the record; and takes any other actions authorized by agency rule consistent with the provisions of the Act.

A. Similarities with a Judge's Role

Hearing examiners conduct hearings, often in accusatory proceedings, and recommend or hand down binding decisions that have far-reaching impact on individual rights and property. If the hearing examiner makes an initial decision that is neither appealed nor reviewed by the agency upon its own motion, his decision becomes that of the agency. According to John W. Macy, Jr., former Chairman of the U.S. Civil Service Commission, "the hearing examiner conducts the hearings, rules upon offers of proof, receives evidence, makes findings of fact and conclusions of law, and except for the decision, generally performs the same kinds of functions performed by a presiding judge in the judicial system."^{1/} The functions of hearing and deciding are insulated from improper pressures and controls under section 11 of the APA, now codified in 5 U.S.C. §1010 (1970), by making the hearing examiner independent of his agency in compensation and in tenure. The framers of the APA assured this independence by requiring that hearing examiners (a) be appointed subject to civil service and other laws not inconsistent with the APA; (b) receive compensation prescribed and adjusted by the Civil Service Commission acting on its own motion, independent of agency recommendation; and (c) be

removable only for good cause determined by the Commission after opportunity for hearings upon the record and subject to judicial review.

The Federal courts have also recognized and strengthened the hearing examiner's status as an official of consequence. In 1951 the Supreme Court, in reversing an NLRB cease-and-desist order in an unfair labor practice case, remanded the case for reconsideration in the light of the hearing examiner's findings. In so doing, the Supreme Court held that "the plain language of the statute directs a reviewing court to determine the substantiality of evidence on the record including the hearing examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."^{2/}

During the intervening quarter century, the status and function of hearing examiners have grown dramatically. Initial decisions of hearing examiners become final without further review in a substantial number of cases. Some agencies, such as the Civil Aeronautics Board, have limited review of examiners' decisions to a certiorari process that requires a demonstration of the importance of agency-level review. There is general agreement that significant decision-making

by the hearing examiner is more common now than it was ten or twelve years ago and is far more common than when the APA was enacted. Respect for the hearing examiner's opinions and determinations is well-established in Federal agencies and reviewing courts; the published decision is generally that proposed by the examiner who heard the case.

B. Distinctions from a Judge's Role

It is at the point of decision, however, that the examiner's likeness to a judge may cease. The judge's decision is a personal one and he retains the right to modify it. The hearing examiner may make the initial decision but in some cases he recommends it or certifies the record; he cannot modify it and though his own decision may be a personal one, the final decision of the agency is often an institutional one. In a few agencies the decisions of hearing examiners are reviewed by employee boards as well as by agency heads.

It must be noted that the hearing examiner and judge operate in different organizational environments, and this fact influences and differentiates their roles. In many agencies hearing examiners are utilized for functions and tasks that are not strictly adjudicatory in character. A

hearing examiner may be employed as a presiding officer at a public hearing in a notice-and-comment rulemaking proceeding that is "legislative" in character. Although proceedings involving ratemaking or economic licensing may be adjudicatory in the sense that the determination must be made on the basis of a record after a trial-type hearing, the policy or "legislative" dimensions of such proceedings tend to overshadow their adjudicatory aspects. And other proceedings, while "adjudicatory" within the broad definition of the APA, lack the adversary quality that is characteristic of most (but not all) court proceedings. The social security disability benefit proceedings in which HEW examiners spend most of their time, for example, do not involve the routine participation of lawyers representing the claimant and the agency (although claimants are represented by lawyers or others in a substantial proportion of the total cases).

The hearing examiner's function varies from agency to agency in many ways.

- * The Social Security examiner hears and decides appeals from findings that a claimant was not in covered employment and from initial determinations that a claimant is not entitled to disability benefits. Disability evaluations commonly involve the application of detailed legal and medical standards to individual claimants. The extensive reliance

on medical, psychological and occupational evidence gives these proceedings a similarity to state workmen's compensation proceedings and some personal injury trials. He also conducts hearings on charges that providers of Medicare services do not measure up to prescribed medical and hospital standards.

- * The Federal Power Commission hearing examiner conducts cases which fix the rates producers and pipeline transmission companies may charge for gas transported or sold in interstate commerce, thereby affecting the price for natural gas that every retail user in the nation must pay. The FPC examiner also presides over hearings to determine whether producers may sell to pipeline companies, whether pipeline companies may construct new lines or extend existing lines, whether new hydroelectric projects may be constructed, and what rates may be charged for the sale of electric power in interstate commerce.
- * The National Labor Relations Board examiner handles cases with far reaching implications for management, unions, and business concerns, deciding labor disputes involving interstate businesses that exceed a monetary cut-off point set by the Taft-Hartley Act. Many unfair labor cases involve a search for a pattern of conduct and an assessment of the demeanor and credibility of opposing witnesses.
- * The Federal Communications Commission examiner conducts hearings on a wide variety of subjects including applications for broadcast and other types of licenses and revocation

of such licenses; applications for construction permits to establish AM, FM, and TV broadcast stations; and various types of cease-and-desist proceedings. Less frequently, an FCC examiner may be involved in a complex common carrier rate or licensing proceeding with large technological and scientific dimensions

The difference in functions performed by these hearing examiners, apparent from this brief description of only a few agencies, has been one of the stumbling blocks in the numerous attempts to find a new title for APA §11 hearing examiners.

III. ATTEMPTS TO FIND A NEW TITLE

As early as 1955, the Hoover Commission's Task Force on Legal Services and Procedure recommended a new title "with the status of administrative trial judge"^{3/} and that hearing examiners preside in formal adjudicatory and rule-making^{4/} proceedings with authority "to conform as closely as practicable to that of district judges"^{5/} and "with the degree of independence of judgment which is expected of judges."^{6/} Congress rejected

both the Hoover Commission's recommended new title "hearing commissioner" and its recommendation of an Administrative Court in the labor, trade and tax fields.

In 1963 the Civil Service Commission considered adoption of the title "hearing commissioner" but the title was thought to be productive of confusion with the heads of independent and other agencies who are denominated "Commissioners." The Civil Service Commission decided against the suggested changes.

In 1966 a bill was introduced in Congress to change the title to "administrative judge." The Committee on Revision of the Laws of the Judicial Conference of the United States recommended disapproval of the bill, and the Judicial Conference of the United States then took the same position. The full text of the 1966 action of the Judicial Conference is as follows:

The Conference also considered other legislative proposals on recommendation of the Committee on Revision of the Laws and took the following action:

(a) H.R. 16550, 80th Congress would amend the Administrative Procedure Act and related statutes so as to designate hearing examiners as "administrative judges." The Conference was of the opinion that the designation "hearing examiner" is well understood and that the proposed change would be inappropriate and confusing. Accordingly, the Conference voted its disapproval of the proposal. [Proceedings of the Judicial Conference of the United States, p. 40 (September 1966).]

The committee report in support of this action is not available to the public.

The Administrative Conference of the United States undertook consideration of the title question in 1969 as part of a broader examination of matters relating to the selection and continuing education of hearing examiners. The Committee on Personnel, under the chairmanship of Dale W. Hardin, held public hearings for five days in April 1969, surveyed agency views, and considered responses to tentative proposals. A transcript of the public hearing was kept and an edited version, a copy of which is attached, was later published by the Federal Trial Examiners Conference under the title "The Case For Administrative Trial Judge."

In September 1969 the Committee on Personnel recommended, inter alia:

RECOMMENDATION 1:

That the title of presiding officers appointed pursuant to §11 of the Administrative Procedure Act (5 U.S.C. 3105) should be changed from Hearing Examiner to a title more clearly reflecting the unique status and responsibilities of these quasi-judicial officers.

RECOMMENDATION 2:

That an appropriate title to accomplish the objectives of Recommendation 1 would be Administrative Chancellor.

RECOMMENDATION 3:

That the Civil Service Commission effect this change of title.

RECOMMENDATION 4:

That every department and agency employing such persons effect this change of title, as it is in the public interest that the same title be used throughout the Government."

The Council forwarded the recommendation to the Administrative Conference with the following statement of views:

(1) The Council objects to the name Administrative Chancellor as proposed in paragraph 2 of the recommendation. The Council also objects to the name Administrative Trial Judge which has been proposed by the minority members of the Committee. If the name is to be changed, the Council feels that the name adopted should be one which does not have the disadvantages of the names proposed.

(2) Since in its view an acceptable title has not yet been proposed, the Council does not express an opinion on paragraph 1 of the recommendation.

(3) If it is determined to change the name of Hearing Examiners to an acceptable title, the Council is in agreement with paragraphs 3 and 4 of the proposed recommendation.

Mr. Harold Russell, a member of the Council, wishes to be recorded as in favor of paragraphs 1, 3, and 4 of the proposed recommendation, and in favor of the name "Administrative Trial Judge" for the position now named Hearing Examiner.

