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FEDERAL GRANT DISPUTE RESOLUTION
A REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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CHAPTER 53

Federal Grant Dispute Resolution*

SYNOPSIS

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§ 53.01 Introduction

Although grants have been awarded by the Federal Government for more than a century, it has been only in the last decade that there has been a traceable pattern of grant disputes. These disputes have arisen throughout the Government, in a variety of contexts and a variety of programs.

The number of disputes is impressive. Between 1970 and 1980, more than seventeen hundred grant-related appeals were filed in writing with the Federal Government. Countless others were handled informally or resolved at lower levels of government. The total amount of money at issue in these appeals is estimated at over $350 million.[1]

Many of these appeals—and particularly those involving large sums of money—were brought by State and local governments. Others were brought by nonprofit organizations, educational institutions, individuals and other recipients of Federal funds.

This report looks at these appeals, and the administrative procedures developed by Congress and the agencies to deal with them. The first part presents an overview of the grants system, and an introductory primer on the types of grant programs and potential grant disputes.[2] The second part provides a summary of our study of thirty-four grantmaking agencies[3]—the types of dispute resolu-

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[1] For further discussion of these figures, see § 53.03[3] *infra.*

[2] See § 53.02 *infra.*

[3] These agencies include: ACTION, United States Department of Agriculture (USDA), Department of Commerce, Community Services Administration (CSA), Department of Education (ED), Department of Energy (DOE), Environmental Protection Agency (EPA), Department of Health and Human Services (HHS), Department of Housing and Urban Development (HUD), Department of Justice (DOJ), Department of Labor (DOL), Department of Transportation (DOT), Department of Defense (DOD), Department of Treasury, Federal Emergency Management Agency (FEMA), General Services Administration (GSA), National Science Foundation (NSF), National Endowment for the Arts and the Humanities, Nuclear Regulatory Commission (NRC), Office of Personnel Management (OPM), nine regional commissions, Small Business Administration (SBA), Veterans Administration (VA), and the Water Resources Council (WRC). Although technically not Federal agencies, the Legal Services Corporation (LSC) and Smithsonian Institution also were studied because they engage in grantmaking with Federal funds.

tion procedures used by the agencies and the nature of disputes brought before them.[4] The third part begins our analysis of the adequacy of existing grant dispute resolution procedures; it discusses the legal nature of a grant, and traces efforts by Congress and the Administration to distinguish grants from Federal procurement contracts.[5] The fourth part considers existing procedures in light of constitutional due process concerns.[6] Finally, the fifth part draws some conclusions and recommendations.[7] Following this presentation we discuss individual agencies in detail; the appeals and appeals mechanisms of each of the thirty-four Federal and quasi-Federal agencies reviewed in this study.[8]

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[4] See § 53.03 *infra.*

[5] See § 53.04 *infra.*

[6] See § 53.05 *infra.*

[7] See § 53.06 *infra.*

[8] See Chapter 54 *infra.*

§ 53.02 The Grants System: An Historical Overview and Typology of Grants and Grant Disputes

[1]—An Historical Overview

The earliest Federal grants were land grants awarded to the States in the late 1800's for the development of agricultural colleges, railroad construction, and other public purposes. During the same period, Congress authorized the first Federal grants of cash, targeting assistance for such diverse purposes as aid to the blind and the support of agricultural experimental stations.[1]

In the early 1900's, the number and size of Federal grant programs grew steadily. By 1922, grant expenditures totalled $118 million, nearly 80 percent of which was for a highway construction program initiated that year.[2]

The 1930's saw the advent of the New Deal, and the push for social reform. The Social Security Act of 1935[3] and other grant-enabling statutes of that period were key elements in the country's effort to stimulate the economy and to create new jobs.[4]

Through the next two decades, Federal grant programs continued to grow dramatically. In 1937, grant expenditures totalled approximately $296 million; by 1947, the amount reached $1.1 billion.[5] That figure doubled by 1950.[6] By 1960, more than $7 billion (or 7.6% of the Federal budget) was spent on grant programs.[7]

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[1] Madden, "The Right to Receive Federal Grants and Assistance", 37 Fed. B. J. 17, 18 n. 7 (Fall 1978).

[2] Advisory Commission on Intergovernmental Relations (ACIR) report, "Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law" (December 1980), p. 4.

[3] 49 Stat. 620. Amendments to the Act currently are codified throughout Volume 42 of the United States Code.

[4] Madden, *supra* N. 3, at 19.

[5] Office of Management and Budget, "Special Analysis H, Federal Aid to State and Local Governments," in Special Analyses, Budget of the United States Government 1979 at 175 (Jan. 1978) (hereinafter referred to as "OMB Special Analysis H").

[6] ACIR, "Significant Features of Fiscal Federalism 1976-77" (1977), p. 55, Table 38.

[7] OMB Special Analysis H, p. 175, 184 table H–5.

But the real explosion was yet to come.

In the 1960's, the Kennedy and Johnson Administrations used grant programs as key weapons in their War Against Poverty. Through grants, the Federal Government sought to target resources to particular segments of the population and to implement Federal civil rights policy.

With these goals, the Government changed not only the volume of grant activity, but also its direction. Prior to 1960, virtually all grants were awarded to States, and idenitified as "grants-in-aid." The term "cooperative federalism" frequently was used during this period to describe the grant-in-aid system, and to emphasize the voluntary nature of State participation.[8] Implicit in the notion of "cooperative federalism" was a recognition of States' autonomy in developing and administering grant programs. As one commentator noted:

> "Before the 1960s, the typical grant-in-aid programs were not used to resolve problems of national concern but were established to help state or local governments accomplish their respective objectives—'to help them get farmers out of the mud' . . . . In general, federal agencies saw their role as one of technical assistance rather than of control: they offered advice and worked with the states to improve programs initiated by the states, and they did not substitute their policy judgment for those of state and local agencies. . . . Federal review and control of grant distribution in earlier decades was designed to accomplish the objectives of efficiency and economy in order to safeguard the federal treasury, and was not generally intended to affect the substance of grant programs."[9]

The grant programs of the "New Frontier" and "Great Society" were different. In many cases, they were designed especially for the purpose of implementing social change. Federal oversight of the programs focused not only on specific program requirements, but also on broader national goals.

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[8] Corwin, "National-State Cooperation—Its Present Possibilities," 8 AM. LAW SCHOOL REV. 687, 704 (1937).

[9] Harbert, "Federal Grants-in-Aid: Maximizing Benefits to the States" (1976), p. 4, as cited in Cappalli, *Rights and Remedies Under Federal Grants* (BNA: 1979), p. 12.

During this period, there was a genuine *quid pro quo:* In exchange for the billions of dollars in grant funds awarded each year, States and local goverments were required to give up some of the autonomy which had characterized the pre-1960 notion of cooperative federalism. Between 1960 and 1979, Congress enacted more than twenty separate laws imposing national standards on grantees, notably in the areas of civil rights and environmental protection.[10] These statutes attached "strings" to virtually all grants and were to be implemented by virtually all grantmaking agencies. In addition, in the 1970's, the Office of Management and Budget added another layer of "strings," by establishing Government-wide cost and administrative standards for grants.

State and local governments accepted these strings—and the billions of grant dollars that went along with them. Thus, in the 20-year period from 1960 to 1980, the amount of Federal funds spent on grants to State and local governments increased more than 13-fold: In 1960, the amount of such expenditures was roughly $7 billion; by 1981, it was estimated that expenditures would reach $96.3 billion.[11] Percentage-wise, the increase also was dramatic: In 1960, the amount of grant expenditures to State and local governments represented 7.6% of the total Federal budget for the year; in 1979, such expenditures represented approximately 17.4% of the Federal budget.[12]

Moreover, during the 1960's and 1970's, significant numbers of Federal grants were made to nongovernmental entities, such as colleges and universities, hospitals, community-based and other nonprofit organizations. Indeed, under the Economic Opportunity Act

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[10] See Madden, "Future Directions for Federal Assistance Programs: Lessons from Block Grants and Revenue Sharing", 36 FED. B.J. 107, 115 n. 48 (1977). Examples of these laws include the Civil Rights Act of 1964 and the National Environmental Policy Act of 1969.

[11] A further breakdown shows some of the growth spurts:

1962: $7.4 billion

1968: $17.3 billion

1970: $25 billion

1977: $68.4 billion

1979: $82.9 billion

OMB Special Analysis H at 175.

[12] *Id.* at 184, Table H–5.

of 1964 and other legislation identified as part of the War Against Poverty, a whole cadre of organizations was created specifically for the purpose of receiving and administering Federal grant programs. These organizations—which included community action agencies, migrant and seasonal farmworker programs, and community health centers—often were 100%-federally funded.

Taking these non-intergovernmental grants into consideration, the growth in Federal grant activity from 1960 to 1980 was even more astounding. Although no firm figure is available, grant outlays for these private sector activities are believed to amount to 30% of grant payments made to State and local governments—for an estimated total grant outlay in 1981 of more than $125 billion.[13]

In the 1980's, the Reagan Administration has sought to reverse many of these recent grant trends. Legislative initiatives have been designed to reduce and to consolidate the vast number of grant programs spawned in prior decades. Many of the programs originally targeted for community-based and other nonprofit organizations have been eliminated or redesigned as part of larger, block grants awarded to States and local governments.[14] The myriad of Federal strings previously created has been abandoned or ignored. The notion of "cooperative federalism" so popular in the 1950's has been resurrected as "new federalism," and States have been assured "maximum flexibility" in administering grant funds.[15]

It still is too early to assess the full impact of these Reagan initiatives, and their long-range effect. In the meantime, however, it is important to review the current situation, and the ways by which Congress and the agencies themselves have viewed Federal grants and grant-related disputes.

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[13] Catz, "Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirements," 59 WASH. U.L.Q. 1067, 1069 (1982).

[14] See, e.g., the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357. For a brief discussion of the meaning of the term "block grant," see § 53.02[2][b] *infra*.

[15] See, e.g., Department of Health and Human Services, Interim Final Rules on Block Grant Programs, 45 C.F.R. Part 96, 46 Fed. Reg. 48582 (Oct. 1, 1982).

[2]—Types of Grant Programs

As the foregoing section suggests, there are various types of grant programs and various types of grantees. Before considering the more specific issues of this report, it may be helpful to review quickly the nature of these variations.

There are at least five ways to categorize grants. First, grants may be classified as being either mandatory or discretionary. Second, grants may be classified as being either block or categorical. Third, grants may be categorized according to their program purpose. Fourth, grants may be categorized according to the type(s) of eligible recipients. Fifth, grants may be categorized according to their anticipated duration. Each of these categorizations is discussed below.

[a]—Mandatory versus Discretionary Grants. The distinction between mandatory and discretionary grants relates primarily to the amount of discretion allotted to an agency in the award of grant funds. The discretion may lie with respect to both the selection of a recipient and the determination of levels of funding.

"Mandatory" grants are authorized by statutes which require Federal agencies to award funds to eligible applicants which meet minimal requirements.[16] Once these requirements are met, applicants generally are viewed as having an "entitlement" to funds appropriated under the programs.

Most mandatory grants are awarded to States, and are designed to provide supplemental funding to support traditional public services, such as public school education, law enforcement, public welfare, health services, housing and community development, public employment, sewage treatment, highway and airport construction. Appropriations for mandatory grant programs often are divided among eligible applicants according to statutory formulae which take into account relevant demographic, social and economic data. The application of these formulae results in an allotment of funds to each applicant based on its size and relative needs. Block grants, as discussed below, are one type of mandatory grant.

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[16] Applicants for mandatory grants usually are required to submit to the administering agency a "plan" which contains assurances that the applicant will comply with all grant conditions, and describes in general terms the activities which the applicant will undertake.

The authorizing statutes for "discretionary" grants generally do not require agencies to award grants to any particular applicant or to support any particular type of activity. Rather, the statutes provide that the agencies "may" award grants to support certain types of projects. Eligibility for discretionary grants generally is not limited to States or units of local government, but instead is defined broadly to include any public or nonprofit private entity.[17]

The underlying intent of most discretionary grant programs is not to solve long-range, broad social problems. Rather, the programs typically are designed to target support for specific problems or to meet specific research needs over a finite period of time. Federal agencies are given broad discretion both in terms of selecting applicants and determining levels of funding; there is no preordained formula.

[b]—Categorical versus Block Grants. The distinction between categorical and block grants relates generally to the permissible range of eligible activities and the degree of discretion afforded the recipient. "Categorical" grants generally mandate that recipients use grant funds for specific purposes to aid specific segments of the population. Grant agreements for categorical grants typically include a full range of program and administrative requirements, virtually all of which are subject to Federal oversight.

In contrast, "block" grants authorize a broader range of activities, allowing the recipient to make priority funding determinations. As fashioned by the Reagan Administration, block grants have a minimal number of Federal restrictions, and rely heavily upon State law and practices. The recipients of block grants are virtually always States and local governments.

Some grant programs have characteristics of both categorical and block grants. Thus, for example, the Comprehensive Employment and Training Act of 1973, as amended,[18] authorizes the recipients' discretion in the selection of program services, but mandates compliance with many Federal standards and requirements.

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[17] There has been a recent movement to expand elibility for these kinds of activities to profitmaking organizations. The National Science Foundation has been one of the first agencies to undertake such awards.

[18] 29 U.S.C. § 801 *et seq.*

[c]—Grant Purposes. There is a full range of possible grant program activity. To name a few: The delivery of educational, health, welfare, cultural and other social services, housing and community development, public employment, job training, sewage treatment, energy development and assistance, transportation and wastewater treatment facility construction, as well as scientific research and research and development activities. As indicated above[19] most of the federally-funded services historically provided by State and local governments (such as public school education, welfare, sewage treatment, highway construction, etc.) generally are being funded through block grants to the States.

[d]—Grant Recipients. Some grants (such as the new block grants authorized under the Omnibus Budget Reconciliation Act of 1981)[20] may be awarded only to State governments; others (such as grants for the construction of wastewater treatment facilities under the Clean Water Act)[21] are awarded primarily to local governments; still others (such as Headstart) may be awarded to private, nonprofit organizations as well as to State and local governments. Finally, under certain circumstances, grants may be awarded to individuals or private profit-making organizations.[22]

[e]—Duration of Grants. Most grants are for a one-time project or a designated one or two year period. However, some grants provide for a multi-year program, with annual funding review.[23] This distinction is important in our later discussion of pre-award appeals.

[3]—Types of Potential Grant Disputes

Just as the types of grant programs administered by the Federal Government vary tremendously, so do the types of disputes arising out of grant administration. At the outset, a fundamental distinction must be drawn between "pre-award" and "post-award" disputes.

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[19] See § 53.02[2][a] *supra.*

[20] See N. 14 *supra.*

[21] 33 U.S.C. § 1251 *et seq.*

[22] See N. 17 *supra.*

[23] For further discussion of grants with multi-year authorizations, see text at Ns. 24–26 *infra.*

[a]—Pre-Award Disputes. The term "pre-award" dispute refers to problems arising before a grant has been awarded. Pre-award disputes typically involve applicants who are disappointed with their nonselection or with the levels of approved funding.

There may be several grounds for a pre-award dispute. For example, disappointed applicants may claim that the denial of their grant applications are caused by a conflict of interest on the part of Federal or non-Federal "peer" reviewers, the denial of legal rights afforded to applicants, the improper application of review criteria, or the failure of an agency to follow its own procedures. In addition, applicants may challenge the nonrenewal of continuation grants.[24]

Where mandatory or entitlement grants are involved, Federal agencies generally are required by statute to provide notice and the opportunity for a hearing before denying all or substantial funding to an eligible applicant. Similarly, agencies frequently are required by statute to provide notice and the opportunity for a hearing before denying refunding to continuation grant applicants.[25] Where no such statutory requirement exists, the agencies rarely view the denial of refunding as an appealable decision.[26] Absent statutory requirements to the contrary, denials or reductions in discretionary funding generally are considered nonappealable.

[b]—Post-award Disputes. The term "post-award" dispute refers to problems arising after a grant has been awarded. The following types of post-award disputes tend to recur: (1) voiding of a

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[24] Federal agencies, especially the Department of Health and Human Services (HHS), often support projects which are on-going in nature, i.e., they cannot be completed in one year. For example, the need to support health clinics to serve the poor may continue indefinitely. Accordingly, for the convenience of both the agency and the grantee (in terms of long-range planning and budgeting) grants are made to support a project over a multi-year "project period." After the initial year of support, the grantee must apply for successive "continuation" awards (or "renewal" funding), but is not required to compete with other projects for funding. If the annual application is approvable, funds are available, and the grantee has performed satisfactorily, the Federal agency will continue to fund the project.

[25] The Department of Justice, and the Legal Services Corporation (LSC), have administered grant programs which are subject to such requirements.

[26] However, HHS' new rules provide for administrative review of such actions when the nonrenewal is based on the applicant's failure to comply with the terms of a previous award. 45 C.F.R. Part 16, Appendix A, Secton C(3).

grant; (2) suspension; (3) termination; (4) cost disallowances; (5) denial of requests for approval to incur expenditures; (6) disapproval of indirect cost or other special rates; and (7) cease and desist orders or compliance determinations. Although uniform Federal definitions of these terms do not exist, there is some common understanding as to their meaning.

A grant may be "voided" (and funds recouped) when an agency determines that the award was obtained fraudulently or was otherwise illegal or invalid from inception. For example, at HHS, grants have been voided upon a finding that a grantee was not eligible to receive an award.

"Suspension" of a grant means a temporary withdrawal of a grantee's authority to obligate grant funds, pending corrective action by the grantee or an agency decision to terminate the grant. The underlying reason for suspension is a failure of the grantee to comply with grant terms. A suspension order typically may be in effect no longer than 30 days.[27] Because it is viewed as an emergency action, suspension generally is preemptive, and not subject to full appeals. However, once the 30 days elapses, the grantee generally is afforded notice and the opportunity for a hearing.[28]

"Termination" of a grant means the permanent withdrawal of a grantee's authority to obligate previously awarded funds before the expiration date of the grant.[29] Typically, a grant is terminated when the agency determines that a grantee has failed to comply substantially with grant terms and conditions. In such cases, the proceeding is called a "termination for cause". A grant also may be terminated by consent of both the grantee and grantor agency.[30]

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[27] See, e.g., 42 U.S.C. 2996j(2) (LSC); 42 U.S.C. 5052 (ACTION).

[28] *Ibid.*

[29] A grant may be "partially" terminated as well as fully terminated. A decision by the agency to narrow the scope of the supported activity which prevents the grantee from using a part of the funds initially awarded is a partial termination.

