REPORT IN SUPPORT OF RECOMMENDATION 72-8

PROCEDURES FOR ADVERSE ACTIONS AGAINST FEDERAL EMPLOYEES

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I. Introduction

Since its birth in 1883, the federal civil service system has developed into a modern and viable personnel service.[1] In 1883, competitive service protection extended to only 14,000 employees, just over 10 percent of the total federal payroll. Today approximately 2.5 million employees—more than 85 percent of a now vastly larger federal workforce—are within the competitive service.[2] Originally, the duties of the Civil

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At the invitation of Roger Cramton, former Chairman of the Conference, I have made use of his notes for a study of judicial review of adverse actions. In addition, I have borrowed heavily from the excellent staff report on that subject by John Trezise, a 1971 graduate of the University of Michigan Law School, which was prepared under the supervision of the then-Chairman as an aid to further study and discussion.

Finally, I owe thanks to two members of the 1973 class of the University of Virginia School of Law, Earl Collier and Cameron Smith, who provided valuable assistance in preparing this report.

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[1] *See generally,* Kaufman, The Growth of the Federal Personnel System, in S. W. Sayre (ed.), *The Federal Government Service* 7 (1965).

[2] The civil service is divided into two major classes, the competitive service and the excepted service. Entrance into the competitive service, sometimes referred to as the classified service, is controlled by the competitive service examining process. 5 U.S.C. §§ 3301–64 (Supp. IV, 1965–1968). Excepted positions are not subject to the examining process, but are covered by other provisions of the civil service laws and regulations. See 5 C.F.R. Part 213, Subpart C (1971). Within both the competitive and the excepted services, certain categories of employment have a particular effect on employee tenure. These include the categories of probationary or trial period employment. 5 C.F.R. Part 315, Subpart H (1971); 5 C.F.R. §§ 2108, 3309, 3502(a)(2), 7512, 7701 (Supp. IV, 1965–1968). Of less importance, but still pertinent to the tenure distinction, are the subcategories of

Service Commission consisted largely of screening applicants for federal employment,[3] but in the intervening years the Commission's jurisdiction has expanded greatly.[4] Its principal responsibilities involve affirmative aspects of personnel management. The Commission now supervises a system of position classification and administers federal pay scales and operates both a recruitment program and a pension system and oversees many employee training operations. Policies and procedures for probation, transfers, promotions, attendance, leave and relations with employee organizations are also part of its job. In addition, the Civil Service Commission exercises final authority over the discipline and removal of employees.

Despite the dramatic changes in and improvement of the civil service system, many aspects of federal employment practice have been subject to criticism.[5] Recent controversies have ranged from dispute over the proper role for federal employee unions[6] to the

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temporary employment, term employment, employment outside of the executive branch, and employment for which Senate consent is required. 5 C.F.R. § 752.103(a) (1971).

As of 1968 the breakdown of federal employees by category was as follows:

Competitive Service	2,500,000
Career	1,907,000
Career-conditional	439,000
Temporary and indefinite	154,000
Excepted Service	210,000
Permanent	127,000
Other	83,000

U.S. Department of Commerce, *Statistical Abstract of the United States* 395, Table No. 568 (1968).

[3] Civil Service Act of 1883, ch. 27, 22 Stat. 403.

[4] The present statutory authority for the civil service system is found primarily in 5 U.S.C. Parts II, III (1970). For a history of the expanding functions of the Civil Service Commission, *see generally*, P. Van Riper, *History of the United States Civil Service* (1958).

[5] Van Riper, for one, is critical of the increasing bureaucratization of the civil service:

> [I]ncreasing red tape, greater procedural controls, more restrictive dismissal procedures, and more review and appeal boards—all in the name of justice, security, and fair play for civil service employees, are wreaking havoc with flexibility, administrative discretion, decentralization and ultimately, the individual again.

Van Riper, *supra* note 4, at 529. Cf. W. L. Riordon (ed.), *Plunkitt of Tammany Hall* 11–16 (1963).

The late Thurman Arnold, on the other hand, took the view that the Civil Service Commission fails adequately to protect federal employees:

> Actually . . . the civil service affords practically no protection in the tenure of government service. The head of a department, if he is conscientious, can always get rid of an employee by the process of reorganization that abolishes his job. If he is not conscientious, he can file a list of charges against an employee, listen to the employee's defense in an absent-minded way, and then fire him. The employee can appeal to the courts if he wants to spend his money uselessly. . .

T. Arnold, *Fair Fights and Foul* 151 (1965).

[6] *See generally*, Craver, Bargaining in the Federal Sector, 19 Lab. L.J. 569 (1968); J. Smith, Executive Orders 10988 and 11491 and Craft Recognition in the Federal Service, 48 Mil. L. Rev. 1 (1970); Donoian, Recognition and Collective Bargaining Agreements of Federal Unions—1963–1969, 21 Lab. L.J. 597 (1970); Wray, Crisis in Labor Relations in the Federal Service: An Analysis of Labor Management Relations in Federal Service Under Executive Order 11491, 37 Brooklyn L. Rev. 79 (1970). *Also see* Wellington & Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107 (1969).

government's response to homosexuality among employees[7] to the extent of official encroachment on the privacy of federal workers. A persistent subject of concern has been the conduct and disposition of employee discharge and discipline cases, or "adverse actions."[8] Technically defined, an "adverse action" is any personnel action in which an employee in the classified service or eligible for veterans preference is removed, furloughed without pay, suspended for more than 30 days, or reduced in rank or pay.[9]

Approximately 93 per cent of the federal civilian workforce—nearly 3 million employees—are potentially subject to "adverse action" and entitled to the procedural safeguards Congress and the Civil Service Commission have prescribed for such proceedings. Data about the number of adverse actions initiated each year are unreliable.[10] Extrapolating from what is ostensibly a 10 per cent sample of all adverse actions initiated by government agencies,[11] one obtains estimates of 11,600, 12,700,[12] and 15,700 actions for fiscal years 1969, 1970, and 1971. Each year perhaps one-quarter of these personnel actions are contested by the affected employees, either within their agencies

[7] *See, e.g.*, Recent Decision, Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications, 58 Geo. L.J. 632 (1970); Note, Federal Employment of Homosexuals; Narrowing the Efficiency Standard, 19 Cath. L. Rev. 267 (1969); Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv. L. Rev. 1738 (1969). *See also Mirel*, The Limits of Governmental Inquiry Into the Private Lives of Government Employees, 46 B.U.L. Rev. 1 (1966).

[8] *See generally*, R. Vaughan, *The Spoiled System* (1972); Chaturvedi, Legal Protection Available to Federal Employees Against Wrongful Dismissal, 63 N.W.U. L. Rev. 287 (1970); Adverse Action Symposium: The Development and Exercise of Appellate Powers in Adverse Action Appeals, 19 Am. U. L. Rev. 323 (1970); Berzak, Right's Accorded Federal Employees Against Whom Adverse Personnel Actions are Taken, 47 Notre Dame Lawyer 853 (1972).

[9] 5 U.S.C. § 7511(a) (1970). 5 C.F.R. §§ 752.101, 752.201(b), 752.301(b) (1971).

[10] A recommendation implicit in this statement is that the Civil Service Commission and employing agencies must substantially improve their methods of recording adverse actions and appeals. At the present time no government agency keeps a complete count of all adverse actions taken against federal employees.

[11] The Civil Service Commission retains a computerized record of all personnel actions—including adverse actions—affecting federal employees whose Social Security numbers end in "5". The assumption is that Social Security numbers are randomly distributed through the federal workforce, thus making the experience of this 10 percent representative of the experience of all federal employees.

[12] These figures are my own extrapolation from the Civil Service Commission's 10 per cent sample for each of the three years. Except for the total for fiscal year 1970, the figures correspond closely to those in the annual accounting of personnel appeals compiled by the Commission's Office of Appeals Program Management. See U.S. Civil Service Commission, *Appeals Program Selected Data: Fiscal Years 1969, 1970, and 1971.* The Commission's figure for total adverse actions taken in fiscal 1970 exceeds 19,000, with demotions accounting for most of the difference.

Historically, the Post Office has accounted for more adverse actions initiated and actions contested than any other department or agency. Although here again computation is difficult, it would probably be appropriate to discount my government-wide totals by roughly one-third to approximate the caseload throughout the rest of the government. This share is not high when one considers that the Post Office (now the United States Postal Service) employs no more than one-fifth of all federal civilian employees.

or in appeals to the Civil Service Commission. Reductions in rank or pay, i.e., demotions, account for more than half of all adverse actions. Removals make up the second largest category of actions taken, and amount to well over half of the actions that are contested by emploees. Furloughs and suspensions for more than 30 days represent a comparatively insignificant part of the actual caseload.

Adverse actions not only involve several thousand employees in the federal service each year as well as virtually every government agency; with growing frequency federal personnel cases reach court, often with accompanying discussion in the press. Until little more than a decade ago, federal courts were reluctant to play any significant role in supervising administrative decisions adverse to federal employees.[13] Meaningful judicial review of employee dismissals was, for practical purposes, unavailable.[14] Unless presented with allegations of specific violations of statute or regulation, most courts flatly rejected attempts by discharged employees to obtain judicial redress. The due process clause was considered inapplicable to government management decisions,[15] and dismissals were routinely upheld on the theory that the hiring and firing of employees was an area of executive discretion [16] or on the closely related theory that government employment is not a

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[13] The traditional attitude of the federal courts towards employee discharge cases is discussed in Chaturvedi, Legal Protection Available to Federal Employees Against Wrongful Dismissal, 63 N.W. L. Rev. 287, 307–28 (1968).

[14] *See* Westwood, The "Right" of an Employee of the United States Against Wrongful Discharge, 7 Geo. Wash. L. Rev. 212 (1938), who concludes:

> In any case, as matters now stand, the individual employee is helpless. The [Lloyd-LaFollette] Act of 1912 gives him scant protection, even on its face. . . . And the courts have stood fast against enforcing it.

Id. at 231. Some years earlier Mayers similarly wrote:

> The popular misconception as to the effect of this statute [Lloyd-LaFollette] sometimes is so extreme that it is thought that the employee has the right to invoke a judicial review of the action of the administrative officer in removing him. There is absolutely no warrant for this belief. Should the administrative officer choose to make a wholly unfounded charge against an employee and remove him on the basis of such charge, even if the employee's reply to such charge, filed before removal, were ever so conclusive, there is no way whatever in which the action of the officer may be submitted to a judicial review. . . .

L. Mayers, *The Federal Service* 498 n. 1 (1922). *Cf.* Merton, Judicial Review of the Dismissals of Executive Employees, 23 Geo. Wash. L. Rev. 69 (1954).

[15] Bailey v. Richardson, 182 F. 2d 46, 57 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court,* 341 U.S. 918 (1951). For a critical discussion of the decision, see Gardner, Bailey v. Richardson and the Constitution of the United States, 33 B.U. L. Rev. 176 (1953).

[16] The notion that the executive has unlimited discretion to hire and fire its employees dates back at least to Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839). Other decisions taking this tack include, *e.g.,* Eberlein v. United States, 257 U.S. 582 (1921); Burnap v. United States, 252 U.S. 512 (1920); Shurtleff v. United States, 189 U.S. 311 (1903). In Deak v. Pace, 185 F. 2d 997 (D.C. Cir. 1950), Judge Prettyman in dissent wrote:

> But the fact of the matter is that a Government employee has never in our history had any right to a job except such rights as Congress or the Executive gave him. . . .

185 F. 2d at 1001. *See generally* Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

right, but a privilege.[17] As late as 1950 in *Bailey* v. *Richardson*,[18] affirmed by an equally divided Supreme Court, the D.C. Circuit Court of Appeals stated that: "In terms the due process clause does not apply to the holding of Government office." [19] And even when employees were ostensibly protected by statute or executive regulation, the courts usually required only paper compliance,[20] and entirely rejected allegations of bad faith [21] and insufficiency of evidence.[22]

However, since the late 1950's the role of the courts in federal personnel disputes has changed dramatically.[23] Although one commentator has argued that *Bailey* v. *Richardson* has never been squarely repudiated,[24] the implication is at best dubious.[25] The companion concepts of

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[17] *E.g.*, Crenshaw v. United States, 134 U.S. 99 (1890); Bailey v. Richardson, 182 F. 2d 46 (D.C. Cir. 1950), *aff'd per curium by an equally divided court*, 341 U.S. 918 (1951). The right-privilege distinction assertedly was first enunciated by Justice Holmes in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). McAuliffe was dismissed from a position with the New Bedford police department pursuant to a regulation prohibiting certain political activities. In refusing to disturb the dismissal, the Supreme Judicial Court, through Holmes, stated that McAuliffe may have had a "constitutional right to talk politics, but . . . no constitutional right to be a policeman." 155 Mass. at 220. *See* Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439–45 (1968). Some commentators, however, have disputed that *McAuliffe* really validates the right-privilege distinction. Dotson, The Emerging Doctrine of Privilege in Public Employment, 15 Pub. Adm. Rev. 77 (1955).

[18] 182 F. 2d 46 (D.C. Cir. 1950), *aff'd per curium by an equally divided court*, 341 U.S. 918 (1951).

[19] 182 F. 2d at 57. The full text of the Court's statement on this point, written by Judge Prettyman, is as follows:

> In terms the due process clause does not apply to the holding of a Government office. . . . Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service. . . . The controversy concerning the removal power began when the First Congress considered the establishment of the first executive department. Since then the subject has involved many colorful events and personalities over the years, including such as Presidents Jefferson, Jackson, Lincoln, Cleveland, Hayes, Theodore Roosevelt and Woodrow Wilson. The effort to establish a degree of stability in Government employ, tempestuous though that effort has been at times, has been made in the Congress and before the Presidents and their advisers, as a legislative and executive problem.

Later in the opinion Prettyman observed:

> In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms. If removal be at will, of what purpose would process be? To hold office at the will of a superior and to be removable there-from only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right.

182 F. 2d at 58. *See also* Kaplan, *The Law of Civil Service* 230 (1958).

[20] *See* Note, Review of Removal of Federal Civil Service Employees, 52 Colum. L. Rev. 787, 792–97 (1952).

[21] *E.g.*, Golding v. United States, 78 Ct. Cl. 682, *cert. denied*, 292 U.S. 643 (1934). *See also* Levy v. Woods, 171 F. 2d 145 (D.C. Cir. 1948).

[22] *E.g.*, Levine v. Farley, 107 F. 2d 186 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 622 (1940); Fulligan v. United States, 107 Ct. Cl. 222, *cert. denied*, 330 U.S. 848 (1947).

[23] *See* Chaturvedi, *supra* note 26.

[24] *Id.*, at 318.

[25] In Garrott v. United States, 340 F. 2d 615 (Ct. Cl. 1965), the Court of Claims suggested, in the clearest statement rejecting *Bailey*, that "the split decision of 1950 in Bailey v. Richardson . . . is no longer authoritative on this point." 340 F. 2d at 618–19.

employee privilege and management discretion have worn badly,[26] and it is now clear that federal employees are entitled to at least limited due process protections. Rather than rejecting employee complaints of arbitrary or discriminatory action out of hand, the courts have become willing to entertain such suits seriously.[27] The current attitude is reflected in *Norton* v. *Macy*,[28] a decision, like *Bailey*, from the D.C. Circuit. Reversing the dismissal of a National Aeronautics and Space Administration employee who had been charged with homosexual conduct, the court stated that "[t]he Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious."[29] The courts have also given increasingly vigilant enforcement effect to statutes and regulations designed to protect employees (which have themselves been considerably expanded). Furthermore, the scope of judicial review of agency judgments in personnel cases is now significantly broader in most federal courts than a decade ago.[30]

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[26] *Privilege:* Mr. Justice Holmes' blunt "privilege" observation delivered in the *McAuliffe* case, note 30, *supra*, was flatly rejected by the Supreme Court in Pickering v. Board of Educ., 391 U.S. 563 (1968). Writing for the Court, Justice Marshall stated:

> To the extent that the [opinion below] may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous decisions of this court.

391 U.S. at 568, citing Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); and Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See also* Sherbert v. Verner, 374 U.S. 398 (1963); Goldberg v. Kelly, 397 U.S. 254 (1970); Dixon v. Alabama State Board of Educ., 294 F. 2d 150 (5th Cir. 1961). The decline of the privilege doctrine is treated in Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, *supra*, note 30. See also Van Alstyne, The Constitutional Rights of Public Employees: A Comment on Inappropriate Uses of an Old Analogy, 16 U.C.L.A. L. Rev. 751–54 (1969); Linde, Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector, 39 Wash. L. Rev. 4, 31–46 (1964); O'Neil, Public Employment, Antiwar Protest and Preinduction Review, 17 U.C.L.A. L. Rev. 1028, 1040–55 (1970).

Discretion: Gadsden v. United States, 78 F. Supp. 126, 111 Ct. Cl. 487 (1948), *cert. denied*, 342 U.S. 856 (1951). *See also* Balany v. Electrical Workers Local 1031, 374 F. 2d 723 (7th Cir. 1967); Gonzalez v. Freeman, 334 F. 2d 570 (D.C. Cir. 1964). *Cf.* Fay v. Douds, 172 F. 2d 720 (2d Cir. 1949). Law review comment on discretion in the employment may be found in Chaturvedi, Legal Protection Available to Federal Employees Against Wrongful Dismissal, 63 N.W. L. Rev. 287, 307–28 (1968); Note, Dismissal of Federal Employees—The Emerging Judicial Role, 66 Col. L. Rev. 719, 737–40 (1966).

[27] *E.g.*, Scott v. Macy, 349 F. 2d 182 (D.C. Cir. 1965); Meehan v. Macy, 392 F. 2d 822 (D.C. Cir. 1968), *modified on petition for reconsideration*, 425 F. 2d 469, *panel opinion reinstated by court sitting en banc*, 425 F. 2d 472 (1969); Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969). *Cf.* Greene v. McElroy, 360 U.S. 474 (1959); Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, *rehearing denied*, 368 U.S. 869 (1961).

[28] 417 F. 2d 1161 (D.C. Cir. 1969).

[29] 417 F. 2d at 1164.

[30] Compare the authorities cited in notes 31 and 32, *supra*, with *e.g.*, Vigil v. Post Office Dept., 406 F. 2d 921 (10th Cir. 1969); Halsey v. Nitze, 390 F. 2d 142 (4th Cir.), *cert. denied*, 392 U.S. 939 (1968); Taylor v. Civil Service Comm., 374 F. 2d 466 (9th Cir. 1967); Brown v. Zuckert, 349 F. 2d 461 (7th Cir. 1965), *cert. denied*, 382 U.S. 998 (1966); Jenkins v. Macy, 357 F. 2d 62 (8th Cir. 1966); McTiernan v. Gronouski, 337 F. 2d 31 (2d Cir. 1964); Pelicone v. Hodges, 320 F. 2d 754 (D.C. Cir. 1963); Gadsden v. United States, 78 F. Supp. 126 (Ct. Cl. 1948, *cert. denied*, 342 U.S. 856 (1951).

A. *The Nature of the Process*

Both government managers and employee representatives are accustomed to distinguishing between two stages of what this report refers to as "the adverse action process." To insiders, "adverse action procedures" are those an agency must observe in effecting a decision to remove or discipline an employee. Described more fully in Part III of this report, these procedures consist essentially of notice of proposed action; an opportunity for the employee to reply orally and/or in writing, ordinarily within 15 days; and the agency's decision which may become effective 30 days after issuance of the notice. The procedures for taking adverse action thus do not include any opportunity for a trial-type hearing, presentation of witnesses, or confrontation and cross-examination, or provide any mechanism for appellate review. The second stage of the process is the more elaborate, more protracted "appeals process," in which the burden is on the employee to initiate review. An employee who appeals from the employing agency's action has an opportunity for one and possible two trial-type hearings, and may obtain review of the agency's adverse decision at as many as three different administrative levels.

This report treats the two stages as parts of a single process. Because the procedures for effecting adverse personnel actions are comparatively expeditious and afford employees very meager protection against unjust action,[31] the appeals process is really the tail that wags the dog. The appeals process is the heart of the procedures for implementing removals and effecting discipline. It consumes most of the time required for decision and simultaneously provides the significant protections available to employees. Moreover, it is in the appeals procedures that the competing interests of management and employees conflict most sharply.

The visible portion of the adverse action process—the appeals process—is already highly adversary in character, notwithstanding government supervisors who prefer to emphasize its informal, administrative features.[32] The charges against an employee typically allege conduct that reflects adversely on his character or integrity. Relatively few cases deal with an employee's *ability* to do the work. Charges that are performance-related are more likely to focus on an employee's attendance record or his ability to work with others. The most common charge is "misconduct," which ranges from destruction

[31] These procedures, alone, would not satisfy the requirements of due process. See Kennedy v. Sanchez, 349 F. Supp 863 (N.D. Ill. 1972).

[32] See, e.g., Berzak, Adverse Actions by Federal Agencies and Administrative Appeals, 19 Am. U. L. Rev. 387, 394 (1970); Berzak, Review and Analysis of Professor Egon Guttman's Article on "The Development and Exercise of Appellate Powers in Adverse Action Appeals," 19 Am. U. L. Rev. 367, 379 (1970).

of government property, to failure to pay creditors, to the commission of a criminal offense.

Ordinarily, by the time an employing agency decides to initiate removal proceedings, the relationship between supervisor and employee has deteriorated so badly that accommodation is not possible. Feelings run high on both sides. Although the employee may initially view the matter as a misunderstanding, once he contests the agency's action he no longer believes that the dispute can be resolved amicably. Thus it is not surprising that the system for handling such cases has evolved into a process of adjudication in which, more often than not, both sides are represented. Moreover, because employees usually lose,[33] and because compromise is difficult when an agency wants an employee removed, the process is not conducive to settlement.

The reader should be cautioned, however, that this description of the process is drawn largely from contested adverse actions. Most of our information comes from cases in which employees sought review of actions against them, thus bringing into play the adjudicatory procedures of the appeals process. We have only a general idea of what proportion of employees against whom action is initiated appeal, and very little information about unappealed cases. We do not know, for example, how many involve charges of misconduct, rather than inefficiency, or are directed against low-ranking employees. We only know that the majority of disciplinary actions do not now become "cases" at all. The failure of so many employees to appeal could indicate that they do not dispute the charges against them or the penalty imposed. With so little information about these actions, however, it is hazardous to draw any inferences.

Another characteristic of adverse actions should be noted. Unlike other adjudicatory systems, the adverse action process involves adversaries who have been, and for some time will continue to be, in close proximity. Supervisor and employee have had time to cultivate their resentments, increasing the possibility that emotion rather than judgment may influence an employee's conduct or his supervisor's decision to initiate action. Such hostility may make it more difficult to retain an employee on the job during disposition of his case, than, for example, to permit the continued operation of a motor carrier charged with exceeding its certificated authority.

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[33] In fiscal year 1970, employees contesting removal within their agencies were successful less than 20 per cent of the time. Approximately 24 per cent were successful before the Civil Service Commission's regional offices. In appeals from reductions in grade or pay, employees prevailed more frequently, roughly 24 per cent of the time at the agency level and in 47 per cent of appeals to the Commission. In appeals from reductions in rank, their rates of success were 16 per cent and 9 per cent, respectively.

Finally, one must acknowledge what seems to be an accepted, if regrettable, fact of life: Removal from government employment for cause carries a stigma that is probably impossible to outlive. Agency personnel officers are generally prepared to concede, as employee spokesmen claim, that it is difficult for the fired government worker to find employment in the private sector. The impression that it is difficult to fire government employees is widely shared—perhaps itself a product of the procedures that must be observed—and contributes to the belief that anyone who gets fired by the government is probably unemployable. This may exaggerate the consequences of removal. The acquiescence of so many employees suggests that alternative employment may not be impossible to find. One cannot escape the conclusion, however, that the government employee who is removed from his job loses something of tremendous value that in a market of declining demand for many skills may not be replaceable.

Three major charges have been leveled at the existing administrative system for processing adverse actions. The first is that it permits employees to be disciplined or removed on the basis of illegitimate and unsubstantiated charges. Second, it is claimed that the system embodies insufficient safeguards against unfairness and thus fails to command the confidence of employees. Finally, the accusation is made that the system is complicated, duplicative, and takes too long to dispose of cases.

Although one encounters cases in which the government's action seems wrong on both procedural and substantive gorunds, I am not persuaded that the adverse action process regularly *produces* unfair results. "The Spoiled System," the recent Nader Task Force study of the Civil Service Commission,[34] describes several examples of outrageous government action against employees, from which the author apparently infers that most employees are mistreated. I do not. The data we have assembled do not betray any systematic unfairness that the suspicious critic might expect to find: not young, or low-ranking, or female employees, not even those without representation seem to fare worse (or better) than employees generally.[35] The fact that employees usually fail to upset the action against them by itself neither confirms nor rebuts the integrity of the process.[36]

Neither, however, do the data establish that justice is rarely miscarried. The system lacks many features that would substantially reduce the risk of arbitrariness and thereby support confidence that employees are likely to be treated fairly. The opinions of persons who

[34] See R. Vaughn, The Spoiled System II–1 through II–152 (1972).
[35] See Tables, pp. 1087–1090.
[36] See note 33, supra.

are involved in the process, as one might expect, are largely determined by the role each plays. Lawyers who represent employees, union spokesmen, and former appellants believe the system inadequate to ensure fair decisions—and can cite examples to support their impressions. Agency personnel officers, government lawyers, and those who bear decisional responsibility in the Civil Service Commission defend its integrity, and point to the infrequency with which management decisions are upset in court.[37]

Notwithstanding the confidence of government managers, the adverse action system possesses an uncanny capacity to generate suspicion, and not only among employees or those who represent them. A principal cause of this "image" problem has been the secrecy shrouding the disposition of individual cases. Cases that reach court often involve sympathetic employees whose claims depict the process at its worst. Cases in which employees are removed for blatant inefficiency, or demonstrable incapacity to get along with fellow workers, or unquestioned disregard for public property rarely surface. External observers have thus come to judge the process by cases that *probably* are not representative. However, self-righteous assertions that such cases are the exceptions, and that the vast majority of adverse actions are properly initiated and fairly adjudicated cannot by themselves dispel the suspicion.