The recommendation of the Committee on Personnel was considered by the Assembly of the Conference on October 22, 1969. After a spirited debate, the portion of the recommendation relating to change of title of hearing examiners was deleted from the recommendation that ultimately became Recommendation 17. A synopsis of the debate is contained in Appendix B.

In 1970 the Judicial Conference of the United States reiterated its opposition to a title change for hearing examiners that involved the word "judge." The Conference resolved:

H.R. 14688, 91st Congress, would redesignate hearing examiners as "administrative trial judges." The Conference at its September 1966 session (Conf. Rept., p. 40) expressed the opinion that the designation "hearing examiner" is well understood and that the proposed change would be inappropriate and confusing. The Conference was informed that the Administrative Conference of the United States at its October 1969 session disapproved the change in the title of "hearing examiner." After further consideration, the Conference reaffirmed its disapproval of this legislation. [Proceedings of the Judicial Conference of the United States, p.11 (September 1970).]

In July 1971, as already indicated, the Section on Judicial Administration of the American Bar Association created the Conference of Administrative Law Judges, and this Conference is composed primarily of Federal hearing examiners. The ABA has thus officially conferred the title "judge" upon hearing examiners.

Balancing the judicial designation explicit in this ABA action is the report of the Job Evaluation and Pay Review Task Force of the Civil Service Commission (the so-called "Oliver Report"). Agencies were requested to rate several suggested titles and "Hearing Examiner" received the most votes, followed by "Administrative Examiner" and "Administrative Law Examiner." The report concluded that while "hearing examiner" was a durable title, it was not truly descriptive of the duties involved, and that "Administrative Law Examiner," which received a high degree of agency support, should be the new title for APA §11 examiners. The report indicated that "judge" was too controversial and was therefore not a viable choice.

Meanwhile, the number of Federal hearing examiners has continued to grow. There are now nearly 700 hearing examiners employed by nearly 25 agencies or units within agencies. More recently, difficulties in filling hearing examiner positions have been encountered in a number of agencies, especially those in which the need for hearing examiners is rapidly growing, such as the Social Security Administration of HEW. At the present time, it is estimated that there are nearly 400 prospective vacancies in the hearing examiner corps, most of which are in Social Security Administration. The table on the following page lists the number of hearing examiners employed by Federal agencies, grade of position, and the number of prospective vacancies that are expected in the near future because of imminent retirement or expansion of workload.

NUMBER OF HEARING EXAMINERS EMPLOYED BY FEDERAL AGENCIES, GRADE OF POSITION, AND PROSPECTIVE VACANCIES (February 1972)

<u>Agency</u>	<u>Grade of^{1/} Position</u>	<u>Number of Examiners</u>	<u>Prospective^{2/} Vacancies</u>
Department of Agriculture	GS-16	6	0
Atomic Energy Commission	GS-17	1	0
Civil Aeronautics Board	GS-16	22	1
Federal Communications Commission	GS-16	17	1
Federal Maritime Commission	GS-16	6	0
Federal Power Commission	GS-16	19	0
Federal Trade Commission	GS-16	11	2
Food and Drug Administration, Department of Health, Education and Welfare	GS-15	1	<u>-3/</u>
Office of the Secretary, Department of the Interior	GS-15	12	<u>-3/</u>
Office of the Secretary, Department of the Interior (Indian Probate)	GS-13	12	<u>-3/</u>
Internal Revenue Service, Department of the Treasury	GS-15	1	<u>-3/</u>
Interstate Commerce Commission	GS-16	78	15 <u>4/</u>
Department of Labor	GS-16	3 <u>4/</u>	2
Maritime Administration, Department of Commerce	GS-16	3	<u>-3/</u>
National Labor Relations Board	GS-16	100	10 <u>4/</u>
National Transportation Safety Board, Department of Transportation	GS-16	6	<u>-3/</u>
Occupational Safety and Health Review Commission	GS-16	10	13
Postal Rate Commission	GS-17	1	<u>-3/</u>
Post Office Department	GS-16	2	<u>-3/</u>
Securities and Exchange Commission	GS-16	6	<u>-3/</u>
Social Security Administration, Department of Health, Education and Welfare	GS-15	345	340
U. S. Civil Service Commission	GS-16	1	<u>-3/</u>
U.S. Coast Guard, Department of Transportation	GS-15	<u>17</u>	<u>-3/</u>
		680	384

Source: Office of Hearing Examiners, U.S. Civil Service Commission

1. With 10 or more hearing examiners, Chief is one grade higher. In addition the single hearing examiners of the Atomic Energy Commission and the Postal Rate Commission are GS-17's.
2. Includes imminent retirement and expansion of hearing examiner corps.
3. Unknown.
4. Estimated.

A polling of the agencies of the issues of whether there should be a title change, what alternative title should be chosen, and whether all agencies should use the same title shows disagreement on all questions. A survey of current agency attitudes on these questions is contained in Appendix C.

The title "hearing examiner" has been under fire since 1955; it would be most constructive if some definitive resolution of the issue could be formulated which would be acceptable to at least the majority of those directly involved, i. e., the agencies, the hearing examiners, and the groups with which they deal. In order to do so, the arguments for and against a change in the title of hearing examiner, particularly one that employs the word "judge," must be outlined. The basic premises of the contending views then become readily apparent and a basis is afforded for arriving at a considered conclusion of policy.

IV. ARGUMENTS IN FAVOR OF A CHANGE

A. More Accurate Description of Function

Those who favor a change in title to "administrative trial judge" believe that the present titles of "hearing" or "trial examiner" are not descriptive of the function performed by APA §11 hearing examiners. They assert that "administrative trial judge" is an accurate description applicable to the initial decision-

maker in the Federal administrative process and is sufficiently unique to avoid confusion with Federal and State judges. As noted in the Wall Street Journal, "an examiner's job is similar in many ways to that of a trial judge * * *. He presides over court-like hearings, complete with harried steno-typists, bickering lawyers and nervous witnesses. He makes rulings -- called initial or recommended decisions -- that are subject to review by the agency's governing body."^{8/} While the examiner's job varies with the agency that employs him, the examiner's basic function is the same in almost all agencies: build a factual report and make a decision supported by legal reasoning.^{9/} As noted by Professor Lloyd Musolf, "the examiner has powers which are commensurate with those of a trial judge and often far exceed those of a master." The master's power concerning the admission of evidence is only nominal while the examiner, unfettered by common-law rules of evidence, has wide discretion. In the exercise of this discretion, he actually has greater leeway than a judge, for as one commentator has noted:

"the examiner is faced with the responsibility of passing on questions of evidence without the traditional standards of the judiciary save to the extent there are holdover rules from the common law that found their way to the administrative process."^{10/}

APA §11 hearing examiners in the NLRB are often cited as an example of why the title should be changed to improve the description of the examiner's function. NLRB officials believe that their agency performs more like a court than any other agency; rules of evidence apply, initial decisions are a matter of law, and examiners must provide detailed reports to support their findings. The current NLRB position description states that:

"the Division of Trial Examiners presently consists of hearing examiners who serve as administrative trial judges under the provisions of the Administrative Procedure Act and National Labor Relations Act, and preside at formal public hearings and prepare decisions containing detailed findings of fact, conclusions of law and recommendations. The Division functions very much like any judicial tribunal. The hearing examiner's role in connection with the complaint and hearing is materially no different from that of a judge of a court of record, with unusual latitude for the exercise of discretion and independent judgment in the conduct of the hearing; and determination of all issues of law and fact."

Those who favor the change of title firmly believe that "administrative trial judge" is more descriptive of the hearing examiner's function because it connotes the examiner's judicial duties and emphasizes the importance of the examiner's role.

B. Confusion with Other "Examiners"

The title "examiner" is a carry-over from the days prior to the APA and has long been used by Federal administrative agencies, even before the present role of the APA examiner was established. Proponents of a change in title maintain that the public still is unable to distinguish between a hearing examiner in his judicial role and the many other varieties of examiners who have administrative, investigative, or clerical functions. "Examiner" is commonly used in Federal, state, and municipal governments to designate many types of occupations that differ greatly from the role played by the APA §11 hearing examiner. Confusion is compounded by agencies' use of such names as "examiner," "hearing examiner," "trial examiner," "presiding examiner," and "presiding officer." Occasionally several titles are used interchangeably.

Within the Civil Service System, "examiner" is generally an organizational or functional title, a generic term used by the agencies. There are at least eight types of examiners: Appeals Examiner (GS 12-14, attorney not required); EEO Appeals Examiner (GS 12-13); NLRB Field Examiners and Hearing Officers; Civil Service Retirement Claims Examiners; Workmen's Compensation Claims Examiners; Social Insurance Claims Examiners;

Civil Service Examiner (gives Civil Service Exam); and Voucher Examiner. Unless designated otherwise, the GS ratings of these examiners are spread mostly from GS-5 to GS-11 with chiefs usually GS-13 or 14. The 650 APA §11 hearing examiners range from GS-13 (only 12, all in the Department of the Interior) to GS-16 (292 spread among the major regulatory agencies) with Chief Hearing Examiners at GS-17 where there are 10 or more hearing examiners in the agency and in two other agencies. (See the table on page 16, supra.)