[30] Historically, one of the major distinctions between a Federal grant and a Federal procurement contract was that the Government could not terminate a grant for the convenience of the Government. See, Mason "Current Trends in Federal Grant Law—Fiscal Year 1976," 35 FED. B.J. 167 (1976). However, there have been recent indications that this distinction no longer is as vital as it once was. For one thing, the Office of Management and Budget (OMB) circulars which establish the Government-wide principle that grants may not be terminated for

"Cost disallowances" are determinations that particular costs incurred by a grantee and charged to a grant are not allowable under the terms and conditions of the grant award. For example, costs of construction may not be charged to most grants unless specifically authorized by statute. Absent specific authority, if a grantee nevertheless incurs construction costs and charges those costs to the grant, the agency may disallow those costs, i.e., require the grantee to reimburse those funds to the Federal Government. Disallowances commonly arise when grantees: (1) exceed their budgets (overall or in certain categories); (2) fail to obtain agency approval of certain costs; and (3) lack documentation supporting costs charged to the grant. Disputes arising from cost disallowances are by far the most common type of dispute arising in grant administration.

Under certain circumstances, a grantee is required to obtain prior approval from an agency in order to charge certain costs to its grant. For example, grant funds under a domestic program typically may not be used to support foreign travel, to purchase major pieces of equipment, or to cover pre-award costs, unless the grantor agency approves the expenditure in advance. If the grantee does not obtain prior agency approval and incurs such costs, they may be disallowed. Disputes may arise in this context both before and after such costs are disallowed. Before the matter reaches that point, a few agencies (such as the Departments of Education and Labor) permit grantees to challenge the agency's failure to give cost approval; afterwards, a grantee may challenge the disallowance itself.

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convenience (OMB Circular A–102, Attachment L, OMB Circular A–110, Attachment L) do not apply to the new block grants enacted at the initiative of the Reagan Administration. Moreover, there recently have been some Federal court decisions holding that the Government may terminate grants for reasons related to the Administration's budgetary concerns and process. See, e.g. West Central Missouri Rural Development Corp. v. Donovan, C.A. No. 81–1581 (D.C. Cir., filed July 2, 1981); Region X Peer Review Systems, Inc. v. Schweiker, No. C–2–81–1067 (S.D.C Ohio, filed Oct. 11, 1981). These cases seem to suggest that there are valid reasons for grant terminations other than a grantee's failure to comply with grant terms and conditions. The full implications of the cases are not yet known.

Another type of grant dispute involves the negotiation and approval of indirect and other cost allocation rates. Many grantees are recipients of numerous Federal grants. These grantees typically incur administrative and other general overhead costs which benefit more than one grant, and cannot be identified directly with any one grant. At least some of these costs may be regarded as "indirect."[31] To facilitate the equitable distribution of indirect expenses to each grant, the grantee may negotiate with the Government to arrive at a certain percentage "indirect cost" rate, rather than having to determine the actual indirect costs attributable to each grant. Special allocation plans or rates also may be required in situations where grantees incur joint direct costs. Disputes often arise out of these indirect cost rate and cost allocation plan negotiations. For example, grantees may challenge rates established by the Government, because the rate is too low or because in computing the rate, the agency refused to consider certain costs which the grantee believed should be included.

A few granting agencies (such as the Departments of Education, Justice and Labor) have authority to order grantees to "cease and desist" from violating any terms and conditions of their grants; noncompliance determinations also may be issued. Generally, this type of determination is made only after a complaint of noncompliance has been filed by a third party or the agency and, thereafter, investigated by the agency. The issuance of a cease and desist order or compliance determination may set the stage for graver sanctions, such as suspension, termination or debarment.

[c]—Debarment. Technically not a pre-award or post-award dispute, "debarment" refers to a situation in which a grantee or grant applicant is determined to be guilty of malfeasance or is determined to be so untrustworthy that a Federal agency refuses to do business with the grantee for a specified period of time, e.g. two years. A debarred entity is disqualified from future participation in *any* grant program administered by the agency, not just the grant program(s) which gave rise to the finding of misconduct. Moreover, the ban against program participation is absolute: not only may a debarred entity not receive any direct grant funding from the

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[31] Common examples of indirect cost items include: costs of operating and maintaining a facility, accountant services, central office administrative staff salaries and housekeeping services.

agency; it also may not receive any indirect funding through a subgrant or other subsidiary relationship with a grantee. While this form of remedy is relatively new in the grants field, the agencies which are authorized to debar grantees (such as the Department of Housing and Urban Development, Department of Labor, and Environmental Protection Agency) afford the affected entity full notice and hearing rights, apparently recognizing the severity of the sanction.

[d]—Other Disputes. All of the foregoing types of disputes would arise between a grantee and its grantor agency. Disputes also may arise between a grantee or grantor agency and subrecipients of the grantee. For example, a nonprofit organization may challenge a grantee's decision to deny its application for a subgrant. A construction company may protest a grantee's decision to award a contract under a grant to another company. Potential beneficiaries, employees, or participants in a program may challenge the validity of a grantee's actions. As shown below, some Federal grantor agencies provide appeal procedures for these types of disputes; most do not.

§ 53.03 Grant Disputes: Existing Dispute Resolution Procedures and Disputes Brought Under Them

[1]—Background

The burst of grant activity in the 1960's was accompanied by the emergence of grant disputes. With a vastly increased Federal grant budget, an expanded range of types and numbers of eligible grant recipients, and a significantly increased role for Federal audit and oversight, Congress recognized the possibility of growing numbers of grant disputes and the need to establish dispute resolution procedures.

Accordingly, many of the grant-enabling statutes of the 1960's and 1970's specifically provided for notice and hearing procedures and appeal rights. For example, the Economic Opportunity Act of 1964, as amended,[1] provided for notice and hearing rights upon the suspension, termination, or denial of refunding of a grant. The Omnibus Crime Control and Safe Street Act of 1968, as amended,[2] authorized "compliance" and "adjudicatory" hearings for certain types of grantees and grant applicants. The Comprehensive Employment and Training Act of 1973, as amended,[3] established a multi-tiered grievance procedure, culminating in a hearing before an administrative law judge. The General Education Provisions Act of 1978 mandated the establishment of an Education Appeal Board.[4]

In the 1970's, grantmaking agencies began to use these procedures—and to develop their own. Thus, in 1972, the Department of Health, Education and Welfare—the agency responsible for administering the largest number of grant programs—established a Departmental Grant Appeals Board to hear and to decide various categories of post-award grant disputes. Similarly, in 1974, the Environmental Protection Agency established grant appeal procedures, and designated a board of hearing examiners to consider appeals. Some years later, the Department of Energy did likewise.

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[1] 42 U.S.C. § 2701 *et seq.* (1981).

[2] 42 U.S.C. § 5301 *et seq.*

[3] 29 U.S.C. § 801 *et seq.* (1982).

[4] 20 U.S.C. § 1234 *et seq.*

Other agencies have been far less aggressive in developing grant appeals procedures. At least one agency, the National Foundation on the Arts and Humanities (NFAH), is required statutorily to provide notice and opportunity for a hearing prior to suspension, termination and denial of refunding, but has not established general procedures to handle these actions.

In the absence of any statutory mandate, many agencies (including the Departments of Commerce and Defense, Federal Emergency Assistance Agency, General Services Administration, and Water Resources Council) have not developed any formal dispute resolution procedures; or have a review procedure which applies only to certain programs.[5] Some agencies, such as the Small Business Administration and the Regional Commissions, include a "Disputes Clause" in their standard grant award document which permits appeals of post-award decisions to review committees or designated agency officials.

This section focuses on these and related dispute resolution procedures.

Before beginning the discussion of grant dispute resolution procedures, a few comments should be made regarding the nature of our study, and the character of statistics contained in this report.

In the course of this study, we reviewed the procedures and case law of each of thirty-four Federal and quasi-Federal grantmaking agencies.[6] We interviewed dozens of agency officials, and reviewed documentation regarding the more than 1,700 appeals reported by the agencies. Our findings are reported in detail in the individual agency chapters of this report. A summary of our findings is presented below.

In both the summary and agency chapters, references are made to statistics regarding the numbers, amounts, and types of grant disputes considered by the agencies. Unless otherwise noted, these statistics are based on our original research and compilations of

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[5] Examples include: The Department of Interior, with respect to its Office of Surface Mining and Bureau of Indian Affairs; and the Department of Agriculture, with respect to its Food and Nutrition Service and Farmers Home Administration; USDA (FMHA, FNS, Child Care, Summer Feeding programs).

[6] For a complete list of the agencies studied, see N. 2, *supra*. Unless otherwise indicated, the agency abbreviations referenced in that footnote shall be used throughout the rest of this report.

available case data While every feasible effort was made to ensure accuracy, certain inherent limitations existed. For example, many grantmaking agencies do not maintain centralized—or, in some cases, any—files of grant appeals.[7] Thus, data collected was the result of piecing together information from various sources in various locales. Furthermore, even where centralized files were maintained, there was no guarantee of complete and consistent information. For example, many case files failed to report the dollar amounts at issue in the appeal, or the full range of contested issues. Wherever possible, we tried to supplement written records with agency or grantee follow-up reports.

While these facts suggest a less than exact analysis, we feel comfortable in stating that: (1) The major trends and developments suggested by the statistics are accurate; and (2) Even with its inherent flaws, the study represents the most extensive effort to date to review and catalogue grant disputes and grant dispute resolution procedures.

Finally, we must make clear what this study is *not* intended to do. It is *not* intended to focus on appeals to the General Accounting Office, Office of Management and Budget, Equal Employment Opportunity Commission or other agencies responsible for implementing or enforcing cross-cutting requirements. It is intended only to provide a cursory look at issues related to third-party rights under grants. As shown below, some agencies extend appeal rights to those parties; most do not. Furthermore, the study is designed to consider informal dispute resolution procedures only to the extent that they bear upon more formal appeal structures. Nor did we seek to document disputes ending (for whatever reason) prior to the invocation of the agency's final tier of review. Thus, for example, where the last stage of a review process was conducted before a grant appeals board or administrative law judge in Washington, we did not consider cases resolved or settled in prior review by regional or program officials.

With these *caveats* in mind, we move on to our findings.

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[7] See § 53.03[2][n] *infra.*

[2]—Existing Procedures

[a]—What Form Must an Appeal Take? Grant-related administrative appeal procedures take various forms. Most formal are those which require a full-scale evidentiary hearing at which witnesses may be examined and cross-examined, and documentary evidence may be introduced. Less formal are those procedures which call for submission of a written record (consisting of relevant documentation and briefs) and a nonadversarial conference or "show cause" meeting.[8] Still less formal are those procedures which call for an appeals decision based only on a written record or informal reconsideration.

The degree of formality of grant appeals procedures varies: (1) from agency to agency; (2) from program to program within an agency; and (3) from one type of decision to another. Many agencies have developed a combination of formal and informal procedures. Thus, agencies with relatively formal appeals mechanisms, such as HHS, DOL, EPA and DOJ, consistently build into their procedures a method for encouraging informal negotiation and settlement. A few agencies have fairly sophisticated methods for encouraging informal resolution. HHS, for example, provides trained mediators to accomplish this task.

The highest degree of formality is present in those agencies which permit oral hearings with the full range of procedural protections contained in the Administrative Procedure Act (APA).[9] DOL's appeal process for the CETA program is the prime example. DOL calls for the use of an independent administrative law judge (ALJ) as the arbiter of disputes; permits discovery; gives the opportunity to examine and cross-examine witnesses and to introduce written evidence; establishes burdens of proof; and provides generally that, absent an agency rule to the contrary, Federal Rules of Civil Procedure govern the appeal process. DOE also uses ALJs and, in factually complex cases, may provide the full range of protections employed by DOL.[10]

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[8] Some agencies, such as HHS, occasionally conduct these conferences by telephone.

[9] 5 U.S.C. § 554 *et seq.*

[10] HUD provides for APA-type hearings before ALJs in instances of termination or reductions in funding to recipients of mandatory grants under the Community Development Block Grant program. Moreover, in all instances of debarment,

HHS, EPA and DOE have developed agency-wide grant appeals boards. These boards are composed of designated agency officials, and are governed by relatively elaborate rules of procedure. ED maintains a similar appeals board structure, but generally uses non-agency officials as hearing examiners. These agencies provide, at a minimum, for the development of a full written record. Most of the boards encourage the parties to resolve disputes informally by holding prehearing conferences, waiving deadlines to encourage settlement negotiations, and, at HHS, using trained mediators. In addition, HHS and EPA have developed expedited appeal mechanisms to resolve appeals which involve relatively small amounts of money.

A few agencies have established grant appeals boards to handle disputes arising in particular grant programs or agency components. For example, the Department of Agriculture has created such a procedure specifically for handling disputes arising from the Food Stamp, Child Care and Summer Youth programs.

Some agencies, such as DOJ, LSC, CSA and ACTION, have developed rather elaborate dispute resolution procedures, but have not created formal grant appeals boards. At least two of these agencies, ACTION and CSA, differentiate between termination decisions and all other appealable adverse decisions. They provide for relatively formal appeals in the termination context ("full and fair hearings" before the responsible official or an independent hearing examiner); and less formal appeals (through informal "show cause" meetings with the responsible official) in all other cases. DOJ, on the other hand, makes no distinction between types of disputes for purposes of deciding the nature of the appeals proceeding. In every case, DOJ seeks to resolve disputes informally (with marked success). If efforts at informal resolution fail, formal hearings are held, either by a DOJ official or, at the request of the appellant, an ALJ from outside the agency. LSC also builds informality into an otherwise formal procedure by requiring the agency decisionmaker to hold an informal conference "promptly" after the filing of an ap-

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termination and suspension, hearing officers from HUD's Board of Contracts Appeal are assigned to hear the appeals and a full range of procedural protections (oral hearing, witnesses under oath, etc.) are provided. HUD never has had occasion to use these procedures.

peal. If settlement is not reached, LSC appoints an independent person, not an employee of LSC, as "presiding officer," to conduct a "timely, full, and fair hearing." The rest of the agencies (e.g., DOI, HUD, DOD, GSA, VA, WRC) generally resolve disputes informally, whether or not formal appeals procedures exist.

[b]—Who Decides What Form an Appeal Should Take? At most agencies, an appellant generally has no choice concerning the form an appeal will take. There, however, are some agencies which have developed alternative appeals methods and have given an election option to the appellant. EPA, HHS, and DOE are the chief examples of this latter category.

EPA decides all cases involving less than $50,000 on the basis of a written record without a conference or full evidentiary hearing. If the case involves more than $50,000, the appellant is entitled to elect a conference or a hearing in addition to the submission of a written record. The Board and agency cannot override the appellant's election of procedure.

At HHS, an expedited procedure (written record plus telephone conference call) is used in cases involving $25,000 or less, unless the Board determines otherwise. If expedited review is not given, a written record with briefs is required. In such cases, the Board may decide to hold a conference, and, where complex issues or material facts are disputed, a full evidentiary hearing. The appellant may request a conference or hearing, but is not entitled to either.[11]

DOE has the same three appeals methods, but the threshhold amount for expedited appeals is $10,000. The Board makes final decisions as to which method will be used in any particular case.

[c]—Who May Bring a Grant Appeal? Most agencies which permit grant appeals have not specifically addressed the issue of who may initiate an appeal, presumably because it is assumed that only the affected applicant or grantee and the agency are interested

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[11] Appellant in one recent case sought to test this issue. When the Board denied appellant's request for an oral hearing, the appellant filed a complaint in Federal District Court charging that there was a dispute as to certain material facts in the case, and that, therefore, a hearing was warranted. Community Relations—Social Development Commission of Milwaukee County v. Schweiker, C.A. No. 81-0124 (D.D.C., filed Jan. 19, 1981). Before the court ruled on a motion for injunctive relief, the Board, through counsel, agreed to have the court remand the case to the Board and granted a hearing to appellant.

parties.[12] A few agencies (such as HHS and EPA) have stated expressly that only an affected applicant or grantee may bring an appeal. However, these agencies generally may permit third parties to intervene if they are "the real party in interest," or if their intervention will not cause undue delay and will aid in disposition of the appeal.[13] ED, LSC and DOE also permit third parties to intervene.

DOL, ACTION, CSA, and DOE are exceptional in this regard. Under the CETA program, DOL allows affected third parties to initiate, as well as to intervene, in appeal proceedings. By statute, CSA was required to review a "delegate agency" applicant's protest of unfair treatment of its application by a grantee.[14] Thus, the delegate agency applicant, not the grantee, was permitted to appeal directly to the agency. In addition, both ACTION and CSA regulations provide that delegate agencies whose conduct forms a sub-

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[12] If, for example, a subgrantee tries to appeal a grantee's decision, agencies typically respond that they will not interfere in the grantee/subgrantee relationship. One agency spokesman has offered a variety of reasons for restricting access to the appeal process. First, access to the process simply is not needed to give fair treatment to parties other than the grantee and affected grant applicant. Second, the agency's involvement in disputes between grantees and third parties may be inconsistent with the grantee's management duties. Third, the agency may not have sufficient resources to provide a right of independent review to all potentially aggrieved parties, which, depending upon the nature of a program, may include other assistance applicants, bidders for assisted work, beneficiaries, contractors, subcontractors and suppliers performing assisted work, employees of assistees, and of contractors, subcontractors and suppliers, public interest groups, public bodies and individual citizens. Allan Brown, Outline of Presentation at Federal Bar Association Seminar on Grant Law, "Establishing an Assistance Appeals Board and Defining its Scope of Authority," Seminar Materials, pages 65–66 (February 20, 1981).

[13] This general rule is inapposite to the seven block grant programs authorized by the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35). HHS interim regulations implementing the Act prohibit participation by third parties in informal compliance hearings which must be conducted after HHS finds States out of compliance with program requirements. Even in cases where a third party's conduct formed the basis for findings of noncompliance, intervention is not permitted. 45 C.F.R. § 96.64, 46 Fed. Reg. 48591 (October 1, 1981). If HHS's findings are upheld at the informal hearing, the State may appeal the findings to the Departmental Grant Appeals Board. However, the Board may review only the written hearing record. Thus, third parties again have no opportunity to participate. 45 C.F.R. § 96.52(d).

[14] A "delegate agency" in CSA parlance is a subrecipient designated by a prime grantee to conduct a portion of the grant activities.

stantial basis for a decision or are financially affected thereby may intervene in termination or suspension proceedings brought against grantees.

DOE's Board Chairman has indicated that if a grantee and subrecipient agree, the Board will review a subrecipient's appeal of grantee decisions. However, if the grantee does not agree, the Board will dismiss the case unless the subrecipient can point to a regulation or clause in its agreement giving it the right to appeal.[15]

[d]—Who May Represent the Parties?

[*i*]—*Appellant.* A few agencies which have implemented grant appeals procedures do not address the issue of who may (or should) represent an aggrieved applicant or grantee. However, most agencies (HHS, EPA, ED, DOE, LSC) have specified that the appellant *may* be represented by counsel. No agency requires the appellant to be represented by counsel. It should be noted that, under OMB's Government-wide cost principles, attorney and other consultant fees incurred in connection with an administrative appeal appear allowable if reasonable, necessary, and allocable to a grant. There has been considerable discussion regarding this issue.[16]

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[15] Interview with John Farmakides, October 1981, Washington, D.C. In one case, Akron-Summit Community Action Agency, Inc., F.A. No. 2–12–80 (Feb. 20, 1981), the Board dismissed a subrecipient's appeal for these very reasons, i.e. the subrecipient could not establish a right to appeal and the grantee did not consent to Board review.