There is considerably broader agreement respecting the efficiency of the process, or lack of it. Most participants agree that cases take too long; and very few agency or employee spokesmen are prepared to argue that interminable delay is the price of assuring fairness. But delay there is, most of it at the agency level, although the Commission's processes are no model of expedition. More than 75 per cent of actions contested within employing agencies require longer to decide than the 60 days prescribed by Commission regulations. More than 50 per cent take more than three months, and 5 per cent are in process for longer than a year! If an employee appeals beyond his agency, another two months will elapse at one of the Commission's regional offices, and yet another three months will be required before a final decision from its Board of Appeals and Review. It is important to realize that, in most agencies, the employee is off the rolls throughout the appeals process.[38]

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[37] During calendar 1968, 1969, and through March 6, 1970, the District Courts, Courts of Appeals, and the Court of Claims decided 113 cases involving challenges to adverse personnel actions. In 84.1 per cent, or 95, of these cases, the administrative action was upheld. Information supplied by the General Counsel, U.S. Civil Service Commission.

[38] See Note 18, Part III, infra. Nine agencies, including the Departments of HEW, HUD, and Justice, and the Civil Service Commission itself provide a hearing before removal, but these nine account for no more than 10 per cent of the total caseload.

Several factors contribute to this delay. There is a striking correlation between employee representation, whether by an attorney or union, and the time required for decision. Cases in which hearings are held routinely take longer, principally because of scheduling difficulties, not because the hearings are protracted. The potential availability of three appellate levels and the opportunity for a second hearing at the Commission manifestly invite delay. Many employing agencies anguish over or ignore appeals for weeks on end, or prolong the process by erecting multiple levels of internal review.

It is hardly surprising that the adverse action process is characterized by uncertainty and delay, or that many observers believe that it is unfair. At the Civil Service Commission cases are handled by officials whose primary responsibility is to adjudicate appeals. No other department or agency, however, regards the disposition of adverse actions as anything other than an unavoidable incident of operating with a large work force. The process is not a part of, let alone integral to, any agency's primary mission. Employees against whom adverse action is taken, by definition, are obstacles to the accomplishment of that mission, and it is difficult for agencies to be concerned about the fairness or even efficiency with which they carry out a responsibility they wish they did not have.

Any system for processing adverse personnel actions must necessarily seek a compromise between these competing interests. The recommendations supported by this report are precisely that, an attempt to achieve a balance between expeditious procedures and fairness to employees.[39] The recommendations rest on the central finding that the present system is complicated and inefficient and lacks essential safeguards of fairness. Because the competing interests are not easily reconciled, the recommendations may reflect a certain ambivalence. Nonetheless, if approved by the Conference and adopted by the Civil Service Commission and employing agencies, they would facilitate fairer as well as faster disposition of contested adverse actions.

The removal or demotion of a government employee involves a clash of competing interests: the interest of the employee in avoiding unfair or groundless action, and that of the employing agency in expeditious decision so it can get on with its primary mission. At a more fundamental level, the employee's interest in retaining his job or rank conflicts with the agency's desire to get the best performance from its workforce. The public shares ambivalent interests, on the one hand, in

[39] *Cf.* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961):

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

efficient and economical operation of government programs and, on the other, in fair and decent government treatment of private interests. It probably is impossible fully to protect any of these interests without jeopardizing the others. A system that guaranteed no employee would ever be deprived of his job because of some supervisor's malice would be too costly for the government to run or taxpayers to support. On the other hand, a system that allowed agency managers to implement disciplinary action immediately whenever, in their judgment, the needs of the agency required it would unjustly deprive many competent and dedicated civil servants of their jobs or benefits.

II. Method and Scope of Study

A. *Sources and Statistical Data*

The Committee's recommendations and this supporting report are based on information obtained primarily from four sources: (1) interviews with persons involved in or familiar with the adverse action process, both in government and out; (2) formal comments on reforms of the process submitted to the Civil Service Commission by employing agencies, employee unions, and other interested organizations in March and April of 1972, and in 1969, when the Commission was recently considering and eventually adopted several changes; (3) personal observations of the process in operation, including study of the files of more than fifty adverse action cases appealed to the Civil Service Commission; and (4) statistical data assembled from cases adjudicated in fiscal year 1970 by both employing agencies and the Civil Service Commission. In addition, of course, published and otherwise available secondary sources have been consulted.

Although the statistical data do not provide the primary basis for the recommendations, a brief statement about their source and limitations is in order. The data cover only contested adverse actions, i.e., actions that were appealed by the employees, and do not necessarily support any inferences about the universe of disciplined or removed employees who did not appeal. Available information about this larger group, as noted earlier, is based upon a 10 per cent sample of personnel actions retained by the Civil Service Commission, as well as the personal experience of participants.

A further caveat is in order. In assembling data about fiscal year 1970, employing agencies and the Commission's regional offices were asked to prepare case reports on all adverse action appeals they adjudicated during that year. The total number of reports received (over 1500), however, fell short of the total of adjudicated appeals previously reported; the disparity ran as high as 20 per cent in some

agencies. The principal reason for this shortfall was the transfer of case files by agencies and regional offices in connection with remands and further appeals, employee reassignments, and for storage. The case reports received—605 from employing agencies and 899 from the Commission's regional offices—are believed to be a representative sampling of cases decided during 1970.[40] We have no reason to suspect that the under-reporting significantly distorts the picture of appellate activities at either level.

Finally, it should be noted that the employing agencies and Commission regional offices were asked to provide only information they were known to have available about individual cases. The Civil Service Commission for several years has required each employing agency and regional office to submit an annual report about the appeals it decided. Each agency and regional office had thus previously reported its appeals caseload for fiscal year 1970, including composite data about employee sex, age, grade, and representation, hearings, average time in process, and outcome. For this study and for the Commission's own current study of adverse actions, the agencies and regional offices supplied essentially the same information on a case-by-case basis. The attached case report form indicates the range of information provided.

B. *Scope and Assumptions of the Report*

The report makes a number of assumptions about the adverse action process. It also avoids discussion of several important related issues, whose resolution is beyond the scope of this study or outside the proper competence of the Administrative Conference.

1. *Postal Service.* The United States Postal Services has not provided information or data for this study, although appeals from Post Office employees are included among the cases for which reports were submitted by the Commission's regional offices. The recommendations proposed below are not intended necessarily to apply to it.

2. *Criteria for adverse action.* The report does not squarely address the difficult question of what employee conduct or preformance should be grounds for discipline or removal. It is not intended to support any inference respecting the legitimacy of particular behavior as a basis for adverse action, or to explore the delicate relationship between management needs and employee privacy. These are troublesome issues that reserve in-depth study, but they are essentially beyond the scope of this report.

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[40] The 605 case reports from employing agencies do not include any cases adjudicated by the then-Post Office internal appeals system. However, the 899 reports from the Commission's regional offices include some 270 appeals by Post Office employees.

The report assumes that the government may legitimately discipline or remove employees for performance or conduct that undermines its ability to carry out its functions. In addition, the report begins with the tentative conclusion—based on available data—that most adverse actions are initiated for reasons that, if true, would be a legitimate basis for some disciplinary action. The recommendations for assuring fair truth-determining procedures, however, would make it easier for an employee to raise the legitimacy question, and thus in the long run might facilitiate resolution of that issue as well.

CASE WORKSHEET

SURVEY OF ADVERSE ACTION APPEALS DECIDED IN FY 1970

1. Name of Appellant (Last, First, Middle Initial) CC-1-25
(Print in Full)

2. Agency Identification CC26-29

3. Grade CC 30-31 | Pay Plan CC 32-33 | Series CC 34-38

4. Veteran Preference (Circle) 1—None 2—5 Pt 3—10 Pt CC-39

5. Sex (Circle) M F CC 40

6. Yr. of Birth CC 41-42

7. Service Comp. Yr. CC 43-44

8. CSC Region of Duty Location: (Circle)
1. Atlanta
2. Boston
3. Chicago
4. Dallas
5. Denver
6. New York
7. Philadelphia
8. Seattle
9. San Francisco
10. St. Louis
11. Wash. D.C.
CC 45-46

9. Action Appealed: (Circle)
1. Removal
2. Reduction in Grade or Pay
3. Reassignment Involving Reduction in Rank
4. Suspension For More Than 30 Days
5. Furlough (NTE 30 Days)
CC 47

10. Personnel Action Code
CC 48-50

11. Reason For Action (Circle)
1. On-Duty Misconduct
2. Off-Duty Misconduct
3. Declination of Relocation or Assignment
4. Inefficiency
5. Disability
6. Position Reclassification
7. Pre-Appointment Factors
8. Other
CC 51

12. Representation (Circle)
1. Self
2. Private Attorney
3. Labor Union
4. Veterans Organization
5. Other Person or Organization
CC 52

13. Hearing Held (Circle)
1. Yes
2. No
CC 53

14. Decision on Appeal (Circle)
1. Action Upheld
2. Reversed on Merits
3. Reversed on Procedures
4. Modified on Merits
5. Other
CC 54

15. Days in Process
CC 55-57

16. Further Appeal (Circle)
1. None
2. To Agency (This Entry Applicable Only To Agencies With Two-Level Appeals Systems.) (If Circled Complete Block 17).
3. To CSC First Appellate Level. (If Circled Complete Block 18).
CC 58

17. Decision on Further Appeal To Agency (Circle)
1. Initial Decision Sustained
2. Initial Decision Reversed on Merits
3. Initial Decision Reversed on Procedures
4. Initial Decision Modifed on Merits
5. Case Remanded To First Level
6. Pending or In Process
CC 59

18. Decision on Further Appeal To CSC (Circle)
1. Initial Decision Sustained
2. Initial Decision Reversed on Merits
3. Initial Decision Reversed on Procedures
4. Initial Decision Modified on Merits
5. Case Remanded To First Level
6. Pending or In Process
CC 60

(SEE REVERSE FOR INSTRUCTIONS)

PD 5 JANUARY 1972

Instructions for Completion of Worksheet

General: One copy of this form is to be completed for each adverse action appeal from actions subject to Part 752-B of the Commissions's regulations (see item seven on the form for a listing of the adverse actions included) decided at one or more appellate levels in agencies during fiscal year 1970. This includes decisions on appeals from actions originating prior to FY 1970 so long as the agency decision falls within that year. Do not include appeals cancelled or withdrawn without a decision.

This form may be completed by hand. Typewritten entries are not necessary.

Additional instructions on items not self-explanatory are as follows:

Item

1. Name of Appellant – Up to 25 letters may be used for this entry. Print last name in full and continue with first name and middle initial up to a maximum of 25 letters. Leave unneeded spaces blank.

2. Agency Identification – Enter the assigned 4-digit submitting office number for the organizational element in which the appeal arose, as used in item 33 of SF 50.

3. Grade – Self-explanatory. Precede one-digit grades with a zero.

   Pay Plan – Enter GS, WG, WS, or PF as appropriate.

   Series – Use Classification Act series designation for GS positions, the Handbook of Blue Collar Occupational Families and Series for WG and WS positions, and the Postal Service series structure in Chapter E-1 of Handbook P-1 for PF positions. Precede 3- or 4-digit code with a zero or zeroes to fill in the 5-digit field. Leave blank for classification systems other than General Schedule, Wage, or Postal Field Service.

4. Veteran Preference – Circle appropriately. Item 5 of SF 50 contains this information.

6. Year of Birth – Enter last two digits of year of birth.

7. Service Computation Year – Enter last two digits of year of service computation date.

9. Action Appealed - Circle appropriate item corresponding to "Nature of Action" terminology in item 12 of SF 50.

10. Personnel Action Code – Insert code as used in item 12 of SF 50.

11. Reason for Action – Circle appropriate entry. The term "off-duty misconduct" is intended to apply to misconduct not related to the employee's job or work environment, such as failure to pay just debts or conviction for a crime committed off the premises and not associated with his official duties. The term "on-duty misconduct" applies to misconduct occurring in the work environment or related to the employee's duties, such as AWOL, insubordination, accepting bribes, assaulting a co-worker, etc. If the action was taken for a combination of off-duty and on-duty misconduct, count as on-duty misconduct unless the off-duty misconduct was clearly the primary reason for the action.

12. Representation - Circle appropriate item. The term "private attorney" refers to practicing legal counsel retained by or for the appellant. If the appellant is represented by a labor organization or a veterans organization and if that organization supplies an attorney, circle the entry for the organization supplying the attorney.

15. Days in Process – Count calendar days from date appeal received until date of first appellate decision. Precede 2-digit numbers with a zero to fill the field if appeal is processed in 99 days or less. If appeal is still pending decision, enter the number of calendar days from date of receipt to date this worksheet is completed.

16. Further Appeal – If item one is circled, no further items on the worksheet need be completed. Item two applies only to agencies with 2-level appeals systems. If item two is circled, continue to field 17, after which the worksheet is completed. If item three is circled in field 16, skip field 17 and go on to field 18 to complete the form.

The report obliquely addresses the criteria for adverse action in one recommendation, which calls on the Civil Service Commission to clarify and amplify the statutory standard of "efficiency of the service." This recommendation, however, is not directed at the substance of that standard but at its vagueness. The objective is to make it easier for employees to know what sort of performance is demanded and what kinds of conduct are forbidden, and to narrow the unfettered discretion the statutory language gives deciding officials.

3. *The tenure classification.* The report accepts the legitimacy, constitutional and administrative, of *some* distinction between tenured and non-tenured public employees that may justify differences in protections afforded against dismissal. The recommendations are addressed to the procedures the government makes available to tenured employees, i.e., those for whom the Constitution would require maximum safeguards. In the federal civil service, as previously noted, these currently include all non-probationary employees in the classified service and all non-probationary employees in the classified service and all preference-eligibles who have completed one year of service, and comprise well over 90 percent of the civilian workforce.[41]

The recommendations do not suggest where the line between tenured and other employees [and] should be drawn. That is essentially a matter of substantive personnel policy beyond the primary competence of the Conference. Possibly the present line should be moved. It is also quite possible that in the long run the Civil Service Commission will be unable to resist pressures to make equivalent protections available to all employees, whether tenured or not. But the constitutional legitimacy of some such distinction at the present time seems incontestable.[42]

4. *Unionization of government employees.* The increasing strength of public employee unions has put pressure on government to enlarge the scope of collective bargaining. Among the many issues now excluded about which unions would like to bargain, matters of employee discipline and removal rank high. Employee unions derive some support from the present system for processing adverse actions, since they can provide members with representation which may not otherwise be available. Without purporting to describe the views of all unions. however, most would support two fundamental changes: (1) procedures for discipline and removal should be subject to negotia-

[41] See note 2, supra Part I.

[42] See Roth v. Board of Regents, 408 U.S. 564 (1972), in which the Supreme Court held that greater procedural safeguards against termination would be required for a public school teacher who had an "expectancy" of reemployment than for one who did not.

tion; and (2) the result of negotiation should be arbitration in place of existing adjudication.[43]

Many observers have reservations about whether arbitration would work in an employment context that involves a third interest, that of the public in efficient operation, which both the parties and outside arbitrators may undervalue. Yet arbitration apparently functions satisfactorily in similar settings in private industry. And it may be well-suited for the settlement of disputes over the appropriate consequences of undisputed behavior, which many adverse actions are. The assertedly lower costs of achieving settlement that may be possible through arbitration may outweigh the costs of retaining inefficient or obstreperous employees who would simply be separated under the present system.

The Administrative Conference should not recommend that binding arbitration be substituted for adjudication, however, although management might wish to consider arbitration as an optional alternative in individual agencies. The Commission probably would not accept arbitration as a means for processing adverse actions without Congressional approval. The Commission's General Counsel has previously taken the position that such action would be an invalid delegation of the Commission's responsibility under the Veterans Preference Act.[44] In any case, arbitration could not be made the exclusive avenue of relief without amendment of the Act's provision entitling all preference-eligibles to a hearing before the Commission on adverse action.[45] Acceptance of arbitration is likely to come, if at all, only as part of larger reforms of the government's policies respecting collective bargaining in the public sector. It is a fair assumption, therefore, that for some time to come employing agencies and the Civil Service Commission will continue to adjudicate contested adverse actions. The proposed recommendations are premised on that assumption.

5. *Judicial review of adverse actions.* The availability and scope of judicial review of administrative decisions to remove or discipline federal employees are matters of considerable uncertainty and debate.[46] An employee can now obtain court review along two avenues—

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[43] These conclusions are based upon interviews with union representatives and a reading of many union comments on proposed changes in the adverse action process. See, in particular, the letter submitted to the Civil Service Commission by the Government Employees Council, AFL–CIO, April 4, 1972. More recently, a spokesman for the National Association of Government Employees expressed the view that "arbitration is not the answer" because "unions and employees should not bear the financial burden . . ." Letter Roger P. Kaplan, General Counsel, to Richard K. Berg, Executive Secretary of the Administrative Conference of the United States, November 16, 1972.

[44] Opinion of the General Counsel, U.S. Civil Service Commission, March 19 (1971).

[45] See note 7, infra Part III, and note 2, infra Part IV, and accompanying text.

[46] See, e.g., Johnson and Stoll, Judicial Review of Federal Employee Dismissals and Other Adverse Actions, 57 Cornell L. Rev. 178 (1972).

by suit in a district court or in the Court of Claims—with resulting differences in possible remedies and variations in the scope of factual inquiry. Although recent decisions announced disparate standards for review of agency and Commission decisions, the federal courts display an increasing willingness to scrutinize adverse actions with care, perhaps even with suspicion.[47]

Two major issues involved in judicial review of adverse actions—the route of review and its scope—are closely related to the problems addressed in this report. Their proper resolution depends significantly on the reception given the recommendations made here. If administrative hearing procedures were improved in accordance with the recommendations, one might willingly accept a scheme of review that confined the court to the administrative record. In a very real sense, therefore, the question of judicial review hinges on the issues discussed here. It is beyond the immediate scope of this report and recommendations, but a logical next subject of analysis and resolution.

III. The Adverse Action Process in Operation

A. *Historical Development of Adverse Action Protections*

The key protections of federal civil servants against arbitrary removal or discipline are currently found in the Lloyd-LaFollette Act,[48] the Veterans' Preference Act,[49] and Executive Order 11491.[50] The Lloyd-LaFollette Act prohibts the removal of an employee in the classified service "except for such cause as will promote the efficiency of the service",[51] and prescribes certain minimal procedural requirements for processing dismissals. Specifically, the act requires that an employee be given advance notice and a written statement of the charges on which his removal is based.[52] The Veterans' Preference Act imposes additional procedural requirements,[53] including the opportunity to respond to charges orally and in writing, and authorizes employee appeals to the Civil Service Commission from adverse agency decisions.[54] The statute, of course, applies only to veterans of military

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[47] See notes 23–30, supra Part I, and accompanying text.

[48] Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555, *codified, as amended,* 5 U.S.C. § 7501 (1970). The "act" was actually only a rider to the fiscal year 1913 Post Office Appropriation. Further citations to the Lloyd-LaFollette Act are to the present codification.

[49] Act of June 27, 1944, ch. 287, 58 Stat. 387. The Veterans' Preference Act is presently codified in numerous sections of Title 5 of the U.S. Code. Section 14 of the Act, the section dealing with dismissals, is presently in 5 U.S.C. §§ 2108, 7511, 7512, and 7701 (1970). Further citations to the Act are to the present codification.

[50] 3 C.F.R. § 861 (Supp. 1966–1970), 5 U.S.C. § 77301 (1970).

[51] 5 U.S.C. § 7501(a) (1970).

[52] 5 U.S.C. § 7501(b) (1970).

[53] 5 U.S.C. § 7512 (1970).

[54] 5 U.S.C. § 7701 (1970).

service,[55] but Executive Order 11491 extends its protections to all non-preference eligible employees in the classified service.[56]

Although the civil service concept is today commonly associated with safeguards against removal of the type contained in the Lloyd-LaFollette and Veterans' Preference Acts,[57] these protections are of comparatively recent vintage. The Lloyd-LaFollette Act became law in 1912, but the Veterans' Preference Act—which first prescribed the procedural safeguards necessary effectively to implement the substantive guarantees of the earlier law—was enacted only in 1944. Non-veterans worked largely without procedural protection until 1962 when President Kennedy issued Executive Order 10988, whose provisions have since been incorporated in Executive Order 11491.[58]

As noted earlier,[59] the original civil service law, the Pendleton Act of 1883,[60] dealt primarily with screening of applicants for federal employment. Except for barring removal or other prejudicial action against employees for refusal to contribute to a political party or render other political services, the Pendleton Act afforded no protection against arbitrary demotion or dismissal.[61] It was not until 1897 that any official action was taken to provide across-the-board protection against arbitrary removal.[62] Civil Service Rule 8, promulgated in that year by President McKinley,[63] provided that no employee in the classified service should be removed except for "just cause" and for reasons given in writing. The Rule also required than an employee facing discharge "shall have notice and be furnished a copy of such reasons, and be allowed a reasonable time for personally answering the same in writing." In practice, Rule 8 provided only a shadow of protection. It did not accord employees the right to a hearing or to confrontation, or provide for any external appeal from agency removals. Moreover, the limited protections the Rule did accord proved unenforceable in the courts. Treating it as an expression of executive

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[55] 5 U.S.C. §§ 2108, 7511 (Supp. V) (1970).

[56] The adverse action material in the Order is found in section 22 3 C.F.R. § 861 (Supp. 1966–1970). Roughly 92 per cent of the federal work force are protected by law against summary removal or discipline and certain agencies accord the same protections to their other employees as well.

[57] *See* Stahl, Security of Tenure—Career or Sinecure, 292 The Annals 45, 50 (1954).

[58] Exec. Order No. 10988, 3 C.F.R. § 521 (Supp. 1959–1963).

[59] *See* note 3 *supra*, Part I.

[60] Act of Jan. 16, 1883, ch. 27, 22 Stat. 403, *codified, as amended,* 5 U.S.C. §§ 1101 et seq. (1970).

[61] The provision was in section 2(2)(5) of the Act, 22 Stat. 404, *codified,* 5 U.S.C. § 7321 (1970).

[62] Some limited expansion of rules against arbitrary removal did take place between 1883 and 1897. One key development was an 1896 civil service rule, promulgated by President Cleveland, prohibiting dismissal or demotion of employees because of their religious beliefs.

[63] Executive Order of July 27, 1897. *See* 15 U.S. Civil Service Commission Annual Report [hereinafter USCSC Annual Rept.].

grace that created no legal interest in employees, "the courts declined to take cognizance of this provision and held that punishment for its violation rested solely with the President . . . ." [64]

Shortly after taking office Theodore Roosevelt, a former civil service commissioner,[65] revoked Rule 8.[66] Although the Rule was subsequently revived by President Taft, the executive made no effort to strengthen its provisions.[67] The controversy over Roosevelt's action, however, finally provoked congressional action to protect federal civil servants from arbitrary removal. Apparently fearing that future Chief Executives might again revoke Rule 8, Congress wrote its substance into statutory law in the Lloyd-LaFollette Act.[68]

The key provision of the Lloyd-LaFollette Act prohibited removal of classified employees from the civil service "except for such cause as will promote the efficiency of the service. . . ." [69] Like Rule 8, the Act also prescribed the minimal requirements of notice, service of a copy of charges, and an opportunity to answer in writing with supporting affidavits.[70] But the Act likewise did not require that an employee facing discharge be accorded a hearing of any kind. Indeed, it expressly provided that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." [71] Nor did the statute authorize any appeal outside the employing agency which, as before 1912, retained final authority to remove.[72]

Since the Lloyd-LaFollette Act failed to go much beyond Rule 8's protections against dismissal, one may infer that Congress was generally satisfied with the modest safeguards it had accorded. At least in theory, the Act did strengthen the position of federal civil servants. The adoption of statutory restrictions on the removal power afforded a new opportunity for judicial review of removals alleged to violate these restrictions; and the courts interpreted the Act as granting employees a legal interest in being free from arbitrary dismissal.[73] As has been noted,[74] however, their inclination was to require no more than pro forma compliance with its provisions. The additional pro-

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[64] *See* 29 USCSC Annual Rept. (1912). *See* United States ex rel Taylor v. Taft, 24 App. D.C. 95 (1904), *writ of error dismissed,* 203 U.S. 461 (1906).

[65] Roosevelt served as Commissioner from 1889 to 1895. Guttman, The Development and Exercise of Appellate Powers in Adverse Action Appeals, 19 Am. U. L. Rev. 323, 324 n. 4.

[66] Exec. Order of May 28, 1902.

[67] Exec. Order of Dec. 4, 1911.

[68] *See* Guttman, *supra* note 65, at 324.

[69] 5 U.S.C. § 7501(a) (1970).

[70] 5 U.S.C. § 7501(b) (1970).

[71] Ch. 389, § 6, 37 Stat. 555 (1912). Similar, but slightly altered, language now appears in 5 U.S.C. § 7501(b) (1970).

[72] *See* Guttman, *supra* note 65, at 331.

[73] *See* Spanhake v. United States, 55 Ct. Cl. 70 (1920).

[74] *See* notes 13–15 *supra,* Part I.

tection accorded employee interests was thus very limited. As late as 1938, an informed commentator concluded that the Act "seems never to have resulted in a successful effort by an employee to enforce his rights in the courts although employees have repeatedly resorted to litigation." [75]

In retrospect, the early service reformers' lack of concern about potential abuses of the removal power is puzzling.[76] Dismissal of political opponents would seem to be as routine a part of an effective spoils system as the appointment of political cronies. From the very first the civl service laws barred discharges for political reasons, but without broader restrictions on removals and a strong enforcement mechanism, no one could reasonably have believed that political removals would not be effected *sub rosa.* Perhaps early reformers were afraid that more effective restrictions on discharges might hamper removal of incompetent or corrupt workers.[77] An equally plausible explanation was advanced by the Court of Appeals for the District of Columbia in *United States ex rel. Taylor* v. *Taft:* [78] "The entire policy of civil service has been to restrict the power of appointment, not removal, because, once the right to appoint is restricted within certain defined classifications, the reason for political removals has ceased. . . ." [79]

Whatever the reasons for these early failures to curb dismissals, some 30 years elapsed after enactment of Lloyd-LaFollette before the Veterans' Preference Act established significant procedural safeguards against arbitrary removal. Even then, the motivation for the legislation was not high-minded concern over the tenure of civil servants. Veterans returning from World War I had experienced considerable difficulty in resuming their old positions or finding any work at all. Well into the 1930's popular movies depicted veterans forced into lives of crime because of their inability to obtain employment.[80]

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[75] Westwood, The "Right" of an Employee of the United States Against Arbitrary Discharge, 7 Geo. Wash. L. Rev. 212, 217 (1938).