Those who wish to escape the designation "hearing examiner" point to the major differentiation in GS ratings, job qualifications and duties among "examiners" as the source of lay misunderstanding about who the hearing examiner is and what he does. It is believed that such misunderstanding frequently leads to inconvenience in the conduct of hearings, since witnesses and other participants do not understand the seriousness of the proceeding or the necessity to respect their oath to tell the truth. Even practicing attorneys may focus on the nonjudicial title and therefore doubt the stature and authority of the person occupying the bench and evidence a lack of respect for the trial.

The public often encounters a Federal agency for the first time in an administrative hearing. Since the manner in which hearing examiners are regarded may affect the handling of the matter or the public's respect for the proceeding, it is a highly important matter. Participants may consider the "examiner" as just another representative of the prosecuting wing of the agency; and they may feel that they have not received the independent and impartial determination, based solely on the facts and the law, that the hearing examiner is supposed to provide.

It is also asserted that when the examiner hears cases outside of Washington, a common occurrence in many of the agencies, he is deprived of the use of idle State and Federal courtrooms and is relegated to using inadequate facilities such as conference rooms, Civil Service Commission examining rooms, and hotel rooms. Proponents for a change believe that a new title would alleviate this situation by clarifying what it is a §11 examiner does and by operating favorably upon public esteem toward the Federal administrative process.

C. Increased Status, Respect, and Dignity

Although we live in a democratic society, titles continue to impart dignity, authority, and honor. It is argued that a change in title would psychologically add to the dignity of the

hearing and that a title containing the word "Judge" would promote public understanding of the examiner's role in conducting an impartial hearing in a judicial atmosphere. While the public recognizes what a court is and what a judge stands for, the public generally does not recognize the status of an examiner particularly if he holds forth in the chapel of the local YMCA or in a hotel room.

An agency's decisions, in cases where a hearing is required, gain credence with the public when the presiding officer demonstrates the impartiality and objectivity of a judge; calling an examiner "judge" is merely one measure to be used in furthering public acceptance of the administrative process. As Mr. Earl W. Kintner, a former Chairman of the FTC, pointed out:

"It is all important to make sure that the public feels a confidence in the quality of justice that is being meted out, that the public and practitioners feel that those who are in the first instance hearing their case ... have judicial temperament, have stature, are not only treated like judges but recognized as judges, because they are judges. ... It is as important to the citizen involved whether the matter be before the U.S. Supreme Court or Court of Appeals or Federal district court or before a hearing examiner. If they are performing judicial duties, they ought to be given the title of judge." 11/

Those who favor a change in title buttress their argument by citing the rigors that must be survived in order to become a hearing examiner. Qualification for an appointment requires

membership in the bar and seven years of legal experience, including two years in administrative law. An applicant must also undergo a five-hour test of his ability to write an examiner's decision and a lengthy oral interview. Only one-tenth of those who apply end up on the register and even fewer are actually appointed. Both NLRB and Social Security Administration officials believe that some recognition of these qualities are called for and that recognition can be gained by a change in title. These officials also believe that such a change would accomplish greater utilization of available court rooms when cases are heard outside of Washington, thereby adding to the dignity of administrative trials and assisting in the maintenance of judicial atmosphere and decorum. The added respect resulting from the judicial atmosphere would also produce speedier hearings, more settlements, and greater compliance with initial decisions.

D. Improved Performance

It is strongly urged that a change in title will result in improved performance by the hearing examiners. Justice Tom Clark stated "... as you put the robe around a judge or give him the title of 'judge', he seems to take on a different perspective from the standpoint of the responsibility he has

in discharging the duties of his office."^{12/} It is a well-known fact that people respect the badge of office. If a change in title adds to the decorum of the hearing, to the significance of the oath, to the ability of the hearing examiner to obtain truthful testimony, and to the respect shown by participating lawyers, it is clear that those changes would contribute ultimately to improved performance by the examiner. Additionally it is argued that:

"financial rewards are not enough. People, whether managers or workers, whether in business or outside, need rewards of prestige and pride. * * * It would seem almost elementary to give the men in the big companies a title that is in keeping with their responsibility and importance. * * * What a difference it makes to the status of the position, the pride of its holder, his incentive and the spirit of his organization. Professional people should be given the incentive and recognition of professional status."^{13/}

It is the idea that a change of title will cause the examiner to take stock of himself anew and act in a manner worthy of the title "judge" that causes some of the fervor behind the quest for the transition to "administrative trial judge."

E. Improved Recruitment

One of the central factors emphasized by those favoring a change of title is the difficulty in recruiting qualified persons for the position of hearing examiner. It is claimed that it is difficult to keep the current hearing examiner register adequately filled to meet current demands. An additional problem is encountered in the likelihood that new

positions for hearing examiners will be created in the near future. The Social Security Administration now has 347 examiners but anticipates an increase to 682 by June 1973. Congress has authorized employment of temporary SSA examiners through December 1973 to handle the rising incidence of black lung cases. HR 1, the Family Assistance Bill now pending in Congress, calls for 1,000 additional hearing examiners. It is suggested that since the title is neither descriptive of function nor appropriate to the status of the office, potential applicants are not attracted to the position. While a successful lawyer may be willing to relinquish job and even some remuneration to become a state, district court, or circuit court judge, he is unwilling to change his living circumstances for a job entitled "hearing examiner."

Another part of the recruitment problem is centered on the recognition that a hearing examiner has a terminal position: he can be removed only for cause or upon reaching the mandatory retirement age of 70. Several of the agencies acknowledge that they have a superannuated staff of hearing examiners and face a gross depletion in ranks in the next few years. These agencies want to avoid an inbred, agency-staffed corps of examiners and are anxious to find qualified applicants from the private sector. Senator Tower, sponsor of a Senate

bill that incorporates a change in title, has stated that the change to "administrative trial judge" could very well be the deciding factor in persuading a qualified person to serve in the post. Fear of mass retirements and creation of new positions have caused those who favor a change in title to focus on recruitment as an additional factor in support of their position.

D. "Overjudicialization" Will Not Result

As a general rule, a hearing examiner's initial decision is adopted as the agency's decision. Under the legal mandate of exhaustion of administrative remedies, the claimant is required to appeal an examiner's decision first within the agency. Those who favor the change of title maintain that those who are within the system, such as members of review boards, will not be influenced in their ability to review fairly and impartially if the decision comes from a "judge" instead of a "hearing examiner." Agencies will still feel free to review, rewrite, amend or modify the examiner's decision. And no one has voiced an intent to reduce the powers of agency heads by retitling hearing examiners.

The spectre of overjudicialization has been raised as a likely consequence of a change in title to one including the word "judge." Advocates of the title change assert that the examiner already presides at hearings having both

adjudicatory and policy making aspects, drawing heavily on court tradition, and that a change in title will not result in over judicialization of a process that is already highly judicialized.

It is also asserted that statutory distinctions between adjudication and formal rulemaking have had little effect on the examiner's conduct of administrative hearings or the initial decision-making. It is argued that the APA dichotomy between ratemaking as a "legislative" function and adjudication as a "judicial" function is artificial. Under the APA, ratemaking for a past period, such as in a reparations proceeding, is adjudicatory while prospective ratemaking is rulemaking. Yet both may be determined on the same evidence in the same hearing, and in any event they have many common characteristics.

While initial licensing under the APA is accorded some of the attributes of rulemaking, such as an exemption from separation-of-functions requirements, it nevertheless is defined as "adjudication" by the APA. Yet initial licensing has many of the policy aspects of ratemaking -- as do anti-trust cases in Federal courts!

At agencies such as the CAB or FPC, on-the-record evidentiary hearings are provided in both licensing and ratemaking proceedings; the rules of evidence are relaxed in both types of hearings; hearsay is allowed with respect to technical matters, direct testimony is taken in advance, and the oral part of the hearing is restricted to cross-examination. In NLRB unfair labor practice trials, strict rules of evidence and safeguards of rights usually associated with criminal trials are generally applied. It is argued, therefore, that the system is already judicialized and that a change to the title "judge" will not tend to undermine the legislative aspects of the examiner's position.

V. ARGUMENTS AGAINST A CHANGE

There are many who are opposed to any change in the title of hearing examiners, and there are some who confine their objections to the use of the word "judge" but are not generally opposed to a title change. Both groups tend to support the same or similar arguments in support of their position.