[16] Under OMB cost standards, legal expenses are allowable grant costs if they are "required in the administration of grant programs." Federal Management Circular ("FMC") 74–4, "Cost Principles Applicable to Grants and Contracts with State and Local Governments," App. B, ¶ B.16; FMC 73–8, "Cost Principles for Educational Institutions", App. A, ¶ J.26; OMB Circular A–122, "Cost Principles for Nonprofit Organizations," Att. B, ¶ 34. A major exception, however, applies for "the prosecution of claims against the Federal Government." *Id.* Both HHS and OMB have taken the position that this exception does *not* apply to appeals brought before the HHS Departmental Grant Appeals Board "or to similar administrative appeals to other appropriate grant appeals authorities." Letter from Henry G. Kirschenmann, Jr., (then) Director of the Office of Grant and Contract Financial Management, HHS, to Ann Steinberg, September 26, 1980. In subsequent rulemaking before the Department of Labor, the Section of Public Contract Law of the American Bar Association went on record in support of this position.

[*ii*]—*Appellee.* Respresentation of the agency official who made the disputed decision is handled by agency attorneys in virtually all agencies which have formal appeals mechanisms.[17] Most agencies which authorize appeals only to some higher agency official or to the same official (in effect, a request for reconsideration), or which otherwise handle appeals "informally", typically do not see the need for representation by attorneys because these appeals are viewed as nonadversarial.[18] A few agencies, such as DOJ, call upon agency lawyers even at "informal" stages of review.

[e]—How is an Appeal Initiated? In order to appeal an adverse agency decision, most agencies require applicants or grantees to demonstrate that a "final" adverse decision has been rendered. A few agencies (such as ED and HHS) describe in their regulations what constitutes a final decision, going so far as to require the decisionmaker to include various types of information in the decision letter, such as what action is being taken, the specific reasons (with citations) for the action, and advice to the applicant or

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The Equal Access to Justice Act, 5 U.S.C. § 501 *et seq.* also may be relevant to this discussion. That Act authorizes certain parties, including tax-exempt, § 501(c)(3) organizations with less than 500 employees, to recover attorneys' fees arising out of certain court and administrative litigation. A recovery of fees is warranted where the party prevails in the action, unless the position of the United States was substantially justified by special circumstances which make an award unjust. The burden is on the Federal government to prove the reasonableness of its position.

Of special relevance to grantees and grant applicants, the Act authorizes the award of attorneys' fees in connection with administrative proceedings only where those proceedings are agency adjudications under 5 U.S.C. § 554 (the APA). This limitation makes prospects for recovery of fees in the context of administrative grant appeals quite bleak, because the vast majority of grant appeals procedures are not provided under the authority of 5 U.S.C. § 554. (DOL appears to be the sole exception.) In fact, HHS's rules specifically deprive the Departmental Grant Appeals Board of jurisdiction in cases where a statute requires a § 554 hearing. (45 C.F.R. Part 16, Appendix A, Section F) In its Equal Access to Justice Act implementing regulations, HHS predictably does not authorize attorneys' fee awards in connection with Grant Appeals Board proceedings. (See 45 C.F.R. § 13.3, 47 Fed. Reg. 10837 (March 12, 1982).)

[17] An exception is HHS' Public Health Service. Grants management officials represent PHS in appeals to the HHS Board. Past officials of the Board have indicated that this practice hindered Board operations.

[18] Prime examples of this type of agency are NSF, NFAH, and FEMA.

grantee concerning its appeal rights and deadlines. However, most agencies do not systematically advise applicants and grantees of their appeal rights either in advance or in the adverse decision letter; moreover, some agencies' appeals procedures are not published in regulations (e.g. NSF).

Most agencies require that an appeal be filed within a certain time period, generally 30 days. Some agencies are far more restrictive. For example, DOL requires the filing of a notice of appeal within 10 days of the receipt of notification of adverse agency action. Some agencies (such as HHS and DOL) waive this deadline for good cause shown (HHS, DOL); others (such as ED) may not.

Most agencies require further that the appellant notify the agency in writing of its intent to appeal. HHS, ED, and DOL require the appellant to attach a copy of the agency decision to the appeal notice; HHS and ED also demand a brief statement of why the agency decision is wrong.

Some agencies (such as DOL, DOE and HHS) provide the appellant with a formal acknowledgement of their receipt of the notice of appeal. HHS then sends the appellant a copy of the grant appeals procedures.

If either the agency decision or the appellant's notice of appeal is incomplete, the parties generally are notified. At ED, if the appellant's notice is inadequate, the appellant is given only one chance to revise it.

[f]—Who Hears the Appeal? The agencies have differed greatly in their approach to this issue. Some agencies require an impartial or independent decisionmaker on appeal; others (such as ACTION, CSA, NFAH) provide only for reconsideration by the original decisionmaker or his/her immediate supervisor.

Where impartial or independent decisionmakers are called for, several models emerge. For example, at ED, most appeals are heard by non-federal individuals (attorneys and nonattorneys). DOJ gives the appellant an option: The appellant may request a hearing before a DOJ official or an ALJ designated by the General Services Administration.

DOL assigns appeals to an Office of Administrative Law Judges, which is physically and bureaucratically removed from the rest of

the Department. HHS' Grant Appeals Board is lodged within the Office of the Assistant Secretary for Personnel Management, wholly separate from all program offices and the Office of General Counsel; DOE uses a Board composed of three ALJs; also removed from other parts of the agency. USDA assigns Food and Nutrition Service appeals to an independent Administrative Review Staff.

These agencies may compare favorably to agencies which have placed supposedly impartial hearing examiners in the Office of General Counsel, the office also responsible for representing the agency in appeals. EPA is the primary example of this type of agency. At EPA, the issue of impartiality is further compounded by the fact that the Board uses technical advisors who are employed by various EPA program divisions as standing members of the Board. Although these members are not permitted to vote on decisions, and are viewed purely as technical advisors, their ability to influence the Board's deliberations may suggest at least the appearance of agency bias.

Virtually all of the agencies discussed above indicate that appellants may object to a particular hearing examiner on grounds of conflict of interest or personal bias.[19] In addition, the agencies generally require that the hearing examiner have no prior involvement in the matters at issue in the appeal. Such agencies also generally prohibit *ex parte* communications with the hearing examiner.[20]

[g]—Is the Outcome of the Appeal Reviewable by the Agency Head? Several agencies do not regard the hearing examiner's decision as the final agency decision. Instead, agency procedures at ED, DOJ and DOL require that the hearing examiner's "recom-

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[19] Our study showed at least one case where this concern was an issue on appeal. In Kansas Turnpike Authority, Docket No. 75-3 (March 2, 1979), the EPA Board of Assistance Appeals considered the issue of whether a designated hearing examiner (Regional Counsel for Region I) was sufficiently removed from the Regional Administrator of Region VII, whose action was being appealed, and whether he was, in fact, impartial in light of his prior defense of appeals on similar issues. EPA refused to replace the examiner, stating that its requirement that a hearing examiner be organizationally and geographically removed from the decision being appealed must not be carried to extremes; otherwise, no official of the Agency could hear an appeal from a decision of any other official of the Agency.

[20] See § 53.03[2][k][vi] *infra.*

mendations" be transmitted to the Secretary, and permit the Secretary to affirm, reverse or modify those decisions.[21]

At HHS and EPA, Board decisions currently represent final agency action, not reviewable by the agency head. However, there recently has been considerable debate on this issue in both agencies. At HHS, until August 1981, only one category of Board decisions was considered final: appeals brought under mandatory Social Security Act programs. These decisions represented the largest category of appeals brought before the Board, both in terms of volume and dollar amounts at stake. Yet there remained other categories of cases, including those involving the many discretionary grants administered by HHS.

In August, 1981, the Secretary of HHS promulgated new rules for the Board. In the rules, the Secretary specifically reserved this issue for further review, but provided that, in the interim, all Board decisions should be considered final agency action.[22]

While the issue is thus temporarily resolved at HHS, it may be helpful to consider the various pros and cons raised by the Board chairman with respect to the issue of finality of Board decisions. In a memorandum to the Secretary of HHS,[23] the Chairman recommended against Secretarial review because such review could: (1) subject the Secretary to frequent pressures to change decisions from conflicting interests inside and outside the Department; (2) introduce further delay in resolving disputes; (3) require the Secretary to devote considerable personal and staff time to responding to requests for review, reviewing decisions (and the underlying voluminous records), and writing new decisions; (4) cause unfavorable reaction in court and Congress; and (5) reduce the incentive of the parties to present their best case to the Board.

On the other hand, the Chairman acknowledged that Secretarial review could: (1) give the Secretary control over Board decisions

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[21] At ED, the Secretary never has reversed or modified a hearing examiner's decision. DOJ's Administrator appeared to consistently adopt the hearing examiners' decisions when favorable to the agency, but to reverse at least some of the decisions which were unfavorable to the agency.

[22] 52 Fed. Reg. 43817 (August 31, 1981).

[23] Memorandum to the Secretary from Norval D. Settle, Chairman, Departmental Grant Appeals Board, "Should the Secretary review all decisions of the Departmental Grant Appeals Board" (April 8, 1981).

with which the Secretary disagreed on policy grounds; (2) give the Secretary and parties a means to correct errors in Board decisions; and (3) make the Board's job easier if difficult questions could be passed to the Secretary. In response to these points, however, the Chairman further noted that the Board is bound by HHS regulations and defers to agency expertise and programmatic judgment, thereby reducing the risk of a Board decision conflicting with Departmental policy. Furthermore, the nature of disputes brought before the Board (primarily contested audit findings) rarely involved policy questions of sufficient importance to justify Secretarial review. Finally, the Board's reconsideration process allows the Department to alert the Board to any errors and permits the Board to change its decision.

In light of these considerations, the Chairman recommended that Board decisions be accorded finality. In the event that the Secretary rejected this recommendation, the Chairman suggested that Secretarial review be limited in terms of short timeframes and subject to a "clearly erroneous" standard of review.

While HHS was considering this issue, EPA was too. The issue, however, is viewed slightly differently at EPA, because there the appeals board has taken the position that it is not bound by agency regulations (i.e., the Board may determine that duly promulgated regulations are inconsistent with statutory mandates or otherwise improper).[24] This position created the concern that the EPA Administrator should have the opportunity to review at least those Board decisions which would render invalid an agency regulation. In unpublished, draft regulations, the agency recently proposed to deal with this issue by removing the Board's authority to review the validity of agency regulations. No changes in the Board's current posture on finality is suggested.

[h]—What is the Hearing Examiner's Scope of Authority? Agencies with fairly elaborate appeals procedures have considered a number of issues regarding their hearing examiners' scope of authority. The first issue is whether hearing examiners may review the validity of agency regulations, and if necessary, declare regulations invalid. The second issue is whether hearing examiners may waive duly promulgated regulations. The third issue is whether hearing

[24] See discussion at § 53.03[2][h][i] *infra.*

examiners may overrule prior agency interpretations of relevant statutes not promulgated through regulation. The fourth issue is whether hearing examiners may evaluate the substance of financial audit and program compliance reports issued by qualified agency personnel. The fifth issue is whether hearing examiners may hold that an agency is "estopped" from rendering an adverse decision because of prior agency actions. Each of these issues is discussed below.

[*i*]—*Authority to Review the Validity of Agency Regulations, and, if Necessary, to Declare Them Invalid.* As indicated above, the agencies' consideration of this issue seems closely tied to the question of the finality of hearing examiners' decisions.[25] If such decisions represent final agency action, agencies may be reluctant to delegate to the hearing examiners the authority to rule on the validity of agency regulations. Conversely, if hearing examiners' decisions are subject to review by the Secretary or other agency head, agencies appear less reluctant to delegate such authority.

The experiences of EPA and HHS are instructive on this point. At EPA, decisions of the Board of Assistance Appeals are final; they are not subject to the review of the Administrator. Current rules governing the Board are silent on the issue of the Board's authority to review the validity of agency regulations. However, in April 1981, the Board held that it had such authority.[26] In apparent response to this decision, EPA has proposed (but has not yet published in the Federal Register) rules which would make clear that even if the Board once had the authority to render regulations invalid, it does not have such authority now.

According to one agency spokesman, the current rulemaking is required because it would be bad law and policy for EPA to allow a board with final decisionmaking authority to rule on the validity of agency regulations.[27] From a legal standpoint, the spokesman notes that allowing the Board of Assistance Appeals to overturn agency regulations might contravene the principle that an agency is bound to follow its own rules. Moreover, according to the spokesman, such a policy might violate the principle that rules should not

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[25] See discussion at § 53.03[2][g] *supra.*

[26] Carlstadt Sewerage Authority, EPA Docket No. 79–49 (April 13, 1981).

[27] Brown, § 53.03[2][c], N. 12, *supra* at 73–74.

be made through *ad hoc* adjudication but rather, through the rule-making process.[28] From a policy standpoint, the spokesman suggests that if Board review were allowed to continue, agency program managers could lose control of the agency's funding liability; the facts of one appeal could cause the Board to ignore more general policy and factual determinations underlying a rule; the agency may have to use additional resources to justify its policies and rules to the Board, thereby reducing its ability to defend against outside attacks; and the agency head may be placed in the anomalous position of having to request that Congress enact legislation to accommodate or reverse decisions of the agency's own board.[29]

Prior to August 1981, these considerations were not particularly significant at HHS where Board decisions regarding discretionary grant programs were subject to review by agency heads. To be sure, HHS regulations during that period specifically provided that the Departmental Grant Appeals Board was bound by applicable laws and regulations.[30] However, in at least one appeal involving a discretionary grant, the Board held that it had authority to determine whether a regulation was properly issued, applicable to the dispute, and reasonably consistent with the authorizing statute.[31]

In August 1981, the HHS regulations were changed to make virtually all Board decisions final, without any opportunity for Secretarial review. In light of this change, the considerations discussed above with respect to EPA now may be equally relevant to HHS. In any event, the current Board Chairman has indicated some doubt as to whether the decision in the *Hinds County* case would have the same vitality it once had.

[*ii*]—*Authority to Waive Duly Promulgated Regulations.* A related issue is whether, assuming the validity of duly promulgated regulations, hearing examiners may waive regulations on equitable

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[28] *Id.* at 74–75.

See Section 552(a)(1) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1).

[29] *Id.*

[30] 45 C.F.R. § 16.14. ED has a similar provision. 34 C.F.R. § 78.61(b).

[31] Hinds County Human Resources Agency, HHS Docket No. 7911, Decision No. 109 (July 3, 1980).

or other grounds. The agencies' response to this issue appears to be a resounding "No."[32]

[*iii*]—*Authority to Overrule Prior Agency Interpretations (Not Codified Regulations) of Relevant Statutes and the United States Constitution.* Where an agency's interpretation or application of a statute or constitutional provision is contested, the HHS and EPA Boards have not been reluctant to differ with the agency's position.[33] However, ED's Board has refused to review the validity of the agency's interpretation of a statute.[34]

[*iv*]—*Authority to Evaluate the Substance of Financial Audit and Program Compliance Reports—A Question of Burden of Proof.* All of the agencies appear willing to evaluate financial audit and grantee compliance reports, but to differing extents. The extent to which such evaluations will be made generally is expressed in terms of burdens of proof. In some agencies, such as LSC and CSA, the burden of proof to justify the proposed sanction, e.g. by a "preponderance of the evidence" or by showing a "substantial basis," rests with the agency. However, in most agencies, such as ED, EPA, and DOL, the grantee has the burden of proving that the agency decision was wrong, e.g. in violation of applicable requirements, based on erroneous interpretation of facts or law, or otherwise unreasonable. Where an applicant already has had the opportunity for informal but independent review (such as by an informal review committee of the Public Health Service at HHS) the agency-wide board may review the informal decision only to the extent necessary to determine whether it is clearly erroneous.[35]

[*v*]—*Authority to Hold That an Agency is Estopped From Taking Adverse Action.* The HHS and EPA boards both consider it

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[32] See, e.g., Village of Elburn, EPA Docket No. 77-13 (June 20, 1980). The HHS and ED boards, and DOL Administrative Law Judges have reached similar conclusions.

[33] See, e.g., Michigan Department of Social Services, HHS Decision No. 101 (May 23, 1980).

[34] See California State Department of Education and Richmond Unified School District, 4-(59)-80 (August 30, 1980). This holding seems inconsistent with ED's appeal regulations which state that the Board may interpret statutes and regulations. However, the Board labeled the agency's interpretation an "interpretative rule", the validity of which it could not question.

[35] The same standard was applied with respect to delegate agency appeals of prime sponsor decisions at CSA.

within their authority to hold the agency estopped from taking a particular action because of inconsistent prior action on the part of duly authorized agency officials.[36] For a finding of estoppel, a grantee or grant applicant must show that: (1) there is no written regulation, policy, or other guidance which should have alerted it to the impropriety of the prior action; (2) the prior action was taken by someone duly authorized to do so; and (3) its belief or acceptance of the prior action was reasonable.[37] The boards apparently have found no cases in which all three requirements were met.

[i]—Where is the Appeal Proceeding Held? Some agencies, like ACTION, rely on regional appeal proceedings held in regional offices.

Those agencies which have established centralized, Washington-based appeal mechanisms have taken a variety of approaches to dealing with the sometimes long distances between the parties and decisionmaker. DOL gives the site option to the appellant: Hearings may be conducted either in Washington or at a location closer to appellant.[38] LSC similarly provides that any hearing should be held at a place convenient to the appellant and the community it serves. HHS generally conducts all hearings or conferences in Washington, but tries to offset the cost and time involved in long-distance travel by conducting as much business as possible through written submissions and conference calls. Other agencies, notably DOJ, which have combined formal and informal appeals methods, conduct informal proceedings at regional offices (or, in some cases, closer to the grantee's site), and only when an appeal reaches the formal stage, is the proceeding conducted in Washington.

[j]—What is the Hearing Examiner's Authority to Control a Proceeding? Most agencies with relatively formal appeals mechanisms (such as HHS, EPA, ED, DOL) authorize hearing examiners to issue binding orders necessary for the conduct of an orderly and fair proceeding, such as orders to assist the parties to obtain testi-

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[36] See, Carlstadt, N. 26 *supra;* City of Miami Beach, EPA Docket No. 75–26 (July 13, 1980); Lane County Community Mental Health Center, HHS Decision No. 33, (March 3, 1977); United States International University, Decision No. 42 (October 19, 1977).

[37] *Ibid.*

[38] In either event, the DOL Office of the Solicitor generally assigns agency representation to attorneys located in regional offices.

mony or information, orders to assure that deadlines are met, and rulings on requests and motions. These orders may be issued pursuant to Federal Rules of Civil Procedure (as in the case of DOL), or simply as written and/or oral instructions to the parties (as in the case of most other agencies).