[76] The unimportance of early civil service curbs on removal at both the federal and state levels is suggested by examination of G. W. Plunkitt's important 1905 anti-civil service essay, *The Curse of Civil Service Reform.* The essay focuses entirely on the problem of the merit system as a bar to political appointments and does not even mention regulation of removals. Plunkitt, The Curse of Civil Service Reform, in Riordon (ed.), *Plunkitt of Tammy Hall* 11–16 (1963).

[77] This concern was expressed in the Civil Service Commission's first annual report: "The power of removal and its exercise for just reasons are essential both to the discipline and the efficiency of the public service." 1 USCSC Annual Rept. 26 (1884).

[78] 24 App. D.C. 95 (1904), *writ of error dismissed,* 203 U.S. 641 (1906).

[79] 24 App. D.C. at 98. In addition, the unwillingness of reformers to support curbs on removals may have been a reaction to the early English view that public office was a hereditament to which a property right attached. *See, e.g.,* Trimble v. People, 19 Colo. 187, 34 Pac. 981 (1893); Edge v. Holcomb, 135 Ga. 765, 70 S.E. 644 (1911).

[80] *E.g.,* The Roaring Twenties (Warner Brothers, 1939); I Am a Fugitive From a Chain Gang (Warner Brothers, 1932).

As World War II drew to a close political pressures mounted to avoid a repay of the post-World War I experience. The result was a range of laws designed to ease the transition of veterans back into peacetime society, among them the Veterans' Preference Act.

The Act's primary objective was to accord veterans preferential treatment in civil service hiring and related employment decisions.[81] Almost incidentally, Section 14 added provisions making it more difficult to remove veterans from federal positions.[82] Although it did not guarantee a trial-type hearing at the agency level, Section 14 required the employing agency, at least 30 days in advance, to furnish written notice stating in detail the reasons for a contemplated discharge, and provided, that the employee could answer personally, as well as in writing.[83] More significantly, Section 14 authorized a preference eligible employee to appeal his removal to the Civil Service Commission, which was required to investigate, grant a hearing, and submit its findings and recommendations to the agency.[84] A 1948 amendment to the Act required employing agencies to follow the Commission's recommendations, which many had initially regarded as advisory only.[85] The original Act also extended the "efficiency of the service" standard to other major disciplinary actions such as reductions in rank or compensation, which had not been covered by Lloyd-LaFollette, and required that such actions comply with the full range of procedural protections applicable to removal.[86]

B. *Current Administrative Procedures For Adverse Actions*

To implement the provisions of the Lloyd-LaFollette and Veterans' Preference Act and Executive Order 11491, the Civil Service Commission has promulgated detailed regulations governing procedures for adverse actions.[87] A case may proceed through as many as three major stages: (1) agency procedures prior to "adverse action," often referred to, in the case of removals as separation procedures; (2) administrative appeal from the action within the employing agency; and

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[81] This was the principal thrust of sections 2 through 10 of the Act. These sections are now codified in 5 U.S.C. §§ 3305(b), 3306(a)(2), 3308–13, 3317–18, 3319(b), 3320, 3351, and 3363, 3504 (1970).

[82] 5 U.S.C. §§ 7512(a)(b), 7701 (1970).

[83] 5 U.S.C. § 7512 (1970).

[84] *As amended,* 5 U.S.C. § 7701 (1970).

[85] Act of June 22, 1948, ch. 604, 62 Stat. 575, *codified,* 5 U.S.C. § 7701 (1970).

[86] 5 U.S.C. § 7511 (1970).

[87] The pertinent regulations are contained in 5 C.F.R. Part 752 (Adverse Actions by Agencies); Part 771 (Employee Grievances and Administrative Appeals); Part 772 (Appeals to the Civil Service Commission). Procedural protections extend to any career or career-conditional employee who is not serving a probationary trial period, any preference eligible employee who has completed one year of continuous employment in a position outside the competitive service and certain other employees. 5 C.F.R. § 752.201(a) (1972).

(3) appeal to the Civil Service Commission. This section describes the process at each of these stages.[88]

Three preliminary observations are necessary. First, the Administrative Procedure Act does not apply to adverse action cases, for section 5 specifically exempts "the selection or tenure of an employee" from the Act's requirements.[89] Second, adverse action procedures in recent years have undergone continuing change.[90] As recently as 1970, the Commission significantly revised these procedures [91] and currently has additional changes under consideration.[92] Finally, as the following description will make clear, existing procedures are already elaborate and complex, comprising an administrative process that possesses many trademarks of a refined, formal system.

C. *Agency Pre-Action Procedures*

Employing agencies have traditionally exercised initial jurisdiction in the adverse action area. The Pendleton Act gave the Civil Service Commission appellate jurisdiction only over removals for refusal to pay political assessments.[93] At first, the Commission read this provision as denying it even informal authority to investigate non-political removals,[94] but later gradually assumed an advisory appellate function. Shortly after the promulgation of Rule 8, the Commission requested that agencies file with it copies of the charges on which removals were to be based.[95] Soon the Commission, on an informal basis, began to investigate agency removals for lack of compliance with procedural rules.[96] This investigative function was eventually formal-

[88] Throughout this part, "agency" refers to the agency or department in which the employee involved is employed and "Commission" refers to the U.S. Civil Service Commission.

[89] 5 U.S.C. § 554(a)(2) (1970).

[90] *See, e.g.,* the very helpful discussion of the evolution of the Civil Service Commission's appellate activities in Guttman, The Development and Exercise of Appellate Powers in Adverse Action Appeals, 19 Am. U. L. Rev. 323, 329–40 (1970). *See also Berzak,* Rights Accorded Federal Employees Against Whom Adverse Personal Actions are Taken, 47 Notre Dame Lawyer 852 (1972).

[91] U.S. Civil Service Commission, Federal Personnel Manual Letter No. 771–3 (September 25, 1970). The changes described in this letter included alterations in 5 CFR Part 752 (adverse actions by agencies) effective November 1, 1970, and in 5 CFR Part 771 (Employee Grievances and Administrative Appeals) effective April 1, 1971.

[92] *See* 59 Nation's Business 70 (June 1971).

[93] Ch. 27, § 2, 22 Stat. 403 (1883).

[94] *See, e.g.,* 3 U.S. Civil Service Commission Annual Report 56 (1886); 9 U.S. Civil Service Commission Annual Report 77 (1892), (hereinafter cited as Annual Report).

[95] *See,* 15 Annual Report 20 (1898). The Commission at this point, however, continued to disclaim review authority. The filing request was imposed "not so that the Commission may review the findings of the department upon the charges and answers, for it is not believed that such action by the Commission would be either authorized or advisable, but this copy of the record of the action taken is desired merely to enable the Commission more readily to ascertain whether a person before his removal, is furnished with the reasons for his removal and given an opportunity to make answers in accordance with the terms of [R]ule [8]" *Ibid.*

[96] Guttman, *supra* note 65, at 331.

ized by the creation of a Division of Investigation and Review,[97] and later of the Board of Appeals and Review,[98] but Commission recommendations regarding removals remained advisory only, as Congress during the 1920's and 1930's persistently ignored its requests for effective appellate authority.[99] The Veterans' Preference Act in 1944 gave statutory sanction to the advisory appellate system,[1] although Commission appellate decisions were not made binding on agencies.[2] Not until 1948 did the Commission acquire authority to compel agencies to reinstate discharged employees.[3]

Despite the increasing role of the Civil Service Commission, employing agencies, as in 1833, have remained the primary repositories of adverse action authority.[4] The decision to initiate an adverse action is entirely the employing agency's. Agency, not Commission, personnel are in charge of procedures for a proposed action and are responsible for deciding initially whether an employee should be separated or disciplined. Once an agency has taken adverse action against an employee, the burden of initiating further review lies with the employee. In removals the employee is usually dropped from the agency's payroll as of the effective date of adverse action or upon receiving notification of the action, whichever occurs last.[5] Thus, an employee who appeals does so on his own time, not the government's. Furthermore, it is only through employees' exercise of their appellate rights that the Commission is brought into the decisional process.

1. *Notice of proposed adverse action.* When an agency[6] has decided to take action against an employee, ordinarily it must provide him with written notice of the proposed action at least thirty days before it is to become effective.[7] The Commission's regulations require

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[97] The Division was created in 1920. *Id.*

[98] *Id.*, at 332–33.

[99] For an example of Civil Service Commission requests for statutory review authority, see 48 Annual Report 41 (1931); 50 USCSC Annual Rept. 11 (1933); 51 Annual Report 9 (1934).

[1] Ch. 287, § 14, 58 Stat. 391 (1944).

[2] Section 14 of the Act provided only that "after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its *findings and recommendations* to the proper administrative officer and shall send copies of same to the appellant or to his designated representative. . . ." *Id.* at 391. (Emphasis added).

[3] Act of June 22, 1948, ch. 604, 62 Stat. 575, *recodified* 5 U.S.C. § 7701 (1970).

[4] The number of adverse actions eventually appealed to the Commission is small in proportion to the total number of such actions taken. In fiscal year 1970, for example, only 1,452 adverse actions reached the Commission, while over 12,000 were taken by all federal agencies, including the Postal Service.

[5] *See* note 27, *infra.*

[6] Current Civil Services Regulations do not specify which officials in an agency may initiate an adverse action.

[7] 5 C.F.R. § 752.202(a) (1971). This regulation implements the requirements of 5 U.S.C. § 7501(b)(1) (1970), which requires preference eligibles to receive 30 days notice of a proposed adverse action. An agency may dispense with the 30-day notice requirement "[w]hen there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed." In this situation, the notice given need only be reasonable under the circumstances. 5 C.F.R. § 752.202(c)(2) (1972). The requirement

that this notice state the reasons for the proposed action in such detail as will enable the employee to have adequate information on which to base a response.[8] The specifications contained in the notice of proposed charges delimit the grounds on which action can ultimately be taken. Discipline based on other reasons would violate an employee's statutory right to be apprised of the basis for a proposed action.[9]

Prior to November 1, 1970, an agency was not required to make available to an employee in advance of his answer or any hearing the evidence on which it planned to rely to support its action. As a result an employee, although apprised of the charges against him, sometimes found himself unable to rebut the specific details of his employer's case.[10] This failure to require disclosure also made it possible for an agency to act precipitously, without realizing that evidence to support its action simply did not exist.[11] The Commission's 1970 amendments of regulations remedied this deficiency by requiring that material relating to a proposed adverse action be made available for review by the charged employee.[12] Evidence that the agency does not or cannot show to the employee for any reason, such as its allegedly confidential or classified nature, may not be relied upon.[13]

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is also inapplicable in cases of furlough without pay due to unforeseen circumstances ("sudden breakdowns in equipment, acts of God, or emergencies requiring immediate curtailment of activities"). 5 C.F.R. § 752.202(c)(1) (1972). With these exceptions, the 30-day period may not be ignored. *See* 5 U.S.C. § 7512(b) (1970). *Cf.* Manning v. Stevens, 208 F. 2d 827 (D.C. Cir. 1953); Roth v. Brownell, 215 F. 2d 500 (D.C. Cir.), *cert. denied*, 348 U.S. 863 (1954).

The cases suggest some confusion concerning the computation of the 30-day period. *See, e.g.*, Stringer v. United States, 90 F. Supp. 375 (Ct. Cl. 1950); O'Brien v. United States, 124 Ct. Cl. 655 (1953); Engelhardt v. United States, 125 Ct. Cl. 603 (1953). *Cf.* Sudduth v. Macy, No. 3418–62 (D.D.C. July 2, 1962), *aff'd*, 341 F. 2d 413 (D.C. Cir. 1964).

[8] 5 C.F.R. § 752.202(a)(1) (1972). This provision apparently requires reference to such aspects of the employee's conduct as time, place, and character, *e.g.*, inefficiency or whatever. A notice of a proposed removal relying simply on the general ground that the dismissal would promote the efficiency of the service will not suffice. Norden v. Royall, 90 F. Supp. 834 (D.D.C. 1949). *See also* Deak v. Pace, 185 F. 2d 997 (D.C. Cir. 1950) (reasons for discharge not stated sufficiently to permit statement in defense); Manning v. Stevens, 208 F. 2d 827 (D.C. Cir. 1953) (same). Claims of insufficiency of notice were also raised in Deviny v. Campbell, 194 F. 2d 876 (D.C. Cir.), *cert. denied* 344 U.S. 826 (1952), and Baughman v. Green, 229 F. 2d 33 (D.C. Cir. 1956), but were rejected by the court on factual grounds.

[9] *E.g.*, Urbina v. United States, 180 Ct. Cl. 194 (1967); Shadrick v. United States, 151 Ct. Cl. 408 (1960); Blackmar v. United States, 120 F. Supp. 408 (Ct. Cl. 1954).

[10] Nammack & Dalton, Notes on the Appropriateness of the Current Adverse Action and Appeals System, 19 Am. U. L. Rev. 374, 377 (1970).

[11] *Id.* The possibility of precipitous action, in a nonremoval context, is suggested by Scott v. United States, 160 Ct. Cl. 152 (1963). An employee was charged with having engaged in sexual misconduct on the basis of an uncorroborated confession obtained under duress. When the employee filed an answer repudiating the confession, the agency expanded the case against him to include unsuitability "because he had voluntarily made derogatory statements in the confession about himself and other persons which had no basis in fact."

[12] 5 C.F.R. § 752.202(a)(2) (1972). This provision also requires that the employee be advised of the availability for inspection of evidence against him.

[13] 5 C.F.R. § 752.202(a)(3) (1972). In point of fact, this portion of the new provision does not have a substantive impact on adverse action procedures since "classified" or "confidential" material could not be relied on to support adverse action under the prior regulations. *See* 5 C.F.R. § 752.304(c) (1968); Nammack & Dalton, *supra* note 10, at 377.

2. *Opportunity to Answer.* After receiving notice of a proposed adverse action, an employee must be afforded a reasonable time to answer the charges and submit affidavits in his defense.[14] Under the Commission's regulations, what is a reasonable time "depends on the facts and circumstances of the case."[15] Most agencies permit employees at least ten days in which to respond, although the courts have been flexible in interpreting this provision.[16]

An employee may answer either personally, or in writing or, if he chooses, both personally and in writing.[17] The right to reply personally does not, however, imply that the employee has a right to a trial-type hearing at this stage of the proceeding, for in most agencies he does not. Commission regulations require agencies to afford an employee one opportunity for an evidentiary hearing, but leave them the option of providing the hearing prior to the initial decision or delaying it until the employee appeals from an unfavorable decision.[18] All but nine agencies have chosen the latter alternative, providing a hearing only on appeal. This approach is favored, among other reasons, because a majority of adverse actions are not appealed (or are appealed directly to the Civil Service Commission) and the number of formal agency hearings necessary is ostensibly reduced.[19] In most agencies, therefore, an employee's right to reply simply means that he may meet informally with a representative of the agency and advance oral representations that he hopes will sway the final decision.[20] He has no right at this stage to present witnesses or to confront and cross-examine the agency's witnesses.[21] The agency official before whom he appears must

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[14] 5 C.F.R. § 752.202(b) (1971).

[15] *Id.*

[16] *E.g.*, Dew v. Quesada, No. 275–69 (D.D.C. 1959); Tierney v. United States, 168 Ct. Cl. 77 (1964).

[17] 5 C.F.R. § 752.202(b) (1971). *See, e.g.*, Washington v. United States, 147 F. Supp. 284 (Ct. Cl.), *petition dismissed*, 355 U.S. 801 (1957).

[18] 5 C.F.R. § 771.208(a) (1972). On the question of the constitutionality of this procedure, *see* note 21, *infra*.

[19] The mechanics of this phenomenon have been observed in other areas as well. Prior to Goldberg v. Kelly, 397 U.S. 254 (1970), welfare recipients could request a hearing if their benefits were terminated. As few did, welfare officials were saved considerable effort which they would otherwise have had to expend on hearings. Briar, Welfare from Below: Recipients' Views of the Public Welfare System, 54 Calif. L. Rev. 370, 379–80 (1966); Comment, Texas Welfare Appeals: The Hidden Right, 46 Texas L. Rev. 223 (1967).

[20] 5 C.F.R. § 752.202(b) (1971).

[21] The absence of these safeguards was considered fatal to the system's validity in *Kennedy* v. *Sanchez*, 349 F. Supp. 863 (N.D. Ill., 1972). The Commission regulations specify that the right to appear "does not include the right to a trial or formal hearing with examination of witnesses." 5 C.F.R. § 752.202(b) (1972). It will be remembered that the Lloyd-LaFollette Act, while not requiring trial-type hearings, did authorize agency officials in their discretion to hold such hearings. The applicable decisions in this area have confirmed that employees have no statutory or regulatory right to a hearing. *See* Studemeyer v. Macy, 321 F. 2d 386 (D.C. Cir.), *cert. denied*, 375 U.S. 934 (1963); Hart v. United States, 284 F. 2d 682 (Ct. Cl. 1960).

For discussion of some of the problems surrounding the constitutionality of postponing the opportunity for an evidentiary hearing, *see* Comment, The Constitutional Minimum

be in a position either to make the final decision on whether action should be taken, or at least to recommend what decision should be made.[22] In preparing and making his reply, an employee may have the assistance of counsel, of a union representative, or of another employee or person of his choosing.[23]

During the thirty-day notice period, the employee threatened with adverse action is entitled to remain on active duty unless the agency finds that his presence may result in damage to government property or be detrimental to the interests of the agency.[24] If such danger exists, the employee may be temporarily assigned to other duties.[25] In cases involving imputation of a crime for which imprisonment may be imposed in which retention on active duty is undesirable, the agency may suspend an employee without pay after providing at least twenty-four hours notice. Since such suspension is itself an adverse action, the employee must receive written notice of the reasons, as well as be afforded an opportunity to answer this notice separately.[26] Thus, except in unusual cases, an employee is likely to remain on duty until after the agency has considered his reply and decided against him.[27]

Under the Commission's 1970 revisions of its regulations, an employee may use a reasonable amount of on-duty time to prepare his answer.[28] This provision was added because an employee remaining on active duty was often unable, without using official time, to review documents or discuss his case with individuals readily available only during working hours.[29]

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for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich. L. Rev. 112, 119–28 (1969). *See also* Reich, The New Property, 73 Yale L. J. 733 (1964).

[22] 5 C.F.R. § 752.202(b) (1972). *See, e.g.,* O'Brien v. United States, 284 F. 2d 692 (Ct. Cl. 1960) (employee not guaranteed an interview with any particular official; it is enough that he sees a superior who may recommend or take final action); Brownell v. United States, 164 Ct. Cl. 406 (1964) (employee does not have right to appear before agency head); Paterson v. United States, 319 F. 2d 882 (Ct. Cl. 1963) (right to oral presentation not satisfied by interview with agency investigators).

[23] 5 C.F.R. § 771.105(a)(1) (1972).

[24] 5 C.F.R. § 752.202(d) (1972).

[25] As an alternative to transfer an employee may, with his consent, be placed in a leave status, but he may not be *forced* to take leave during this period. Taylor v. United States, 131 Ct. Cl. 387 (1955); Kenny v. United States, 145 F. Supp. 898 (Ct. Cl.) *cert. denied,* 352 U.S. 893 (1956); Armand v. United States, 136 Ct. Cl. 339 (1956).

[26] 5 C.F.R. § 752.202(e) (3) (1972).

[27] While most employees are removed from active duty status on the date on which adverse action is taken, *see* text accompanying note 21, *supra.* Some agencies, including the Post Office, the Civil Service Commission itself, and until recently the Veterans Administration, retain employees in active duty status during some or all of the appeal period. The Post Office permits employees to remain on duty during first level (regional) appellate review (unlike most agencies the Post Office has two internal appellate levels). Kennedy, Adverse Actions in the Agencies; Words and Deeds; Postal Adverse Action Procedures, 19 Am. U. L. Rev. 398, 404 (1970).

[28] 5 C.F.R. § 752.202(b) (1972).

[29] Nammack & Dalton, *supra* note 10, at 378.

3. *Notice of decision.* After receiving an employee's answer, and assuming no pre-action hearing is provided, the employing agency must render a "notice of adverse decision" at the earliest practicable date, but not later than the time the action is to become effective.[30] Commission regulations do not specify which agency official must make the decision; nor do they provide standards to guide agencies in assigning that responsibility.[31] It is thus possible, though not usual, that the final decision may be made by the same official who originally brought charges against an employee.[32]

The agency's written notice of adverse decision must inform the employee of the factual grounds found to support the action and advise him of his appeal rights, including the time limits for filing an appeal. Prior to 1970, the final notice had only to discuss those charges relied upon by the agency, even if the notice of proposed action contained additional charges. Thus an employee, although the action against him might ultimately be reversed, could have outstanding allegations concerning his conduct on his employment record. Now, the agency's notice of decision must spell out which of the initial charges have been found sustained and which have not.[33]

D. *Agency Appeals Procedures*

After receiving a notice of adverse decision, an employee who wishes to regain his job or to avoid disciplinary action is faced with a choice. Under present regulations, he may appeal either directly to the Civil Service Commission[34] or to the first appellate level within his agency.[35] If an employee appeals within his agency at this stage, he does not lose the right to appeal to the Commission at a later date.[36]

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[30] 5 C.F.R. § 752.202(f) (1972). Decisions within the 30-day notice period are not forbidden once an employee has filed his answer. Palmer v. United States, 121 Ct. Cl. 415 (1952).

[31] *See* DeBusk v. United States, 132 Ct. Cl. 790 (1955), *cert. denied,* 350 U.S. 988 (1956).

[32] 5 C.F.R. § 752.202(f) (1971). The agency's decision to take action must, of course, rely on reasons stated in the original notice. Urbina v. United States, 180 Ct. Cl. 194 (1967). But it need not, and rarely does, explain why removal is for "such cause as will promote the efficiency of the service." Begendorf v. United States, 340 F. 2d 362 (Ct. Cl. 1965); Meyers v. United States, 169 Ct. Cl. 1 (1965); DeBusk v. United States, 132 Ct. Cl. 790 (1955), *cert. denied,* 350 U.S. 988 (1956); Blackmon v. Lee, 205 F. 2d 13 (D.C. Cir. 1953).

[33] 5 C.F.R. § 752.202(f) (1972). See Nammack & Dalton, *supra* note 10, at 378.

[34] 5 C.F.R. § 752.203 (1972). *See* text accompanying notes 56–99, *infra.*

[35] 5 C.F.R. § 771.205 (1972). An agency is required to provide one internal appellate level. With the approval of the Commission, however, it may have more than one appellate level. 5 C.F.R. § 771.203 (1972). The three military departments and the Departments of Interior and HEW maintain two-tiered systems.

[36] 5 C.F.R. § 752.205(c) (1972). In one older case, the District Court for the District of Columbia held that a veteran's right to appeal was denied without justification when he was informed by a Commission regional director that he could not appeal to the Commission if he decided first to pursue an appeal within his agency. Berloff v. Higley, (D.D.C. June 13, 1956).

He will forfeit his right to an agency appeal, however, if he seeks Commission review in the first instance.[37]

The uniform right of appeal within the employing agency is of more recent vintage than the right to seek Commission review. By executive order in 1962 President Kennedy ordered each department and agency to establish internal procedures for reconsideration of administrative decisions to take adverse action against employees.[38] Previously, an employee's right to appeal internally varied from agency to agency, and existing appeal procedures were far from uniform.[39] The President's order not only required all agencies to establish appellate systems, but also required that they conform to uniform standards and procedures. Guidelines for implementation of the order were subsequently set out in the Commission's regulations.[40]

Internal agency appeals system theoretically provide several benefits. Such systems allow career employees to obtain review within their own agencies, obviating the necessity of going immediately to the Commission for assistance. Internal review is said to permit agency management an opportunity to correct hasty or improper action by subordinates and to improve internal operations. From the Commission's viewpoint, internal appeals supposedly weed out less difficult and frivolous cases, thereby permitting it to serve a more general policy making and over-sight function. Even assuming these benefits are obtained, their cost has been greater complexity in the handling of adverse action cases, including the possibility of successive evidentiary hearings—one in the agency and another at the Commission—in many cases.[41]

1. *The appeal.* If an employee initially chooses to remain within his agency, he must file a written appeal with the appropriate agency official (who will have been identified in the notice of adverse decision) no later than 15 days after the action against him has been effected.[42] An employee's appeal must set forth clearly its basis as well as his request for an evidentiary hearing if he desires one.[43] In preparing his

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[37] 5 C.F.R. § 752.205(b) (1972). Appeals within the agency and to the Commission may not be processed concurrently. 5 C.F.R. § 752.205(a) (1972).

[38] Exec. Order No. 10987, 3 C.F.R. 519 (Supp. 1959–1963). The order excepted several agencies from its requirements, including the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Atomic Energy Commission, and the Tennessee Valley Authority. 5 C.F.R. § 771.103(b) (1972).

[39] For the background of Exec. Order 10987, see Grossman, Adverse Actions and Appeals Therefrom: A New System for Federal Civil Servants, 14 Labor L.J. 265 (1963).

[40] 5 C.F.R. Part 771 (1972). This part was extensively rewritten during the 1970 revision of the Commission's regulations. *See* Part I, note 6, *supra.*

[41] *But see* text at note 76 *infra,* noting that the Commission may curtail the scope of its hearing where a prior hearing has been held by the agency. Guttman, *supra* note 65, at 352–354.

[42] 5 C.F.R. § 752.204(a) (1972).