A. Description of Function

There is strong sentiment expressed that "hearing examiner" adequately describes the function of the APA §11 hearing examiner and that "judge" will serve only to muddy the already murky waters. There are examiners, it is noted, who preside



at rulemaking hearings and at hearings where there are no adversary qualities present. Thus hearings held by SSA examiners to decide claimants' rights are quite different from the complex economic proceedings at the FPC and both differ from the fitness determinations of an FCC examiner in a broadcast license renewal case. All three differ significantly from the factfinding responsibilities and credibility determinations made by the NLRB examiner, and these differences serve to illustrate the difficulties in assigning the same title to all hearing examiners and in using judicial terminology.

B. Confusion With "Judges"

Opponents to a title change often cite confusion with judges as a reason to support their position. They maintain that the role and capacity of a judge of a court of general jurisdiction is simply not analogous to the decision-making problems faced by an examiner and that a judge should not be placed in the same lot with an examiner. In 1966 the Judicial Conference of the United States stated that "hearing examiner" was understood and the proposed change was inappropriate and confusing. In 1970 the Judicial Conference reaffirmed its 1966 position and cited the 1969 action of the Administrative Conference as support for its stand. It is argued that the

views of the Federal judiciary should be given great deference on this question.

It is also charged that the title of "judge" should be reserved, insofar as the Federal Government is involved, to the judges of "constitutional courts" created pursuant to Article III and not extended to the officers staffing "legislative courts." The long historical experience to the contrary is viewed as an unfortunate aberration.

"A 'legislative court' is one with a jurisdiction including nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been committed exclusively to executive officers."^{14/} Article III §1 of the Constitution provides:

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

From the very earliest days of the Republic, the officers who staffed "courts" created by Congress pursuant to Article I have been referred to as "judges" but over the years there has been a marked tendency to convert these legislative courts into

into constitutional courts. During the 1950's, statutes were passed in which the Congress declared the Court of Claims and the Court of Customs and Patent Appeals to be courts established under Article III. In Glidden Company v. Zdanok,^{15/} the Supreme Court held that these courts had been transformed into "constitutional" courts and that the assignment of judges or retired judges of these courts to sit with courts which are clearly constitutional was valid. There was disagreement as to when and how these courts became "constitutional" courts. The opinions for the majority recognized, however, that the jurisdiction of these courts over congressional reference cases and review of certain Tariff Commission findings may go beyond the judicial power that can be given to a "constitutional" court. Justice Harlan's test was:

"Whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite."^{16/}

Application of the title "judges" to hearing examiners, some fear, may initiate some of the same developments that have been encountered with other legislative courts. Increased independence and "overjudicialization" might interfere with an agency's control of its hearing examiners on questions of law and policy. And

"judges," it is felt, should be appointed by the President with the consent of the Senate and removed by impeachment rather than by the U. S. Civil Service Commission. Those resisting a title change believe that Congress' failure to reserve the power of advice and consent over Hearing Examiners and the grant of the power of appointment to the Civil Service Commission are clear indicia that hearing examiners do not preside over "courts" and should not, therefore, be called "judges."

C. "Hearing Examiner" Sufficiently Honorific

"Hearing Examiner" has been in use since 1946 and there are many who believe it is a familiar designation and one that imparts dignity and status to the office with which it is associated. Even those who do not oppose a title change per se may find the use of "judge" inappropriate. The center of this particular issue focuses on the belief that there is a wide disparity among hearing examiner positions. At the present time there are 680 hearing examiners distributed among 23 agencies. More than one-half of these examiners have a grade designation of GS-15 and of those, 345 are employed by the Social Security Administration. It is asserted that a single title such as "administrative trial judge" would confer inappropriate formality upon proceedings

that benefit from their very informality, such as SSA hearings. This argument has led some observers to call for a distinction in title between GS-15 and GS-16 hearing examiners, with the title of "administrative trial judge" reserved for the latter group.

Additionally it is pointed out that examiners do not have the independence or scope of legal interpretation accorded to judges. An examiner is bound by his agency's statute and while he is free to interpret that statute within certain limits, he can neither declare it unconstitutional nor choose to ignore it. While the examiner is insulated from pressures that might affect his decision, his decision is subject to restraints not imposed upon a judge.

D. Status Determined by Performance

It is a commonly held belief that status and respect do not flow from titles or labels but rather from first-rate performance. Those who share this belief assert that the only way the hearing examiner will increase his status and the respect for his position is by putting out a better work product, conducting more dignified hearings, and comporting himself in a manner befitting his office. A change of name will not produce

these desired effects; only a concerted effort by the hearing examiners themselves will earn them the status and dignity they believe they deserve. The best public relations, in this view, is to do a good job.

E. Recruitment and Retention

It is well known that a hearing examiner has a terminal position, that he will either die in office or retire due to illness or Government regulations. Therefore, a change of title will have no effect on the retention rate of hearing examiners.

According to Civil Service Commission officials, there are about 130 people on the GS-16 register and 112 people on the GS-15 register, and the Civil Service Commission plans to hire 30 examiners in March. Both registers, according to Civil Service Commission officials, are at an adequate level. These officials have stated that the basic difficulty faced in recruiting hearing examiners is the high standards that must be met to satisfy civil service requirements. While they feel that a change in title might help, they feel that the major difficulty is simply one of numbers, of finding enough qualified people to pass the rigid tests set forth by the Commission. The perceptions of officials in agencies which need new hearing examiners are different on this question; they emphasize the limited number and quality of persons on the registers.

F. Effect on Agency Review ("Overjudicialization")

Opponents of a title change believe that agency control on policy and agency supervision of hearing examiners will be adversely affected if examiners are called "judges." In both the FCC and the ICC employee review boards review the hearing examiner's decision. It is argued that these review boards, which are at least partially composed of GS-12's and 13's, would be intimidated if the decisions they were reviewing had been handed down by a "judge." It is also argued that once an examiner is called "judge," he will feel freer to act independent of established agency policy, changing it as he sees fit.

Overjudicialization is another objection raised and is the source of the argument that once an examiner is called "judge," his entire function will begin to look less like the administrative function it was intended to be and more like that of an Article III court. A judge decides "adjudicatory" matters whereas the examiner's work also involves "rulemaking" (such as ratemaking and licensing) and use of the word "judge" tends to ignore these important legislative aspects of the examiner's job.

Agency heads have not tended to echo these concerns about "overjudicialization." But several of them feel that the relations of their agencies to reviewing courts, which they depend upon for enforcement of orders, will be adversely affected due to judicial hostility to the use of the term "judge" with respect to hearing examiners.

VI. THE ISSUE OF UNIFORMITY

A. Against Uniformity

In addition to whether there should be a title change, there is also the question of whether all hearing examiners should have the same title. Some Government officials cite the variations in the examiner's job from agency to agency as support for letting the agencies choose their own designations for their APA §11 hearing examiners. Other officials see a logical cut-off point for title distinctions through the GS rating system. They advocate the title "administrative trial judge" or something similar for all those having a GS rating of 16 or above and an appropriate title that does not include "judge" (such as "hearing examiner") for examiners with a GS rating of 15 or below. Practically speaking, the Social Security Administration examiners are the focal point of this particular controversy. It is asserted that the 345 SSA examiners do not have the responsibilities or judicial functions of the GS-16 examiners in the major regulatory agencies and

that they therefore should not be called "judge." This argument gathers additional force when it is realized that the number of SSA examiners will double by 1973 and the title "judge" would therefore be spread very thin. SSA examiners generally preside over disability and related claims; generally only one claimant appears at each hearing; only about one-third of the claimants engage the services of an attorney; and a staff lawyer does not ordinarily participate. The line can easily be drawn between GS-15 and 16 when assigning titles although there are some exceptions in each category that may merit particular attention.

B. For Uniformity

Those who favor the use of the same title for all APA §11 hearing examiners regardless of GS rating or agency believe that the examiner's function is basically alike for all agencies despite statutory distinctions. The differences that do exist are generally in terms of the substantive issues involved and their complexity. The rendering of a written decision on a record which becomes a final decision unless appealed and the holding of evidentiary hearings are common denominators for most agencies. While disability determinations involve individual citizens, so do personal injury and petty criminal cases, in many of which the parties are unrepresented and the case turns on issues of fact relating

to the individual. Moreover, under Civil Service Commission practice, a hearing examiner is fungible and can move from agency to agency after his initial appointment either on a loan or permanent basis.

It is also emphasized that while there are different GS ratings for examiners, there are also different kinds of judges, yet all are called "judges." At the state and local level a wide variety of officials of tribunals of limited jurisdiction and significance are given the title of "judge." It is asserted, therefore, that all those who qualify under APA §11 can be called by the same title even if their functions do vary slightly. To differentiate in title would only make it more difficult to find able people to fill the GS-15 examiner positions.

The SSA officials point out that all SSA hearing examiners must be lawyers, that they operate as independent entities and hand down final decisions. The great increase in SSA claims has required expeditious as well as judicious handling of cases: approximately 40,000 hearings were held in fiscal year 1970, 50,000 in fiscal year 1971, and there may be as many as 120,000 in fiscal 1972.