[k]—What Information May Be Presented? The rules of procedure governing the conduct of grant appeals vary from agency to agency. There are several issues which may be considered in this context, such as: (1) the applicability of Federal Rules of Civil Procedure and Federal Rules of Evidence; (2) whether oral testimony as well as written documentation may be offered; (3) whether compulsory process (subpoena power) is available; (4) whether testimony must be given under oath; (5) whether after-the-fact documentation may be offered; and (6) whether *ex parte* communications are permitted.

[*i*]—*Formal Rules of Discovery and Evidence.* No agencies treat grant-related appeals as "mini-trials," subject to the Federal Rules of Civil Procedure and Federal Rules of Evidence. DOL and DOE come the closest: They authorize administrative law judges to use such rules as "guides."

Most agencies which have addressed the issue (such as ACTION, CSA, DOJ, EPA, LSC, HHS, DOL) empower their hearing examiners to decide all issues concerning admissibility of evidence and discovery. Typically, the hearing examiners are authorized to include all relevant information in the appeal record. In addition, most hearing examiners are authorized to order, or at least request, the parties to submit relevant documentation and testimony.[39] At some agencies (EPA and DOE), the appellant is assigned the initial burden of producing documentation in support of its position. Other agencies, such as HHS and ED, do not specify such a burden, but since the appellant has the burden of proof (e.g. to prove the allowability of costs), in effect it also bears the burden of production.[40]

[*ii*]—*Oral Testimony.* An initial distinction must be drawn between procedures which afford the parties an opportunity to make informal oral presentations in response to the hearing exam-

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[39] E.g., ED, EPA, DOL, and HHS.

[40] See discussion of burden of proof issue at § 53.03[2][h][iv] *supra.*

iner's questions, and a hearing in which the parties may conduct direct and cross-examination of witnesses. DOL permits hearings in all appeals. CSA and ACTION provide that a grantee is entitled to both informal oral presentations and more formal hearings, but only in instances of grant termination. Most agencies vest discretion in the hearing examiner to determine on an *ad hoc* basis whether informal oral presentations and/or oral testimony are necessary.

In a few agencies, such as HHS, EPA and DOE, different types of appeal methods may be available: (1) appeals based solely on written records; (2) appeals based on written records with conference (nonadversarial) hearings; and (3) full-scale evidentiary hearings. The availability of on oral presentation and/or witness testimony in these agencies depends on which appeal method is selected. If a conference-type appeal is selected, the parties may make oral presentations in response to questions from the hearing examiner but generally may not examine or cross-examine witnesses. Such conferences may be conducted telephonically. At EPA, if a case involves more than $50,000, the appellant is entitled to select the appeal method, and thus may elect a full-scale hearing with witness testimony. HHS and DOE do not automatically permit full-scale oral hearings in any case. At HHS, for example, an appellant may request a full oral hearing but the request will be approved only if: (1) the Board finds that there are complex issues or material facts in dispute, the resolution of which would be significantly aided by a hearing; (2) for other reasons, the Board concludes that oral argument would be helpful; or (3) a hearing is required by law or regulations. DOE generally will provide an "adversary evidentiary hearing" only if there are complex facts in dispute. ED simply decides whether an oral hearing is necessary to clarify the issues in dispute.

[*iii*]—*Compulsory Process.* Most agencies have not dealt with this issue, or have determined that compulsory process in grant appeals is not necessary. These agencies simply encourage the parties to cooperate in developing a complete appeal record.

Some exceptions are: (1) DOL, where an ALJ may order discovery under the Federal Rules of Civil Procedure as well as issue subpoenas to secure the attendance of witnesses; (2) DOE's Board of

Assistance Appeals, which may order the production of documents and other evidence, issue subpoenas and order depositions; (3) DOJ, which has specific procedures permitting discovery, including the taking of depositions and serving of interrogatories; and (4) HHS, which may issue show cause orders and "request" the submission of written witness statements and documents. ED specifically does not have authority to issue subpoenas.

[*iv*]—*Administering an Oath.* Most agencies do not specifically require that oral testimony be given under oath.[41] However, HHS indicates that false statements by a witness may subject the witness to criminal prosecution.[42]

[*v*]—*After-the-Fact Documentation.* Whether an appellant may justify questioned conduct with after-the-fact documentation is an issue typically arising in the context of audit disallowances.[43] HHS has addressed this issue on several occasions, and appears willing to consider such documentation, provided it is specific and precise.[44] No agency prohibits the submission of after-the-fact documentation, but it is unclear whether many would be willing to rely on it.

[*vi*]—*Ex Parte Communications.* Virtually every agency which has developed formal grant appeals procedures prohibits *ex parte* (off-the-record) communications about the merits of an appeal.[45] However, communications concerning administrative or procedural questions often are not prohibited.[46]

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[41] DOE is an exception. See 45 C.F.R. § 1024.4, Rule 5(b)(3).

[42] See 45 C.F.R. § 16.11(d)(3).

[43] "After-the-fact" documentation refers to documentation that was prepared or issued subsequent to the event in question. Thus, for example, a grantee's affidavit that certain cost comparisons had been undertaken prior to a purchase completed at the time of the signing of the affidavit would be considered "after-the-fact" documentation.

[44] In fact, in none of the written decisions of the Board, has a disallowance been reversed in reliance on after-the-fact documentation. See, e.g., Head Start of New Hanover County, Decision No. 65 (September 26, 1979); Neighborhood Services Department, Decision No. 110 (July 15, 1980). Board officials suggest that where adequate after-the-fact documentation is produced, the agency typically withdraws the disallowance (before a formal decision is reached by the Board).

[45] See, e.g., 45 C.F.R. § 16.17 (HHS); 34 C.F.R. § 78.47 (ED).

[46] See, e.g., 45 C.F.R. § 16.17(a); 34 C.F.R. § 78.47.

Recognizing, however, that parties nevertheless may attempt to influence the outcome of appeals by initiating such contacts, a few agencies have developed procedures to handle these attempts. HHS, for example, provides that if such a communication is made either to a Board or staff member, it must be disclosed to the other party and made a part of the record after the other party has had an opportunity to comment.[47] ED has similar requirements. EPA's Board records the substance of any *ex parte* communication and sends it to the other party.

None of the agencies expressly characterize congressional or other outside contacts as *ex parte* communications subject to disclosure and comment rules. In practice, however, it seems such contacts are treated as *ex parte* communications.[48]

In any event, most agencies require that the appeals decision be based only on documents and testimony which are part of the record.[49]

[l]—What Impact do Timeliness Considerations Have? On June 26, 1978, the Administrative Conference of the United States issued Recommendation 78–3, "Time Limits on Agency Action," which encouraged agencies to adopt reasonable time limits or guidelines for the prompt disposition of adjudicatory and regulatory actions. This recommendation has been largely ignored in the grant appeals arena.

Rather, proceeding through an agency's appeals mechanism has proven to be a time-consuming affair, sometimes more time-consuming than litigating a dispute in court.[50] The agencies offer a variety of explanations for the delays, such as: (1) understaffed boards; (2) understaffed General Counsel's Offices (to represent the agency); (3) non-Federal individuals or part-time employees who

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[47] See, 45 C.F.R. § 16.17(b).

[48] In a recent appeal to the HHS Board, East Bronx Community Health Association, Inc., Docket No. 81–191 (January 29, 1982), a Congressman urged the Board to rule in the appellant's favor. The Board Chairman sent a copy of the letter to both parties as well as a copy of his response to the Congressman, in which he thanked him for his interest and promised to send a copy of the decision once rendered. This response seems typical.

[49] See, e.g., 45 C.F.R. § 16.21(a) (HHS); 20 C.F.R. § 676.20(c) (DOL).

[50] At ED, the average case takes 2–4 years to resolve; at EPA, the average is 1–3 years; at DOJ and DOL, 1 to 1–1/2 years.

serve as hearing examiners, but have other priorities and may need training to handle the cases; (4) settlement efforts which require the relaxation of deadlines; and (5) built-in incentives for the delay of proceedings, particularly in cost disallowance appeals.[51]

Although delays in the context of cost disallowances may be advantageous to grantees, delays in other types of disputes may be devastating. Prime examples are disputes arising in the pre-award context. Such disputes could take several forms: (1) a rejected grant applicant, claiming that a Federal agency improperly denied its application; (2) a community-based organization, claiming that a State or local government serving as a Federal grantee improperly denied its application for subgrant funds; or (3) a construction company claiming that a Federal grantee improperly rejected its bid for contract construction work under a grant. In all of these cases, the awarding agency (Federal, State, or local) may have awarded available grant funds to other parties at the same time it denied appellants' bids or applications. Unless the appeals are handled promptly or on an expedited basis, the grant funds will be expended before the appeal is resolved. At that point, unless the awarding agency (Federal, State or local) has available additional funds, the appellants may have no viable remedy.

Furthermore, it should be noted that in all types of disputes—even the cost disallowance proceedings discussed above—delays may have a definite impact upon the conduct and outcome of an appeal. Records both inside and outside the Government have a tendency to be lost or destroyed as time goes by; staff turnovers often result in key personnel being absent by the time the appeals reach a critical stage. Moreover, from the appellant's standpoint, delays often mean money. Additional attorney or consultant time may be necessary to review or resurrect records. Duplicative efforts may have to be made to advise or negotiate with newly-arrived Federal officials.

A few agencies are trying to speed up the process. For example, HHS and EPA recently have developed expedited appeals methods for relatively uncomplicated cases, and encourage the use of conferences rather than full-scale hearings even in moderately complex

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[51] Interest may not be charged on outstanding disallowances until they become final, i.e., after the grantee has fully exhausted its appeal rights.

appeals.[52] Both agencies have developed the staff capability to manage large caseloads, and the staffs carefully monitor the progress of each case, setting deadlines for filing and contacting the parties regularly to ensure that deadlines are met. The use of permanent Board members at both agencies has served to reduce delays. HHS will dismiss appeals if grantees repeatedly miss deadlines; however, it will not reverse the agency decision if the agency causes delay.[53]

Of course, in emergency situations, grantees may seek to circumvent administrative appeals by suing the agency in court. Typically, the first defense raised by the agency will be that the grantee must exhaust administrative remedies.[54] While there are certain limitations to the exhaustion doctrine,[55] grantees may be hard pressed to obtain relief, especially where the agency has an expedited appeals process. Indeed, ED specifically states in its appeals regulations that bringing a lawsuit prior to administrative appeal is a failure to exhaust administrative remedies.[56]

With respect to one agency, ED, Congress has taken the initiative in trying to cope with the massive delays. In 1974, Congress enacted legislation which excused audit disallowances which had

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[52] See discussion at § 53.03[2][b] *supra.*

[53] In response to comments critical of the Board's unwillingness to reverse agency decisions because of timeliness concerns, the Board stated that: "There is a substantial legal and policy question whether the Board could or should take an action effectively precluding HHS from recouping funds which HHS determines the grantee possesses or claims illegally." 46 Fed. Reg. 43817 (Aug. 31, 1981).

[54] The doctrine of exhaustion provides that "no one is entitled to judical relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipping Corp., 303 U.S. 41, 50–51 (1938). The rationale for the doctrine is the need to let the administrative process develop the factual record for its decisions and exercise its expertise and discretion accordingly (without premature interruption by the courts.). It also is an expression of executive and administrative autonomy.

[55] See, e.g., McKart v. United States, 395 U.S. 185 (1969) (no need to exhaust where issue is purely legal rather than factual, and does not involve agency discretion); Cannon v. University of Chicago, 441 U.S. 677, 706 n. 41 (1979) (private judicial remedy available where statute explicitly confers a benefit on a class of persons but does not assure those persons the ability to activate and participate in the administrative proceedings).

[56] 34 C.F.R. § 78.7.

not been resolved within five years.[57] This "statute of limitations" resulted in the forgiving of millions of dollars in questioned costs to ED grantees.

[m]—Do Grant Appeals Decisions Have Precedential Value? None of the agency appeal regulations provide that precedential weight must be accorded to appeals decisions. However, as a practical matter, the appellate bodies generally seem guided by prior decisions.

A more difficult issue may be whether other components of an agency consider themselves bound by grant appeal decisions. At HHS, there has been at least one problem in this regard. In *Wayne State University,*[58] the Departmental Grant Appeals Board held against the National Institutes of Health (NIH) in a case involving the issue of whether certain types of compensation should be charged as "research fellowships" or "stipend payments." NIH, however, refused to change its policies to reflect the Board's decisions. Indeed, quite the opposite occurred: When other educational institutions sought to use the *Wayne State* decision as precedent for research fellowship classification, they were told flatly that the decision did not govern. Thus, the Chief of Audit Resolution for NIH advised an educational institution that:

> The Wayne State case was not precedent setting for a later case involving the same principal issue.[59]

This type of agency response to Board decisions suggests a number of important implications. First, even if a grantee were to receive a favorable ruling from a grant appeals mechanism, it may not be assured of continued proper treatment without further appeals. Second, there may be an inequity between those grantees which are willing and financially able to bring appeals and those which are not. Third, the agency's caseload may be burdened with repetitive appeals of virtually the same issue. Although these appeals presumably could be handled in some form of expedited manner, they nonetheless would impose an added workload.

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[57] 20 U.S.C. § 884 (1975).

[58] Docket No. 21, Decision No. 12 (Dec. 12,1975).

[59] Confidential letter from Jacob Seidenberg, Chief, Audit Resolution Section, NIH, to counsel for educational institution, Dec. 4, 1978.

[n]—Are Grant Appeals Decisions Disseminated or Made Available to the Public? With few exceptions, appeals decisions are not published, and few agencies have any "system" for notifying grantees of their decisions. Indeed, several agencies have no system for maintaining a central file of appeals decisions.

HHS, ED and EPA keep decisions in a centralized location, and disseminate them periodically to designated agency officials and persons outside the agency who request copies of decisions. These agencies maintain a central index file at the boards' offices in Washington. From time to time, summaries of HHS and ED decisions are published in the Federal Register. DOL decisions are maintained by the clerk of the Office of Administrative Law Judges.

Notwithstanding these efforts, it is difficult to track large numbers of grant-related disputes, and to ascertain case precedent. This is so for several reasons. First, several agencies, such as HUD, DOT, NSF (and a host of agencies with relatively small grant programs), do not have formal appeals procedures. Even agencies which have such procedures invariably attempt to resolve disputes informally, e.g., through negotiation or reconsideration. The agencies rarely maintain a system of records to track disputes which are resolved informally.[60]

Second, a few of the larger grantor agencies do not have an agency-wide office of grants administration and do not deal with disputes in a centralized manner. Accordingly, examination of dispute resolution at the Departments of Commerce and Agriculture reveals varying levels of attention to grant disputes among subagency components. Some components have no appeals mechanism (and no records of appeals) while other components have formal grant appeals boards. These agencies do not track disputes in any centralized fashion.

Third, even some of the agencies with formal appeals pocedures do not keep track of grant appeals. Thus, LSC, CSA and ACTION, for example, were able to identify a few instances in which terminations and denials of refunding were appealed, but identify-

[60] There are a few exceptions. DOJ, HHS, DOL and EPA have tracked formal appeals which have been resolved informally, e.g. settled or withdrawn. NSF has kept track of requests for reconsideration of rejected applications. These agencies, however, only keep track of appeals which have been filed formally.

ing those appeals appeared to be a hit-or-miss proposition. The problem is compounded in agencies, such as ACTION, which handle appeals at the regional office level. In those agencies, no centrally-located appeals file is kept.

[3]—Appeals Actually Brought

[a]—Numbers. During the ten-year period from 1970 to 1980, more than 1,700 grant-related appeals had been brought before the appeal mechanisms discussed above. A closer look at the period shows a clear upswing in cases towards the end of the period.

Not surprisingly, most of the appeals have been brought before agencies which administer large grant programs. Thus, for example, during this period, more than 420 appeals were filed with the Departmental Grant Appeals Board of the Department of Health and Human Services (and its predecessor, the Department of Health, Education and Welfare); and more than 821 grant-related appeals were filed with the Department of Labor's Office of Administrative Law Judges.[61] Other agencies, such as the National Science Foundation and Department of Interior, reported no or only a few disputes.[62]

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[61] It should be noted that 548 of the DOL appeals involved disputes concerning individual CETA participants. The remaining 273 appeals involved disputes between DOL and grantees, as well as grantee-subgrantee disputes.

[62] The caseload in other agencies surveyed was as follows:

EPA: 208; USDA: 130; DOJ: 109; ED 65; LSC: 20; NFAH: 11; Commerce: 9; CSA: 5; ACTION: 4; DOE: 1.

The agencies' perceptions with respect to these figures *vis-a-vis* the need for elaborate grievance procedures vary. For example, NSF officials state that the few number of disputes raised before their agency evidence the fact that formal appeal procedures are not necessary. On the other hand, however, these same officials express concern that, if more elaborate procedures existed, more appeals would be brought. Interviews with William Cole, Director of the Division of Grants an Contracts, NSF, (Washington, D.C., June 1980 and March 5, 1982). Officials at DOL generally refute this latter concern. According to them, the main variable in an agency's number of appeals is the policy underlying enforcement and settlement decisions. If an agency is willing (and legally able) to compromise, for example, audit disallowances, the number of disputes will decline; conversely, if grantees are required to repay full amounts disallowed, the number of appeals may increase. Interview with Chief Judge Nahum Litt, Office of Administrative Law Judges (Washington, D.C., May 5, 1982).

These figures may represent only the tip of the grant dispute iceberg. Many disputes are resolved informally without any paper trail or recordation and, therefore, are unrepresented in our survey. Moreover, even where paper trails exist, many agencies lack any tracking system or centralized method for ascertaining the number and types of disputes brought.[63]

[b]—Dollar Amounts. The dollar amounts involved in these appeals is significant: At HHS alone, appeals involving more than $200 million have been considered by the Departmental Grant Appeal Board. At DOL, amounts subject to appeal are estimated at more than $150 million; at EPA, more than $50 million; at DOJ, more than $18 million. The amount subject to appeal in individual cases has ranged from less than $100 (in an HHS appeal) to an estimated $50 million (also in an HHS appeal).

[c]—Issues. The types of appeals vary from agency to agency, and, in some cases, from program to program. However, in the aggregate, the vast majority of grant-related appeals pertain to cost allowability issues, i.e. whether a grantee properly expended grant funds. Most of these appeals have arisen as a result of Federal audits of grant funds. Recurring issues in these appeals include: (1) inadequate documentation; (2) improper cost allocation; (3) costs in excess of budgeted amounts; (4) allowability of certain costs (such as the purchase of equipment) without prior approval; and (5) allowability of preaward costs.