[43] 5 C.F.R. § 771.207 (1972). *See* note 14, *infra.*

appeal, an employee may be assisted by counsel, by his union representative, or by any other person of his choice.[44] Commission regulations specify that the fifteen-day limit is to be strictly observed, but permit the agency to extend the time when the employee (1) shows that he was not notified about, and was unaware of, the time limit, or (2) demonstrates that he was prevented by circumstances beyond his control from appealing within the time limit.[45] In the unusual case that an employee remains on active duty status after the adverse action, he is entitled to a reasonable amount of official time to assist him.[46]

2. *Opportunity for hearing.* An evidentiary hearing will be granted only if an employee requests it in a timely appeal.[47] Once a request is made, however, the agency must ordinarily hold the hearing.[48] If, contrary to the general practice, a hearing was held prior to the adverse decision against the employee, the agency may dispense with a hearing on appeal.[49] According to the regulations, a hearing may also be avoided when it is "impracticable by reason of unusual location or other extraordinary circumstance." [50]

3. *Conduct of the hearing.* The Commission in 1970 significantly altered the rules governing the conduct of adverse action hearings. Previous regulations required the agency hearing to be conducted by a committee chosen in accordance with agency regulations.[51] Although under the regulations the "committee" could consist of a single examiner, three-member panels were common in several agencies. In some the committee would consist of one person chosen by the agency, one by the employee and a third selected by the first two.[52] Hearing officers were not required to have legal training and frequently lacked experience in conducting adversary proceedings.[53]

Before 1970, the hearing officer or committee did not have ultimate responsibility for deciding employee appeals. His function was simply

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[44] 5 C.F.R. §§ 7771.105(a)(1), 771.206 (1972).

[45] 5 C.F.R. § 752.204(b) (1972).

[46] 5 C.F.R. § 771.206 (1972). Until 1970, the regulations permitted an employee remaining on active duty to use official time to *present,* but not to *prepare,* an appeal. See Nammack & Dalton, *supra* note 10, at 378.

[47] 5 C.F.R. § 771.207 (1972). Professor Guttman criticizes this practice of placing the burden of requesting a hearing on the employee. Guttman, *supra* note 65, at 354–55.

[48] *See* the Judge Skelton's concurrence in Ricucci v. United States, 425 F. 2d 1252 (Ct. Cl. 1970), which suggests that due process *requires* a hearing in adverse action cases.

[49] 5 C.F.R. § 771.208(b)(2) (1972). The language of this section is deceptive. It specifies that the agency may deny a hearing "when the employee failed to request a hearing offered before the original decision." It is therefore possible for an employee to wind up with no right to an appellate hearing even though he had no pre-decision hearing.

[50] 5 C.F.R. § 771.208(b)(1) (1972).

[51] 5 C.F.R. § 771.214 (1969).

[52] Nammack & Dalton, *supra* note 10, at 379.

[53] *Id.*

to hear and record the facts so that the agency official charged with deciding the appeal would have an adequate basis upon which to act.[54] Agencies were allowed the option of having the hearing officer or committee submit only findings of fact or findings accompanied by a recommendation, [55] and many agencies chose the former course. [56] Where the hearing officer submitted recommendations, they were advisory only and the reviewing official was free to arrive at a contrary decision.[57] The former regulations excluded officials with ultimate decisional responsibility from serving on hearing committees, but they did not bar participation by their subordinates.[58]

Agency hearing committees were subject to several criticisms.[59] With no requirement of training or experience, every member of a committee might be unfamiliar with the intricacies of civil service law and hearings, thus, were often something less than full and adequate inquiries.[60] The use of three-man committees also frequently proved cumbersome. Because hearing officers were sometimes subordinates of the deciding official, the system's objectivity was questioned. A committee member might strive to be scrupulously impartial, but it is difficult to discount the subtle and unconscious influence of having to report to an official with authority over the conditions, and perhaps even the continuance, of his tenure.[61] Finally, the "advisory" status of committee recommendations in many agencies caused some to doubt the significance of agency hearings, particularly where adequate treatment of any employee's appeal turned on assessment of the credibility of witnesses or similar subjective factors. Where hearing officers were confined to recording facts, such factors often got excluded from the decisional process. Even in agencies that permitted them to make recommendations, their influence was problematical since the deciding official was in no way bound by them.

The Commission's 1970 amendments swept away the committee system. Agency hearings now must be conducted by a single examiner.[62] Examiners must meet standards of experience and training prescribed

[54] 5 C.F.R. § 771.218(a) (1969).

[55] *Id.*

[56] Letter from Anthony Mondello, General Counsel, Civil Service Commission, to Prof. Roger Cramton, University of Michigan Law School (March 6, 1970).

[57] *Cf.* Camero v. United States, 345 F. 2d 798 (Ct. Cl. 1965).

[58] 5 C.F.R. § 771.214(a) (1969). The regulations did, however, require that the method of selection "will insure that members are fair, impartial and objective." The regulations further excluded from participation in appellate hearings persons responsible for the original decision.

[59] *See generally,* Nammack & Dalton, *supra* note 10, at 379–381.

[60] The Civil Service Commission distributed a pamphlet entitled *Conducting Hearings on Employee Appeals* (1968). This guide contained useful hints on hearing mechanics and procedures, but was no substitute for formal training or experience.

[61] For a useful discussion of the problem of subjective perception of facts, see J. Frank, *Courts on Trial* 146–164 (1949).

[62] 5 C.F.R. § 771.209(a) (1972).

by the Commission, and must be selected through procedures it has approved.[63] An examiner may not occupy a position directly or indirectly under the jurisdiction of the official who proposed the adverse action or who bears ultimate responsibility for decision, unless that official is the head of the agency.[64] In the latter situation, however, an agency may, but is not required to, designate an examiner from another agency.[65]

The new regulations accord the examiner's views substantial weight. Agencies no longer have the option of limiting the examiner's report to findings of fact. The report must contain the examiner's recommendations,[66] and the deciding official, unless he is the agency head, may no longer arbitrarily reject the examiner's views. If he decides the examiner's recommendation is unacceptable, he must refer the case to a higher level of authority for decision, with a statement of his reasons for rejecting it.[67] Although these changes have not eliminated the problems of the old system, they have enhanced the employee's opportunity to receive a meaningful hearing.

Agency adverse action hearings are trial-type, though ordinarily less formal than adjudicatory proceedings under the Administrative Procedure Act.[68] Both the employee and the agency may produce, examine, and cross-examine witnesses,[69] who testify under oath or affirmation.[70] Documentary evidence may also be introduced.[71] The rules of evidence applicable in jury trials are not strictly observed, but the examiner may exclude irrelevant or unduly repetitious evidence.[72] One justification offered for informality is that "adverse action proceedings are administrative in nature," and since "[t]he cause of action generally involves an alleged offense against the employer-employee relationship, . . . justice would not be served by converting the adminis-

[63] 5 C.F.R. § 771.209(a), (e) (1972).

[64] 5 C.F.R. § 771.209(b) (1972). The deciding official in an agency appeal must be at a higher administrative level than the official originally ordering adverse action, unless, of course, that official was the agency head. 5 C.F.R. § 711.218 (1972).

[65] 5 C.F.R. § 771 209(d) (1972).

[66] 5 C.F.R. § 771.213(a) (1972).

[67] 5 C.F.R. § 771.219(b)(3) (1972).

[68] *See* 5 U.S.C. §§ 554–57 (1970).

[69] 5 C.F.R. §§ 771.210(f), 771.211 (1972). *See, e.g.,* Brown v. Zuckert, 349 F. 2d 461 (7th Cir. 1965); McTiernan v. Gronouski, 337 F. 2d 31 (2d Cir. 1964); Cohen v. Ryder, 258 F. Supp. 693 (E.D. Pa. 1966).

[70] 5 C.F.R. § 771.210(e) (1972).

[71] 5 C.F.R. § 771.210(b) (1972).

[72] 5 C.F.R. § 771.210(c) (1972). The objection to this approach is not that adverse action decisions will be grounded on incompetent evidence. At least in jurisdict'ons adhering to the substantial evidence scope of review, action based solely on evidence without probative value is unlikely to withstand judicial scrutiny. Jacobowitz v. United States, 424 F. 2d 555 (Ct. Cl. 1970). *See also* Morelli v. United States, 177 Ct. Cl. 848, 853–54 (1966); Montana Power Co. v. Federal Power Comm., 185 F. 2d 491, 497–98 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 947 (1950). The risk is that such evidence may color in the mind of an inexperienced fact-finder an otherwise marginal case.

trative process to a judicial one." [73] This explanation, which bears some flavor of the discredited notion that federal employment is a "privilege" that may be withdrawn at will by the government,[74] would have more force if the presiding officers were professionals who were experienced in evaluating evidence. A more persuasive justification is that rigorous formality might disadvantage employees who are not represented by counsel.[75]

Congress has not empowered either employing agencies or the Civil Service Commission to subpoena witnesses or documents in adverse action cases. However, the agency must, if at all practicable, make its employees available as witnesses when requested by the examiner to do so.[76] Such a request is ordinarily initiated by the employee and should be granted when, in the examiner's opinion the testimony of the witness requested will aid the hearing. If an employee fails to request witnesses in the agency's employ in a proper and timely manner, he may not later object to the absence of these witnesses.[77] Under the old regulations, the practicability exception became a major loophole for agencies reluctant to produce witnesses. An agency's determination that production of one of its employees was impracticable was, for practical purposes, unchallengable.[78] The Commission in 1970 sought to close this gap by authorizing examiners to determine whether the absence of a witness makes a full and fair hearing impossible. If an examiner finds that a witness' presence is essential, he may now suspend the hearing until the agency and the employee can arrange for his testimony to be produced.[79] During their appearance, witnesses who are employees of the agency continue in active-duty status and the regulations require that they be free from restraint, coercion and reprisal.[80]

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[73] Berzak, Adverse Actions By Federal Agencies and Administrative Appeals, 19 Am. U. L. Rev. 387, 394–95 (1970). Chairman Berzak's discussion, it should be noted, focuses on the admissibility of evidence in hearings within the Commission. The same justification would, however, apply to hearings in the agencies, where deciding official and hearing officers are still less accustomed to adjudicatory processes.

[74] *See* note 26, Part I, *supra*.

[75] *But see* Comment, Trumpets in the Corridors of Bureaucracy: A Coming Right to Appointed Counsel in Administrative Adjudicative Proceedings, 18 U.C.L.A. L. Rev. 758 (1971).

[76] 5 C.F.R. § 771.211(b) (1972). *See* Williams v. Zuckert, 372 U.S. 765 (1963). This does not solve the problem of securing testimony from a witness who is no longer or never was in the agency's employ.

[77] *See, e.g.*, Begendorf v. United States, 340 F. 2d 362 (Ct. Cl. 1965), relying on Williams v. Zuckert, 371 U.S. 531, *vacated and remanded on rehearing*, 372 U.S. 765 (1963).

[78] Nammack & Dalton, *supra* note 10, at 379–80.

[79] 5 C.F.R. § 771.211(c) (1972). This may not help the employee in a removal case, since he is likely to be off the payroll, and delay will be to his disadvantage. *See* text accompanying note 68, *supra*.

[80] 5 C.F.R. § 771.211(d)–(e) (1972).

The employing agency must keep a record of the hearing and supply a copy to the employee.[81] Until 1970, however, agencies had the option of preparing either a verbatim transcript or a summary of the hearing. If only a summary was supplied, the employee could object to sections that he felt failed accurately to reflect the substance of the hearing, and his objections would become part of the record.[82] These summary reports cause numerous problems,[83] for they rarely reflected the nuances and inconsistencies in complex cases. In 1970 the Commission withdrew authority for use of summaries; all agency hearings must now be reported verbatim.[84]

The agency official to whom the hearing examiner transmits his findings and recommendations must be at a higher administrative level than the official who took the original adverse action. An exception is made where the agency head made the original decision.[85] Review of the original decision includes, but is not limited to, a review of issues of fact and of compliance with agency and Commission procedural requirements.[86] The deciding officials' decision must be in writing, must contain specific fact findings, and must notify the employee of his right to further appeal.[87]

E. *Appeals to the Civil Service Commission*

When Congress in 1944 gave the Civil Service Commission authority for binding review of agency adverse actions,[88] it spoke in very general terms:

> The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.[89]

The Commission accordingly has been relatively free to adopt the procedures it believes will best fulfill its appellate responsibilities.

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[81] 5 C.F.R. § 771.212 (1972).

[82] 5 C.F.R. § 771.217(a) (1969).

[83] Nammack & Dalton, *supra* note 10, at 380.

[84] 5 C.F.R. § 771.212(a) (1972).

[85] 5 C.F.R. § 771.218(a) (1972). The authorized official shall also be at an organizational level no lower than the head of a field organization or the head of a primary subdivision of the headquarters organization. *Id.*

[86] 5 C.F.R. § 771.218(b) (1972).

[87] 5 C.F.R. § 771.220 (1972).

[88] *See* text accompanying notes 55–64 *supra*.

[89] 5 U.S.C. § 7701 (1970). *See also* Exec Order No. 11491, § 22; 3 C.F.R. § 91 (Supp. 1966–1970), 5 U.S.C. § 7301 (1970).

At a minimum the statute appears to require a *de novo* review of the facts.[90] The language empowering the Commission to make binding recommendations "after investigation and consideration of the evidence submitted" has been read both by it and by the courts as contemplating more than an ordinary appeal. In *McTiernan* v. *Gronouski*,[91] for example, the Second Circuit held that procedural error within the agency review system was cured when the employee received *de novo* consideration of his claim on appeal to the Commission.[92] The statute seemingly also requires that appellants to the Commission have an opportunity for an oral hearing rather than simply a review of the record,[93] although in some cases this hearing may amount to less than a full trial-type proceeding.[94]

1. *The appellate system.* The Commission operates a two-tiered system for deciding employee appeals. Initial appellate authority had been delegated to the Commission's regional offices, of which there are eleven. Second-level review is before the Board of Appeals and Review, located in the District of Columbia.[95] Within each region, the CSC Regional Director is formally responsible for adjudicating first-level appeals in adverse action cases. The decisional authority actually exercised by appeals examiners in the regional offices derives from the Regional Directors and is subject to their authority to change proposed decisions.[96] Similarly, the Board of Appeals and Review exercises the power of final decision on behalf of the Commission and subject to its ultimate authority,[97] although, unlike the Regional Directors, the Commissioners themselves rarely exercise their revisory power.

2. *The initial appeal.* As previously noted, an employee may by-pass his agency's appellate system and appeal an adverse decision directly to the Commission.[98] Or he may pursue an internal agency appeal and then appeal to the Commission if the action is sustained.[99] An employee

[90] This is not surprising since most employees who appeal to the Commission have not been through the agency appeals processes, and accordingly have had no evidentiary hearing.

[91] 337 F. 2d 31 (2d Cir. 1964).

[92] *Id.* at 35. *See also* Green v. Baughman, 243 F. 2d 610 (D.C. Cir.), *cert. denied*, 355 U.S. 819 (1957).

[93] *Cf.* Williams v. Zuckert, 371 U.S. 531, *vacated and remanded on rehearing*, 372 U.S. 765 (1963).

[94] *See* text accompanying note 81, *supra*.

[95] USCSC Minutes of Proceedings, March 30, 1954; June 20, 1960; August 26, 1960.

[96] Guttman, note 65, Part I, at 339.

[97] USCSC Minutes of Proceedings, August 26, 1960.

[98] See text accompanying notes 1–4, *supra*. Approximately 15% of all appellants do so, their cases comprising more than 55% of the Commission's first-level caseload.

[99] 5 C.F.R. § 752.205(c) (1972). Prior to November, 1970, the regulations contained an exception to this rule applicable where an agency has two appellate levels and an employee pursued an appeal through both levels. In such a case, the employee forfeited his right to appeal to the Commission. The 1970 revisions dropped this provision, but did not change the practice. The Commission will reject as out of time any appeal filed more than 15 days following the first level agency decision, thereby effectively forcing an employee to choose between an appeal to the second level of his agency and appealing to the Commission.

may also appeal to the Commission if, after appealing within his agency, he receives no decision within sixty days,[1] though few ever interrupt their internal appeal in this fashion.

An employee's appeal must be in writing and filed within fifteen days after the last action by his agency.[2] An employee's failure to file within the specified period precludes him from appealing to the Commission, in the absence of special circumstances.[3] Upon being satisfied that an appeal is timely, the CSC regional appeals examiner will instruct the employing agency to forward the case file. The appeal should set forth the employee's reasons for contesting the adverse action, together with such offer of proof and pertinent documents as he is able to submit.[4] Employees are not held to rigorous standards of pleading. If an appeal is formally deficient, the regional examiner will make an effort to ascertain its basis and to clarify or supplement the record. This practice represents an important safeguard, since more than thirty percent of all appellants to the Commission are unrepresented,[5] but it often results in a record before the Commission's regional office different from the one on which the agency acted. If an employee fails to furnish additional information with reasonable promptness, however, his appeal may be dismissed. Appeals must be filed with the regional office in the region where the employee is employed.[6]

3. *Right to a hearing.* Appealing employees have a statutory right to a "personal appearance" before the Commission, which interprets this language as requiring an evidentiary hearing and independent determination of the facts. Thus an employee may have two trial-type hearings, one in his agency and a second on appeal to the Commission.[7] Prior to 1970, this possible duplication may have had much to commend it, but since changes that year were designed to increase the reliability of agency hearings, it is simply inefficient.[8] Several factors, however, including the Commission's procedures, limit the number and scope of Commission hearings.

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[1] *Id.*

[2] 5 C.F.R. §§ 752.203, 752.204(a) (1972). The 15-day limit does not apply where the agency has failed to act within 60 days.

[3] *See* Haas v. Overholser, 223 F. 2d 314 (D.C. Cir. 1955); Simpson v. Groark, Civ. No. 64c–1742 (N.D. Ill. May 26, 1965). The Commission or the agency may extend the time when an appellant shows that he was not notified of the 15-day limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit. 5 C.F.R. § 752.204(b) (1972). *See* Henry v. United States, 153 F. Supp. 285 (Ct. Cl. 1957).

[4] 5 C.F.R. § 752.203 (1972).

[5] Berzak, *supra* note 73, at 393 n. 24.

[6] *Id.* at 393 n. 25. Employees working in the Washington metropolitan area and in certain areas outside the continental United States appeal to the Commission's Appeals Examining Office in the District of Columbia. *Id.*

[7] This occurs in perhaps a fifth of all Commission cases.

[8] *See* Guttman, *supra* note 65, at 351–56. Guttman views the possibility of two hearings as unnecessarily burdensome. Since he believes there is less risk of prejudice at the Commission, he suggests that agency appeals systems be dropped or substantially revised.

One factor is the attitude of employees. Only one-half of those who appeal to the Commission request a hearing at that level.[9] Although we have little empirical data to explain this result, some explanations may be surmised. Many employees may be satisfied with the hearings conducted by their agencies. They may be aware that, having had one hearing, they will not get a full retrial before a Commission appeals examiner and thus conclude that the cost, including the cost of travel to the Commission's regional office, may exceed any benefit. In other cases, an employee may forego a hearing because he believes the agency record is adequate or because of tactical considerations.

Prehearing conferences, in most cases also limit the number, as well as regional appeals examiner, and is attended by the employee or his representative and by an agency representative who has sufficient authority to modify the action taken. The conference may provide an opportunity for the parties to reach settlement, which will be binding on the parties. If, as in the great majority of cases, no settlement can be agreed upon, the examiner will attempt to narrow the issues for hearing.

Some employee representatives have voiced disapproval of the prehearing technique on the ground that there is a conflict in the appeals examiner acting first as mediator and then as judge. The practice nonetheless closely resembles the pretrial conference authorized in the Federal Rules of both Civil and Criminal Procedure.[10] This practice has been reasonably successful in the federal courts and its adaptation to administrative adjudications, such as adverse actions, seems sensible.

Even when an employee insists on a hearing after the conference, he is not necessarily assured a full pre-trial of his case. By administrative practice, the Commission has determined that in cases in which a hearing was held at the agency, its appeals examiner may properly restrict the scope of the Commission hearing.[11] The examiner, in his discretion, may decline to receive additional testimony except as to matters not covered at the agency hearing or as to subsequently discovered information. Some Commission "hearings" are thus largely confined to oral argument on the basis of the prior record.

4. *Conduct of hearings.* Except to the extent that the examiner restricts the scope of testimony, Commission hearings are similar to, but probably more professional than, those conducted by employing agen-

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[9] Berzak, *supra* note 73, at 394 n. 27. Actually, Appellants do not "request" a hearing. The first level appellate office informs them of their right to a hearing and, if they do not desire one, they so inform the office in writing. 5 C.F.R. § 772.305(b) (1972).

[10] Fed. R. Civ. Pro. 16; Fed. R. Crim. Pro. 17.1.

[11] Berzak, *supra* note 73, at 394; Guttman, *supra* note 65, at 355.

cies.[12] Both parties may produce and cross-examine witnesses.[13] Testimony is given under oath or affirmation.[14] The rules of evidence are again not strictly observed, but irrelevant or repetitious testimony may be excluded. As at the agency level, all Commission hearings have been closed to the public.[15]

The Commission's examiner, however, plays a more important role than most agency hearing officers. Although the Commission has required that agency examiners possess prescribed qualifications, they need not be full-time hearing officers. Except in larger agencies, such as the Air Force, Army, Navy, and HEW, examiners continue to be drawn from other work for part-time duty presiding in adverse action cases. Commission appeals examiners, by contrast, are specialized hearing officers whose sole duty is to review appeals from agency decisions, although they are not qualified as hearing examiners under the Administrative Procedure Act.[16]

5. *Initial Commission Decisions.* After considering the entire appellate record,[17] the Commission's regional office must issue a written decision containing findings of fact and conclusions, specifying any corrective action required, and notifying both parties of their right to appeal to the Board of Appeals and Review.[18] The decision is supposed to include an "analysis" of the findings and a statement of the reasons for the conclusion reached.[19] Except upon specific authorization of the Commissioners, the regional decision may not modify the agency's disciplinary action. Practically speaking, the regional office is limited to affirming the action, or reversing it on either substantive or procedural grounds.[20]

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[12] For decisions that proceedings before the Commission need not be cast in the mold of a court trial, see Atkinson v. United States, 144 Ct. Cl. 585 (1959); Hunter v. Gronouski, 234 F. Supp. 1010 (S.D. Fla. 1964); Prater v. United States, 172 Ct. Cl. 608 (1965); Kaers v. United States, 175 Ct. Cl. 111 (1966). *Cf.* Williams v. Zuckert, 372 U.S. 765 (1963).

[13] 5 C.F.R. § 772.305(c)(4) (1972).

[14] *Id.*

[15] 5 C.F.R. § 772.305(c)(3) (1972).

[16] A discussion of the status, background and training of the Commission's examiners is found in Guttman, *supra* note 65, at 340–51. Guttman raises some questions concerning their independence and objectivity. For a contrary view, *see* Berzak, Review, 19 Am. U. L. Rev. 367, 368–69 (1970).

[17] When a first level appellate office receives an appeal it takes steps to compile a complete appellate file, which usually includes copies of the notice of proposed adverse action; the employee's reply, if any; the agency's final notice of decision; any affidavits or other evidence submitted to the agency by and in behalf of the employee; and the agency appeals file if an appeal was processed through the agency's internal system. Both parties have an opportunity to review the complete appellate file when it is fully assembled. Berzak, *supra* note 73, at 393. *Cf.* Cohen v. United States, 369 F. 2d 976 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 917 (1962).

[18] 5 C.F.R. § 772.306(a) (1972).

[19] *Id.*

[20] This limitation on Commission disposition is thought to result in a disproportionate number of procedural reversals, some probably spurious.

6. *Appeals to the Board of Appeals and Review.* After receiving the decision of the regional office, either party has fifteen days in which to appeal to the Board of Appeals and the Review.[21] This appeal too must be in writing [22] and must set forth the employee's or agency's full argument, since there is no right to oral appearance before the Board.[23] However, the Board may in its discretion, though it rarely does, permit the parties to appear and present oral arguments and representations.[24]

The Board of Appeals and Review consists of seven members who are assisted by a pool of appeals examiners. When an appeal is received by the Board, and after the arguments of both parties have been submitted, the case is assigned to an examiner who prepares a proposed decision. The examiner's draft is then circulated to two Board members. If both concur in a disposition, it will issue as the decision of the Board. Only if the two disagree will the case be reviewed by a third Board member.[25]

The Board reviews appeals on the basis of the entire appellate file, which includes the agency record, the record developed by the Commission's regional office, as well as any further representations by the parties, which may be factual as well as argumentative. Occasionally the Board will actively seek out additional factual material a member or an examiner believes essential to a fair decision. The Board may also call upon other bureaus in the Commission for expert advice on the resolution of technical issues, such as the proper classification of a job or the extent of physical disability. In neither case are the parties to the appeal likely to be given an opportunity to comment on the information the Board has solicited. If the Board finds the file is simply inadequate for resolution of the issues, it may remand the case to the Commission's first appellate level so that further facts may be developed.[26]

Decisions of the Board are in writing, but are not published or, until very recently, available outside the Commission to any but the appellant and employing agency. Even internal circulation of Board decisions has been sharply restricted. The Board's decisions are final and, if adverse, exhaust an employee's administrative remedies, for there is no right of appeal to the Commissioners.[27]

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[21] 5 C.F.R. § 772.307(a) (1972).

[22] *Id.*

[23] 5 C.F.R. § 772.307(b) (1972). Steelve v. United States, 150 Ct. Cl. 47 (1960).

[24] 5 C.F.R. § 772.307(b) (1972).

[25] *See* Report by Professor James A. Washington, Jr., to Chairman William Berzak, Board of Appeals and Review, September 11, 1968.

[26] Berzak, *supra* note 73, at 396.

[27] 5 C.F.R. § 772.307(c) (1972).

7. *Discretionary Review by the Commissioners.* Although no appeal of right lies to the Commissioners, an employee or agency may petition the Commissioners for reopening and reconsideration of an adverse decision by the Board of Appeals and Review.[28] The regulations authorize reopening where the petition establishes that new material evidence not previously considered has become available,[29] or that the "previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy." [30] A case may also be reopened if the decision is of "a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such exceptional nature as to merit the personal attention of the Commissioners." [31] Reopening by the Commissioners is infrequently sought, and even more rarely granted. Its theoretical availability serves more as a protection against Commission embarrassment than as a significant additional protection of employee rights.