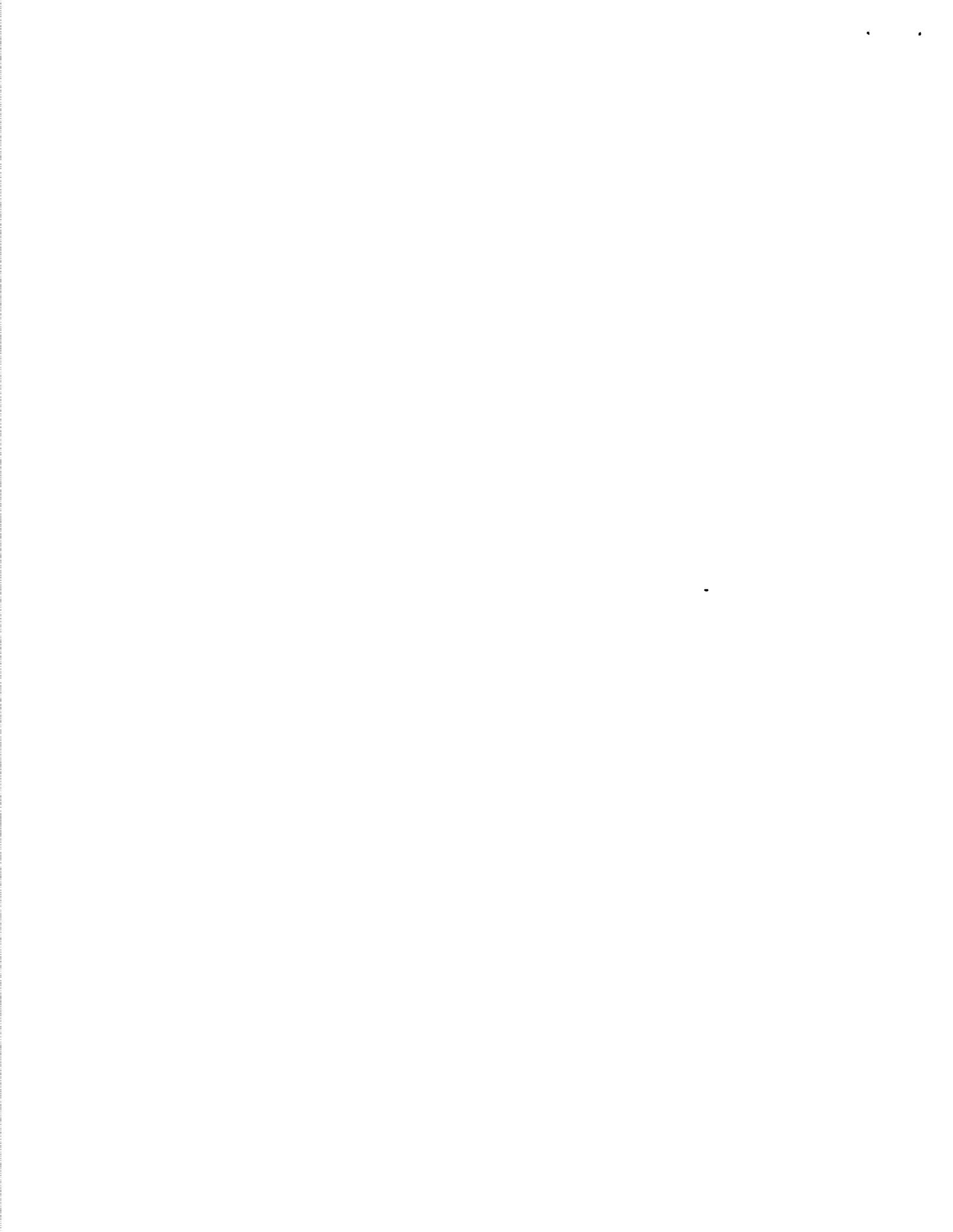
VII. CONCLUSION

In this concluding section I will state my own tentative views on the three questions at issue: (1) Should there be a title change for any group of hearing examiner, or for all hearing examiners, and, if so, to what? (2) Should a single title be applied to all hearing examiners employed by the Federal Government pursuant to section 11 of the APA? (3) Should individual agencies be permitted to change the title of their own hearing examiners insofar as they deal with the public in cases of an adjudicatory character? A fourth question, the answer to which I believe is dependent upon the resolution of the above questions, is then reached: Is the Administrative Conference in a position to make a useful contribution to this problem at this time, and, if so, how?

1. Change of title of all hearing examiners to "administrative trial judge." A number of Federal agencies favor a change in title. A major goal of the Federal Trial Examiners Conference is to change the title of all Federal hearing examiners to "administrative trial judge." Hearing examiners and their supporters are unlikely to be satisfied with anything less. No other alternative offers the possibility of successfully resolving the problem; and any attempt to create a new title, as the 1969 experience of the Administrative Conference with "Administrative Chancellor" indicates, raises more problems than it solves.

My personal view is that it is desirable to change the title of all Federal hearing examiners to "administrative trial judge." The change would put an end to the problem by satisfying the hearing examiners. It would have a number of beneficial effects without, in my view, any negative consequences. It would encourage higher standards and improved performance on the part of hearing examiners -- titles, self-image, and expectations of performance are important influences on the behavior of professional groups and do tend to be self-fulfilling. People tend to joke about other people's concern with titles (or license plate numbers), but they do not joke about their own titles or status, which are viewed as being terribly important. Title change would also have a beneficial effect on recruitment of hearing examiners in a period of substantial growth of the hearing examiner corps. The demand for new, well-qualified examiners is strong and recruitment efforts would be aided by the change.

I do not give great weight to the opposition of the Federal judiciary or to the somewhat metaphysical arguments based on Article III. To the extent that the 1970 or current position of the Judicial Conference of the United States rests on the rather inconclusive 1969 action of the Administrative Conference, it would be circular for us now to defer to the view of the Judicial Conference. The



substantive basis for the Judicial Conference opposition to the title change must be guessed at since the Judicial Conference does not make available to the public the committee reports on which its actions are based. A number of conversations which I have had with individual Federal judges have indicated that the principal bases of the Judicial Conference position are: (1) a fear that the status of Federal judges will be diluted if administrative hearing officers are included within the term "judge," even though qualifying language ("administrative trial judge") clearly differentiates the task and the institutional context; and (2) the assertion that the present title of "hearing examiner" is adequately honorific, well understood, and that a case for a change has not been made. I think that the first argument will not withstand public statement and scrutiny, while the second is outweighed by the opposing arguments.

2. A single title for all Federal hearing examiners.

My preference is for the single title of "administrative trial judge" for all Federal hearing examiners. The argument here largely turns on one's view of the importance and character of the functions performed by Social Security Administration hearing examiners. My view is that this function is clearly

adjudicatory in character and at least as important to the individuals affected as the repetitive personal injury and petty criminal cases on which Federal and state judges spend most of their time. Why should lower status or dignity be accorded to the proceedings in which individual citizens press their claims, highly important to each individual, of entitlement to governmental benefits? Moreover, as claims to entitlement multiply in the welfare state, it is in this area that the beneficial effect of title change on recruitment and performance is likely to have the greatest effects.

There is room, however, for a compromise position on this question. The potential explosion of the need for hearing officers in the Department of Health, Education and Welfare, when combined with the administrative difficulties of supervising such a large number of "independent" hearing officers, suggests the possibility of utilizing "administrative trial judge" for a substantial number of senior HEW hearing officers (perhaps as many as 200), while retaining the present title or a new one such as "referee" for the remainder of the hearing examiner corps. One approach of this kind would provide HEW with greater control over the selection, promotion and conduct of "referees," while retaining APA independence for the "administrative trial judges" who would supervise their work. (See the unofficial views of the Social Security Administration at pp. 64-66, infra.)

3. Opportunity of individual agencies to determine title at least for certain purposes. A 1969 opinion letter of Anthony Mondello, which is reprinted as Appendix D (pages 66-67) of the FTEC's publication "The Case for Administrative Trial Judge," stated that:

"In view of the exception in 5 U.S.C. 5105(c) [allowing the use of organizational or other titles by agencies for internal administration, public convenience, law enforcement, or similar purposes], I have no doubt as to the authority of agencies to establish and use a title other than the official class title for the purposes set forth in the exception. However, since an agency established title could not be used for 'personnel, budget, and fiscal purposes', I would not consider it reasonable or feasible to effect such a significant Government-wide change of title by the independent actions of individual agencies."

The caution expressed in the last sentence became a reality when the FTEC and FPC moved to retitle their hearing examiners, for purposes of internal administration and dealing with the public in connection with "adjudicatory" proceedings. The Civil Service Commission is now moving to block any such independent action on the part of individual agencies. (A copy of the recently promulgated Commission rule on this subject is included in Appendix A.)