The second most common type of appeal (and most prevalent at EPA and DOJ) involves certain types of preaward disputes. At EPA, local governments frequently challenge agency determinations that a locality or the locality's proposed project is ineligible for grant funding. At DOJ, appeals of both entitlement and discretionary grants are common. At DOL, disappointed applicants for CETA funds (at both the prime grant and subgrant levels) frequently challenge agency determinations of ineligibility and/or agency straying from pre-established review criteria and procedures. At HHS, there have been very few pre-award appeals, primarily because the jurisdiction of the Departmental Grant Appeals

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[63] See § 53.03[2][n] *supra.*

Board was extended to pre-award disputes only in limited circumstances and only as of August, 1981.[64]

Appeals involving indirect and other cost rate determinations occur most frequently at HHS. (This fact is not surprising since the Office of Management and Budget has assigned responsibility to HHS for the negotiation and approval of cost rates for many grantees—including State and local governments, hospitals, colleges and universities—which receive Federal grant funds from several agencies.) Recurring issues in such appeals are whether certain costs may be treated as indirect costs, whether certain elements of cost should be included in the rate determination, and whether the rate may be reduced retroactively.

No agency has had more than a handful of appeals involving grant terminations and suspensions. There apparently has been only one appeal (at DOL) involving the debarment of a grantee.

[d]—Parties. The type of grantee (such as States, units of local government, educational institutions, and non-profit organizations) bringing any particular type of appeal depends upon the nature of the grant program involved. Thus, to give an obvious example: Because States are the only eligible recipients of mandatory Social Security Act grants, States are the only appellants in Social Security Act appeals brought before the HHS Board. Similarly, local governments are the primary recipients of EPA's Clean Water Act grants, and, therefore, account for most of the grant appeals brought before EPA. Where program eligibility is more diverse (such as under the CETA program at DOL), the types of appellants are similarly diverse.

Looking at the entire grants picture, more appeals are filed by State governments than any other single category of grantees or grant applicants. The bulk of these appeals has been filed at HHS and DOJ. Appeals brought by local governments (primarily at DOL, EPA, and DOJ) run a close second. Appeals brought by educational institutions and nonprofit organizations run third.

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[64] HHS grant appeal regulations now provide that the Board has jurisdiction to hear appeals from denials of continuation grants where the denial is based on the grantee's failure to comply with the terms of a previous award. *See* 45 C.F.R. Part 16, Appendix A, Section C(3). Denials of continuation grants based on budget constraints are not appealable. East Bronx Community Health Association, Docket No. 81–191 (appeal dismissed, January 29, 1982).

Moreover, it should be noted that the appeals brought by State and local governments involved, on a case-by-case and aggregate basis, significantly greater amounts of dollars than those involved in appeals brought by educational institutions and nonprofit organizations.

[e]—Outcomes. In grant appeals, sometimes the grantee or disappointed applicant wins, sometimes the agency wins, but, more often than not, neither party wins outright: Appeals are settled informally and/or some issues in an appeal are decided in favor of the grantee or applicant, and some are decided in favor of the agency. Especially in audit appeals, the great majority of cases are resolved in this manner.

HHS provides an interesting example. As of December 1980, 149 of the 420 appeals brought before the Departmental Grant Appeals Board were settled or withdrawn prior to the issuance of a written decision by the Board. Of the approximately 140 appeals in which written decisions were issued, 58 percent of the cases were decided wholly in favor of the agency; 19 percent of the cases were decided wholly in favor of the grantee; and 23 percent of the cases were decided in part in favor of the agency and in part in favor of the grantee.[65]

In dollar terms, the rough outcomes of HHS written decisions were as follows:[66]

	Favorable to Agency	Favorable to Grantee	Split
Dollar Value (where known)	$104 million	$3.2 million	$3.6 million

There are two important *caveats* to these figures. First, in many appeals, the amounts subject to dispute were not ascertainable from available records. Second, one of the appeals which culminated in a

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[65] These figures are bases on our independent review of HHS appeal files as of December, 1980. During the next four-month period—from January 1981 through April 1981—approximately 35 additional decisions were issued by the Board. In April, 1981, the Board chairman advised the Secretary of HHS that 59 percent of the decisions of the Board upheld agency action, 17 percent were in favor of the grantee, and 24 percent were resolved partly in favor of the agency and partly in favor of the grantee.

[66] See § 54.08 *infra* for a further breakdown of these figures.

decision adverse to the grantee involved a significant portion of the amount recorded—approximately $50 million. Large amounts in other (notably Social Security Act) appeals also may skew the analysis.

Other agencies also have had interesting experiences. For example, the outcome of DOJ's appeals overwhelmingly favor the agency. DOJ officials explain that this is due to attorney involvement in every stage of the dispute, and that the attorneys "weed out" or settle "bad" cases, i.e., cases which the agency probably would lose. The outcomes also are attributed to the agency's successful informal resolution efforts. LSC's track record—and proffered justification—are the same. EPA's outcomes are split in the preaward dispute context, but post-award disputes tend to be resolved in favor of the agency. In "win-loss" terms, ED decisions have been distinctly anti-grantee, but in monetary terms the outcomes have been split.

§ 53.04 The Legal Nature Of a Grant

While Federal grantmaking agencies have been engaged in developing and utilizing grant dispute resolution procedures, it has been left to Congress and the courts to consider the fundamental issue of what is a grant. In the Federal Grant and Cooperative Agreement Act of 1977,[1] Congress sought to distinguish a grant from a Federal procurement contract, and to identify certain major grant characteristics. In case law dating back to the 1800's, Federal courts have sought to define the legal nature of a grant, and to compare it to more traditional legal instruments, such as gifts, trusts, and contracts.

This part of the report reviews these efforts. It begins with a discussion of the congressionally-created Commission on Government Procurement, which, in 1972, called for legislation to clarify the interrelationship between Federal grants and procurement contracts. It next considers the Federal Grant and Cooperative Agreement Act, and a Governmentwide study conducted pursuant to that Act. Finally, the section reviews the century of case law which analogizes grants to contracts, gifts, and trusts.

Consideration of these issues is important to this study for at least two reasons. First, Congress and administrative agencies have established elaborate procedures for disputes arising under the Federal procurement contracts.[2] As designed and implemented, these procedures allow contractors and disappointed bidders a full panoply of notice, discovery, hearing, and appeal rights. In assessing and making recommendations regarding grant dispute resolution procedures, the Conference (and Congress) may wish to consider the rationale upon which the distinction between grants and procurement contracts is based.[3]

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[1] 41 U.S.C. §§ 501–509.

[2] See, e.g., the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.*

[3] A certain note of irony must be interjected at this point. From the agencies' perspective, one of the fundamental distinctions between grants and procurement contracts is that whereas the Federal Government is engaged in a business, arms-length relationship with contractors, it is in a closer "partnership" relationship with grantees. Moreover, it is understood that whereas contractors generally engage in dealings with the Government for their own benefit (i.e. profit), grantees' dealings are on behalf of the public, and any monetary sanctions imposed must

Second, the legal nature of a grant may have serious implications in light of constitutional due process concerns. In the following discussion we show that, notwithstanding other legal theories advanced through the years, grants are essentially contractual in nature. Because courts consistently have found that contracts give rise to constitutionally-protected property interests, the conclusion of this part of the study suggests that, at least under certain circumstances, even if agencies refuse to give notice and hearing rights to grantees, such rights may be mandated by the constitution.

With these factors in mind, we proceed.

[1]—The Commission on Government Procurement: A Call for Distinction Between Grants and Procurement Contracts

[a]—The Commission's Mandate and Findings. In 1969, Congress established a Commission on Government Procurement to study, among other things, the interrelationship between Federal grants and procurement contracts.[4]

The Commission's focus on grant activities was narrow. As stated in the Commisson's final report, the purpose of the grants study was:

> "[T]o gain an understanding of the significance, if any, of the interchangeable use of grants and contracts and of the extent to which procurement rules and regulations are or should be applied to grant-type assistance programs."[5]

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come from the public weal. Yet, as indicated above, the Government typically chooses to give less notice and hearing rights and other procedural protections to grantees—even when the Government is asking a grantee to repay millions of dollars of grant funds. In such cases, grantees may well wish to be considered as arms-length intruders rather than as close partners.

[4] The Commission was established pursuant to Pub. L. 91-129. It was comprised of two members of the House of Representatives, a public member appointed by the Speaker of the House, two members of the Senate, a public member appointed by the President of the Senate, two members of the Executive Branch, three public members appointed by the President of the United States, and the Comptroller General of the United States.

[5] Report of the Commission on Government Procurement, Volume 3, Part F at 153 (Dec. 1972) (hereinafter "Report"). The Commission's mandate to study grants first was discussed in congressional hearings preceding the enactment of Pub. L. 91-129. See U.S. Congress, House, Committee on Government Opera-

The Commission found that, as of the early 1970's:

"Federal grant-type activities are a vast and complex collection of assistance programs, functioning with little central guidance in a variety of ways that are often inconsistent even for similar programs or projects. This situation generates confusion, frustration, uncertainty, ineffectiveness, and waste."[6]

Three aspects—or causes—of the "disarray" were identified. The first dealt with terminology and practice, and the fact that there was no single or precise meaning of the term "grant." The second dealt with statutes which compounded the confusion by creating inconsistent standards and grant requirements. The third dealt with the lack of Federal control and guidance on grant-related matters.[7] Each of these issues is discussed more fully below.

[*i*]—*Terminology and Practice.* The Commission's chief finding was that the term "grant" had no single or precise meaning.[8] In fact, the Commission found that grants and procurement contracts were used interchangeably (within agencies and among agencies) for the same types of projects. The Report states:

"Some agencies admit that they use grants to avoid the requirements, such as advance payment justifications, which apply to contracts. Some agencies use more grants in June to obligate funds before the end of the fiscal year because grants are quicker to process than contracts. Some program officials who have responsibility for negotiating and administering grants, but not contracts, tend to shift to contracts when they are busy in order to place the workload elsewhere."[9]

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tions, Government Procurement and Contracting (Part 6), Hearings on H.R. 474 before a Subcommittee of the Committee on Government Operations, 91st Cong. 1st Sess., May 15–21, 1969, pp. 1636–1637.

[6] *Id.* at 153.

[7] *Ibid.*

[8] *Id.* at 156.

[9] *Id.* at 157.

The Commission also found wide variance in the level of administrative involvement in grant programs. In this regard, the Commission noted a general recognition of the Executive Branch's tendency to over or underadminister grant-type programs. Citing authorities from the Office of Management and Budget, General Accounting Office, and Congress, the Commission concluded:

[*ii*]—*Statutes.* The Commission's Report states:

> "Enabling and appropriation statutes for grant programs cause confusion. As a group they lack consistency in requirements, terminology, level of details, and emphasis."[10]

Moreover, as noted by the Commission, the statutes are inconsistent in specifying the circumstances under which grants (as opposed to procurement contracts) should be used. Some statutes require the use of grants when a procurement contract would appear to be the more appropriate instrument; others authorize procurement contracts for grant-type activities. Such statutes, according to the Commission:

> "[A]re a major source of the Government-wide inconsistency, confusion, and uneven management attending Federal grant-type assistance."[11]

[*iii*]—*Federal Control and Guidance.* The Commission found uncertainty, at both the Federal and recipient levels, as to what the roles and responsibilities of grantor agencies and recipients should be. As the Commission stated:

> "Agencies often do not know to what extent Congress expects Federal control of, or participation in, a program or the extent to which the agency and its program officials will be responsible for the activities of recipients."[12]

According to the Commission, the confusion may be exacerbated by the variety of media used to issue Governmentwide guidance to granting agencies and the fact that such guidance is not issued systematically.

"Too much, too little, or the wrong kind of Federal involvement demonstrates uncertainty concerning the relationships of the Government and the recipient in many of these programs." (*Id.* at 159.)

Finally, the Commission found that grant-type instruments revealed wide variances in agency requirements. Of particular note here were agency requirements dealing with contracting under grants.

[10] *Id.* at 159.

[11] *Ibid.*

[12] *Ibid.*

[b]—The Commission's Recommendations. To deal with these problems, the Commission made two sets of recommendations. First, the Commission recommended that legislation be enacted to:

> "(1) distinguish assistance from procurement by restricting the term "contract" to procurement relationships and by requiring the use of other instruments to implement assistance relationships; (2) distinguish among grant-type relationships by introducing a "new" instrument (cooperative agreement) to accommodate the assistance relationships requiring substantial Federal/non-Federal interaction during performance; (3) override statutes which prevent the agencies from using the most appropriate instrument in each grant-type and procurement situation; and (4) give the agencies new authority to use grant-type instruments in situations which call for them."[13]

Second, the Commission recommended that the Office of Federal Procurement Policy (within the Office of Management and Budget) be urged to:

> "[U]ndertake or sponsor a study of the feasibility of developing a system of guidance for Federal assistance programs and periodically inform Congress of the progress of this study."[14]

In its report, the Commission expanded upon these recommendations, and their underlying need. For example, with respect to the first set of recommendations, the Commission pointed out that grant-type assistance differed from procurement contracts in their basic design and purpose. Assistance typically is designed to support, stimulate, or aid a recipient's activities in furtherance of public policy. Procurement is solely for the purchase of goods or services for the primary benefit of the Government. The Government's role in assistance relationships generally is more that of a patron or partner, rather than that of a purchaser in a formal, arms-length bargaining relationship.

With respect to the second recommendation (i.e., further study of the feasibility of a Governmentwide system of guidance), the Commission reported:

> "[T]he stimulus to achieve maximum efficiency, consistency, simplicity, and effectiveness is likely to come only from a Gov-

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[13] *Id.* at 153.

[14] *Id.* at 168.

ernment-wide assistance system spelling out the rationale for and specific guidance on methods, techniques, and requirements for assistance transactions and relationships. Such a system would illuminate grant-type programs and the ways they are carried out so as to permit public scrutiny and encourage better understanding and needed improvements."[15]

The Commission suggested that the system of guidance might be regarded as an analogue to the system of Federal procurement regulations. Accordingly, the Commission suggested a process and framework for developing appropriate guidance.[16] As the Commission concluded:

"An important by-product of [this] effort . . . is likely to be the emergence of better ways of defining the nature of Federal assistance. . . . The continuing increase in the number, size, and complexity of Federal assistance programs and the increasing billions of dollars appropriated for assistance underline the urgency of this task."[17]

[2]—The Federal Grant and Cooperative Agreement Act of 1978: Answering the Call

[a]—From Recommendations to Law

[i]—Formal Adoption of Commission's Recommendations. After the Commission on Government Procurement submitted its report to Congress in December 1972, the Executive Branch convened separate interagency Task Groups to review the Commission's two recommendations on grant matters. The Task Groups issued favorable reports on the two recommendations on September 19, 1973, and on March 1, 1974, respectively.[18] The Executive

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[15] *Id.* at 167.

[16] The suggested framework included provisions for dispute resolution.

[17] N. 5, *supra,* at 171.

[18] Hearings before the Subcommittee on Federal Spending Practices, Efficiency and Open Government and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations on S. 1437, 94th Cong., 2d Sess., March 23 and April 5, 1976, 221, 230, cited in S. Rep. No. 95–449, 95th Cong., 2d Sess. 4, notes 2 and 3 (Sept. 22, 1977).

Branch formally accepted the Commission's recommendations on June 23, 1975.[19]

[*ii*]—*Congressional Actions.* Even before the Executive Branch had reviewed and accepted the Commission's grant recommendations, bills were introduced in the 93rd Congress to give the recommendations the force and effect of law. Thus, on June 28, 1973, a bill was introduced to implement the Commission's first recommendation. The bill, H.R. 9060, sought to distinguish Federal procurement and grant-type assistance transactions, to standardize the use of legal instruments for these types of transactions, and to authorize the use of procurement or grant-type instruments, as appropriate. On the same day, H.R. 9059 was introduced to create an Office of Federal Procurement Policy. Section 14 of that bill embodied the Commission's second recommendation for further study. On the Senate side, S. 3514, styled the Federal Grant and Cooperative Agreement Act of 1974, was introduced. This bill incorporated both of the Commission's recommendations on Federal grant-type activities. None of these bills was enacted.[20]

In the 94th Congress, Senate Bill S. 1437, styled the Federal Grant and Cooperative Agreement Act of 1975, was introduced. This bill, essentially a reintroduction of the 93rd Congress' S. 1437, was reported by the Senate Committee on Government operations;[21] a companion bill was reported by the corresponding House committee.[22]

Both the Senate and House passed the legislation, and on October 1, 1976, forwarded it to President Ford for signing. President Ford withheld approval and pocket vetoed the legislation. In his Memorandum of Disapproval, the President indicated that while there was "confirmed support for the objectives of the legislation,"

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[19] *Id.* at 112.

[20] Although hearings were held on both H.R. 9060 and H.R. 9059, neither bill was reported by the House subcommittee. Joint hearings were held during the summer of 1974 on S. 3614 by the Ad Hoc Subcommittee on Federal Procurement and the Subcommittee on Intergovernmental Relations of the Government Operations Committee. The Government Operations Committee reported S. 3514 as amended on October 7, 1974 (S. Ret. 93–1239). It passed the Senate two days later.

[21] S. Rep. 94–1180, 94th Cong., 2d Sess. (1976).

[22] H. Rep.. 94–1572, 94th Cong., 2d Sess. (Sept. 16, 1976).

a recently completed OMB study had "led to serious questions as to whether, at this point legislation is necessary or desirable."

Virtually identical legislation was introduced again during the 95th Congress. This time the bill was styled the Federal Grant and Cooperative Agreement Act of 1977, S. 431. Essentially a reintroduction of the legislation that passed the Senate in both the 93rd and 94th Congress, S. 431 was reported by the Committee on Governmental Affairs, as amended, on August 2, 1977.[23] It passed the Senate on October 1, 1977. Its companion bill, H.R. 7691, was reported by the House Committee on Government Operations on July 1, 1977;[24] and passed by the House on September 27, 1977, and then again on January 19, 1978, to reflect minor differences in bill language embodied by the Senate version. President Carter signed the bill into law on February 3, 1978. (Pub. L. 95–224).

[b]—The Act's Provisions. Despite the fact that it took three sessions of Congress to be enacted, the Federal Grant and Cooperative Agreement Act of 1978 basically reflects what was its original impetus—the grant recommendations of the Commission on Government Procurement. It, therefore, is quite limited in scope.

The provisions in the Act, according to the Senate report, "give statutory expression to the initial steps needed to correct the problems in Federal grant-type activities described by the Commission."[25] Like the Commission, the Congress found legislation was needed to distinguish Federal assistance from Federal procurement relationships, as well as to standardize usage and to clarify the meaning of the legal instruments which reflect these relationships (§ 2(a)(1) of the Act). In addition, Congress agreed with the Commission that the meaning of the terms, "contract," "grant," and "cooperative agreement," as well as the relationship they reflect, are uncertain and that this uncertainty "causes operational inconsistencies, confusion, inefficiency, and waste" for recipients and executive agencies (§ 2(a)(2) of the Act).[26]

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[23] S. Rep. 95–449, 95th Cong., 1st Sess. (1977).

[24] H. Rep. 95–481, 95th Cong., 1st Sess. (July 1, 1977) (Government Operations Committee).

[25] S. Rep. 95–449 at p. 7.