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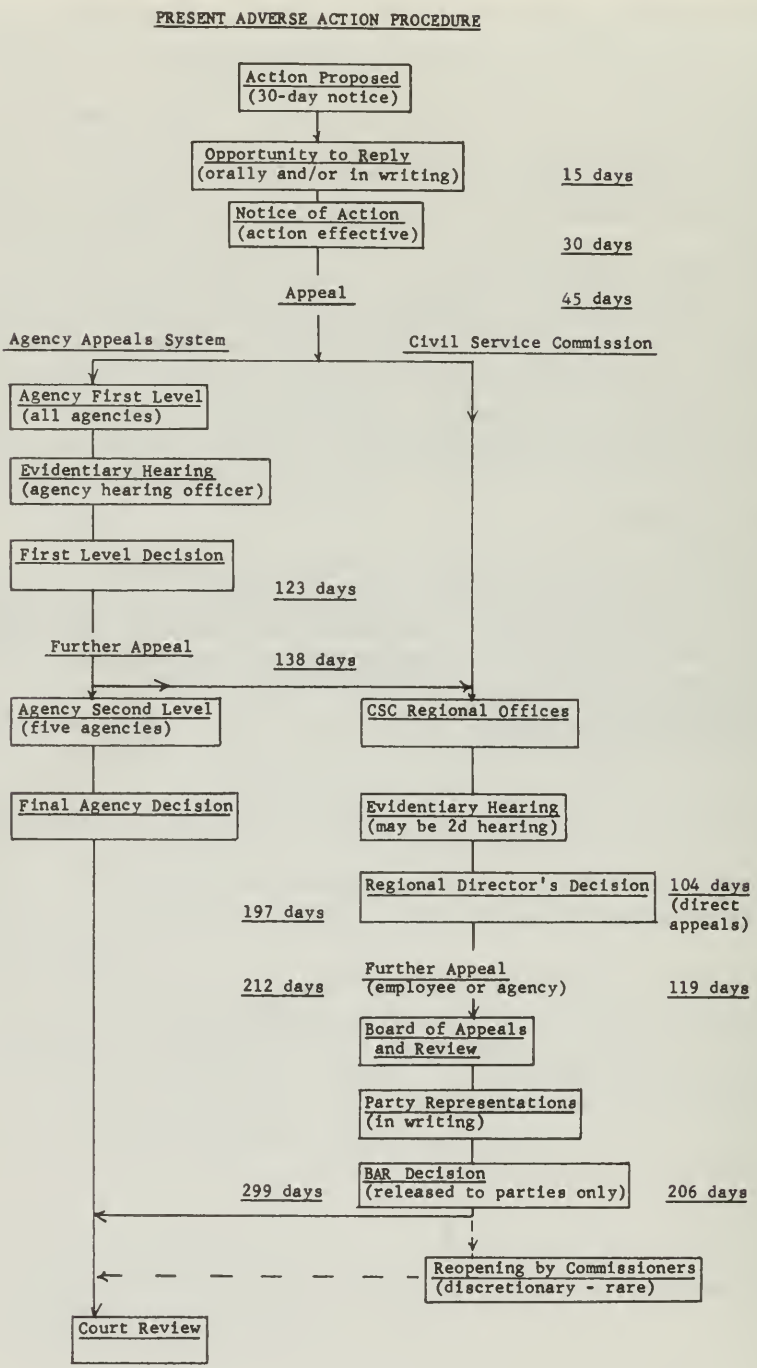
[28] 5 C.F.R. § 772.308 (1972). Decisions involving this authority include Gardner v. Barron, 240 F. Supp. 87 (E.D. Pa. 1965); Keeling v. United States, 172 Ct. Cl. 246 (1965); Sudduth v. Macy, No. 3418–62 (D.D.C. July 2, 1963), *aff'd*, 341 F. 2d 413 (D.C. Cir. 1964); Shadrick v. United States, 151 Ct. Cl. 408 (1960); De Pusana v. United States, 164 F. Supp. 672 (D.C.C. 1958); Roberts v. United States, 128 F. Supp. 706, 131 Ct. Cl. 108 (1955); Lynsky v. United States, 126 F. Supp. 453, 130 Ct. Cl. 149 (1954).

[29] 5 C.F.R. § 772.308(a)(1) (1972).

[30] 5 C.F.R. § 772.308(a)(2) (1972).

[31] 5 C.F.R. § 772.308(a)(3) (1972).


PRESENT ADVERSE ACTION PROCEDURE
Action Proposed
(30-day notice)
Opportunity to Reply
(orally and/or in writing)
15 days
Notice of Action
(action effective)
30 days
Appeal
45 days
Agency Appeals System
Civil Service Commission
Agency First Level
(all agencies)
Evidentiary Hearing
(agency hearing officer)
First Level Decision
123 days
Further Appeal
138 days
Agency Second Level
(five agencies)
CSC Regional Offices
Final Agency Decision
Evidentiary Hearing
(may be 2d hearing)
Regional Director's Decision
104 days
(direct
appeals)
197 days
Further Appeal
(employee or agency)
212 days
119 days
Board of Appeals
and Review
Party Representations
(in writing)
BAR Decision
(released to parties only)
299 days
206 days
Reopening by Commissioners
(discretionary - rare)
Court Review

IV. Commentary on Proposed Recommendations

A. *Definitions and Standards*

1. *Redefining "adverse action."* Adverse actions currently include four types of disciplinary action: removals, reductions in rank, pay, or grade (demotions), suspensions for more than 30 days, and furloughs without pay. Since employing agencies initiate comparatively few long suspensions or furloughs, and fewer still are contested, it is appropriate to focus attention on the first two categories.[32]

Agency officials frequently lament the formality of adverse action hearings, which feature confrontation, testimony under oath, cross-examination, and now verbatim transcription of the record. Given the tenor of recent court decisions,[33] it is unlikely that the adverse action process could be supplanted by informal, off-the-record investigations. More important, however, adverse actions are proceedings, among many for which formal adjudication is required, for which such procedures usually make sense.

Reductions in rank or grade comprise the majority of adverse actions taken, but most appealed adverse actions are removals. In well over 80 percent of all appeals,[34] the agency's action is based on the employee's inability or failure to do the work—inefficiency in the colloquial sense—or so some kind of misbehavior, on- or off-duty, that is thought to impair his capacity to carry out his responsibilities. Examples of such misconduct include absence without leave, fighting on the job, destruction of government property, fasification of government records, and indictment or conviction for criminal conduct.[35] The essential point is that most adverse action cases center on either the employee's performance or his conduct.

These disputes are inevitably two-sided. Generally, the surrounding circumstances are known to both parties and can be easily proved. Disputed issues of fact almost invariably involve past events that are not likely to recur. By contrast with many other administrative proceedings, the credibility of witnesses is often at issue, and witnesses are

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[32] During fiscal years 1968, 1969, and 1970, removals and demotions (reductions in rank, grade or pay) comprised more than 95 per cent of all adverse actions initiated, and a slightly higher percentage of actions appealed. U.S. Civil Service Commission, Statistical Report of Appeals Activities: Fiscal Years 1968, 1969, and 1970, Table I (1970).

[33] *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Kennedy v. Sanchez, 349 F. Supp. 863 (N.D. Ill. 1972).

[34] This estimate is based on the assumption that actions described as having been taken for "other" reasons fall principally within the "misconduct" category. Many agency officials have reported that they have difficulty deciding how to label actions based on repeated absence without leave, for example, and therefore class them under the heading "other reasons".

[35] The Commission's 1970 data do not identify the precise reasons for actions and therefore do not permit a numerical breakdown.

usually amateurs. Dispute customarily centers on two issues: (1) did the employee do what the agency alleges, and, if he did, (2) does his conduct or performance warrant the action proposed. Although the second is a matter of judgment, it depends upon resolution of issues of fact.[36]

The adjudicatory model that has evolved for handling such cases is better equipped than others in common use to find the "true" facts. From the standpoint of apparent fairness, it enjoys greater support among employees than any other process save arbitration.[37] Agency management would probably prefer adjudication to arbitration because it more readily permits full implementation of the agency's decision if the facts are proved.[38] Measured by efficiency, the present procedure will come up short against other, less formal alternatives, including ex parte investigation. A process that did not require the simultaneous attendance of parties and witnesses would undoubtedly be cheaper. But any procedure that permits external review of agency actions and affords an opportunity for employee participation—as any legitimate procedure must—will take longer.

A personnel action that results in a reduction of rank or pay clearly affects an employee *adversely* in the literal sense. Its impact may be as harsh in the long run as outright removal. Such actions, however, frequently have no punitive purpose or flavor. The employing agency's reasons may be wholly unrelated to the conduct or performance of the employee affected, and instead be prompted by structural changes or budgetary constraints. A particular type of job may be reclassified throughout government for reasons having nothing to do with the employees who perform it. A notable example involves from 3000 civilian shipworkers in the Department of the Navy, which recently adopted the Coordinated Federal Wage System. The new system, as did the old, provides extra pay for hazardous work, but the new classifications are not identical. These 3000 employees will receive approximately the same pay as before, but under a schedule that results in a pro forma reduction in rank. They have all challenged this change as an "adverse action," and each is theoretically entitled

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[36] *See generally,* Boyer, A Re-Evaluation of Administrative Trial-Type Hearings for Resolving Complex Scientific and Economic Issues (Staff Report to the Chairman of the Administrative Conference of the United States, December 1, 1971) ; Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585 (1972).

[37] The National Association of Government Employees commenting on the Committee's recommendations, recently cast doubt on union support for arbitration. See note 43 supra Part I.

[38] Adjudication may also be faster than arbitration, notwithstanding the lengthy delays built into the present procedures.

to proceed individually through the Navy and Civil Service Commission formal appeals systems.[39]

One could cite other examples. Position reclassification is the most common reason for which agencies reduce an employee's rank or pay, but under present law each action must, if the employee demands, be processed through a system designed for adjudicating issues of fact and assessing individual penalties. This comparatively expensive process should be reserved for cases that have a disciplinary purpose and raise issues of fact involving an employee's competence or conduct; at the same time, employees should have adequate opportunity for review or other decisions that essentially involve issues of efficiency or of managerial judgment.[40]

A possible solution would be redefine "adverse action" to include only those personnel actions taken for reasons relating to an employee's performance, behavior, or past record. This essentially functional approach would make more sense than attempting to confine trial-type procedures to specific categories of personnel action. Many demotions are focused and disciplinary, but others are not. However, this approach would require amendment of the Veterans Preference Act, which constructively requires an opportunity for a trial-type hearing in the four named classes of cases without reference to the issues involved.[41]

A partial, interim solution would be to permit consolidation of cases that involve the same issue, such as those of the 3000 Navy shipworkers.[42] Trial type procedures would be tolerable in such cases, even though no issues of fact were involved, if a single proceeding could resolve all identical claims. The Civil Service Commission has been understandably reluctant, however, to suggest that an agency may legally dilute an employee's hearing right by consolidating his appeal with all similar cases. Therefore, this approach, too, might require Congressional action, and it would only ameliorate the problem where an agency was taking identical actions against two or more employees.

A third possibility, which would not require legislation, would be to adopt the rule—routinely followed in other adjudicatory settings—

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[39] The Department of the Navy reached tentative agreement with representatives of these employees pursuant to which it held consolidated hearings at different installations. Recently, the Chicago regional office of the Civil Service Commission received demands for individual hearings from several of the employees, suggesting that this agreement may be breaking down.

[40] Consistently with this principle, "reductions in force," which characteristically are prompted by budgetary constraints, are not governed by the formal procedures for taking adverse actions. *See generally*, 5 C.F.R. Part 351 (1972).

[41] *See* Nammack & Dalton, Notes on Appropriateness of the Current Adverse Action and Appeals System, 19 Am. U. L. Rev. 374, 383 (1970).

[42] Specific authorization for consolidation should be provided, so that agencies could avoid the difficulty currently confronting the Department of the Navy. See note 39 supra.

that an evidentiary hearing need not be held when no issues of fact are raised.[43] If an employee threatened with demotion contests only the agency's classification of his job or its reading of Commission's regulations-issues that are susceptible of resolution without a "trial"—an opportunity to present *arguments* to management, perhaps oral as well as written, affords adequate protection. The Commission's regional appeals examiners are already accustomed to simplifying hearings when an employee who has had an agency hearing wants only to reexamine his own witnesses or those of the agency.[44] An affirmation of the hearing officer's authority to narrow the proceeding to the contested issues would improve efficiency without sacrificing any employee interest. It could also expedite cases that *did* involve an employee's performance or conduct by permitting summary resolution of issues on which the parties did not disagree.[45]

Whatever steps are taken to eliminate the need for trial-type procedures in cases for which they are not appropriate, agencies should not be able to circumvent an employee's right to a hearing in a proper case by invoking procedures that are normally nondisciplinary. An employee should be able to challenge the truth of the agency's contention that its action is based solely on managerial considerations. One court has recently so held in the context of an alleged agency attempt to secure an employee's removal by transferring him to another city.[46]

2. *Defining "efficiency of the service."* The quoted phrase is the sole statutory standard by which the legitimacy of any adverse action is to be measured. The legislative history of the Postal Service Appropriations Act of 1912[47] in which the phrase first appeared is silent on its meaning, and neither the Lloyd-LaFollette Act nor the Veterans Preference Act, which adopted it, provide any insight into Congress' intent. The core of the concept obviously was inefficiency in the colloquial sense: inability to perform in the job. But routine inefficiency is among the least frequent grounds for action, relied on in fewer than nine percent of cases that are contested.[48] Misconduct, on- and off-duty,

[43] *See, e.g.*, United States v. Storer Broadcasting Corp., 351 U.S. 192 (1956); Upjohn v. Finch, 422 F.2d 944 (6th Cir. 1970); Pfizer v. Richardson, 434 F.2d 536 (2d Cir. 1970).

[44] *See* Berzak, Adverse Actions by Federal Agencies and Administrative Appeals, 19 Am. U. L. Rev. 387, 394 (1970).

[45] Such authority would not conflict with the Veterans Preference Act provision that entitles employees to a hearing before the Commission. Even if that provision is properly interpreted as guaranteeing an evidentiary hearing, an agency may dispense with trial-type procedures when no factual issues are in dispute, notwithstanding statutory language that purports to require a hearing in all cases. *See* authorities cited note 43 *supra*.

[46] Motto v. General Services Administration, 335 F. Supp. 694 (E.D. La. 1971); *cf.* Fitzgerald v. Hampton, 467 F. 2d 755 (D.C. Cir. 1972).

[47] Postal Service Appropriations Act of 1912 § 6, 37 Stat. 539, 555.

[48] "Inefficiency" was the announced reason for action in only 8.7 per cent of adverse actions appeals adjudicated during fiscal year 1970.

accounts for almost 46 per cent, while unspecified "other" reasons are offered in another 27 per cent.

As the reasons for an agency initiating disciplinary action move further from the central criterion of substandard performance, the risks of official interference with purely private behavior and government enforcement of conventional morality increase. With growing frequency, the federal courts have begun insisting that the government show some rational nexus between an employee's behavior and its legitimate needs as an employer to justify his removal.[49]

The generality of the statutory standard of "efficiency" creates serious problems of adequate notice. Not only do court decisions provide little guide as to the types of behavior government agencies may *legitimately* forbid; it is often difficult to discern what kinds of behavior agencies *intend* to treat as a basis for disciplinary action. Many agencies have devised "tables of penalties," which not only attempt to identify disqualifying behavior but specify the range of punishments particular offenses may carry.[50] These provide better guidance for employees than the statute itself, but invariably include a catch-all category, such as "immoral, indecent, or disgraceful conduct," that permits abuse.

The Civil Service Commission has done no better. In its regulations,[51] the Commission has attempted to identify several reasons that will disqualify an applicant or probationer, or justify removal of a tenured employee:

> (a) Dismissal from [other] employment for delinquency or misconduct;
>
> (b) Criminal, *infamous*, dishonest, *immoral*, or *notoriously disgraceful conduct;*
>
> (c) Intentional false statement or deception of fraud in examination or appointment;
>
> (d) Refusal to furnish testimony as required by § 5.3 of this chapter;
>
> (e) Habitual use of intoxicating beverages to excess;
>
> (f) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
>
> (g) *Any legal or other disqualification which makes the individual unfit for the service.* (Emphasis added.)

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[49] *See, e.g.,* Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969); Scott v. Macy, 349 F. 2d 183, 185 (D.C. Cir. 1965).

[50] *See, e.g.,* Appendix A: Tables Pertaining to Penalties for Various Offenders, of Civilian Personnel Regulation 700, Department of the Army, April 27, 1972.

[51] 5 C.F.R. § 731.201 (1972).

This regulation is deficient both as a guide to agency management and as a warning to employees of the sorts of behavior that will get them in trouble. This is not to suggest necessarily that a court should declare the statutory standard invalid without further administrative elaboration.[52] Even as "fleshed out" by the Commission, however, the statute remains an invitation to arbitrary action by government agencies.

These problems of overbreadth and adequate notice are not easy to solve. It may be impossible to define in advance all the types of behavior that can so damage an agency's reputation or disrupt its program that removal is warranted. Yet, most large agencies as well as the Commission in the course of deciding appeals have developed a large, still essentially secret body of law on the meaning of "efficiency." Each year, for example, the Commission's Board of Appeals and Review applies this standard in more than 600 cases,[53] but its decisions have not been available to the public or to other agencies and employees. By drawing upon this body of precedents, the Commission should be able to amplify the statutory standard with much greater precision.

B. *Procedures for Agency Hearing and Decision*

1. *Advice to employees and opportunity to respond.* An agency's letter of proposed adverse action must provide sufficient details about its charges to enable the employee to respond and prepare his defense. Although these letters have frequently been a source of procedural defects, agency practice has been improving. However, employing agencies need to do a better job of advising employees about the consequences of proposed action and about the procedural opportunities available to them. Ordinarily, the agency's letter recites in highly formal language what the employee's rights are and how long he has to exercise them. An employee of moderate sophistication should not have difficulty understanding what is to follow. Yet many employees offer no resistance whatever, and others later contend that they never understood what was happening.[54]

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[52] In Kennedy v. Sanchez, 349 F. Supp. 863 (N.D. Ill. 1972), however, a three-judge district court ruled that the statutory standard of efficiency was insufficiently specific under the First Amendment to support the removal of an employee for derogatory public statements about his agency and supervisor. To date, this is the only case that has declared the statutory standard invalid in any context.

[53] In fiscal years 1968, 1969 and 1970,the Board of Appeals and Review decided 680, 539, and 648 appeals, respectively.

[54] Fewer than one out of four non-Postal employees subject to adverse action contest their cases. My interview with one agency personnel officer evoked the admission that employees frequently seem intimidated and are reluctant to ask advice from agency officials who are connected with the personnel office.

In criminal cases, where every defendant has legal representation, the language of indictment and plea may not inhibit communication. In a process that involves numbers of relatively unsophisticated employees, more than a third of whom have no representation,[55] the government has an obligation to communicate by means that every one can understand.

Agencies should designate one employee who would be responsible for seeking out employees threatened with adverse action to explain what can happen and what they can do about it. This emissary, or "adviser," should not undertake to represent any employee, but should be prepared to advise an employee to consult with his union, if any, or with private attorney. Such a professional "adviser" would undoubtedly be viewed with suspicion by some employees, simply because he worked for the agency. He would not, however, bear the stamp of the agency office that initiated the action, and communication of the agency's message would not be confined to an ominous letter that simply invites the employee to seek advice if he needs it.[56]

Under current regulations an employee must be given an opportunity to respond to the agency's charges, in person as well as in writing, before the action becomes effective.[57] If a trial-type hearing were made available *before* any action could become effective, this right of reply would of course assume less importance. While courts have treated the right as fundamental and upset agency disciplinary actions in which it was neglected or impaired,[58] a full pre-action hearing at which an employee could defend himself by offering evidence as well as argument would undoubtedly provide an adequate substitute.

Even so, the right of reply should not be discarded if it can be accorded without significantly delaying the process. One assumes that an employee's reply very rarely results in withdrawal of the charges against him.[59] Although in the past agencies often initiated actions

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[55] *See note* 59 Part V, infra and accompanying text.

[56] A Civil Service Commission pamphlet, "Conducting Hearings on Employee Appeals," Personnel Methods Series No. 16 (January 1968), reiterates the requirements of the Commission's regulations that an employee must be informed of all of the reasons for the action against him. *Id.* at 3–4. The problem is the employee who fails to understand the agency's notice of action or to appreciate the potential consequences. The purpose of this recommendation is to make sure that every employee comprehends what the formal notice means. Some agencies claim to be providing such advice already, but many are not.

[57] *See* 5 C.F.R. § 752.202(b) (1971).

[58] *See, e.g.*, Washington v. United States, 147 F. Supp. 284 (Ct. Cl.), *cert. dismissed*, 355 U.S. 801 (1957).

[59] An employee has a better chance of persuading the agency to reduce the penalty proposed. See Letter of Roger P. Kaplan, general counsel, National Association of Government Employees, to Richard K. Berg, Executive Secretary of the Administrative Conference of the United States, November 16, 1972.

without having all of the facts, and forced the employee to correct errors of hasty investigation, managers now rarely begin actions about which *they* have remaining doubts. Some agencies even formally instruct supervisors not to send a letter of charges until they have assembled an "iron clad" case.[60] However, the right of reply affords *some* possibility that an employee can change the agency's mind, and a real chance that he can at least persuade his supervisors to reduce the penalty proposed.[61] These possibilities alone may justify retaining a step in the process that imposes few demands on the participants and need not delay a hearing.[62] More importantly, the opportunity to reply permits an employee to assess the strength of the agency's case in advance, and may induce him to acquiesce in the action proposed without proceeding further.

2. *Timing of hearing.* Most agencies do not make a hearing available to an employee until after the proposed adverse action has become effective.[63] Some nine agencies—including the Departments of HEW, HUD, and Justice, as well as the Civil Service Commission itself [64]—provide the hearing in advance, but their caseloads comprise only a small percentage of all contested adverse actions. The Department of the Navy shifted from a pre-action to a post-action hearing procedure in 1967, and the Veterans Administration followed suit in 1971. Both agencies have large caseloads.[65] Among the justifications offered for these changes and for the prevailing practice is the claim that providing a hearing in advance prolongs the process. However, neither Navy nor the VA has yet provided statistics comparing their experience before and after shifting to a post-action hearing.

Our own investigations have yielded somewhat ambiguous evidence. The data demonstrate that cases in which hearings are held do require longer to decide.[66] The problems, apparently, are coordinating schedules, assigning hearing officers, and preparing transcripts; the hearings themselves rarely last more than a day whether held before, or

[60] This, according to officials with whom I spoke, is the unwritten rule in the Department of the Army.

[61] *See* notes 14–23, supra, Part III, and accompanying text.

[62] There is no obvious objection to a requirement that an employee must answer the agency's charges within ten days of receiving its notice, and that the agency must act upon the employee's response no more than five days later. This would shorten the process by some two weeks in the average case.

[63] *See* notes 18–21 Part III supra, and accompanying text. In 1969 the Commission originally proposed that agencies be required to afford an opportunity for a hearing prior to removal, but retreated in the face of agency opposition.

[64] Agencies that provide a hearing in advance of the effective date of adverse action account for less than 10 percent of the governmentwide caseload. In addition to the four agencies mentioned, currently provide a preaction hearing.

[65] The Department of the Navy adjudicated 138, 184, and 215 internal appeals during fiscal years 1968, 1969, and 1970, respectively. During the same period, the Veterans Administration decided 18, 15, and 57 appeals.

[66] *See* Tables IV–1 and IV–2.

after, the action becomes effective. The data also show that, in 1970, agencies that provided hearings in advance of taking action processed cases faster (on average) than agencies that made a hearing available only afterwards.[67] However, the first group also held hearings relatively less frequently,[68] and their superior speed in disposition may be attributable to that fact alone. One cannot, therefore, conclude that a pre-action hearing system actually disposes of cases faster. At the same time, the data clearly do *not* show that holding the hearing afterwards helps shorten the process.[69]

Two other arguments are made in favor of post-action hearings. First, it is claimed that requiring a hearing before action can become effective would significantly inhibit government managers from taking effective disciplinary action because they would have to face and work with a threatened employee every day until the hearing was held. Furthermore, other employees would feel insecure in their work, or become skeptical of management discipline, if employees threatened with removal remained on the job until a hearing.[70] This argument, it should be noted, assumes that ordinarily it will take a good deal longer than 30 days to hold and act upon any hearing. Under present regulations, an employee must be given at least 30 days' notice of a proposed adverse action; thus, unless the agency acts also to suspend him pending removal, supervisors and fellow workers must function for at least a month with the threatened employee in their midst.[71]

The second argument in favor of the present practice, seldom articulated but widely shared, is that postponing the hearing discourages employees from challenging their removal, and this reduces the potential caseload. As discussed above, our data raise doubt whether this hope is realized. Moreover, this justification may partially be discounted, even if factually suported. The government should not structure procedures to discourage those they are designed to protect from invoking them. A similar argument was made in favor of postponing the hearing given welfare recipients on termination of benefits, and squarely rejected by the Supreme Court in *Goldberg* v. *Kelly*.[72]

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[67] *See* Table IV–3.

[68] In fiscal year 1970, the four agencies with the largest caseloads that routinely provided a hearing in advance held hearings in only 32.4 percent of appeals. Other agencies, almost all of which postponed the hearing, held hearings in 70.4 percent of appeals. At the time, it should be noted, the Veterans Administration was one of the agencies that provided a preaction hearing.

[69] It is possible, of course, that more recent experience of the Department of the Navy or the Veterans Administration would document such a correlation.

[70] In response to requests for comments on the Committee's recommendations, both the Department of the Air Force and the Office of the Secretary of Defense favored the post-action hearing procedure. The Department of Justice and the Department of the Army, with some qualification, approved the Committee's recommendation.