I believe that one's attitude on this question is very much influenced by one's position on the desirability of a title change for hearing examiners. Those who favor a title change are apt to emphasize the diversity and freedom that 5 U.S.C. 5105(c) appears to contemplate. After all, the

NLRB for sometime has referred in its rules to its "Trial Examiners" as individuals who act as "administrative trial judges" and has required members of its staff to address them as "Judge." Although an individual agency cannot affect the title established by the Civil Service Commission for "personnel, budget, and fiscal purposes," why should it not be free to take any other steps for other purposes which it thinks desirable?

Opponents to any title change for hearing examiners are likely to emphasize the "nose of the camel in the tent" or "divide-and-conquer" themes that may be the practical results of adoption by individual agencies of a changed title. There is no doubt that such steps would create pressures for similar efforts by other agencies. An agency's failure to respond to those pressures would be likely to create serious morale problems among its hearing examiners and difficulty, relative to agencies that had so responded, in recruiting new examiners. Thus opponents of a title change also tend to oppose any opportunity for different agencies to handle the problem in their own way.

If it is not possible to persuade the Civil Service Commission to change the title of all Federal hearing examiners, I would at least attempt to preserve the authority of individual agencies to act independently. But I recognize that, if a majority of the Council is opposed to the title change, the same majority is likely to be opposed to independent agency action.

4. Role of the Administrative Conference at this time. I believe that it would not serve a useful purpose for the Assembly of the Administrative Conference to consider this question anew unless there is a strong likelihood that a decisive position will emerge. If the Council were to favor a change of the title of hearing examiners to "administrative trial judge," I believe that the Assembly would follow the Council's lead. An endorsement by the Conference would create a great deal of momentum in support of change.

On the other hand, if the Council opposes the change, I believe that that view can be communicated to the Civil Service Commission with or without further discussion of the question by the Assembly. A strong expression of opinion against the change is likely to be a decisive influence in preserving the status quo.

The third possibility is that the Council will be divided on the desirability of a change. If so, the Assembly is also likely to be divided. An inconclusive reconsideration of the question by the Assembly would not serve any useful purpose. Thus, if the Council is fairly evenly divided on the principal question, I believe that we should merely report to the Civil Service Commission that we have no further intelligence to offer.

Footnotes

- 1/ John W. Macy, Jr., The APA and the Hearing Examiner: Products of a Viable Society, 27 Federal Bar Journal 384 (1967).
- 2/ Universal Camera Corp. v. N.L.R.B. 340 U.S. 474 (1951).
- 3/ Report on Legal Services and Procedure, prepared for the Commission on Organization of the Executive Branch of the Government by the Task Force on Legal Services and Procedure (March 1955), p. 197-198.
- 4/ Ibid.
- 5/ Ibid.
- 6/ Ibid. at 215.
- 7/ The arguments presented below are geared to the proposed title, "administrative trial judge." It is to be noted, however, that the Conference remains open to viable alternatives in finding a replacement for "hearing examiner" should such a replacement be deemed necessary and that the arguments put forth below should serve as guidelines in the selection of any title.
- 8/ September 16, 1969.
- 9/ Ibid.
- 10/ Lloyd D. Musolf, "Federal Examiners and the Conflict of Law and Administration", pp. 129-130.
- 11/ Earl Kintner, in The Case for Administrative Trial Judge, p.27, Federal Trial Examiners' Conference, Washington, D.C. 1969.
- 12/ Justice Tom Clark, ibid., p. 23.
- 13/ Peter F. Drucker, The Practice of Management, p. 154, Harper and Bros., New York, 1954.

14/ Ex Parte Bakelite Corporation, 279 U.S. 438, (1929).

15/ 370 U.S. 530 (1962).

16/ 370 U.S. at 552.

APPENDIX A. RECENT CORRESPONDENCE

Letter of Robert E. Hampton, Chairman, U.S. Civil Service Commission to Roger C. Cramton, Chairman, Administrative Conference of the United States, dated February 29, 1972 (with enclosures).....

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UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

FEB 29 1972

IN REPLY PLEASE REFER TO

YOUR REFERENCE

Honorable Roger C. Cramton
Chairman, Administrative Conference
of the United States
726 Jackson Place N.W.
Washington, D.C. 20506

Dear Mr. Chairman:

Attached are copies of self-explanatory letters I have written to Chairmen Nassikas and Kirkpatrick of the Federal Power Commission and the Federal Trade Commission respectively, concerning title change for the position of hearing examiner. Also attached is a copy of the addition of section 930.233a to our regulation in title 5 of the Code of Federal Regulations which sets the single title of "hearing examiner" for all purposes dealing with such positions, and a copy of the Federal Personnel Manual Letter No. 930-3, dated March 1, 1972, which announces that the Civil Service Commission will immediately place under study the question whether a more appropriate title should be adopted.

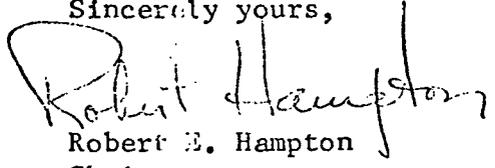
The study we plan will follow the outlines of an exercise in informal rulemaking in which the relatively few interested persons and organizations will have a voice. Initially we would appreciate the assistance of your Conference in several ways. First, we would like to draw on its expertise, both generally in administrative practice matters and specifically because of its previous involvement with a proposed title change for hearing examiners, for whatever guidance or recommendations it may have. In view of the possible extensive expansion of the hearing examiner corps, we would be particularly interested in your views on the practicability of making distinctions among hearing examiners based on real differences in the functions they perform and the nature of the cases they handle.

Secondly, we understand that your Conference has established liaison with the Judicial Conference of the United States, and we solicit your good offices to the end of obtaining from the Judicial Conference a more detailed and reasoned basis for whatever judgment it currently holds on the use of a title containing the word "judge", or concerning any title or class of titles it may consider objectionable for use by hearing examiners.

Following receipt of your Conference's views, this Commission would adopt a tentative position, or perhaps a series of alternative positions, which it would circulate to hearing examiners through their Federal Trial Examiners Conference, to the agency heads who do or may employ substantial numbers of hearing examiners, and to the bar associations. Upon receipt of all views, we would then determine what change, if any, was necessary or desirable.

We would appreciate your advice on the feasibility and adequacy of this approach, or if you find it both feasible and adequate, your views on the merits of title change.

Sincerely yours,



Robert E. Hampton
Chairman

51
FEB 28 1972

Honorable John N. Nassikas
Chairman, Federal Power Commission
Washington, D. C. 20426

Dear Mr. Chairman:

This has further reference to the matter of changing of title for the hearing examiner position. On February 16, 1972 this Commission took action to adopt the title of "Hearing Examiner" for personnel, budget, fiscal, and all other purposes concerning hearing examiners. A draft copy of the Federal Personnel Manual Letter which will be sent in the immediate future to all agencies is enclosed, and explains the nature of the precise action we have taken.

I recognize that this action by the Commission does not accord with the judgments expressed by your associate Commissioners and yourself concerning title change. I ask, however, that you consider the problem this Commission was facing.

A critical situation is developing in the hearing examiner area. H.R. 1 (Welfare Reform Act) currently being considered in committee in the Senate, contains a provision for full Administrative Procedure Act-type hearings for claims arising in connection with the new Family Assistance Program and the Adult Categories Program to be administered by the Department of Health, Education, and Welfare, and the Opportunities for Families Program of the Department of Labor. While these will be Administrative Procedure Act-type proceedings, the authority for appointment that is contained in the legislation will be vested in the Secretary of the Department of Health, Education, and Welfare, without any requirement for selection from Civil Service Commission registers.

It is estimated that the number of hearing examiners required for the Family Assistance Program will be between 800 and 1000; for the Social Security Administration and Adult Categories Program about 500; and for the Department of Labor Opportunities for Families Program about 500.



It is not clear at this juncture whether the kinds of proceedings in which these proposed hearing examiners would be employed require the full range of Administrative Procedure Act procedures. Thus, what we face in the immediate future is possible establishment of a corps of hearing examiners well above the 2000 mark performing a currently unclarified variety of benefit-determination functions to which there may or may not be attached a requirement to follow Administrative Procedure Act procedures.

While the problem of distinguishing between the kinds of functions known to be performed by the hearing examiners in your Commission, and the somewhat different functions currently performed by examiners in the Department of Health, Education, and Welfare, may have formerly deserved recognition, in a corps such as that which may soon be established, that problem becomes of far greater import.

By mentioning these factors I do not mean to suggest that we will not resolve the question of change of hearing examiner title until these future events have unfolded. Rather I would expect the Commission to take these matters into account without delay and, in consultation with the major agencies employing hearing examiners of all types, determine as quickly as possible an appropriate title, or appropriate titles, for all of them. While I cannot offer you any guarantee as to when, or if, the current title will be changed, I can promise you we will move on it quickly.