[26] The Senate Report stated, as the Commission had found earlier, that this situation had given "rise to inappropriate practices by Federal agencies, including

The stated purposes of the Act are as follows:

(1) To characterize Federal/non-Federal relationships in the acquisition of property and services and in the furnishing of assistance by the Federal Government so as to promote a better understanding of Federal spending and help eliminate unnecessary administrative requirements on recipients of Federal awards;

(2) To establish Government-wide criteria for the selection of appropriate legal instruments, to achieve uniformity in their use by the executive agencies which offer such instruments, a clear definition of the relationships they reflect, and a better understanding of the responsibilities of the parties;

(3) To promote increased discipline in the selection and use of contracts, grant agreements, and cooperative agreements;

(4) To encourage competition, as appropriate, in the award of contracts, grants and cooperative agreements; and

(5) To require a study of Federal/non-Federal relationships in Federal assistance programs that should lead to the development of a comprehensive system of guidance for Federal assistance programs.

To address these findings and purposes, the Act establishes Government-wide criteria for selecting the appropriate class of legal instruments to be used by Federal agencies. Following the Commission's recommendations, Sections 4–6 of the Act describe the appropriate use of a "procurement contract, a "grant agreement," and a "cooperative agreement." The Act does not define these instruments, or discuss the rights and responsibilities arising from them. Nor are the exact terms, conditions, and clauses that are contained in these types of instruments necessarily determined by the mandated criteria. Rather, tracking the Commission recommendation, the Act simply sets forth circumstances and conditions under which each instrument is to be used. They are as follows:

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the use of grants to avoid competition and certain requirements that apply to procurement contracts." S. Rep. 95–449, p. 7.

Contract:
Whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

Whenever an executive agency determines in a specific instance that use of a type of procurement contract is appropriate.

Grant:
Where the principal purpose of the relationship established is the transfer of money, property, or services, or anything of value to the recipient to accomplish a public purpose of support or stimulation; and

No substantial involvement is anticipated between the federal agency and the recipient during performance of the contemplated activity

Cooperative Agreement:
Where the principal purpose of the relationship established is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation; and

Substantial involvement is anticipated between the federal agency and the recipient during performance of the activity.

Recognizing that the above criteria are broadly worded, Section 9 of the Act authorizes the Director of OMB "to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants agreements, and cooperative agreements . . ."[27] In addition to classifying legal instruments to be used in certain Federal transactions, the Act also provides Federal agencies with authorization to enter into the relationships it describes. (§ 7(a) of the Act.) This provision was designed to overcome the problems some agencies faced of having their choice of instrument statutorily restricted to a particular instrument. However, the Act is not designed to supersede a provision of law which specifically prohibits an agency from using a particular type of instrument.[28]

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[27] According to Senate Report No. 95-449, *supra* at p. 10, these distinctions provide only a "structure which will enable the Federal agencies to make disciplined choices and decisions on their roles and responsibilities and the roles and responsibilities of recipients."

[28] *Ibid.*

Section 8 of the Act implements the Commission's study recommendation by instructing the Director of OMB, in cooperation with other Executive agencies, to "undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs, and to determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs." The study was to be transmitted to Congress within two years and was to include a "thorough consideration" of the findings and recommendations of the Commission on Procurement. Three areas of study were required to be included in a report:

(1) Detailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which use of each appears to be the most desirable;

(2) Detailed descriptions of the basic circumstances and an outline of a comprehensive system of guidance for federal assistance programs which may be feasibly developed; and

(3) Recommendations concerning (a) arrangements to proceed with full development of the comprehensive system of guidance and (b) administrative or statutory changes which may be deemed appropriate.

The Act also contained various savings provisions to insure that the legislation did not unintentionally interfere with existing programs. Thus, for example, Section 10 states the Act does not prohibit the use of different legal instruments for different components of a federally-funded project.

[c]—Implementation of the Act

[*i*]—*OMB Guidelines.* Pursuant to Section 9 of the Act, OMB issued supplementary interpretative Guidelines on August 18, 1978.[29] In general, the Guidelines sought to provide further —albeit limited—explanation of the statutory distinctions between procurement and assistance relationships; to delineate OMB's exceptions policies and procedures under Section 10 of the Act; to detail various recordkeeping and reporting requirements; and to clarify the meaning of various other sections of the Act.

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[29] 43 Fed. Reg. 36380 *et seq.*

The Guidelines reflected the narrow scope of the Act. They did little to clarify the situation.

For example, like the Act, the Guidelines failed to provide any specific definition of a "grant," "contract," or "cooperative agreement." Instead, they relied simply upon the statutory distinctions based on the purpose of the transaction and level of Federal involvement. The Guidelines provided no explanation, illustration, or further description of the criteria to be applied.

OMB justified its position by indicating that agencies "will have no trouble" making the required distinction "in most cases"; and when they do "agency mission and intent must be the guide, and . . . more detailed criteria would not be useful."[30]

The Guidelines also are not expansive in another ambiguous statutory area. During deliberations on the Act, concern was expressed that Section 4(2), which allows use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate" would neutralize the distinction otherwise drawn between procurement and assistance. While the Senate report on the Act rejected this concern,[31] it is apparent that this language, if abused, could nullify significant provisions of the statute. Despite this danger, the Guidelines offered no guidance on the issue. Rather, they required Federal agencies to report procurement transactions based upon this subsection, and to rely on policies and procedures in various procurement regulations whenever procurement contracts were awarded.

[*ii*]—*Section 8 Study.* As indicated above, Section 8 of the Act required OMB to conduct a two-year study of Federal assistance and to issue a report on various ways to improve it. The report, "Managing Federal Assistance in the 1980's" was submitted to Congress on March 5, 1980. In addition to the three study issues mandated by the Act, OMB identified other related issues for inclusion in the study.

The study was conducted by eight task groups with members from Federal agencies, recipients and other interested parties. The task groups produced an eleven-volume set of working papers which were widely distributed as part of a public comment process.

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[30] 43 Fed. Reg. 36380.

[31] 43 Fed. Reg. 36832.

After the comment period, the working papers were revised. According to OMB, the final report basically reflected the content of the working papers as well as views expressed by and submitted to OMB. The sixty-four page report produced by OMB contained a wide-range discussion which identified numerous unresolved issues concerning Federal assistance and suggested ways to deal with them. However, one area of the report was notably lacking. Among the three major topics which Section 8 of the Act required to be included in the report was:

> "[D]etailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which use of each appears to be most desirable. . . ."

The OMB Report contains less than a two-page discussion of this issue and did not contain the required descriptions. Instead, the report noted the problems of resolving the issue, and suggested that more work and analysis needs to be done. As the report stated:

> "This study attempted to identify the patterns of grant and cooperative agreement sub-types, but it has barely scratched the surface . . . . Guidance that explains the characteristics of each major sub-type would help both Congress and the agencies design more effective programs. More analysis is needed, however, before accurate guidance can be issued. OMB in conjunction with the agencies will continue this important work."[32]

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[32] Curiously, the OMB Report fails to mention any of the impressive work done on the issue of alternative means by Task Force C of the OMB Study. In its Working Papers, Task Force C proposed a first-cut definition of a Federal grant, and established a blueprint for the review and development of delivering Federal assistance. Specifically, the Task Force developed in matrix form a number of alternative instruments for implementing Federal programs or projects; described the alternatives in terms of purpose and the characteristics that distinguish one from the other; developed a sample decision tree which illustrated the process of selecting one alternative over another; provided a narrative description of how the process might proceed and a suggested typology of grants; included a flowchart to illustrate the factors or considerations one might use in choosing between grants and cooperative agreements; and suggest what specific steps needed to be taken to further develop, test and implement alternative means of Federal assistance. Managing Federal Assistance in the 1980's, Working Papers, C. Alternative Means of Implementing Federal Assistance (August, 1979).

OMB's failure to adopt these—or other—recommendations is unexplained.

One other aspect of the Section 8 Report dealing with the grant relationship merits comment. The Senate Report, as indicated above, emphasized that the study should take into account the concerns of voluntary human service organizations, including consideration of their rights in the event of disputes. While all the problems of these agencies are not addressed by OMB, the report does recognize that the "number of disputes between Federal assistance agencies and recipients is growing apace with the growing importance and complexity of Federal assistance." Therefore, the report recommends "speedy, economical and fair dispute resolution processes" within each Federal administering agency.[33]

[*iii*]—*Cases before the General Accounting Office.* The General Accounting Office (GAO), through the Comptroller General of the United States, has decided two cases involving the appropriate classifications of legal instruments under the Federal Grant and Cooperative Agreement Act. *Burgos & Associates,*[34] and *Bloomsburg West, Inc.,*[35]

In both cases, protestors challenged the decisions of Federal agencies to finance activities through assistance awards. Previously, both agencies had used competitive procurement contracts to finance similar activities. After the enactment of the Federal Grant and Cooperative Agreement Act, the agencies changed the award instruments to grants, and defended the changes on the basis of the Act's provisions. The protestors claimed that the agencies' shift from contracts to grants was made for the purpose of avoiding the competition requirements of Federal procurement.

In deciding both cases, the Comptroller General noted that GAO generally did not consider the propriety of grant awards. However, GAO's consideration of these cases was viewed as proper because funding previously had been provided through competitive

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[33] As a follow-up to this report, a special OMB task force, headed by Norval D. (John) Settle, chairman of the HHS Departmental Grant Appeals Board, prepared a draft OMB circular on grant dispute resolution. The circular was never issued in final form.

[34] Comptroller General Decision No. B–197140 (September 13, 1979).

[35] Comptroller General Decision No. B–1944229 (September 20, 1979).

contracts, and the protestors claimed that the shift to grants unreasonably deprived them of their rights to compete.

On the merits of the cases, the Comptroller General held in favor of the agencies. Reviewing the provisions of the Federal Grant and Cooperative Agreement Act, the Comptroller General held that the agencies' determinations that the awards met the "grant" criteria of the Act were "reasonable" and consistent with the purposes of the Act.

In *Bloomsbury West, Inc.,*[36] there was an additional wrinkle. The protestor claimed that the awarding agency, the Office of Education of the then-existing Department of Health, Education and Welfare, lacked statutory authority to award a grant for the program in question. The Comptroller General disagreed, holding that although it was not clear that OE previously had had only contract authority, in any event, it now was clear that, under the Federal Grant and Cooperative Agreement Act, the agency had authority to award grants as well as contracts for the program.

Although not formally decided by the Comptroller General, the GAO also considered, in response to a congressional inquiry, the appropriateness of an agency's grant/contract classification. Specifically at issue was the propriety of awarding a contract to the State of Connecticut for the operation of a Citizen/Government Transportation Planning Center. The Planning Center's contract was awarded by the Department of Transportation and the Environmental Protection Agency. In considering the grant versus contract issue, the GAO applied the standards of the Federal Grant and Cooperative Agreement Act. Specifically, GAO considered whether the Center's project was for the Federal agencies' "direct benefit or use." GA0 cited—with apparent approval —the comment of an agency official that the agency "may benefit in this case because the Center's interim and final reports will be submitted to [the agency] . . . and consideration will then be given to instituting similar projects nationwide." In light of this explanation, GAO found "no legal or procedural prohibitions" against the agency's use of a contract.[37]

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[36] *Ibid.*

[37] GAO, however, appeared to have certain policy reservations about the contract award. GAO indicated, for example, that the agencies' use of a contract may have precluded the opportunity of the State of Connecticut to establish funding

The Connecticut case suggests that, despite the best intentions of Congress, there is a large unanswered question as to whether the Act has been successful in achieving even its limited purposes. GAO's willingness to accept an agency's selection of a contract instrument solely on the basis of general reporting requirements suggests that: (1) virtually any contract award could be viewed as acceptable; and (2) the agencies continue to enjoy virtually unrestricted freedom in their selection of award instruments.

[3]—A Century of Case Law: The Contractual Nature of a Grant

[a]—A Synopsis of the Law. As shown above, grants are viewed as different legal instruments than Federal procurement contracts. This distinction, however, should not blur the essentially contractual nature of the grant relationship.

As early as 1866, the United States Supreme Court held that:

> "It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State. . . ."[38]

More than a century later, in *Pennhurst State School and Hospital v. Halderman*,[39] the Supreme Court repeated its commitment to the contractual nature of a grant. Reviewing a grant-enabling statute authorized under the Spending Clause of the United States Constitution, the Court held:

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priorities and to assign tasks for all public participation and information programs within the State—an opportunity it would have had under available grant programs. Moreover, the award of the contract, according to GAO, "could potentially work at cross purposes" with existing Federal assistance guidelines which stress the importance of providing adequate public participation and information activities. In view of these concerns, GAO recommended that the Secretary of DOT and the Administrator of EPA require "clear documentation" of "a deficiency or compelling need" before authorizing future contract funding for public participation and information activities which may be eligible for Federal assistance under established grant programs.

[38] McGehee v. Mathis, 71 U.S. 143, 155 (1866).

[39] 451 U.S. 1 (1981).

"[L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' "[40]

In the 115 years which came between *McGehee* and *Pennhurst,* the Supreme Court and lower Federal courts have considered various aspects of the contractual nature of grants. A brief synopsis of these cases follows.

[*i*]—*Land Grand Cases.* The analysis of grants in terms of contractual principles appeared first in the context of land grant disputes. As early as 1810, the Supreme Court specifically was asked the question: "Is a grant a contract?" and answered the question in the affirmative.[41]

The *Fletcher* and *Dartmouth College* cases involved grants from sovereigns other than the United States. In *Fletcher,* the sovereign was the governor of a State; in *Dartmouth College,* the sovereign was the British Crown. In both cases, the Supreme Court held that at least implied contracts existed which assured the recipients' holding of title to land previousy granted.

In *McGehee v. Mathis, supra,* the Supreme Court applied contract principles to land grants awarded by the United States.[42]

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[40] (Citations omitted.) 451 U.S. at 17.

For further discussion of this case, see text at N. 58 *infra.*

[41] Fletcher v. Peck, 6 Cranch 87, 136 (1810).

See also Trustees of Dartmouth College v. Woodward, 4 U.S. (4 Wheat.) 518, 682 (1819).

[42] See also, Burke v. Southern Pacific R. Co., 234 U.S. 669 (1913); Oregon and California R. Co. v. United States, 238 U.S. 393 (1915); and United States v. Northern Pacific R. Co., 256 U.S. 51 (1920); United States v. City and County of San Francisco, 310 U.S. 16 1940. Thus, in *Burke,* the Supreme Court rejected a third-party claim because the claimant lacked "privity" to the "contract" between the United States and the grantee. In the *Oregon* case, the Court rejected plaintiff's argument that railroads were intended third-party beneficiaries of the grant relationship. In the San Francisco case, the Supreme Court rejected the grantee's argument that, because Government officials previously had not contractually enforced a condition, they were estopped from enforcing it.

[*ii*]—*School Board Cases.* In the 1950's and 1960's, Congress recognized that the children of United States military personnel increased local school district membership without contributing their fair share of tax revenues, resulting in overcrowded and underfinanced schools. Under the School Facilities Construction Act, Congress authorized grants to school districts for the construction of school facilities upon the districts' assurance that the facilities would be made available to "Federal" children on the same terms as other children. A series of disputes arose as a result of school districts' alleged noncompliance with this assurance. These cases were analyzed by the courts in terms of contract principles.

For example, *United States v. County School Board of Prince George County, Va.,*[43] involved a suit by the United States for an injunction requiring the grantee to admit black "Federal" children to schools previously attended only by white children. Relying upon earlier land grant cases, the court held that the United States could sue the grantee to enforce compliance. As the court stated:

> "It has long been recognized that federal grants authorized by Congress create binding contracts [citing *Burke,* and *United States v. Northern Pacific R. Co.,* N. 42 *supra*].
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> "There is no essential difference between the grants to the railroads and the grants to the School Board . . . The United States agreed to make certain payments to the School Board in exchange for certain assurances. The School Board, in order to receive the funds, gave the assurances required by the statute. The United States made the payments, and the contract is executed on its part."[44]

In *Prince George County,* the court further held that relief was not limited to the withholding of funds or repayment because that would frustrate the purpose of the Act. Rather, the court declared it to be a "well-established right" of the United States to sue for

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[43] 221 F. Supp 93 (E.D. Va. 1963).

See also United States v. Sumter County School Dist. No. 2, 232 F. Supp. 945 (E.D.S.C. 1964).

[44] 221 F. Supp. at 99–100.

enforcement of the contract, citing *Dugan v. United States,*[45] and *Cotton v. United States.*[46] Accordingly, the Court enjoined the School Board from continued violations.[47]

In *Bossier Parish School Board v. Lemon,*[48] the Fifth Circuit had an opportunity to consider a related case in which a class of black "Federal" children who sought admission to the Parish's schools sued to enforce grant conditions. In *Bossier,* the Court held that the assurances provided by the Parish in exchange for the receipt of Federal grant funds established the children's right to attend Parish schools. Quoting from a lower court opinion, the Court of Appeals held:

> "Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools."[49]

[*iii*]—*Specific Performance Cases.* Relying on earlier land grant and school board cases, a Federal district court in *United*

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[45] 16 U.S. (3 Wheat.) 172, 181 (1818).

[46] 52 U.S. (11 How.) 229, 231 (1850).

[47] 232 F. Supp. 945 (E.D.S.C. 1964).

See also, United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S.D. Miss. 1963), *aff'd* 326 F.2d 237 (5th Cir.), *cert. denied* 379 U.S. 929 (1964); United States v. Madison County Ed. of Ed., 326 F.2d 237 (5th Cir.) *cert. denied* 379 U.S. 929 (1964), wherein the Government also sued to desegregate local schools through the specific performance of grant assurances. The Court of Appeals dismissed these cases, not because the court found the United States lacking in authority to enforce contractual assurances, but rather because the court found that no assurances of desegragation had been made. As the Biloxi court stated:

> "No one would be so rash as to claim that a local school board in either of the 'hard core' states of Alabama or Mississippi would intentionally enter into a contract which it understood to provide for even partial desegregation of the races in the public schools under its jurisdiction. A more improbable official action of such a local school board can scarcely be imagined." 326 F.2d at 239.

Presumably, these courts would have looked favorably on the recent Supreme Court ruling in *Pennhurst State School and Hospital, supra,* wherein the Court held:

> "There can, of course, be no knowing acceptance [of a grant] if a State is unaware of the conditions or is unable to ascertain what is expected of it." 451 U.S. at 17.

[48] 370 F.2d 847 (5th Cir.), *cert. denied* 388 U.S. 911 (1967).

[49] 370 F.2d at 850.

States v. Frazer[50] held that the United States could sue for specific performance of grant conditions (here, merit system requirements for state administrative personnel). As the court stated:

> "This Court is clear to the conclusion that the United States does have standing to seek judicial enforcement of the terms and conditions of grants of Federal property and that the administrative remedy of termination was not intended to be and is not exclusive . . . ."[51]

Although *Frazer* is the case most often cited for the proposition that grant conditions may be specifically enforced by the granting agency, several other courts (including three United States Courts of Appeals) have reached the same conclusion.[52]

The most recent and comprehensive opinion upholding the right of the United States to seek an order compelling specific performance of grant assurances is *United States v. Marion County School District.*[53] In that case, the United States sought to compel a school district to comply with Title VI of the Civil Rights Act of 1964,[54] which prohibits discrimination in federally-funded schools. The school district had provided an assurance of compliance in ex-

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[50] 297 F. Supp. 319 (M.D. Ala. 1968).