[71] Only if the hearing comes well after the employee's removal does this post-action procedure protect the agency's interest in morale.

[72] 397 U.S. 254 (1970).

This is not to suggest that employees who have received a letter of charges do not represent a problem for employing agencies. When the agency's charges relate to serious misconduct on the job or criminal activity threatening persons or property, an employee's continued presence on duty may indeed be disruptive. Furthermore, agencies have an interest in avoiding frivolous cases that are contested simply to postpone the effective date of disciplinary action.

The Supreme Court has never held that due process *requires* the government to afford a hearing before it can remove a tenured federal employee. A District Court in California recently held that on the facts before it a pre-action hearing was not constitutionally requisite,[73] while less than two months ago a three-judge District Court in Chicago ruled that the government must provide tenured employees a hearing in advance of removal.[74] Space does not permit discussion of all the relevant legal authorities, but a brief summary of the central cases should make clear that the constitutional issue is by no means free from doubt.

In *Goldberg* v. *Kelly*, *supra*, the Supreme Court held that due process requires that welfare recipients be given a hearing *before* benefits can be cut off. Because the Court emphasized the financial plight of persons on welfare, some commentators and subsequent cases have read the decision as limited to its immediate context. In *Ricucci* v. *United States*,[75] however, two judges on the Court of Claims concluded—in a case involving removal of a federal employee—that *Goldberg* stood for the broader principle that government may not impair important private interests without *first* providing notice and opportunity for a hearing.[76]

During its last term, the Supreme Court had occasion to amplify its holding in *Goldberg* v. *Kelly*. The vehicle was *Fuentes* v. *Shevin*,[77] a case challenging the constitutionality of pre-judgment replevin statutes in Florida and Pennsylvania, which permitted a creditor to repossess goods from a defaulting buyer without prior hearing. The Court struck down these laws, in the process affirming a broad reading of *Goldberg* v. *Kelly* and specifically rejecting the suggestion that that decision, or the principle for which it stood, was limited to deprivations of "necessities."[78] The Court stated that postponing a hearing until after government acts can be justified only in "extraor-

[73] Carboneau v. Foxgrover, Civ. No. 72–318–T (S.D. Cal., August 31, 1972).
[74] Kennedy v. Sanchez 349 F. Supp. 863 (N.D. Ill., 1972).
[75] 425 F. 2d 1252 (Ct. Cl. 1970).
[76] 425 F. 2d at 1260.
[77] 407 U.S. 67 (1972).
[78] 407 U.S. at 88–90.

dinary" circumstances. One passage from the Court's opinion is particularly relevant here:

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.[79]

A third case warranting discussion is *Carboneau* v. *Foxgrover*.[80] Carboneau was the fire chief at Miramar Naval Air Station in California, against whom the base commanding officer initiated removal proceedings because he had stored plastic explosives near the main firehouse, in violation of Navy regulations. He had also purposely reduced the crash rescue capability of the fire department by failing to assign a crew to one of the station's two trucks and by sending the second truck to another area. Carboneau sued to enjoin his removal, on the ground that the Navy had not afforded him a pre-termination evidentiary hearing.

The district court rejected his contention, declaring that *Goldberg* v. *Kelly* was limited to deprivations of necessities. The court concluded that the Navy's interest in removing Carboneau from duty promptly, in light of the seriousness of the charges against his reliability and the sensitivity of his job, outweighed his interest in being heard first. The court also emphasizes that Carboneau had been given an opportunity prior to removal to reply to the charges before another officer.[81]

As a statement of constitutional law, the *Carboneau* decision is questionable on several counts. First, the court nowhere mentions the Supreme Court's ruling in *Fuentes* v. *Shevin*, which explicity rejects the notion that the *Goldberg* principle is confined to cases of "brutal need." Second, the court treats the employee's right to respond to charges as an important protection against groundless action, although there is no evidence that agencies generally, or the Navy, frequently terminates proceedings at this stage.[82] Third, the court ignores the possibility of achieving a closer balance between the interests of the employee and those of the agency. The Navy's undeniable, legitimate concern that Carboneau not be in a position to jeopardize the lives of pilots and others was allowed entirely to nullify any interest of his.[83]

The final case on point is *Kennedy* v. *Sanchez*,[84] decided on October 24, 1972. Kennedy, a field representative of the Office of Economic

[79] 98 Sup. Ct. at 1999 n. 22.

[80] Civ. No. 72-318-T (S.D. Cal., Aug. 31, 1972).

[81] Slip opinion at 23-24.

[82] The primary reason for retaining this right of reply is to keep alive the possibility of compromise and to afford the employee an opportunity to test the agency's seriousness.

[83] One reason that agencies may have been reluctant to experiment with extended paid leave as an alternative to removal prior to a hearing is the ruling of the Comptroller General that agencies may not place employees in a non-duty status and continue to pay them for more than 5 days. 38 Comp. Gen. 203.

[84] 349 F. Supp. 863 (N.D. Ill., 1972.).

Opportunity, was removed from his job for making derogatory public statements about his agency and supervisor. (The court's opinion is notably lacking in detail about the content of these statements or the audience to which they were made.) He challenged the agency's action on the ground, among others, that failure to afford him a pre-action evidentiary hearing violated due process. The three-judge court, citing *Goldberg*, *Fuentes*, and *Ricucci*, agreed. "The clear implication [of these cases] is that absent such a specialized interest, a prior hearing must be afforded before government employees may be discharged." [85] The court concluded that Kennedy's lack of opportunity before being removed to be heard by an impartial agency official, to present witnesses, or to confront adverse witnesses contravened "minimal procedural requirements" for a valid procedure.[86]

The issue of the timing of the hearing is undeniably controversial. On balance, however, the case against providing a hearing in advance—which is manifestly fairer to the employee—does not withstand scrutiny. The asserted efficiency of the present practice has not yet been supported by evidence; agencies that postpone the hearing in 1970 disposed of cases *less* rapidly than those that afford a hearing in advance. This was partly because they held relatively fewer hearings, which tends to undermine the contention that fewer cases need be heard when the hearing is postponed. If other, more recent evidence revealed that fewer hearings were required under the post-action procedure, one would be concerned that such a system discouraged employees from contesting their removal even in meritorious cases.

The timing of the hearing unquestionably affects which of the parties will be interested in expediting disposition. Under the prevailing practice, agencies have little incentive to decide cases because employees bear most of the costs of delay.[87] If the hearing were required before removal, employees potentially would benefit from scheduling difficulties and procrastination. The real answer to this dilemma is to speed up the scheduling and completion of hearings, which should be facilitated by the use of trained Civil Service Commission hearing officers who tolerate no unnecessary delays.

Efforts to speed up the process of decision should concentrate on the arrangements for, rather than on the conduct of, hearings. Some time could be saved by allowing employees no more than ten days in which to reply to agency charges, and requiring agencies to act upon

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[85] Slip opinion at 4–5.

[86] *Id.* at 7. *See also* Kunzig v. Murray, 462 F. 2d 781 (D.C. Cir. 1972), in which the appellate court held that the district court had jurisdiction to enjoin an employee's discharge pending her appeal to the Civil Service Commission.

[87] Some agencies take longer than 100 days to adjudicate employee appeals, a few considerably longer.

an employee's reply promptly, *e.g.*, within five days. Hearing officers should be authorized to designate the date for hearing, and to be grudging in granting postponements. Rigid time limits should be prescribed for completion of the hearing officer's recommended decision and for the agency's action upon it. Accelerating disposition will not be easy, but can be accomplished.

One cannot ignore the argument that it would be difficult for government managers to live with a requirement that an employee must always be allowed to remain on the job until after a hearing. The very nature of the charges may sometimes justify an agency in removing an employee from the premises promptly, because of the danger he may pose to other employees, government property, or a placid work environment.[88] The claim is also made that morale and discipline will suffer if government supervisors feel they must go through a "trial" to prove facts about an employee's behavior they are convinced are true before the employee can be removed from the premises. Whether or not legitimate, this attitude is real and should be considered.

The recommendation proposed is intended to accommodate both employee and agency interests. It would require an opportunity for a hearing prior to termination of an employee's pay, thus relieving him of the principal pressure to abandon his defense and find other employment. At the same time, it would permit an agency considerable leeway in reassigning the employee or placing him on administrative leave pending any hearing and the agency's final decision, thereby protecting office morale.[89]

3. *Hearings open to the public.* Agency and Commission hearings are not currently open to the public or to the press. Both agencies and the Commission historically have justified closed hearings in terms of protecting employee privacy and facilitating calm, informal exploration of the issues.[90] More recently the Commission, in refusing an employee's request to open his hearing to the public, also cited the possibility of disruption.[91]

Several interests must be weighed in deciding whether adverse action hearings should be open. The public has an interest in monitoring the administration of justice at all levels of government, though

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[88] Cases in which an employee is charged with conduct for which he is already under criminal indictment are clear examples, and present considerable difficulty. The employee may want the administrative proceeding postponed so that his defense of the criminal charges will not be prejudiced. For similar reasons, the agency may be disinclined to move expeditiously so long as the employee can be removed from the rolls. For such cases a special rule might be appropriate, requiring the employee to proceed promptly to hearing or forfeit his right to continue to receive pay.

[89] To implement this regulation it would be necessary to amend the ruling of the Comptroller General referred to in note 16 supra.

[90] *See* R. Vaughn, The Spoiled System II–82 and II–83 (1972).

[91] *See* Fitzgerald v. Hampton, supra note 46, at 23–24.

it is weaker in this setting than in the criminal context. Employing agencies and the Commission have an interest in the orderly and efficient conduct of hearings that would entitle them to prevent disturbance, exclude disturbers, and minimize the costs of accommodating spectators. Except in rare cases involving national security, however, they have no legitimate interest in preserving the secrecy of their hearing processes or the facts they produce. An employee has potentially conflicting interests, on the one hand, in preserving his privacy and, on the other, in open processes that inhibit arbitrariness.

In the author's judgment, an employee's privacy interest outweighs the public's interest in witnessing his case.[92] He should continue to have the right to exclude all non-participants. His interest in an open hearing, should he request it, can be reconciled with the legitimate administrative needs of the agency or Commission. No agency need advertise its proceedings, or provide accommodations for numbers of spectators greater than likely to attend the average hearing.[93] Furthermore, an agency should be free to control disruptive behavior by excluding the offender(s) or closing the hearing. The overwhelming majority of adverse action hearings will not generate sufficient public interest to require seating arrangements, much less crowd control. Among the few controversial cases that might, moreover, the employee more often than not will opt for privacy.

The recommendation that in all but extraordinary cases the hearing should be public if the employee requests it is consistent with, and indeed may be required by, the recent decision of the United States Court of Appeals for the D.C. Circuit in *Fitzgerald* v. *Hampton*.[94] Fitzgerald, though formally removed from his position with the Air Force through a reduction-in-force, was nonetheless given a hearing by the Commission to contest his removal,[95] which he claimed was in retaliation for his testimony before Congress about cost overruns in the Air Force C5A program. The Commission, however, refused Fitzgerald's request that the hearing be open to the public and to the press. The court of appeals unanimously held that due process entitled Fitzgerald to an open hearing, rejecting the Commission's arguments that such a requirement would hamper the "search for truth," deter witnesses who could not be compelled to testify, and make it difficult

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[92] A primary justification for requiring public proceedings is to protect individuals against oppressive administrative action. If the employee in an adverse action hearing wishes to sacrifice this protection in order to protect his privacy, he should be permitted to do so.

[93] It will be the rare adverse action proceeding in which more than one or two members of the public will want to attend the hearing.

[94] No. 71–1771 (D.C. Cir., Sept. 15, 1972).

[95] *Compare* Motto v. General Services Administration, 335 F. Supp. 694 (E.D. La. 1971), discussed at text accompanying note 46 supra.

for the hearing officer to preserve decorum.[96] Literally read, the court's opinion would leave agencies no option but to open their hearings even if the Conference adopted no recommendation.

4. *Hearing officers appointed by the Civil Service Commission.* At the present time, each employing agency is responsible for providing its own hearing officers, although some smaller agencies borrow one from another agency.[97] A hearing officer must meet basic Commission training requirements and for independence from the official proposing the action.[98] For larger agencies with substantial caseloads—the VA, Treasury, HEW, and the military departments—these requirements pose no problem. Army has recently established its own pool of full-time examiners who preside in all of the department's adverse action and other personnel appeals throughout the world.[99] Smaller agencies, however, must often use examiners who, though they may have been exposed to Commission training, have virtually no hearing experience.

Several reasons warrant placing all examiners under the supervision of the Commission. This plan would provide experienced examiners to agencies whose annual caseloads do not fully occupy even one examiner, and spare them the disruption of having to take their only employee who has Commission training off regular duty. It would strengthen the competence and experience that examiners in larger agencies may develop for themselves. Most importantly, it would introduce an outside, independent voice at a much earlier stage in the hearing process, increasing employee confidence and minimizing the likelihood that an agency will become locked into a position that cannot withstand external scrutiny.

Some agencies may complain that this proposal would make it more difficult for them to correct their own errors, and would substitute procedural expertise for sympathetic understanding of their unique needs.[1] But it is doubtful whether sympathy for an agency's mission is important in an official who is responsible for compiling a complete

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[96] Fitzgerald v. Hampton, slip opinion at 23–24. The Civil Service Commission has requested the Solicitor General to file a petition for certiorari in the Supreme Court in the case.

[97] An agency may designate an outside examiner simply to avoid disrupting work of its own employees, or it may be genuinely concerned about finding an examiner who will bring an open mind to a proceeding.

[98] 5 C.F.R. § 771.209(a) (1972).

[99] In military fashion, the Army's hearing officer pool is designated by the acronym, "USACARA." These examiners are also responsible for hearing employee grievances and EEO complaints. *See generally,* Appendix C: Department of the Army Grievance and Appeals System, Department of the Army Personnel Relations and Services Regulations, June 2, 1972. The Air Force, too, has its own corps of full-time hearing officers.

[1] The Departments of Army and Air Force have already expressed their opposition to the Committee's recommendations. A companion objection is that the use of Civil Service Commission hearing officers would break up the consolidated functions of the two departments' own examiners.

factual record of an employee's behavior. So long as examiners take a tolerant view of the relevance of evidence, nothing an agency wants considered is likely to be excluded. Furthermore, if the examiner's recommended decision is then submitted to the agency, the agency will have an opportunity to justify its action in terms of its mission. An agency that believes that standards of employee behavior may legitimately differ among agencies will have an opportunity to make its case. Moreover, under the present system, an employee can avoid his agency's appeal process altogether by appealing directly to the Commission, where his hearing will be before a Commission appeals examiner who may have no understanding of the agency's special disciplinary needs.

A second objection to the proposal for Civil Service Commission hearing officers is more troublesome. The Veterans Preference Act is construed as according all preference-eligible employees a "right" to an evidentiary hearing *at the Commission.*[2] This right is already curtailed by the practice of the Commission's regional appeals examiners of limiting repetition of the agency hearing, and by the Commission's own regulation that prevents an employee who appeals to a second level within his agency from thereafter appealing to the Commission. But the question remains: Would a hearing before an examiner appointed and employed by the Commission, who would submit findings and a recommended decision to the employing agency, plus the availability of ultimate review by the Commission, satisfy the Veterans Preference Act?[3] If not, legislation would be needed to implement this recommendation.

The proposed recommendation leaves the matter of hearing officer qualifications to the Civil Service Commission. It is assumed that the Commission will prescribe qualifications of training and experience that would ensure that these presiding officers will be competent to conduct personnel hearings of an adjudicatory type. The recommendation omits any requirement that hearing officers be attorneys or have a specified minimum level of experience. Several agencies employ very competent hearing officers who are not lawyers. Furthermore, the omission of specific qualifications is consistent with the recommendation's primary objective, which is to assure hearing officer independence from employing agencies.

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[2] *See, e.g.*, Nammack & Dalton.

[3] In terms of affording the employee protections equivalent if not superior to those desired by the Congressional authors of the Act, the proposed recommendation cannot be faulted. Even the Department of Justice, however, is unwilling to declare that the proposal would meet its formal requirements. See Letter from Assistant Attorney General Rogers C. Cramton to Richard K. Berg, Executive Secretary of the Administrative Conference of the United States, November 14, 1972.

5. *Government burden of proof.* The Commission's regulations do not specify who shall have the burden of coming forward with evidence and the burden of persuasion. Most participants in the process view it as the agency's responsibility to prove its case, even though ordinarily the hearing is not held until after the action has become effective.[4] Yet there are recurrent complaints that some agencies and some Commission regional examiners fail to adhere to this principle.[5] Common understanding may effectively assign responsibility for producing evidence in most cases, but the matter should not be left in doubt.

The Commission's regulations should specify: (1) Agencies have the burden of coming forward with evidence in all cases and, accordingly, shall proceed first at the hearing. (2) Agencies shall have the burden of persuading the fact finder, by a preponderance of the evidence, that an employee is guilty of the offenses charged. (3) A hearing officer may terminate an action against an employee after hearing the agency's evidence, if he concludes that the agency has failed to meet its burden of persuasion on all charges that would support disciplinary action.

6. *Prehearing conference and narrowing of disputed issues.* The purposes of this recommendation are adequately summarized under paragraph A.1, supra.[6]

7. *Assembling a complete record.* Most Commission appeals examiners assume responsibility for probing all of the facts underlying an agency's case, not simply those that the agency or employee developed at the agency hearing. Agency hearing officers, by contrast, are generally less inquisitive and more willing to allow the parties to dictate the scope of inquiry.

The hearing officer in adverse action proceedings should be free to question or cross-examine, to suggest avenues of exploration not pursued by the parties, and to request additional documentation— particularly if the employee is not represented.[7] The hearing officer should be responsible for compiling a complete evidentiary record which should not be subject to supplementation either before the deciding agency official or on appeal to the Commission.

In practice, however, the factual complexion of a case may change dramatically as it proceeds from the agency's first level, to the Com-

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[4] The Civil Service Commission's pamphlet, "Conducting Hearings on Employees Appeals," specifies that the agency shall have the burden of proof. The Commission's regulations, however, are silent on the issue.

[5] *See e.g.,* Letter from Roger P. Kaplan, General Counsel, National Association of Government Employees, to Richard K. Berg, Executive Secretary of the Administrative Conference of the United States, Nov. 16, 1972.

[6] The Commission's instructional pamphlet includes specific instructions to this effect, but agency hearing officers are irregular in following them.

[7] Many Commission regional appeals examiners and some agency hearing officers already do precisely this.

mission's regional office, and finally to the Board of Appeals and Review.[8] Because of the Veterans Preference Act guarantee of a hearing before the Commission, compounded by the Commission's failure to define the scope of its review, both the regional examiners and the BAR permit fresh representations by the parties and occasionally seek new facts themselves.[9] Thus, the case the Board finally reverses sometimes is quite different from the one the agency upheld.

The willingness of regional appeals examiners and of the BAR to accept new evidence is justified as protecting employees, who may have failed to present the best case before the agency. Even so, the practice can only be defended as a means of compensating for the inadequacies of the agency hearing. If the hearing officer responsible for the initial hearing were experienced and independent, he should be able to elicit all of the testimony and documents needed for fair decision and meaningful review. Moreover, although the present practice may aid employees, it also affords employing agencies an opportunity to "correct" their own earlier omissions. All parties should prefer a procedure under which, except for evidence that would be admissible in court after trial, the factual record is closed with the completion of the hearing.[10]

Whether the hearing officer should accept proposed findings of fact or written argument after the hearing is concluded is problematical. Presumably he will wait until the transcript has been prepared before completing his recommended decision. It might be helpful to allow the agency and the employee to submit arguments to the hearing officer after they had read the transcript but this would delay disposition. Since most hearings consume less than a day, allowing five days following distribution of the transcript might not significantly postpone the decision. However, the same objective could be achieved more simply by providing the parties with copies of the examiner's proposed decision together with the hearing transcript and allowing both sides to submit written arguments to the deciding agency official.[11]

8. *Hearing officer's decision.* The hearing examiner should submit his recommended decision to the employing agency official responsible for deciding the case. The purpose for this is to allow the employing agency one opportunity to review disciplinary actions taken by lower authority. The official's decision should be final for the agency, which should be able to make whatever personnel action he approves fully effective at this point. If the deciding official's decision is to dismiss

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[8] Both parties may be to blame for failing to make their best case initially. *See, e.g.,* Guttman, The Development and Exercise of Appellate Powers in Adverse Action Appeals, 19 Am. U. L. Rev. 323, 362 (1970).

[9] *See id.,* R. Vaughn, supra note 8, Part I, at II–124.

[10] *Compare* Fed. R. Civ. P. 60(b).

[11] This alternative has been endorsed by the Department of Justice. *See* Letter of Assistant Attorney General Roger C. Cramton, supra note 71.

the action, whether or not the examiner so recommended, the case should terminate. If the deciding official accepts the hearing officer's decision against the employee, his decision should be appealable directly to the Commission. If he does not accept the hearing officer's decision exculpating the employee or proposing a lesser penalty, he should prepare a decision in writing which includes a statement of his reasons. Under present regulations, he would be required to refer the case to higher agency authority.[12]

This referral requirement was designed to enhance the independence of the hearing officer and the importance of the agency hearing.[13] The requirement contributes to delay, however, and would afford no significant advantage if hearings were conducted by Commission examiners. It is only when the deciding official would not adopt the examiner's favorable recommendation that an employee might gain from referral to higher authority. Requiring the deciding official to state his reasons, as part of the record subject to review, would reduce the risk of initial arbitrariness. In addition, the Commission would be more likely to reverse an agency's action in favor of a decision recommended by its own examiner rather than by an employee of the agency. The present rule builds in an additional procedural step in cases where further review by the agency seems unlikely to change the result, and that are likely to be appealed to the Commission.

9. *Subpoena power for hearing officers.* No agency or Commission hearing officer has authority to subpoena witnesses in adverse action cases. There have been complaints about the reluctance of agencies to make employees available to testify on behalf of an appellant. Such incidents should become less frequent under the Commission's regulation authorizing hearing officers to postpone a hearing until the agency makes available an employee whose testimony is considered essential.[14]

The refusal of witnesses who no longer are, or never were, in the government's employ to become "involved" is potentially a more serious obstacle to assembling a complete record. The problem may be partly one of money. A ruling of the Comptroller General permits employing agencies to pay the expenses of non-government witnesses in adverse action hearings, but they cannot reimburse for lost wages.[15] Nor can they compel the attendance of any private citizen who refuses to cooperate, even if his testimony might vindicate the threatened em-

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[12] 5 C.F.R. § 771.219(b)(3) (1972).

[13] *See* Nammack & Dalton.

[14] *Id.* at 379–80. *See* 5 C.F.R. § 771.211(c) (1972).

[15] There is little hard evidence that this occurs frequently, but complaints about the lack of subpoena authority are common. See letter of Roger P. Kaplan, supra note 5; R. Vaughn, supra note 8, Part I, at II–148.

ployee. It is difficult, however, to determine how frequently either problem arises,[16] though private attorneys who practice in this area have called attention to it before. To the extent off-the-job behavior may be a legitimate basis for adverse action non-government witnesses will remain important.

Because of the lack of hard evidence that the inability of hearing officers to subpoena witnesses has been a significant problem, the Committee has followed the suggestion of the Council that no recommendation to authorize the issuance of subpoenas be proposed at this time. A second factor in the Committee's thinking on this issue was the recognition that authorization for subpoenas would unquestionably require legislation. Finally, the question of subpoena power in adverse action cases may properly be considered in any future general inquiry into the use of mandatory process in administrative proceedings.

The failure to propose any recommendation with respect to the use of subpoenas should in no way weaken the Civil Service Commission's current regulations, which in substance obligate employing agencies to make their employees available as witnesses.[17] At the same time, it is understood that the initial responsibility for requesting the attendance of witnesses in the agency's employ rests with the employee himself.[18]

C. *Procedures for Appeals From Agency Decisions*

1. *Agency appeals systems.* From the employing agency's final decision to accept or reject the hearing officer's recommendation, an employee could appeal directly to the Civil Service Commission. Agency appeals systems, as they now operate, would still have an opportunity—at whatever level it chose—to review actions taken by local installations after receiving the hearing officer's recommended decision. In designating the official(s) to render the final agency decision an agency would of course have to balance the desire to maintain uniformity in discipline and the desire to disperse responsibility for decision. Under the system proposed, employing agencies could reexamine every contested adverse action initiated by local authority, because an employee could no longer appeal directly to the Commission and circumvent his agency's internal review system.[19] The primary difference is that an employee would continue to receive pay during the agency's consideration of his case. In short, it is probably more accurate to say that the recommended system would recharacterize, rather than eliminate, agency "appeals" systems.

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[16] 48 Comp. Gen. 110.

[17] *See* Nammack & Dalton.

[18] *See, e.g.,* Begendorf v. United States, 340 F. 2d 362 (Ct. Cl. 1965).

[19] *See* text accompanying notes 98–99, Part III, *supra.*

The proposed recommendation would entail two additional changes. No agency would be permitted to maintain a second appeals level for adverse action cases, as five now do.[20] These second levels serve little purpose. They adjudicated only 61 cases in 1970. In addition, since an employee can, and most do, now ignore his agency's second level and proceed directly to the Commission, they cannot be justified as affording employing agencies a second opportunity to review their decisions. Furthermore, under the recommendation no employee would forfeit an opportunity to seek Commission review as do employees who now appeal to their agency's second level.[21]

2. *Single appeal to the Commission.* A central premise of the proposed recommendation is that the system for adjudicating adverse actions should give employing agencies one opportunity to correct their errors and guarantee employees at least one opportunity for external administrative review. Accordingly, a single level of post-action review in the Commission is proposed, which would consider cases on the record assembled at the agency. A second appeals level within the Commission would add substantially to the time required for final decision without providing employees additional protection against arbitrary agency action.[22]

Arguments can be made that the Commission's appellate authority should be lodged in its eleven regional offices, which are accessible to agencies and employees, and which collectively could more easily absorb an increased caseload. Except for such short-run convenience, however, there would be few advantages in decentralizing appellate responsibility. Dispersion of decisional authority would permit inconsistent decisions among the regions, a problem that exists now partially because both regional and BAR decisions are not readily available. Little evidence exists that the regional offices possess a unique appreciation of local agency needs that support differing qualifications for federal employment. Moreover, it is doubtful whether the system should facilitate expression of local prejudices. Most regional appeals examiners are qualified, conscientious, and fair, but these are not qualities dependent on location.[23]

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[20] The five are the Departments of the Army, Navy, and Air Force, HEW, and the Interior. In 1969 the Civil Service Commission proposed, but failed to press for, the elimination of second appeals levels within employing agencies.