In this connection I think it only fair to suggest that this Commission would not feel warranted in adopting a title including the designation "Judge" without some exploration of the views of the Judicial Conference of the United States. Also, while I am aware of what transpired on title change before the Administrative Conference of the United States in plenary session, I would feel remiss if we did not consult with the Chairman of the Conference currently. I understand that he has collected all information formerly referred to the Conference or in its possession on the subject of title change, and that he is prepared to discuss the matter further at the next meeting he holds with the Council of the Administrative Conference. I am informed this will take place before the middle of next month so that all told these consultations, which I consider necessary, should not take over-long.

Since the nature of the proceedings conducted by hearing examiners may well be dispositive of the language used in a title to describe them, I would be especially interested to hear from you concerning those elements of the differences in function between examiners conducting different kinds of proceedings which you think should be title-determinative.

Sincerely yours,

Robert E. Hampton
Chairman

Enclosure

Ingram 53
FEB 28 1972

Honorable Miles W. Kirkpatrick
Chairman, Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Chairman:

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It is not clear at this juncture whether the kinds of proceedings in which these proposed hearing examiners would be employed require the full range of Administrative Procedure Act procedures. Thus, what we

face in the immediate future is possible establishment of a corps of hearing examiners well above the 2000 mark performing a currently unclarified variety of benefit-determination functions to which there may or may not be attached a requirement to follow Administrative Procedure Act procedures.

While the problem of distinguishing between the kinds of functions known to be performed by the hearing examiners in your Commission, and the somewhat different functions currently performed by examiners in the Department of Health, Education, and Welfare, may have formerly deserved recognition, in a corps such as that which may soon be established, that problem becomes of far greater import.

By mentioning these factors I do not mean to suggest that we will not resolve the question of change of hearing examiner title until these future events have unfolded. Rather I would expect the Commission to take these matters into account without delay and, in consultation with the major agencies employing hearing examiners of all types, determine as quickly as possible on an appropriate title, or appropriate titles, for all of them. While I cannot offer you any guarantee as to when, or if, the current title will be changed, I can promise you we will move on it quickly.

In this connection I think it only fair to suggest that this Commission would not feel warranted in adopting a title including the designation "Judge" without some exploration of the views of the Judicial Conference of the United States. Also, while I am aware of what transpired on title change before the Administrative Conference of the United States in plenary session, I would feel remiss if we did not consult with the Chairman of the Conference currently. I understand that he has collected all information formerly referred to the Conference or in its possession on the subject of title change, and that he is prepared to discuss the matter further at the next meeting he holds with the Council of the Administrative Conference. I am informed this will take place before the middle of next month so that all told these consultations, which I consider necessary, should not take over-long.

Since the nature of the proceedings conducted by hearing examiners may well be descriptive of the language used in a title to describe them, I would be especially interested to hear from you concerning those elements of the differences in function between examiners conducting different kinds of proceedings which you think should be title-determinative.

Sincerely yours,

Robert E. Hampton
Chairman

*Bill
Miles 2/28*
Enclosure

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FPM LTR. NO. 930-8

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UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL SYSTEM

LETTER

Washington, D.C. 20415

March 1, 1972

FPM LETTER NO. 930-8

SUBJECT: Amendment to Regulations governing hearing examiners

Heads of Departments and Independent Establishments:

1. The Commission has approved a change in its regulations governing hearing examiners (subpart B of part 930). The amendment in the regulations is for the purpose of requiring the use of the official class title for all purposes.

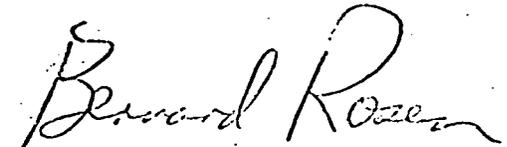
2. Reasons for the Amendment

Recently several Federal agencies have considered using a title different from that of "hearing examiner". The Civil Service Commission feels that it is in the best interests of orderly and efficient administration to regulate use of the title for hearing examiner positions. Leaving the matter to each individual agency could well result in a myriad of descriptive titles describing the same position--a circumstance which would add a great deal of confusion to interested persons both within and outside the government.

3. The Commission will immediately place under study the question whether a more appropriate title than that of "hearing examiner" should be adopted.

4. The attached amendment to section 930.203 is effective March 2, 1972.

By direction of the Commission:



Bernard Rosen
Executive Director

Attachments

INQUIRIES: Office of Hearing Examiner, 63-24604 or Code 101, Extension 24604

CSC CODE 930, Programs for specific positions and examinations

DISTRIBUTION: FPM

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Subpart B, Part 930
Appointment, Pay, and Removal of Hearing Examiners

Sec. 930.203a Title of Hearing Examiner

The title of "hearing examiner" is the official class title for a hearing examiner position and shall be used for personnel, budget, fiscal, and all other purposes, notwithstanding section 5105(c) of title 5, United States Code.

APPENDIX B. SYNOPSIS OF ADMINISTRATIVE CONFERENCE
DEBATE, OCTOBER 22, 1969

The following pages contain a synopsis of the debate on the recommendations of the Committee on Personnel on a proposed change of title of hearing examiners.

Commissioner Hardin:

Chairman of the Committee on Personnel, Commissioner Hardin, spoke in favor of a change of title for hearing examiners. He stated that the Committee, with one member dissenting, found a necessity to improve the status of Federal trial examiners, particularly in the eyes of those who are not knowledgeable about the functions and structure of administrative hearings.

There was some debate as to the desirability of considering Recommendations 1 and 2 (whether a change in title should be made and what the title should be) together between Mr. Seymour and unidentified Conference members. It was decided by a voice vote to consider the two recommendations together.

Commissioner Hardin:

Commissioner Hardin then addressed himself to Recommendation 2, proposing "Administrative Chancellor" as the new title for hearing examiners. This title was chosen as one descriptive of the position yet not to be confused with judges presiding in Federal Judicial proceedings. It was also pointed out that the Hearing Examiners supported this choice of title without abandoning their ultimate goal of being called "Administrative Trial Judge."

Mr. Flaningam:

Mr. Flaningam discussed the need for a change of title, emphasizing the misconceptions held by the public as to exactly who a hearing examiner is and what he does. Mr. Flaningam took the position that a change of title would have numerous beneficial effects: increased public confidence in the federal administrative system; greater public assurance of the impartiality and independence of the hearing examiner; and improved performance by the hearing examiner. He also endorsed "Administrative Trial Judge" as his choice for a new title.

Professor Redford:

Professor Redford stated that he was the member of the Committee who dissented from both "Administrative Chancellor" and "Administrative Trial Judge."

Mr. Seymour:

Mr. Seymour strongly opposed a change to either "Administrative Chancellor" or "Administrative Trial Judge." He found the concern of the hearing examiners about their public image "completely mistaken" and that public image depends upon performance. He suggested "Hearing Commissioner," "Hearing Officer," "Administrative Officer," or "Administrative Trial Commissioner" as more reflective of the type of work done by a hearing examiner in the event that a title change was found desirable. He cited the opposition of the Judicial Conference of the United States to "Administrative Trial Judge" as support for his position and called for serious consideration to be given to the views of the average lawyer appearing at administrative hearings and the average Federal Judge.

Mr. Van Dusen:

Mr. Van Dusen rose to correct the impression that the Committee proposal had the support of the Department of Housing and Urban Development. He expressed agreement with Mr. Seymour and put HUD on record as being opposed to the change.

Mr. Paglin:

Mr. Paglin asked to have the record show that while the FCC favored a change, its choice was "Hearing Officer."

Professor Redford:

Professor Redford spoke in opposition to the proposed title change, giving the nonjudicial and review aspects of an examiner's job as reasons for his opinion. He believed it would be a mistake to call one who recommends a decision,

especially a decision appealable to an Administrative body, "judge." He also objected to "Administrative Chancellor" on the ground that it would add "confusion rather than clarification ... to the position" of examiners.

Mr. Silberman:

Mr. Silberman was against both "Administrative Chancellor" and "Administrative Trial Judge" and cited the practice of allowing non-lawyers to represent clients at administrative hearings as one of the reasons for his position.

Mr. Westwood:

Mr. Westwood moved to substitute "Administrative Trial Judge" for "Administrative Chancellor" in Recommendation 2 and his motion was seconded. He then spoke in favor of a title change as a way in which to increase the dignity and status of the hearing examiner's job and thereby enhance the quality of both the administrative process and the men discharging that process.

Mr. Russell:

Mr. Russell spoke in favor of a change to "Administrative Trial Judge" as a title descriptive of the work done by hearing examiners. He pointed to similarities between a judge's function and that of an examiner and found a "precise parallel" between the two positions. He doubted that any Federal District or Circuit Judge would be hurt by the title change and pointed out that the change could be made without expense or harm to anyone.

Mr. Sellers:

Mr. Sellers compared the function of a judge with that of a hearing examiner and found the two to be very similar. He saw no "diminution in the prestige and role of Federal Judges because the Administrative fact finders -- and indeed, in many cases, initial decision makers -- might have a title that someone may confuse with that of the Constitutional judiciary."