[51] 297 F. Supp. at 322.

[52] See United States v. Harrison County, Miss., 399 F.2d 485 (5th Cir. 1968); Poirrier v. St. James Parish Police Jury, 372 F.Supp 1021 (E.D. La. 1974), *aff'd per curiam,* 531 F.2d 316 (5th Cir. 1976); United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977); United States v. Mattson, 600 F.2d 1295, at 1299, N. 6 (9th Cir. 1979).

While these cases involved a variety of factual settings, all related in some way to alleged violations of fundamental constitutional rights as well as grant assurances. Thus, for example, the *Harrison County* and *St. James Parish* cases involved allegations of unconstitutional racial discrimination. The *Solomon* and *Mattson* cases involved allegations of violations of constitutional rights of mentally retarded persons. This fact has led at least one scholar to suggest that courts will order specific performance of grants only where fundamental constitutional rights are involved; they may be less inclined to do so where more mundane grant assurances are at issue, particularly where States are the recipients of the grant funds and Tenth Amendment questions are involved. Remarks of Sallyanne Payton, Associate Professor of Law, University of Michigan, "Judicial Review: Two Tenth Amendment Puzzles," at the Federal Bar Association's Third Annual Seminar on Grant Law, Washington, D.C., February 22, 1980.

[53] 625 F.2d 607 (5th Cir.), *reh. denied* (1980).

[54] 42 U.S.C. § 2000d *et seq.*

change for Federal financial assistance. Relying on several of the cases cited herein, the court stated:

> "It is settled law that the United States has authority to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed. . . . As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient is obligated to perform the condition, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. . . ."[55]

The district court in *Marion County* had held that the United States had no right to sue on its "contract" because Congress had nullified that right by providing alternative remedies in the Civil Rights Act. In reversing the district court's decision, the Court of Appeals held:

> "[I]t is well established that the government's right to sue to enforce its contracts exists as a matter of federal common law, without necessity of a statute. . . . [T]here is no persuasive, much less unmistakable, evidence that Congress intended to eradicate or even restrict the United States' right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools."[56]

[*iv*]—*Third Party Beneficiary Cases.* As shown above, for more than a century, the courts have used traditional contract principles to establish the authority of the United States to impose grant conditions and to enforce them. A more recent trend is the application of third party beneficiary principles to grant disputes.

The United States Supreme Court has alluded to these principles in two cases. In *Lau v. Nichols,*[57] the Supreme Court recognized the contractual nature of assurances made in connection with grants. Plaintiffs in *Lau* were non-English speaking students who claimed that a school district was violating its grant assurances by failing to provide bilingual education. Viewing the assurance as "contractual" in nature, the Supreme Court held that the school

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[55] 625 F.2d at 611.

[56] *Ibid.*

[57] 414 U.S. 563 (1974).

district was out of compliance and remanded the case for the fashioning of appropriate relief.

In *Pennhurst State School and Hospital v. Halderman,*[58] the Supreme Court again recognized the contractual nature of grant terms and conditions. Plaintiffs in *Pennhurst* were representatives of mentally retarded persons who claimed specific rights based on their State's receipt of grant funds authorized under the Developmentally Disabled Assistance and Bill of Rights Act of 1975.[59] The Supreme Court indicated that if the State's protection of the claimed rights were, in fact, a condition to its receipt of grant funds, plaintiffs may have a cause of action. However, the Court's examination of the Act showed no such condition.

Lower courts have considered third party beneficiary claims in two contexts: Standing and private right of action.

[*A*]—*Standing Cases.* Lower courts have relied on third party beneficiary principles in determining whether parties other than the United States have standing to sue a grantee (and, even grantor) to compel performance of grant conditions.[60]

[*B*]—*Private Right of Action Cases.* The courts also have applied third party beneficiary principles in determining whether individuals have private rights of action against grantees for alleged violations of grant conditions. The courts are particulary inclined to recognize private rights of action in cases where the Government's right to withhold future funds for grantee noncompliance can no longer be asserted, i.e., where the grant activity has ended.[61]

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[58] N. 39 *supra.*

[59] 42 U.S.C. § 6000 *et seq.*

[60] See, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Ramirez, Leal & Co. v. City Demonstration Agency, 549 F.2d 97 (9th Cir. 1976); Local Div. No. 714 v. Greater Portland, Inc., 589 F.2d 1 (1st Cir. 1978); City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972); Miree v. United States, 526 F.2d 679, *reh. en banc,* 538 F.2d 643 (5th Cir. 1976).

Third party standing was rejected in only one of these cases. In *Miree,* the court found no intent in the "contract" to protect members of the general public. In all of the other cases, the courts found that plaintiffs were intended beneficiaries of the grant, and, therefore, had standing to seek enforcement of specific grant conditions.

[61] See Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972).

See also Lloyd v. Regional Transp. Authority, 548 F.2d 1277 (7th Cir. 1977).

[*v*]—*Court of Claims Cases.* Under the Tucker Act, the Court of Claims has jurisdiction over claims against the United States founded upon the Constitution, statutes, regulations, or upon any "express or implied contract with the United States," for damages not sounding in tort.[62] It is hardly surprising that the handful of grant cases over which the Court of Claims has asserted jurisdiction has been analyzed in terms of contract principles.[63]

Three of the cases considered by the Court of Claims involved grants under the Federal-Aid Highways Act, which declares that the Secretary's approval of a State highway project shall be deemed a contractual obligation of the Federal Government for payment.[64]

In the *Arizona* case,[65] the State sought reimbursement of costs incurred in connection with the removal and relocation of facilities for the construction of a highway. The Federal Highway Administration had approved this aspect of the project but thereafter reversed itself. The Court found that the plaintiff had complied with all grant conditions and held that: "The Government has a contractual obligation to pay Arizona . . . since the Government's authorized employees approved an agreement so providing."[66]

With different facts, California and Louisiana did not fare as well. In those cases,[67] the States claimed entitlement to payment of costs incurred *in addition to those authorized* in the State's grant. The Court held that the grantees could not unilaterally increase the Federal contractual obligation.

The Court of Claims has asserted jurisdiction even in cases where the statute authorizing the grant does not contain language explicitly making the agreement a contract. In *Texas v. United*

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[62] 28 U.S.C. § 1491.

[63] See Wallick and Montalto, "Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs," 46 GEO. WASH. L. REV. 159, 167–68 (1978).

[64] 23 U.S.C. § 106(a).

See Arizona v. United States, 494 F.2d 1285 (Ct. Cl. 1974); California v. United States, 551 F.2d 843 (Ct. Cl.), *cert. denied* 434 U.S. 857 (1977); Louisiana Dept. of Highways v. United States, 604 F.2d 1339 (Ct. Cl. 1979).

[65] N. 64 *supra.*

[66] 494 F.2d at 1288.

[67] N. 64 *supra.*

States,[68] for example, the Court asserted jurisdiction over a claim for payments under the Federal Disaster Act although the United States argued that the agreement was not a contract in the traditional sense. While the majority of the Court declined to face squarely the issue of whether the agreement was a contract, it did hold that the agreement imposed "enforceable obligations."

In *Missouri Health and Medical Organization, Inc. v. United States*[69] the Court of Claims again was asked to determine, for purposes of its jurisdiction, whether a grant is a contract. The Court concluded that even the discretionary grant involved in the case created enforceable obligations subject to its review.

[*vi*]—*Other Relevant Case Law.* There is a considerable body of case law in which the courts presume the enforceability of grant conditions. The courts in these cases do not describe the grant as a contract in express terms; however, the underlying rationale for their holdings seems contractual in nature.

For example, the courts have ruled in several cases that when a State, county, city, district or private group voluntarily accepts and utilizes Federal grant monies, the recipient commits itself to comply with Federal "strings" attached to the award. Concomitantly, the Supreme Court has made clear that, as a constitutional matter, the Federal Government has the power to impose conditions on its offer of Federal funds because it does not require the offeree to accept any funds.[70]

The courts further hold that a State law or regulation which is inconsistent with Federal grant conditions must yield to Congress' will under the Supremacy Clause of the United States Constitution.[71] The rationale underlying this principle is that when Federal

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[68] 537 F.2d 466 (Ct. Cl. 1976).

[69] 641 F.2d 870 (Ct. Cl. 1981).

[70] See Massachusetts v. Mellon, 262 U.S. 447, 480, 482 (1923) (dicta); Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937); Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127, 143–144 (1947); Batterton v. Francis, 432 U.S. 416, 420, 431–32 (1977); Quern v. Mandley, 436 U.S. 725, 734 (1978).

See also North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd* 435 U.S. 962 (1978); State of Florida v. Matthews, 526 F.2d 319, 326 (5th Cir. 1976).

[71] Art. 6, Cl. 2.

monies are spent to promote the general welfare,[72] the concept of welfare is shaped by Congress, not the States.[73] The landmark case in this regard is *King v. Smith,*[74] wherein the State of Alabama, a Federal recipient of Aid to Families with Dependent Children (AFDC) funds, issued a regulation which was inconsistent with AFDC provisions of the Social Security Act. Individuals whose AFDC benefits were terminated as a result of the State's regulation sought to enjoin its enforcement. The Supreme Court held:

> "There is of course no question that the Federal Government, unless barred by some controlling constitutional provision, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid."[75]

Although the grantee cannot be enjoined from operating under the conflicting State law, regulation or practice, the grantee can be enjoined from using Federal funds unless and until it complies with Federal requirements.[76]

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[72] U.S. Constitution, Art. I, § 8, Cl. 1.

[73] See Helvering v. Davis, 301 U.S. 619, 640–41, 645 (1937).

[74] 392 U.S. 309 (1968).

[75] 392 U.S. at 333, N. 34.

See also Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Carleson v. Remillard, 406 U.S. 598 (1972); Williford v. Laupheimer, 311 F. Supp. 720, 722 (E.D. Pa. 1969); Barber v. White, 351 F. Supp. 1091, 1096 (D. Conn. 1972); Lower East Side Neighborhood Health Council-South, Inc. v. Richardson, 346 F. Supp. 386, 388 (S.D.N.Y. 1972); Dupler v. City of Portland, 421 F. Supp. 1314, 1320 (D. Maine 1976); Stiner v. Califano, 438 F. Supp. 796, 800 (W.D. Okl. 1977).

[76] Rosado v. Wyman, 397 U.S. 397, 420–22 (1970).

But see Named Individual Members of San Antonia Conservation Society v. Texas Highway Dept., 446 F.2d 1013 (5th Cir.), *reh. denied* 446 F.2d 1029 (1971), in which the State sought to avoid Federal requirements in connection with a highway construction project. The State claimed that it would finance the project solely out of State funds rather than comply. Although no Federal funds had been disbursed to the State, the court ruled that, because the State had agreed to accept Federal funds, the project was "Federal" in nature, and that, despite the fact that the Federal-State "marriage" might be an unhappy one, the State had to comply with the Federal requirements. 446 F.2d at 1028.

See also Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th

[b]—Differing Views. Over the years, there has been considerable debate regarding the legal nature of a grant.[77] In the debate, scholars and a few courts have characterized grants as gifts and trusts, as well as contracts.[78] Significantly, however, none of these characterizations preclude the applicability of the contractual enforcement principles discussed above.

[i]—The "Gift" Theory. Several writers in the grants field have suggested that grants are commonly viewed as analogous to private gifts. These writers hasten to add, however, that they do not share this view of the grant relationship. As Professor Richard Cappalli noted:

> "The concept of giving without receiving leads one readily to the idea of a gift. The spirit is, indeed, donative, but the gift analogy fails when one adds the ingredient of enforceability. Once a federal agency makes a grant award, or in some cases once Congress appropriates funds for a grant program, the recipient can successfully sue if the federal agency does not come up with the promised cash, or parts thereof. The gift analogy is also weakened by the host of restrictions and conditions placed on the federal grant. Each federal control and standard tends to support the idea that, indeed the United States is getting something out of the deal and, thus, moves the grant toward the world of quid pro quos."[79]

Cir. 1972); River v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va. 1973.).

[77] See, e.g., Willcox, "The Function and Nature of Grants," 22 Admin. L. Rev. 125 (1970), Mason, "Current Trends in Federal Grant Law—Fiscal Year 1976," 35 Fed. B. J. 163, (1976); Wallick and Montalto, "Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs," 46 Geo. Wash. L. Rev. 159 (1978); Cappalli, *Rights and Remedies Under Federal Grants,* (BNA, 1979).

[78] In addition, a partnership theory has been suggested. Catz, *supra* N. 15, at p. 1088, N. 117. However, this theory is generally summarily dismissed. *Id.*

[79] See Cappalli, N. 77 *supra* at 174.

As shown above, the courts do not share this view either. Indeed, in two early cases involving land grants, the United States Supreme Court explicitly rejected the notion that grants are gifts.[80]

There appear to be only two cases in which a Federal grant has been characterized as a gift.[81] Neither case offers any explanation as to why it differs from the mainstream of grant law. However, neither case reaches a conclusion which would have been different had contract principles applied.

[*ii*]—*The "Trust" Theory.* According to Professor Allanson Willcox, the trust theory, "in a nutshell," is that:

> "A grant upon conditions is analogous to a trust, and that acceptance of the grant places the grantee under an equitable obligation, independent of any agreement on his part, to abide by the trust. . . ."

Significantly, Professor Willcox goes on to add:

> "This theory does not deny that a contractual obligation on the part of the grantee may and usually does co-exist with his equitable obligation. . . ."[82]

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[80] Burke v. Southern Pacific R. Co., 234 U.S. 669 (1913); Wyoming ex. rel. Wyoming Agricultural College v. Irvine, 206 U.S. 278 (1907).

See also, Stearns v. State of Minnesota ex. rel. Marr, 179 U.S. 223, 241 (1900).

[81] Alabama v. Schmidt, 232 U.S. 168 (1914); School Board of Okaloosa County v. Richardson, 332 F.Supp. 1263 (N.D. Fla. 1971).

[82] N. 77 *supra*, at 128. Willcox favors this theory, and explains its utility as follows:

> "One reason for pressing the trust analogy is that it tends to avoid disputes about what was actually agreed to. A grantee may have demurred to some condition and may resist enforcement on the ground that he did not actually consent. In such a case, surely, if the grantee accepts and uses the funds he should be bound by all valid conditions attached to their use, as one cashing a check is bound by the terms on which it was given.
>
> "But the chief advantage of the trust approach is flexibility of equitable remedies and the tools they provide for the fair resolution of questions that arise in day to day operation. The right to demand an accounting by the grantee should be a matter of course, as well as the right to pursue any funds that may have been diverted. There should be no need to make proof that the Government has been damaged or how much it has been damaged by a breach of the terms of the grant, or alternatively to show that damages are an inadequate remedy. If the purpose of a grant fails or is abandoned, imposition of a resulting trust is likely to be the proper recourse. Conversely, there may be equities on the

Only a handful of cases has alluded to the trust theory; and all of those cases were decided with respect to land grants awarded prior to 1919.[83]

The Comptroller General has applied the trust concept in cases regarding a grantee's use of interest earned on grant funds. In those cases, the Comptroller General ruled that the grantee had to return interest earned because the underlying grant funds were held "in trust" for the Federal Government and any profit earned on those funds inured to the benefit of the United States.[84]

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grantee's side that would be difficult to take into reckoning in an action for breach of contract."

[83] Tucker v. Ferguson, 89 U.S. (22 Wall) 527, 22 L. Ed. 805 (1875). See also, dissenting opinion in Cornell University v. Fiske, 136 U.S. 152 (1890); Stearns v. State of Minnesota ex rel. Marr, N. 80 *supra*, at 240–241; Wyoming ex rel. Wyoming Agricultural College v. Irvine, 206 U.S. 278, 283 (1907); Ervien v. United States, 251 U.S. 41, 48 (1919).

[84] 42 Comp. Gen. 289, 292 (1962), citing 40 Comp. Gen. 81, and 1 Comp. Gen. 652.

§ 53.05 A Legal Analysis of Current Grant Dispute Resolution Procedures: Are They Consistent with Constitutional Due Process?

[1]—Introduction

In the discussion which follows, we will look beyond the dispute procedures currently in existence, and will consider the issue of whether Federal agencies are required under constitutional due process to provide grant dispute resolution procedures, and, if so, what form those procedures must take. To be more precise: In the absence of any statutory command, does the Fifth Amendment to the United States Constitution require that, before an agency can take adverse action against a grantee or grant applicant, the grantee or applicant must be afforded procedural due process? And, if there is this entitlement to due process, exactly what process—what type of "notice" and what type of "hearing"—is due?

The discussion will be organized as follows: First, we will overview the doctrine of procedural due process in terms of the "interests" which are entitled to constitutional due process protection. Following this overview, we step back momentarily to analyze whether the constitutional requirement of procedural due process for "persons" applies to one large category of Federal grantees, namely State and local governments. Then, returning to the doctrine of procedural due process, we focus on pre-award and post-award grant decisions, and the likelihood of finding protected interests in disputes arising from such decisions. Finally, based upon the conclusion that, at least in certain situations, grantees and grant applicants have constitutionally protected interests, we consider what "process is due."

Before undertaking this review, it is important to note that the need to examine constitutional due process issues arises only where the other potential sources of procedural protections for grantees—grant-enabling statutes, agency regulations, and the Administrative Procedure Act (APA)—are lacking.

Three considerations in this regard are especially significant. First, to the extent that grant-enabling statutes and agency regulations establish notice and hearing or other appeal procedures, agen-

cies must follow such procedures.[1] Second, under the APA, grantees and grant applicants may have a right to "prompt notice" of adverse agency action, and, under certain circumstances, a "brief statement" of the grounds for such action.[2] Third, also under the APA, grantees and grant applicants have a right of judicial review of adverse agency action. This right extends even to the denial of discretionary grant applications where it is alleged that an agency "has transgressed a constitutional guarantee or violated an express statutory or procedural directive. . . ."[3]

These protections, however, may not be sufficient. As shown in this chapter, the full panoply of due process protections, such as detailed notice of the charges, an oral hearing before an impartial decisionmaker with a written decision on the record, the right to compulsory process and cross-examination—often are not provided for in agency regulations and vary greatly from agency to agency, and, in some cases, from program to program.[4]

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[1] Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959); Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974).

[2] 5 U.S.C. § 555(e).

[3] Apter v. Richardson, 510 F.2d 351 (D.C. Cir. 1975).