[21] *See* text accompanying note 36, Part III, supra.

[22] In fiscal year 1970 the average time for disposition of appeals by the Board of Appeals and Review was 87 days, compared with 59 days at the Commission's regional offices. The same year, the Board upheld the regional decision in 92 percent of appeals by employees, but in only 63 percent of appeals by employing agencies.

[23] Indeed, their location within the Commission bureaucracy exposes them to considerable pressure frequently unrelated to the merits of cases. *See, e.g.,* Guttman, supra note 8, at 338–39.

Furthermore, if appeals are confined to the record, with no further introduction of evidence permitted, the convenience argument loses much of its force. Centralizing the Commission's appellate function would make oral argument more costly, but in the long run would yield uniformity, independence, and efficiency. A dispersed appeals system would almost certainly lead eventually to creation of some central authority to correct what are perceived as serious errors and reconcile inconsistent results, *i.e.*, a second appellate level.

Accordingly, all employee appeals should be directly from agencies to the central appellate authority in the Commission. This would necessitate enlarging the present Board of Appeals and Review, or any successor, and employing additional staff, but these costs would be more than offset by savings achieved through the elimination of an entire appellate level.[24]

3. *Appeal record.* The record on appeal should consist of the record assembled by the Commission-appointed hearing officer during the agency hearing; the hearing officer's recommended decision; the agency's decision; and any written arguments the parties desire to submit. Only if an employee could show he was justifiably unaware of evidence or prevented from introducing it, at the time of the agency hearing could the Commission accept any evidence, and then only subject to the agency's opportunity to respond. Except in responding to such evidence presented by an employee, the agency should not be allowed to introduce additional facts to strengthen its case.[25]

4. *Power to modify agency decisions.* Although agency appellate levels frequently reduce the punishment meted out to employees by local installations, the Commission's appellate offices for practical purposes never formally modify agency penalties.[26] The Commissioners themselves retain authority to reduce agency penalties, but they delegate it only in response to specific request by the Board of Appeals and Review. The BAR rarely seeks such permission to reduce the penalty an agency has imposed.[27] Theoretically, therefore, the Com-

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[24] Ostensively, the proposed recommendations would eliminate two "appeals" levels, all agency appeals systems and one level of Commission review. By moving the hearing forward, however, the recommendations would force agencies to "review" cases before the action became effective, thus in effect postponing action until after an employee's initial "appeal".

[25] There is no reason to allow employing agencies to submit additional affirmative evidence. An agency is in a position to control not only the timing but the scope of the hearing by its decision to initiate action and to present or withhold particular evidence. If additional evidence is required to substantiate the agency's action, that action, by hypothesis, was improper.

[26] In fiscal 1970 agencies modified the initiating authority's penalty in roughly 8 percent of removal cases, and in nearly 4 percent of demotion cases. Although on rare occasions the Commission's regional offices remand cases for further evidence or consideration, they practically never reduce an agency's penalty. See Guttman, supra note 8, at 361–62.

[27] *Id.*

mission's regional offices and the BAR must either affirm an agency's action, or reverse it for procedural error or for lack of support for the penalty imposed. They cannot accept the agency's fact findings but disagree with its disposition, or impose a lesser penalty when only some of the agency's charges are upheld. This constraint on Commission disposition is justified by the argument that the Commission should not second guess agency disciplinary judgments.[28] The practice exacts costs in terms of both fairness and efficiency.

The recurrent theme of employee appeals to the Commission is that the agency's action far exceeds the offense, which the employee frequently admits. A likely result is that the Commission's appellate offices affirm actions which they privately believe are too harsh. In addition, it is widely acknowledged that regional appeals examiners reverse cases on procedural grounds that would otherwise be viewed as harmless when they find an agency's action excessive.[29] Employees thus suffer excessive penalties because of the Commission's reluctance to revise agency judgments, while at the same time procedural reversals often exaggerate the importance of comparatively insignificant and rarely prejudicial departures from form.[30]

The Commissioners should delegate their power to modify agency decisions to the central appeals authority. A few agencies may object to the Commission's second-guessing their judgments.[31] Most would acquiesce in occasional revision of their penalties in return for fewer procedural reversals. Operating through a single level of appeal, the Commission should be able to achieve uniformity in exercising the power to reduce agency penalties, and seize the opportunity to rationalize penalties throughout the federal service. Furthermore, with authority to consider penalties openly, rather than through the subterfuge of procedural error, the Commission's appellate authority could distinguish between procedural effects that potentially affect fairness and those that do not.

5. *Decisional process.* When a case now reaches the Board of Appeals and Review it is assigned to one of several appeals examiners for preparation of a proposed decision. After a decision has been drafted, the case file is circulated to a member of the Board for his concurrence, revision, or correction. Once he has approved a decision, the case

[28] *See, e.g.,* Berzak, Review and Analysis of Professor Egon Guttman's Article on "The Development and Exercise of Appellate Powers in Adverse Action Appeals," 19 Am. U. L Rev. 367, 372 (1970).

[29] This assessment is based primarily upon interviews conducted off-the-record.

[30] During fiscal years 1968, 1969, and 1970, the Commission's regional offices reversed agencies in approximately 25 percent of employee appeals. In each of those three years, more than twice as many reversals were for procedural errors as on the merits.

[31] Only one agency among those that I consulted—the Department of the Army—objected strenuously to empowering the Commission's appellate authority to reduce agency penalties.

is submitted to a second member of the Board. If he concurs, the decision will issue under the signature of the Board's chairman. If the second member disagrees with the disposition proposed, the case is submitted to a third whose vote determines the outcome. Dissents have not been reported to the agency or the employee.[32]

One would feel more comfortable if cases were examined by at least one Board member *before* a decision was drafted. Many appellate judges and agency heads follow a similar practice, however, directing a law clerk to prepare a proposed opinion before they have studied a case. So long as Board members take responsibility for decisions, their method of reaching them must be their own.

The chairman's practice of signing all decisions and the failure to announce the views of individual members are likewise troubling.[33] It is probably indispensible for the Board to operate, *de facto*, in panels of three, as do the federal Courts of Appeals, but the chairman's signature misleadingly implies that the decision is the work of the board *en banc*. There is no good reason why Board members should not be permitted formally to register their disagreement with cases about which they feel strongly. Announced dissents would breathe some life into the process and perhaps aid judicial review.[34]

Finally, so far as possible, cases should be assigned among Board members by lot or rotation, not on the basis of their backlogs. Longtime observers of the BAR believe the members differ sharply in their attitudes toward cases, which is hardly surprising, and that the outcome of an appeal can depend upon which members decide it. While the influence of philosophic differences cannot be eliminated from the decisional process, doubts that panel composition is solely a matter of chance should be laid to rest.

6. *Authority of Commissioners to reopen.* The Civil Service Commissioners are responsible for formulating federal personnel policy. An employee or agency that believes a decision of the Commission's appellate authority departs from, or threatens, established policy should continue to be able to petition the Commissioners to reopen the case.[35] This avenue of review is rarely pursued, and should remain an extraordinary remedy. Yet it affords the Commissioners an opportunity in important cases to clarify or redirect disciplinary policy. In considering petitions to reopen, the Commissioners should not receive advice from any Commission official who previously was in-

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[32] *See generally,* Report of Professor James A. Washington, Jr. to Chairman William P. Berzak, Board of Appeals and Review, September 11, 1968, at 6–17 (hereinafter Washington Report).

[33] *See* Guttman, supra note 8, at 364.

[34] *See* R. Vaughn, supra note 8, Part I, at II–147.

[35] *See* text accompanying notes 28–31, Part III, supra.

volved in the decision of the case, or provided advice on it to the employing agency.[36] Nor should they be required to announce reasons for refusing to reopen a case.

7. *Release of Commission decisions.* Like decisions of the Commission's regional offices, those of the BAR are distributed only to the parties involved and, infrequently, among other Commission offices.[37] Although it is said that *stare decisis* does not govern disposition of adverse action appeals, many regional appeals examiners and the BAR maintain files of their own decisions and attempt to reach consistent results in like cases. During recent years one Board member has been compiling an index of BAR decisions to facilitate internal research.[38] Some agencies whose own caseloads generate recurrent problems and produce pressure for consistent treatment have developed their own case files. However, employing agencies do not know, except by word of mouth or judicial decision, about cases begun by other agencies. Commission regional offices are familiar with their own precedents and with BAR decisions in cases they originally adjudicated but not with cases from other regions. Private lawyers representing employees lack even this limited access to the administrative precedents. Union representatives are often able to draw on personal experience, but may never learn about cases that did not involve union members.[39]

In short, although the adverse action process is in fact precedent-oriented, it has produced no published or available case law. It is as though the NLRB published no decisions and union and employer representatives had to rely on the labor cases decided by the federal courts. The situation is probably worse, for relatively fewer adverse action cases reach court, and until recently judges were rarely willing to consider any but procedural issues.[40] Furthermore, the Commission has not attempted to amplify the substantive law of employee discipline through regulations defining "efficiency." [41]

The Commission and employing agencies have routinely justified refusal to disclose decisions as protecting employee privacy, as well as federal funds. There are two possible answers to the privacy claim.

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[36] *See* Guttman, supra note ———, at 364–65.

[37] Within the past year significant Board of Appeals and Review decisions have been circulated among selected offices within the Commission. Cf. R. Vaughn, supra note ———, at II–152.

[38] *See* Washington Report at 15–17.

[39] During discussions with employing agencies I encountered no opposition toward, and considerable enthusiasm for, the recommendation that Commission decisions be made public. One or two agencies had reservations about a similar requirement for agency decisions but none thought the proposal impractical.

[40] See text accompanying notes 13–22, Part I, supra.

[41] See notes 47–53, supra and accompanying text.

On a theoretical level, one could argue that the public's interest in the operations of government outweighs the employee's interest in privacy, as in the case of court proceedings. Without reaching that issue, however, it is possible to accommodate employee privacy and the public's right to know. Deletion of names, dates, and perhaps locations (although not the names of agencies or descriptions of installations) from agency and Commission decisions would prevent any but coincidental identification of the employees involved, without nullifying the value of the decisions as guides to employee performance and behavior. There would appear to be no reason why the BAR index of decisions should not be available on the same terms.[42]

Sanitizing decisions for release would entail modest expense. An intelligent clerk could delete identifying passages from the average five-page BAR decision in 15 minutes. If he processed 20 cases a day, he could keep pace with the production of the Board members themselves. The Commission need not bear the cost of distributing decisions beyond the parties and among its own offices. Decisions could be supplied to other agencies, employee unions, private lawyers, and libraries on a paid subscription basis, and made available for inspection at the Commission without charge.

There could be some additional expense. Release of appellate decisions would probably cause both the agencies and the Commission to increase efforts to inform federal employees about significant cases, and about the increasingly desirable contours of the "efficiency" standard.

Another reason it is rumored, that decisions are not released is that many could not withstand public scrutiny. This charge is exaggerated, but not purely hyperbole. Few commission decisions seemed wrong, but opinions often failed adequately to justify, or even explain, the result reached. *Ipse dixit* is the dominating characteristic of some decisions, which detail the offense(s) the employee was found to have committed but rarely discuss why the action upheld would "promote the efficiency of the service." [43] The "thrust" of such decisions—if that is the appropriate term—is simply that the employing agency could reasonably have concluded that its action would satisfy the statute.

Recommendations that simply urge an agency to do a better job are not likely to have much impact. Therefore, it would be pointless to recommend that the Commission and employing agencies write better decisions. But decisions are very likely to improve if they are required to be made public, and thus open to criticism.

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[42] *Cf.* Guttman, supra note 8, at 362.

[43] *Compare* White v. Bloomberg, 345 F. Supp. 133 (D. Md. 1972), in which the court takes the Commission (the Board of Appeals and Review) to task for failing to explain the bases of its decision.

D. *Ex Parte Communications*

1. *Commission advice to agencies.* It is not uncommon for a Commission regional director or even appeals examiner to be consulted by an agency about the steps it should follow in adjudicating a particular case, or for the official consulted to give such advice.[44] Under the proposed system for adjudicating adverse action appeals, the Commission's appellate authority should neither respond to nor initiate communications with employing agencies about particular cases. It would be manifestly improper for any appellate official to advise an agency about the prosecution of a case and later participate in deciding the employee's appeal.[45]

The Commission itself would remain responsible for establishing and revising adverse action procedures, and for providing agencies with information about the operation of the system in general. Such information could be highly detailed and precise, *e.g.*, including examples of letters of proposed charges. Even in particular controversies, it would be short-sighted to forbid all communication between the agency and the Commission. Consultation with Commission officials before any letter of proposed charges has been issued is more likely to persuade the agency that it has no basis for initiating action than to provoke action that the agency would not have taken on its own. Once a letter of charges has issued, however, *no* Commission official should provide aid to the agency, whether or not he might later be involved in deciding a possible appeal. If the Commission is to function successfully as an adjudicatory agency, there should not be even the appearance of its involvement in agency prosecution of individual cases.

It should be noted that under the system proposed, agencies should less often require advice about handling particular cases, because hearings would be conducted by hearing officers appointed and trained by the Commission.

2. *Ex parte and command influence.* It is credibly alleged that some Commission regional directors exercise considerable control over the disposition of cases by their appeals examiners.[46] As the regional directors assume responsibility for decisions, they should be expected to look before they sign. But often the reasons that prompt their exercise of decisional authority reportedly have little to do with the merits of cases, or respond to communications outside the record. When the regional director intervenes, it is usually to affirm the agency's action.

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[44] *See Guttman,* supra note 8, at 338–45.

[45] *Id.* at 343–44.

[46] *Id.* at 338–39. Off-the-record interviews also confirmed these allegations.

To the extent such influence prevails, it threatens the fairness of the process in two ways. The inputs that cause a director to revise the appeals examiner's decision, although relevant, may not be known to the employee and thus he may have no opportunity to rebut them. There is the further danger that cases will be decided on grounds that bear no relation to the merits, a danger that is heightened in a system that requires no public explanation of decisions.

Commission regional directors could not influence the disposition of appeals under the recommended system, of course, since appeals would come directly to the Commission's central appeals authority. Off-the-record communications could still prejudice the process, however, if no rule against *ex parte* contacts were adopted. The opportunities for illegitimate influence would be considerably reduced if no further *factual* representations, *ex parte* or otherwise, were permitted after the record was closed.[47] In addition, the Commission's appellate authority should observe a rule against *ex parte* contact that requires disclosure of, and an opportunity to respond to, representations on behalf of either party in a case before it.

Finally, the same rule should apply to information or assistance solicited by the appellate authority on its own motion. The appellate authority should only receive evaluative assistance from experts—*e.g.*, disability experts or job classification specialists—on the record, subject to the right of both parties to respond. Hearing officers who preside at agency hearings should, of course be subject to similar constraints.

E. *Role of the Civil Service Commission*

The Civil Service Commission not only adjudicates individual cases and exercises primary responsibility for establishing the procedures that govern all agencies in removal and discipline cases, it is also responsible for formulating and implementing government personnel policy. The superficial inconsistency of these roles has provoked charges from several quarters that the Commission should remove itself altogether from deciding adverse action appeals.[48] The thrust of the argument is two-fold: (1) As management's personnel advisor, the Commission is incapable of viewing employee appeals objectively or of fairly assessing managerial claims. (2) Whether or not actual bias can be shown, the Commission is viewed by employees as an arm of management, and this alone undermines confidence in the system.

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[47] *See* text accompanying notes 25–26, part III, supra.

[48] *See, e.g.*, R. Vaughn, supra note 8, Part I, at II–144, VI–1 through VI–50.

I am not persuaded that responsibility for final adjudication of adverse action cases should be removed from the Commission. While some Commision decisions seem wrong, their defects are less often a product of a managerial bias rather than carelessness, lack of candor, or misjudgment. The failures are principally failures of quality, not predeliction. There are cases that support the critics,[49] but not enough of them alone to justify creation of a new agency. Furthermore, the Commission's adjudicatory functions can be better insulated from managerial pressures, and other steps taken to enhance impartiality. The specific proposals have already been discussed.[50]

It is not uncommon for government agencies to combine responsibility for formulating policy with authority to adjudicate individual cases that test its application. The Food and Drug Administration, the Federal Trade Commission, the Securities & Exchange Commission—indeed most major regulatory agencies—are examples. In these instances, experience and expertise are thought to outweigh the risks of systematic bias, which can be inhibited by appropriate separation of functions [51] and, in the final analysis, cured through judicial review. On this theory, one can justify assigning responsibility for deciding adverse action appeals to the agency most knowledgeable about government personnel policy.[52]

In addition, there is an important difference between the role of other agencies and that of the Commission in adverse action appeals. The FTC, for example, both initiates cases and later decides them. But except when one of its own employees is involved, the Civil Service Commission is not the moving party in any adverse action. It may have a stake in the efficient implementation of government personnel policies, but it has not previously taken a position respecting the employee involved.

A final argument against shifting responsibility for disposition of adverse action appeals from the Commission to some other agency is that such action would require Congressional approval.

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[49] Vaughn cites several through the course of his indictment of the Commission. Id. at II–1 through II–143.

[50] *See* text accompanying note 47, supra.

[51] *See* 5 U.S.C. § 554(d). *See generally,* K. Davis, Administrative Law Text §§ 13.01–.08 (1971).

[52] Prescribing qualifications for federal employment and the disposition of adverse actions are not unrelated activities, and their close interrelationship supports the desirability of assigning responsibility for both to the same, quasi-expert agency.

Conclusion

A final word may be in order to forestall one objection to the procedural scheme embodied in the proposed recommendations. If one were devising procedures for personnel disputes for the first time, unencumbered by precedent or statute, one might produce a less formal, less complicated system than that proposed. The present system, however, is already highly judicialized. Furthermore, many of its features—such as the requirement of an evidentiary hearing at some stage, are clearly required by the Constitution.[54]

While several of the proposed recommendations would contribute to formality, they are designed primarily to enhance the fairness of procedures that are already undeniably adversary. Many other of the recommendations are intended to expedite disposition and eliminate duplication. For example, the recommendations would eliminate an entire level of appellate review, and limit employees to a single evidentiary hearing. In short, the proposed reforms would simplify an already complex process and ensure greater fairness for employees.

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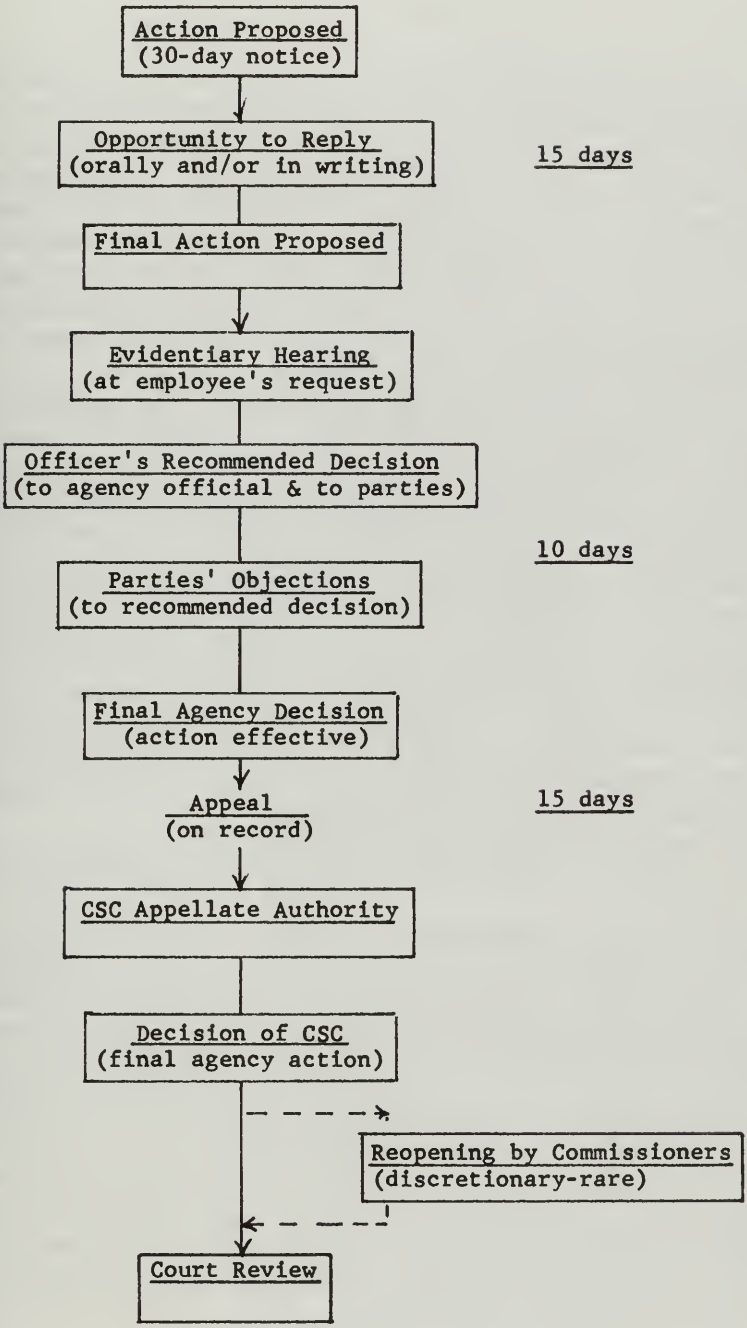
[53] *See* Part III, supra.

[54] *See* Kennedy v. Sanchez, 349 F. Supp. 863 (N.D. Ill. 1972) ; see also text accompanying notes 74–77, Part V, infra.

PROPOSED ADVERSE ACTION PROCEDURE



V. Counsel in Adverse Action Cases

A. *Use of Representation by Employees*

The Committee makes no recommendation at this time on the important and controversial issue of whether counsel should be provided for employees who cannot afford to pay for representation. A threshold reason for avoiding a recommendation is that the underlying issue is broader than the adverse action context and raises questions concerning the need for counsel for indigents in a wide range of administrative adjudicatory proceedings. Secondly, data concerning the availability of counsel to federal employees is scanty. Finally, available evidence about adverse actions fails to establish any correlation between representation and eventual success on appeal.[55]

1. *Right to counsel.* It should be emphasized that the issue here is not whether employees have the "right" to be represented in adverse action proceedings. Under present Civil Service Commission regulations, an employee against whom adverse action is proposed may be represented in replying to the agency's charges, in preparing for and appearing at any evidentiary hearing, and in processing any further appeal. The representative can be practically anyone the employee chooses: a friend, a fellow employee,[56] a union or other organizational spokesman,[57] or a private attorney. If the representative is a fellow worker he, like the employee charged, is entitled to time during working hours to prepare and participate, and is protected against constraint or coercion by the agency.[58] Apart from this very limited form of government subsidy, however, no provision is made for assisting employees to find or pay for representation.

2. *Frequency of representation.* Based on data from fiscal year 1970, roughly one-third of all appellants proceeded without repre-

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[55] In fiscal year 1970 employing agencies affirmed 80.3 percent of cases in which the employee was without representation; in cases in which employees were represented by attorneys, the affirmance rate was 78.9 percent; and in cases in which employees had union representation, the rate was 77.4 percent. These differences are not significant. The Commission's regional offices affirmed agency actions at the following rates: for employees without representation, 65.5 percent; for employees with attorneys, 77.9 percent; and for employees with union representation, 73.9 percent. Corresponding figures for the Commission's Board of Appeals and Review are not available, because by no means all of its decisions are included in the data base and because case reports do not distinguish between Board affirmances in employee and in agency appeals.

[56] There are no data on the frequency with which employees are represented by other employees from the same agency. One view holds that few employees would risk the resentment of their agency in order to represent a colleague threatened with removal. This explanation was offered by three APA hearing examiners (now Administrative Trial Judges) in the Interstate Commerce Commission who recently undertook to act as counsel for several Commission employees subject to adverse action.

[57] In years past veterans organizations provided representation for many employees, but they are involved in few cases currently.

[58] 5 C.F.R. §§ 752.202(c), 771.105, 771.2206 (1971).

sentation.[59] Approximately one-third rely on union representatives, and roughly one-fourth employ private attorneys.[60] The remainder are represented by other groups or individuals, e.g., veterans organizations, Legal Aid, OEO lawyers, fellow employees, etc. Agency and Commission officials believe the percentage of represented employees is increasing, but there is no later data to document this impression.

We do not know how many employees subject to adverse action—not simply those who appeal—have representation. Available data disclose a striking correlation between representation and employee decisions to appeal further, either to the Commission or to an agency second level.[61] That correlation alone would suggest that far fewer non-appellants than appellants are represented. A few employees who decide not to appeal may have consulted an attorney, and others may have sought and been denied union assistance, but it is difficult to believe there are many in either category. However, because we lack information about the universe of employees subject to adverse action—such as age, grade, or pay scale—it is impossible to determine why more employees do not have representation. Inability to pay may be part of the explanation, but we have no idea how large a part.

3. *Distribution of representation.* Representation appears to be proportionately distributed among appellants measured by almost every criterion. The only significant exception to this generalization is that appellants contesting removal are much more likely to be represented than those appealing some lesser action.[62] One finds no notable disparities in frequency of representation based on grade or pay.[63] Wage Grade and Postal Field Service employees rely more on union spokesmen than GS scheduled employees, more of whom employ private attorneys, but the percentage of unrepresented employees does not vary significantly among these groups.[64] Among employees with

[59] At employing agencies 32 percent of all appealing employees were without representation, while 38 percent of all appellants at the Commission's regional offices had no representative.