Mr. Barker:

Mr. Barker discussed the relevance of a title in today's society, saying that "titles carry dignity, authority, and in some cases, honor." He told an anecdote about one of his clients who was surprised to learn that a hearing examiner's opinion could be more detrimental than that of a judge as an illustration of public confusion about hearing examiners. He also referred to the ABA Committee on Practice and Procedure under the Labor Law Section and read their recommendation favoring a title change to "Administrative Trial Judge."

Chairman Nassikas:

Chairman Nassikas favored the change from hearing examiner to "Administrative Trial Judge." He compared the matters handled in municipal, district, probate, and surrogate courts with those in which Administrative agencies are involved and concluded that in numerous instances, hearing examiners dealt with more complex, more important matters than those facing judges. He found the title "judge" consistent with "the responsibilities, the authority, and the dignity of the office of trial examiner." He also felt that a more appropriate title would aid recruiting efforts.

Professor Nathanson:

Professor Nathanson disagreed with Mr. Westwood and Mr. Russell and opposed the suggested title change. He said that it would be best to decide this issue definitely now, thereby allowing examiners to focus on providing the performance that would bring them the status they seek.

Mr. Wozencraft:

Mr. Wozencraft did not believe that either public enlightenment or a change in status would be achieved by a title change. He predicted further confusion if "Chancellor" or "Administrative Trial Judge" were adopted but was open to other suggestions that would increase the dignity accorded to hearing examiners.

Professor Park:

Professor Park sought to clarify the Committee's understanding of the positions taken by FCC and HUD on the proposed title change. He read responses from these two agencies and maintained that these responses "did not constitute either an objection to, or criticism of, 'Administrative Trial Judge.'"

Mr. Ruhlen:

Mr. Ruhlen, a Hearing Examiner with the CAB, stated his support for a change to "Administrative Trial Judge." He cited public confusion about the title "hearing examiner" and difficulty in recruiting examiners as support for his stand. Mr. Ruhlen defended the examiners' "educational campaign," saying that it was not a lobby but merely an attempt to inform members of the Conference about the Personnel Committee's hearings and survey.

Mr. Hess: Mr. Hess, speaking for the Social Security Administration, favored the title "Administrative Trial Judge" as a means to further a judicial atmosphere at hearings. He found "Hearing Examiner" nondescriptive and "Chancellor" confusing.

Mr. Wall:

Mr. Wall quoted a statement from the acting General Counsel of the Department of Defense in announcing his support for a title change. He also favored "Administrative Trial Judge" over "Chancellor."

Mr. Keatinge:

Mr. Keatinge, former Chairman of the Administrative Law Section of the American Bar, urged a change to "Administrative Trial Judge" giving growing difficulties in recruitment as a reason for his views. He explained that the panels of the ABA had had only a small number of qualified applicants in the past few years and that lack of status and prestige contributed to the declining number of applications for hearing examiner jobs.



The Conference members then voted on the main motion, adoption of Recommendations 1 and 2 with the words "Administrative Trial Judge" substituted for the words "Administrative Chancellor." The recommendation was defeated by a vote of 30 to 23, and Recommendations 3 and 4 were automatically dropped. The Conference, after a short adjournment, then considered other business.

APPENDIX C. AGENCY VIEWS ON THE PROPOSED TITLE CHANGE

A partial and incomplete survey of a number of agencies that use hearing examiners provides a preliminary picture of the views of Federal agencies on the question of a title change for hearing examiners. The information summarized below should not be viewed as an official agency position, but as the prevailing sentiment within each agency based on private conversation with agency heads and high-level staff. While each individual expressed his own personal feelings, he also endeavored to voice the general tenor of opinion within the agency. The agencies are listed in an order that reflects the number of hearing examiners that they employ.

Social Security Administration of the
Department of Health, Education, and Welfare

The Social Security Administration employs 345 hearing examiners and has 340 prospective vacancies with respect to disability benefit cases (including the growing number of "Black lung" cases). The enactment of welfare reform legislation and other pending proposals would create a staggering new demand for hearing officers, estimated at 1,000 or more. In view of these uncertainties the position of the Social Security Administration is not entirely clear. SSA did not oppose the title change in 1969; and Arthur Hess

supported "administrative trial judge" in the Administrative Conference debates. Top officials of SSA believe that the adjudicatory quality of disability and welfare determinations deserves recognition; and that a change to "administrative trial judge" would have a favorable effect on public reception of the process and recruitment of new hearing examiners. And they would oppose proposals which would stigmatize SSA hearing examiners as second-class citizens.

But SSA has encountered problems in recruiting APA hearing examiners and getting effective performance from them. There is doubt in SSA whether it would be desirable to give a GS-16 grade and an enhanced title to all of the current SSA hearing examiners; and even greater doubt whether, if the corps grows to a size of 1,000 or more, that the same title should be borne by everyone. The current thinking in SSA favors a change in title for a supervisory group of hearing examiners (perhaps 200 in number) who would be certified and disciplined by the Civil Service Commission. A larger number of referees or magistrates would handle the bulk of cases under the direction of the Bureau of Hearings and Appeals and the APA hearing examiners. This larger group would be civil service employees, all lawyers, recruited by SSA and subject to personnel management by the Bureau of Hearings and Appeals. Problems encountered in processing a massive volume of individual claims with a proper

balance of expedition, fairness, accuracy and consistency loom much larger in SSA than in agencies in which individual proceedings may be virtually unique and hand-tailored. SSA proceedings may require more supervision and control than is permitted by the developing notions of hearing examiner "independence." The Administrative Conference may play a useful role in accommodating the needs of the Social Security Administration with more general concerns.

National Labor Relations Board

The NLRB, which employs 100 hearing examiners and has 10 prospective vacancies, favored a change of title in 1969 and probably continues to do so today. Several members of the Board, however, give considerable weight to the opposition of the Judicial Conference of the United States, fearing that the judges upon whom the Board depends for enforcement of its decisions might resent the change of title. Also, they are concerned about congressional attitudes on the subject. However, if satisfied that repercussions would not emanate from the judiciary or the Congress, the Board feels that the positive aspects of a title change are substantial: improved morale, better recruitment and possibly improved hearing examiner performance. The title change is not viewed as a total panacea of hearing examiner problems: other changes, such as increase in secretarial help for examiners and provision of law clerk assistance, would also have beneficial effects wholly apart from a title change.



Interstate Commerce Commission

The ICC employs 78 hearing examiners and has at least 15 prospective vacancies. In 1969 a majority of the ICC opposed a title change for hearing examiners. The Commission may, however, be more favorably disposed to a change now. There is a high rate of turnover among ICC hearing examiners; twenty are now eligible for retirement, ten have left since June 1971 and five more are expected to leave by June. It is believed that a change of title would be an aid in recruiting. Along with a title change, ICC also desires a revision of Civil Service requirements applicable to hearing examiners. The Commission wants high-level agency personnel to participate in the grading process and recommends that less emphasis be given to the applicant with a long term of years of service as an attorney in order to attract the younger, more vital person who seeks a challenging job.

Civil Aeronautics Board

The CAB, which employs 22 hearing examiners, does not have a clear position on title change. In 1969 a majority of the Board opposed the change and that may still be the case. While opponents of the change don't foresee an undermining of the actual authority of the agency's power to overturn an examiner's



decision, they do predict that public misunderstanding and poor public relations will result when an administrative agency seeks to review the decision of a "judge." This position might change if other Federal agencies or the Administrative Conference came out in favor of a new title. The CAB has no difficulty with recruitment now but many of its hearing examiners are eligible for retirement. The Board may view a title change as a partial solution to its impending recruitment problem.

Federal Power Commission

The FPC, which employs 19 hearing examiners, favors a title change for its own examiners. In 1969 Chairman Nassikas favored a change of title to "administrative trial judge." When the FTC indicated in 1971 it was going ahead with a title change, the FPC decided that it too would implement a title change, subject to Civil Service Commission action. Many FPC hearing examiners are eligible for retirement and a large number will be mandatorily retired in the next few years. Almost all FPC examiners have come from within the government; lawyers from the private sector either don't apply or don't survive certification process. The FPC, therefore, favors both a title change and a modification

of the certification process to get the most highly qualified people. Some individuals in the FPC would restrict the title "judge" to GS-16's and retain "hearing examiner" for GS-15's.

Federal Trade Commission

The FTC, which employs 11 hearing examiners, favors a title change to "FTC trial judge" and would use this title for adjudicative purposes only. The majority of the Commissioners believe that the examiner engages in truly adversary proceedings and consequently has trial responsibilities as a judicial officer. The Commission is refraining from implementing its proposed change at the request of Civil Service Commission Chairman Hampton.

Atomic Energy Commission

The AEC, which has only one hearing examiner, takes no formal position on the question of a title change for hearing examiners. It is possible however, that the new commissioners at the AEC would be more receptive to both the use of more hearing examiners and a change of title for examiners.