[60] At employing agencies 36 percent had union representation, while 27 percent employed attorneys. At the Commission's regional offices, 33 percent relied on union representation and 23 percent had attorneys.

[61] At employing agencies 60 percent of employees without representation took *no* further appeal, while 68 percent of those represented by attorneys and 63 percent of those with union representation appealed at least once more.

[62] At employing agencies only 25 percent of employees contesting their removal were without representation, while 49 percent contesting their demotion and 47 percent contesting reassignment had no representative. Among appellants to the Commission's regional offices the figures were 32 percent, 50 percent, and 50 percent, respectively.

[63] See Tables V–1 and V–2.

[64] At employing agencies, the percentages of employees appearing with union representation were: GS, 32.5 percent; Wage Grade, 40.2 percent. The percentages of employees without representation were: GS, 31.8 percent; Wage Grade, 32.1 percent. (No data is available concerning appeals by Postal Service employees within that agency's appeals system.) At the Commission's regional offices, the percentages of employees with union representation were: GS, 30 percent; Wage Grade, 33 percent; and PFS, 36 percent. The percentages of employees without representation were: GS, 38 percent; Wage Grade, 36 percent; and PFS, 39 percent.

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from 3 to 30 years of service, frequency of representation in agency appeals remains almost constant at roughly 65 per cent.[65] Employees in the lowest grades are represented slightly less frequently, but employees in the highest grades—who presumably can best afford representation—rely on it least.[66] The disparities are small, however, and probably insignificant. Several factors are probably operating here, in addition to ability to pay. Employees undoubtedly weigh what they perceive to be their chances of ultimately defeating the action against them, their opportunities for other employment, and the importance of the jobs they are losing, as well as their need or desire for professional advice and assistance.

4. *Effects of represenation.* Based solely on employees who appeal, our data suggest that having representation does not make much difference in the outcome. In fiscal 1970, employees with no representation of any kind fared as well in agency appeals systems as those with union or attorney spokesmen,[67] and actually prevailed more often before the Commission.[68] One must be very cautious, however, in attributing significance to the figures on this point. We know practically nothing about the cases unrepresented employees won, or why they did not have representation. Conceivably, many realized they did not need help (although the low success rate of employee appeals generally casts doubt on this hypothesis). Unions may devote more efforts to harder cases that are won less frequently. Or many successful employees may have had assistance in preparing a written appeal although they did not appear with counsel, and accordingly were recorded as "self represented."

It is particularly difficult to explain why unrepresented employees not only won on procedural grounds more often than on the merits, but won on procedures far oftener than employees who had attorney or union representation.[69] One cannot believe these successful appellants recognized at the outset that the agency had committed a procedural error that would eventually require reversal and therefore decided to dispense with representation. As these procedural reversals were more common among Commission decisions, there is a more likely explanation. Because the Commission's regional offices cannot reduce

[65] See Tables V–3 and V–4.

[66] See Tables V–1 and V–2, *supra.*

[67] See note 55, *supra.*

[68] See note 55, *supra.*

[69] At employing agencies 12.4 percent of employees without representation won procedural reversals, compared with 3.7 percent of employees with attorneys and 7.8 percent of employees with union representation. At the Commission's regional offices, a whopping 24.8 percent of appellants without representation won on procedural grounds, compared with 8.7 percent and 12 percent, respectively, of employees with attorney and union representatives.

agency penalties, it is reported that they frequently find procedural errors to upset agency actions they regard as too harsh. Most appellants claim that the agency's punishment was excessive and many including a high percentage of those who "represent" themselves make no other argument. Thus, the surprising frequency of procedural reversals in favor of employees without representation may simply reflect examiner solicitude for appeals for clemency, and not indicate that employees are able adequately to represent themselves.[70] This does not of course explain why unrepresented employees fare no worse before the agencies.

Apart from the uncertain relationship between represenation and success on appeal, our data reveal other, less equivocal correlations. Employees who are represented are twice as likely to request an evidentiary hearing as those who are not.[71] They are more likely to press their appeals beyond the initial level of decision, either to the Commission or to a second level within their agencies.[72] And the appearance of a representative adds significantly to the time required for decision.[73] There is no suggestion here that representatives purposefully delay the process. Since an employee is ordinarily out of a job during the appeals process, he gains little by delay. There are two more likely explanations. Adding another participant to the process makes coordination of schedules more difficult. In addition, employing agencies and the Commission examiners may proceed more cautiously in appeals by represented employees, perhaps because they raise more issues or are more persuasively argued, or perhaps because representation means that a case is more likely to be appealed.

B. *Constitutional Considerations*

Space does not permit extended discsussion of the "right to counsel" issues involved in the adverse action process. Accordingly, only the basic outline of analysis will be suggested. but it supports the basic conclusion that the failure to provide counsel for indigent employees does not violate due process. This is not to suggest that some scheme

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[70] One might speculate whether appeals officials are not also likely to consider more sympathetically the case of an employee who does not make a big production of his appeal and, as the data reveal, is likely to request an evidentiary hearing.

[71] Employees without representation requested hearings only 24 percent of the time. For employees with attorneys the figure was 73 percent, and for employees with union representation 66 percent.

[72] See note 61, *supra*. Of the 68 percent of appellants represented by attorneys who took further appeals, 12 percent appealed to a second level within their agencies, and 88 percent sought review by the Commission. Of appellants with union representation who appealed further, 24 percent remained within the agency and 76 percent appealed to the Commission.

[73] The sharp correlation between representation and the length of time required for decision is depicted in Tables V–5 and V–6, appended to these footnotes.

for supplying representatives for employees who cannot afford them should not, for other reasons, be considered.

Since current regulations permit an employee to have representation at all significant stages of the process, it may seem a matter only of academic interest whether due process would independently require this opportunity for counsel. However, the suggestion that failing to provide counsel for indigent employees may violate equal protection depends on the availability of representation to employees who can afford it.[74] A persuasive argument could be made that the Commission could not now constitutionally prohibit employees from appearing with legal counsel. Although the rules of evidence are relaxed in adverse action proceedings, it requires skill to marshal and present facts, and the ability to analyze agency regulations and distinguish earlier decisions may be important in contesting the sanction proposed by the agency. Moreover, an employee's opportunity to present witnesses and to confront and cross-examine those of the agency may be substantially diluted without legal assistance.[75] For these and other reasons, the right to be represented by counsel—as distinguished from the right to have counsel appointed—may be considered as important to a fair hearing in this as in other administrative contests.[76]

The question arises then, if counsel is essential to a fair hearing, why must not the government provide counsel for employees who cannot afford to pay for one.[77] There are several answers, none entirely satisfactory but which together warrant postponing any recommendation that counsel be appointed.

First, the overwhelming majority of cases suggest that the failure to provide counsel in this and similar contexts is not unconstitutional. No court has held or even suggested that an employee in an adverse action proceeding who cannot afford an attorney must be provided one. In a closely related context, the Sixth Circuit recently held that the Air Force was not obligated to provide counsel for black civilian employees who challenged alleged discriminatory employment practices under the department's Equal Employment Oppor-

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[74] The suggestion was made by the late Justice Black in Goldberg v. Kelly, in his dissent from the majority's holding that welfare recipients are entitled to a pre-termination hearing at which they may appear with counsel. 397 U.S. 254, 278–79 (1970).

[75] There is no intention here to suggest that legal training is the *sine qua non* of effective representation. Many union representatives, most of whom are not attorneys, are equally if not more effective than private counsel in adverse action hearings.

[76] In Motto v. General Services Administration, 322 F. Supp. 1218 (E.D. La. 1971), the court acknowledged the difficulty of seeking administrative review of adverse action without the assistance of counsel and held that laches did not bar review where the employee had diligently, though unsuccessfully, sought to review on his own. Cf. Webb v. Finch, 431 F. 2d 1179 (6th Cir. 1970) (proceeding contesting termination of Social Security benefits; court remanded for further administrative hearing where recipient was prejudiced by lack of counsel.)

[77] See Note, 68 Mich. L. Rev. 112, 137–38 (1969).

tunity procedures.[78] In *Goldberg* v. *Kelly*, the Supreme Court, quoting *Powell* v. *Alabama*,[79] held that a welfare recipient should be allowed to appear with counsel at any pre-termination hearing, but refused to require that representation must be provided.[80] Finally, last term the Supreme Court refused to decide whether due process requires appointment of counsel for indigents charged with parole violation.[81]

Standing against the Supreme Court's conspicuous silence are the arguments of commentators that appointment of counsel in adjudicatory proceedings threatening deprivation of vital individual interests should be a matter of constitutional command,[82] and a provocative decision of the Federal Trade Commission. In *In re American Chinchilla Corp.*,[83] the Commission ruled that when a respondent in an adjudicatory proceeding made an adequate showing of indigence, he was entitled to have counsel appointed. The respondent was charged individually with making false and misleading representations to prospective purchasers of his company's breeding stock. Significantly, the Commission based its decision neither on its own rules of practice, which provide parties to hearings "all . . . rights essential to a fair hearing,"[84] nor on the Administrative Procedure Act, which grants "any person compelled to appear in person before any agency or representative thereof the right to be accompanied by counsel." [85] Rather, the ground of decision was constitutional due process:

> We have no doubt that . . . where an adequate showing of financial inability is made out, a respondent is entitled to counsel. We can think of nothing less conducive to fairness and due process in administrative proceedings than to pit the power of the state, armed with all the panoply of the legal machinery (funds, investigatory resources, staff of skilled attorneys, etc.) against a single individual and then deny that individual the right to counsel when he denies the allegations and specifically asserts that he cannot afford counsel.[86]

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[78] Ogletree v. McNamara, 449 F. 2d 93 (6th Cir. 1971).

[79] 287 U.S. 45, 48–69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks skill and knowledge adequately to prepare his defense even though he [may] have a perfect one.

[80] 397 U.S. 254, 270 (1970).

[81] Morrisey v. Brewer, 408 U.S. 471 (1972).

[82] See generally Note, Trumpets in the Corridors of Bureaucracy: A Coming Right to Appointed Counsel in Administrative Adjudicative Proceedings, 18 U.S.L.A. L. Rev. 758 (1971).

[83] 26 Ad. L. 2d 284 (1969).

[84] 16 C.F.R. § 2.41(c) (1969).

[85] 5 U.S.C. § 555(b).

[86] 26 Ad. L. 2d at 288. Rather than remand for appointment of counsel and further hearings, the Commission found the proceedings fundamentally unfair and dismissed the complaint.

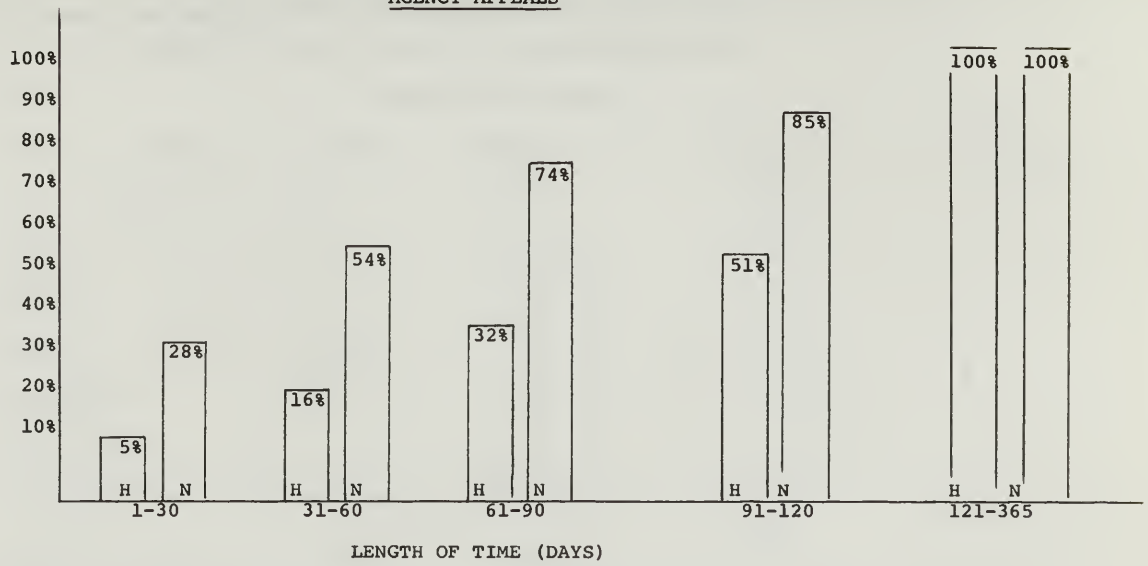
If the assumptions of this decision were accepted by a majority of the Supreme Court, it would be difficult to resist the conclusion that due process requires appointment of counsel for indigent employees threatened with removal. The sanction is serious, and the reasons for removal frequently carry a stigma that will persist beyond the loss of employment. At this writing, however, the precedents do not require provision of counsel.

Moreover, the proposed recommendations should provide significant additional protection for the unrepresented employee. The proposal that every agency appoint an officer who shall seek out employees threatened with adverse action to provide information about the nature of the process, including the possible availability of representation outside the agency, should reduce complaints by employees that they did not understand what was happening. The recommendation that all hearings be conducted by examiners appointed by the Civil Service Commission will interject an outside, inquisitive voice into the process at the time when it can help.

Finally, any scheme for providing counsel for indigent employees must assume not only that representation is likely to contribute to success, but that employees forego representation because they cannot pay for it. The available evidence does not support either assumption, although as noted we lack information about employees who do not appeal. By definition, government employees are receiving pay, at rates that are comparable to those paid in private industry and, for the overwhelming majority, are well above the criteria of indigence in criminal cases. The recommendation that employees continue to receive pay until after any hearing will sustain their ability to afford counsel during the stage of the process at which representation is likely to be most helpful. Undoubtedly, employment of an attorney entails expense that employees are reluctant to bear, and may for that reason avoid, but we have no evidence that significant numbers fail to appeal or appeal without representation because they cannot pay.

TIME IN PROGRESS - EFFECT OF REQUESTS FOR HEARING

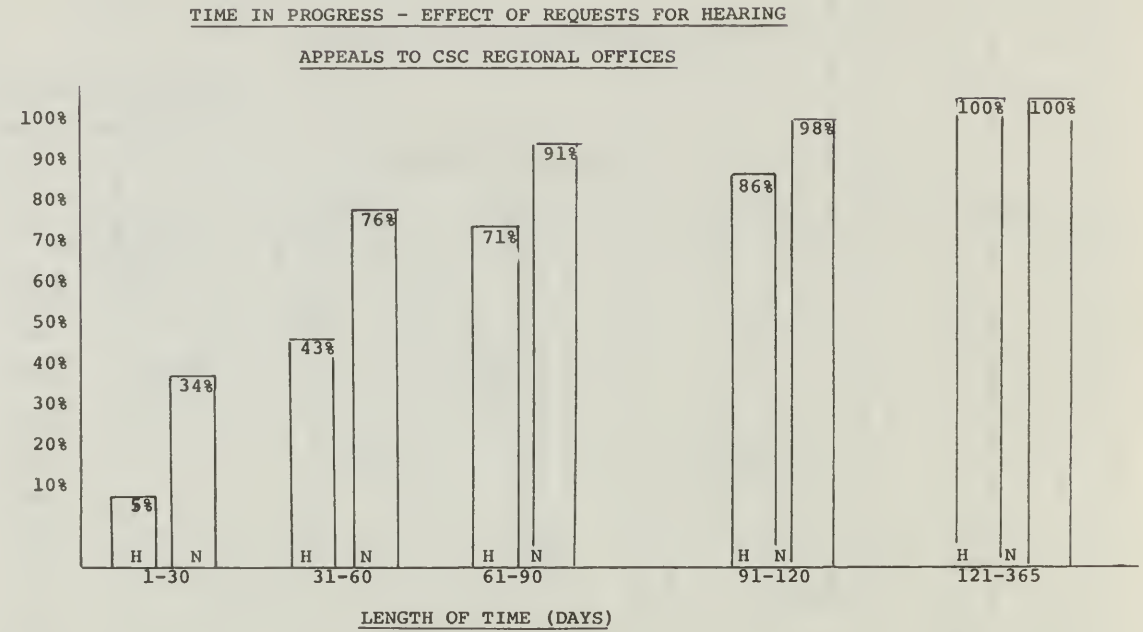
AGENCY APPEALS



H = Hearing Requested

N = No Hearing Requested

TABLE IV–1—*Percentage of work completed*



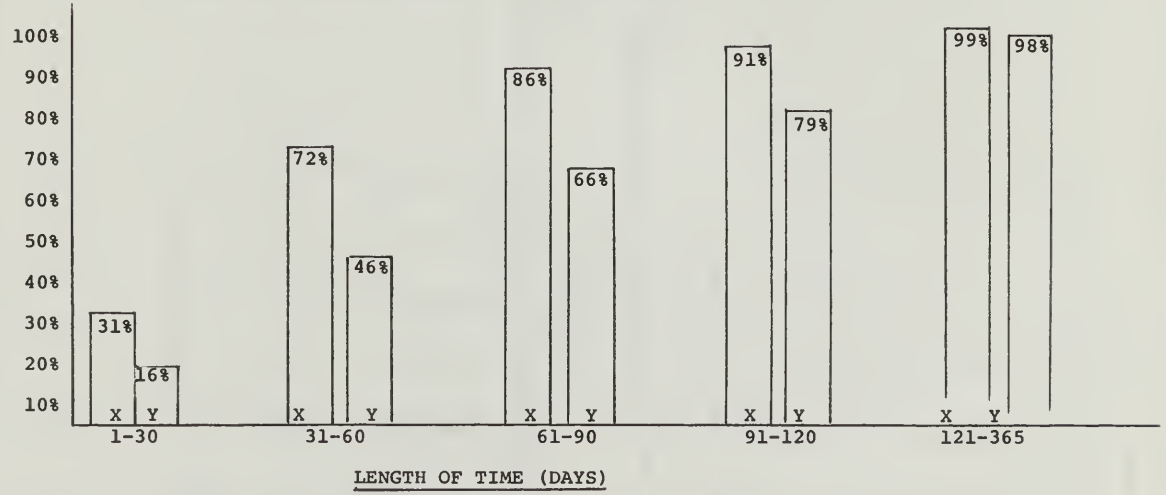
H = Hearing Requested

N = No Hearing Requested

TABLE IV-2—*Percentage of work completed*

TIME IN PROCESS - EFFECT OF PRE-ACTION HEARING

AGENCY APPEALS AND APPEALS TO CSC REGIONAL OFFICES



X = Actions in Agencies That Grant Hearings Prior to Taking Action

Y = All Other Actions Reported

TABLE IV–3—*Percentage of completed appeals*

TABLE V–1—*Representation—Distribution by grade agency appeals*

		GS Classification					Wage Grade				
		1-4	5-8	9-12	13-15	Total	1-4	5-8	9-11	12-16	Total
None	N	30	29	36	11	106	41	20	20	6	87
	P	38.9	33.3	25.4	40.7	31.8	46.6	20.2	28.1	46.1	32.1
Attorney	N	20	19	57	10	106	17	22	14	3	56
	P	26.0	21.8	40.1	37.0	31.8	19.3	22.2	19.7	23.1	20.7
Union	N	26	34	43	5	108	27	51	28	3	109
	P	33.8	39.1	30.3	18.5	32.5	30.6	51.5	39.4	23.1	40.2
Other	N	1	5	6	1	13	3	6	9	1	19
	P	1.3	5.8	4.2	3.8	3.9	3.5	6.1	12.8	7.7	7.0
Total	N	77	87	142	27	333	88	99	71	13	271
	P	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

N=Number of actions.
P=Percent of appellants with designated representation.

TABLE V–2—*Representation—distribution by grade appeals to CSC Regional Offices*

		GS Classification					Wage Grade				
		1-4	5-8	9-12	13-15	Total	1-4	5-8	9-11	12-16	Total
None	N	22	37	59	21	139	35	26	15	14	90
	P	37	38	34	55	38	51	31	21	64	36
Attorney	N	15	15	61	13	104	9	19	12	3	43
	P	25	15	36	34	28	13	22	17	14	18
Union	N	16	41	48	4	109	14	32	34	1	81
	P	28	42	28	11	30	21	38	47	4	33
Other	N	6	5	4	-----	15	10	8	11	4	33
	P	10	5	2	-----	4	15	9	15	18	13
Total	N	59	98	172	38	367	68	85	72	22	247
	P	100	100	100	100	100	100	100	100	100	100

N=Number of actions.
P=Percent of appellants with designated representation.

TABLE V–3.—*Representation—Distribution by length of service agency appeals*

		Length of service (years)						
		1–3	4–5	6–10	11–20	21–30	30+	Total
None	N	9	15	33	73	61	2	193
	P	36	29	29	33	34	23	32
Attorney	N	5	13	34	59	46	3	160
	P	20	26	30	27	26	33	27
Union	N	8	18	42	85	61	3	217
	P	32	35	36	38	34	33	36
Other	N	3	5	6	6	12	1	33
	P	12	10	5	2	6	11	5
Total	N	25	51	115	223	180	9	603
	P	100	100	100	100	100	100	100

N=Number of actions.
P=Percentage of appellants with designated representation.

TABLE V–4.—*Representation—Distribution by length of service appeals to CSC Regional Offices*

		Length of service (years)						
		1–3	4–5	6–10	11–20	21–30	30+	Total
None	N	35	32	68	111	82	10	338
	P	38	43	41	45	38	50	42
Attorney	N	17	19	32	69	67	4	208
	P	19	26	19	29	32	20	26
Union	N	36	23	66	64	64	6	259
	P	39	31	40	26	30	30	32
Other	N	4	----	----	----	----	----	4
	P	4	----	----	----	----	----	----
Total	N	92	74	166	244	213	20	809
	P	100	100	100	100	100	100	100

N=Number of actions.
P=Percentage of appellants with designated representation.

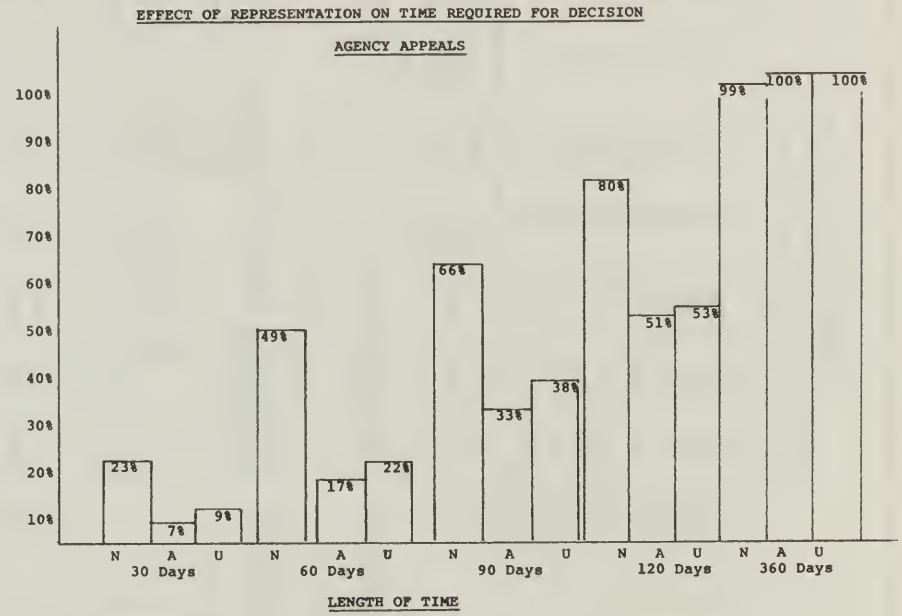
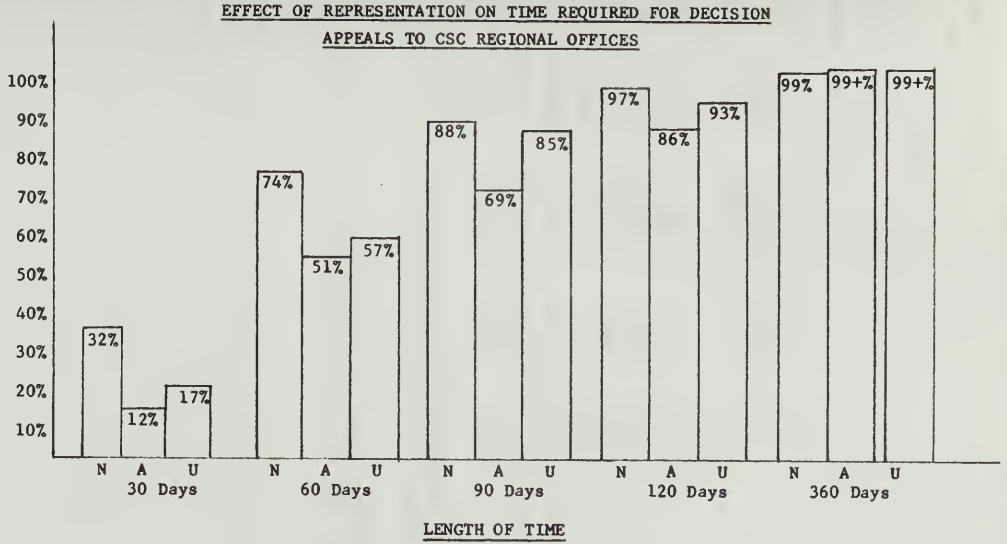


TABLE V–5—*Percentage of total workload completed*



N = NO REPRESENTATION

A = ATTORNEY

U = UNION

TOTAL CASES: 898

TABLE V–6—*Percentage of total workload completed*

TABLE V–7—*Effect of Representation on Decision to Take Further Appeal*

		Agency appeals			
		Agency [1]	CSC [2]	None taken	Total
None	N	16	61	114	191
	P	8.4	31.9	59.7	100.0
Attorney	N	14	97	51	162
	P	8.6	59.9	31.5	100.0
Union	N	31	103	80	214
	P	14.5	48.1	37.4	100.0
Other	N	----------	14	17	31
	P	----------	45.2	54.8	100.0
Total	N	61	275	262	598
	P	10.2	46.0	43.8	100.0

[1] Second level of agency appeals.
[2] CSC regions.

N = Number of further appeals.
P = Percentage of appeals with designating representation.