See also, Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969). In Apter, the court acknowledged the potential burden to an agency of broad judicial review of an agency's award of discretionary (in this case, the National Institutes of Health of the Public Health Service) grants. Thus, the court noted: "We are mindful as well that judicial review of training grant decisions might place a heavy burden of litigation and delay upon the agency and its grantees as well." 510 F.2d at 355, N. 5. In light of this and other considerations, the court expressly limited its finding of the right to judicial review to the situation described in the text accompanying this footnote. As the court held:

> "[T]he medical merits of NIH decisions on training grants may be committed to the unreviewable discretion of the agency. However, that does not mean that NIH actions wholly escape judicial scrutiny. Where it is alleged that the agency has transgressed a constitutional guarantee or violated an express statutory or procedural directive, otherwise non-reviewable agency action should be examined to the extent necessary to determine the merits of the allegation." [Citations omitted.]

510 F.2d at 355.

[4] Compare, for example, the grant dispute procedures at the Department of the Interior to those in the Department of Health and Human Services, discussed at § 54.10 and § 54.08 respectively *infra.*

The Administrative Procedure Act, specifically the adjudication provisions therein,[5] rarely apply to grantees absent a constitutionally protected due process interest.[6] The APA's formal adjudication provisions,[7] are provided to grantees in an agency proceeding only if a statute *explicitly* requires that a "hearing" be held by the agency.[8] Thus, if a grant-enabling statute is silent as to the hearing rights of grantees, the formal adjudication provisions of the APA will not be invoked.

[2]—An Overview of the Doctrine of Procedural Due Process

To decide whether grantees and grant applicants are constitutionally entitled to notice and hearing rights in agency proceedings, the doctrine of constitutional due process requires a two-step analysis. First, a finding must be made that the aggrieved party (the one seeking due process) has a protected "interest" in the object of the dispute—either a protected "property" interest or a protected "liberty" interest.[9] Second, a determination must be made as to what process is due the aggrieved party and interest.

In *Board of Regents v. Roth*,[10] the Supreme Court defined what would constitute a "property" interest meriting constitutional protection:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . Property interests, of

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[5] 5 U.S.C. §§ 554, 556, 557.

[6] See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). For a full discussion of this case, see § 53.05[5][b] *infra*.

[7] 5 U.S.C. § 554 *et seq.*

[8] See U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 536 (D.C. Cir. 1978). To trigger the formal adjudication provisions of the APA, a statute does not have to invoke the precise language of 5 U.S.C. § 554, calling for a hearing "on the record." If the statute contains words requiring some type of "hearing", the courts will inquire into whether Congress intended to create an APA adjudicatory hearing and the substantive character of the proceeding involved to decide if APA adjudication applies. See also, 2 Davis, *Administrative Law Treatise*, § 12:20 (2d ed., 1979).

[9] Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Perry v. Sindermann, 408 U.S. 593, 599 (1972); Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

[10] 400 U.S. 564 (1972).

course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and support certain claims of entitlement to those benefits."[11]

On the same day as the Supreme Court decided *Roth,* it held as follows in the companion case of *Perry v. Sindermann:*

"A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or *mutually explicit understandings* that support his claim of entitlement to the benefit that he may invoke at a hearing."[12]

In *Board of Regents v. Roth,* the Supreme Court also announced the parameters of a constitutionally-protected "liberty interest." According to the Supreme Court, such interest arises,

"where a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him."[13]

Under such circumstances, "notice and an opportunity to be heard are essential."[14]

After a constitutionally protected interest is found, a court's analysis will shift to an inquiry into what "process is due," i.e. whether a party is entitled to detailed notice and a trial-type hearing, or a lesser proceeding still involving some type of notice and some type of hearing.[15] To identify the particular process due in any particular case, three factors generally are balanced:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

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[11] *Id.* at 577.

[12] (Emphasis added.) Perry v. Sinderman, 408 U.S. 593, 601 (1972).

[13] 408 U.S. at 573, quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[14] *Id.* See also, Bishop v. Wood, 426 U.S. 341, 348 (1976); Goss v. Lopez, 419 U.S. 565, 574 (1975).

[15] See Mathews v. Eldridge, 424 U.S. 319, 333-335 (1976); Goss v. Lopez, 419 U.S. 565, 575-577 (1975); Wolff v. McDonnell, 418 U.S. 539, 555-557 (1974); Cafeteria and Restaurant Workers Union, Local 473 v. McElory, 367 U.S. 886, 894-895 (1961).

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[16]

[3]—The Applicability of Procedural Due Process to States and Localities as Grantees

Before commencing an extended discussion of the procedural due process rights of grantees and grant applicants, it is important to focus on a potentially significant limitation on this constitutional right: *Under current law, State and local governments are not considered to be within the reach of the procedural Due Process Clause of the Constitution.* The apparent exclusion of State and local governments stems from a 1966 Supreme Court decision, *South Carolina v. Katzenbach,*[17] in which the Supreme Court upheld the constitutionality of a provision in the Voting Rights Act which allows the Justice Department to invalidate a State's voting district plan. As the Court held:

> "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any Court."[18]

Commentators have interpreted the Court's holding in this case to apply equally to localities within a State serving as Federal grantees.[19]

Relying on *South Carolina v. Katzenbach,* at least five courts which have been faced with the question of whether States have procedural due process rights have concluded that they do not.[20]

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[16] Mathews v. Eldridge, 424 U.S. at 335. For a different approach to the issue of what process is due, see discussion of the Supreme Court's decision in Wong Yang Sung, 339 U.S. 33 (1950) at § 53.05[5][b] *infra.*

[17] 383 U.S. 301.

[18] *Id.* at 323–324.

[19] See Wallick and Montalto, "Symbiosis or Domination: Rights and Remedies Under Grants-in-Aid," 46 Geo. Wash. L. Rev. 185 (1978); Cappalli, *Rights and Remedies Under Federal Grant Law,* 225 (BNA: 1979).

[20] Aguayo v. Richardson, 473 F.2d 1090, 1100-1101 (2d Cir. 1973); Arizona State Dept. of Public Welfare v. Department of Health, Education and Welfare, 449 F.2d 456, 478 (9th Cir. 1971), *cert. denied,* 405 U.S. 919; Connecticut State Dept. of Public Welfare v. Department of Health, Education and Welfare, 448

However, none of these courts squarely addressed the issue of whether the sweeping language of *South Carolina v. Katzenbach* was meant to apply to due process considerations in grant dispute resolution.[21] Nor did the courts consider the incongruities of having due process protections denied to State and local governments, but afforded to other types of grantees and grant applicants.

These arguments have been raised by Professor Richard Cappalli in his book, *Rights and Remedies Under Federal Grants.*[22] According to Professor Cappalli, the denial of due process rights to State and local grantees is wrong for three reasons: (1) Denying due process to State and local grantees created undesireable contradictions in the law governing grant administration[23]; (2) Other Supreme Court cases, notably *Thorpe v. Housing Authority of the City of Durham,*[24] have given States the implicit protection of procedural due process in their dealings with the Government[25]; and, finally,

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F.2d 209, 212-13 (2d Cir. 1971); Stiner v. Califano, 438 F. Supp. 796, 799 N. 3 (W.D. Okla. 1977); Carroll v. Finch, 326 F. Supp. 891, 894 (D. Alas. 1971).

[21] In two of these cases, *Arizona State Department of Public Welfare v. Department of Health, Education and Welfare,* and *Connecticut State Department of Public Welfare v. Department of Health, Education and Welfare,* State grantees were claiming that grant appeals procedures afforded them by HEW did not comport with constitutional due process. However, in both cases, the States admitted that they had no Fifth Amendment right to due process under *South Carolina v. Katzenbach,* and instead were basing their claim on the Tenth Amendment—a claim which was rejected by one court (*Arizona,* 449 F.2d at 478), and found to be irrelevant by the other because the State, in fact, had been given due process. (*Connecticut,* 448 F.2d at 212.) Thus, neither court was forced to reach the question of whether *South Carolina v. Katzenbach* applied to States in their role as grantees.

[22] Cappalli, *Rights and Remedies Under Federal Grants,* (BNA, 1979), pp. 225-243.

[23] Cappalli at 229-233. By way of example: A nonprofit grantee may have the right to a hearing when the Federal Government demands a repayment of grant funds, while under the exact same grant program and for exactly the same type of dispute, a State or locality may have no hearing right.

[24] 393 U.S. 268 (1969).

[25] Cappalli at 238. As Professor Cappalli states: "In the *Thorpe* case . . . one argument made by the government defendant was that the new HUD regulations violated the constitutional prohibition on the impairment of contracts which applied, by way of Fifth Amendment Due Process, to the Federal Government. Note that a government agency was, thus, sneaking under the protective shield afforded 'persons' by the constitutional text. The Court reached the argument on the merits

(3) If ever faced with a claim by a State or locality demanding due process rights in its role as grantee, the Supreme Court would allow due process protections. Professor Cappalli bases this last prediction on the Supreme Court decision in *National League of Cities v. Usery,*[26] a case in which the Court was willing "to rediscover a domain of untouchable state power and authority. . . ."[27]

Even if a court were to disagree with these arguments and deny constitutional due process to State and local grantees, the issue of constitutional due process protections in grant dispute resolution remains crucial. Nongovernmental grantees (such as private educational institutions and nonprofit organizations) represent a significant segment of the grantee community; Federal grantmaking agencies still must consider whether they are obligated to provide due process protections to these types of recipients. Furthermore, if agencies are required to provide due process protections for grant disputes involving nongovernmental grantees, they may decide that, for reasons for policy, administrative convenience, or fundamental fairness, they will extend the same protections to all grantees, including State and local governments. In the political milieu in which we live, it would be highly unlikely if an agency were to follow a different course.

[4]—Constitutionally Protected Interests in Grant Disputes

[a]—Constitutionally Protected Interests in Pre-Award Grant Disputes. Pre-award disputes usually center around the denial, in whole or in part, of a grant to an applicant, or disagreements in the way in which a grant application was processed. Also falling into the category of pre-award disputes are those conflicts that arise because a former grantee has been denied refunding. At the outset, it is important to recall that rejected grant applicants have the right

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and held that the grant agreement was not impaired. It did not deny Durham Housing Authority the right to claim such protection."

[26] 426 U.S. 833 (1976).

[27] Cappalli at 241. It should be noted, however, that *National League of Cities v. Usery* was dealing with matters covered by the Fair Labor Standards Act, a "domain of untouchable state power" which may be quite distinct from a State's role in Federal grant programs. Thus, the case may be no more than suggestive of the considerations the Supreme Court may weigh in deciding whether procedural due process applies to States and local grantees.

to judicial review of denials where they allege that an agency has transgressed a constitutional guarantee or violated an express statutory or procedural directive.[28]

[*i*]—*The Applicant's Property Interest.* Drawing on the Supreme Court's language in *Board of Regents v. Roth,* a series of lower court decisions has held that disappointed applicants have no constitutionally protected property interests in receiving a grant.[29] These courts reason that because applicants have no ongoing contractual relationship with the Government, there are no "mutually explicit understandings" which would give rise to a constitutionally protected property interest. Rather, disappointed grant applicants have only a "unilateral expectation" of receiving a grant. There do not appear to be any decisions to the contrary.[30]

It is important to note, however, that all of the foregoing cases involved applications for *discretionary* grants. At least one commentator (Professor Cappalli) has suggesed that eligible applicants for *mandatory, entitlement* grants (where funds are distributed according to a statutorily-mandated formula) have a constitutionally protected property interest if they are denied funding.[31] This conclusion is based on the fact that most mandatory grant programs allow no administrative discretion in terms of who will receive the grant, and instead require only that the administering agency approve the applicant's (usually a State's) submission if it conforms

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[28] See text at N. 3 *supra.*

[29] See, e.g., Missouri Health and Medical Organization, Inc. v. United States, 641 F.2d 870 (Ct. Cl. 1981); National Consumer Information Center v. Gallegos, 549 F.2d 822 (D.C. Cir. 1977); Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976); Legal Services Corp. of Prince George's County, Maryland v. Ehrlich, 457 F. Supp. 1058 (D. Md. 1978); Mil-Ka-Ko Research and Development Corp. v. OEO, 352 F. Supp. 169 (D.D.C. 1972); *aff'd mem.,* 497 F.2d 684 (D.C. Cir. 1974).

[30] Of course, one could postulate a situation in which an applicant had been explicitly promised funding or refunding by an agency, only to be later denied the grant. In such circumstances, a court could apply the quasi-contractal doctrine of promissory reliance, to hold that mutual obligations had been entered into, constituting a property interest. No cases have been decided on this issue. But see, Conset Corporation, et al. v. Community Services Administration, 655 F.2d 1291, 1295 (D.C. Cir. 1981), which suggests that promissory reliance analysis may be accepted in appropriate circumstances as creating a property interest.

[31] Cappalli, *Rights and Remedies Under Federal Grants,* N. 23 *supra,* 193-198. For further discussion of the nature of mandatory grants, see § 53.02[2][a] *supra.*

to Federal requirements. Under this scheme, a justifiable reliance by the grant applicant may be established which could constitute a constitutionally protected property interest. Any rejection of an application for a mandatory grant, therefore, would have to be consistent with constitutional due process.[32] There do not appear to be any cases which specifically address this issue.

[*ii*]—*The Applicant's Liberty Interest.* A liberty interest revolves around questions of a person's reputation or integrity and what the Government is doing to that reputation.[33] Situations in which a grant applicant's liberty may be violated include those in which an applicant has been blacklisted by an agency ("debarred") or otherwise denied the opportunity to apply for grants. Also involved may be situations in which the denial of a grant application harms the applicant's reputation or standing in the community.

There do not appear to be any cases which address this liberty interest in the context of the denial of a grant application. However, three recent cases have held that Federal *contractors* who were blacklisted by the Government have a protected liberty interest in their reputations and, therefore, are entitled to due process protections before they are disqualified from bidding for Government contracts. These cases are *Conset Corporation, et al. v. Community Services Administration*[34], *Transco of Ohio v. Freeman*[35], and *Old Dominion Dairy v. Secretary of Defense*[36]. Under these cases, a constitutionally-protected liberty interest may be found where an agency makes a decision that a contractor lacks integrity, communicates that decision to other agencies; and, as a result of the decision, the contractor is denied Government contracts.

Although each of these cases is limited on the facts to *contractor* rights vis-a-vis the Government, the liberty interest at issue here may be at least equally compelling in grantees facing debarment. To begin with, unlike the contractors involved in these cases, some grantees have legal "entitlements" or statutory preferences in some grantmaking. Furthermore, grant applicants typically are public

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[32] Cappalli at 197.

[33] Board of Regents v. Roth, 408 U.S. at 573.

[34] 655 F.2d 1291 (D.C. Cir. 1981).

[35] 639 F.2d 318 (6th Cir. 1981).

[36] 613 F.2d 953 (D.C. Cir. 1980).

entities or nonprofit organizations which are largely dependent upon the receipt of Federal grant funds for at least part of their essential operations. The potential harm to these parties conceivably would be greater or at least more direct than the harm to Government contractors, many of whom have significant non-Federal, private business dealings.[37]

[b]—Constitutionally Protected Interest In Post-Award Grant Disputes. Although several judicial decisions during the last decade have touched on the question of the constitutional due process rights of a grant applicant,[38] no court has faced squarely the issue of whether a grantee involved in a post-award dispute has the right to due process notice and hearing prior to final agency action.[39]

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[37] In Southern Mutual Help Association, Inc. v. Califano, 574 F.2d 518, 524 (D.C. Cir. 1977), a court recognized the importance of this interest to a grant applicant. In its discussion of an applicant's standing to contest the denial of a continuation grant, the court noted:

> "For an organization such as SMHA, dependent as it is upon grants of its very existence, a good reputation is perhaps its most valuable asset. Reputation, especially that established by past performance is a key element in agency grant decisions, and an organization that acquires a bad reputation in the grant a community based on poor performance will have a difficult burden to overcome in securing new grants."

[38] See discussion at § 53.05[4][a] *supra.*

[39] Two recent appellate courts have skirted the issue. In State of New Jersey v. Hufstedler, 662 F.2d 208 (3rd Cir. 1981), and State of West Virginia v. Secretary of Education, No. 80-1704 (4th Cir., Oct. 15, 1981) (unpublished decision), *motion to file late pet. for cert. denied,* 50 U.S.L.W. 3858 (April 15, 1982), the courts considered the validity of remedies imposed against Department of Education grantees for the misexpenditure of grant funds. The central issue in both cases was whether proceedings held before the Department's Education Appeal Board upholding the agency's cost disallowances were authorized by statute. In their decisions, both courts touched on what may have been due process concerns. In *State of New Jersey,* the court, in *dicta,* expressed concern about the Department of Education acting without statutory authority. In its discussion, the court referred to "due process," but only in the context of the unilateral abridgement of grant terms. As the court stated:

> "More important [than other concerns cited] would be the absence of due process in a system where agencies charged with administering the multitude of federal grant programs were free to augment or abridge the rights and obligations forming the contractual basis of the grantees' participation." 662 F.2d at 212.

In State of West Virginia, the court considered the grantee's claim that it was impermissibly denied an evidentiary hearing before the Board. The court rejected

[*i*]—*The Grantee's Property Interest.* Unlike the pre-award situation, in all post-award disputes the grantee has received grant funds or has a written agreement promising the award of grant funds. For a grantee to demonstrate that it has a constitutionally-protected property interest under *Roth* and *Sindermann,* the grantee must demonstrate that its grant award or agreement constitutes a "claim of entitlement" arising from a "mutually explicit understanding" with the Government. As shown below, because grant agreements generally are viewed as being contractual in nature, and because contracts with the Federal Government are held to be protected property interests, the conclusion that a grantee, in a post-award dispute, possesses a protected property interest in grant funds seems compelling. Moreover, as also shown below, several courts already have treated Federal grant agreements as constitutionally-protected property interests.

[*A*] *Contracts with the Federal Government Create Property Interests.* It appears undisputed that *contracts* with the Federal Government are viewed as constitutionally-protected property interests. Not only does this conclusion flow logically from the "mutually explicit understanding" language of cases like *Sindermann* and *Roth,* but on several occasions the Supreme Court has ruled on this precise issue. As the Supreme Court held in *Lynch v. United States:*

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."[40]

In *Thorpe v. Housing Authority of the City of Durham,*[41] the *Lynch*

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this claim, but it is not clear on what grounds. For example, in its decision, the court found that there had been a pre-hearing conference and that, from the record, it was "not clear . . . that [the grantee] desired an evidentiary hearing." Slip opinion, p. 4. Furthermore, the court found that the basic facts in the case were undisputed, and that the written record before the Board was sufficient. Thus, neither court expressly acknowledged the application of constitutional due process protections to grantees. The full implications of the decisions are not yet known.

[40] 292 U.S. 571, 579 (1934).

[41] 393 U.S. 268, 278 N. 31 (1968).

holding was reaffirmed in a case involving a federally-assisted housing program.[42]

[*B*]—*Federal Grants are Contractual in Nature.* Given the fact that contracts with the Federal Government are considered to be protected property interests, the finding in this chapter that grants are contractual in nature becomes extremely significant in establishing a protected constitutional interest for grantees. As shown above, although grants are different from Federal procurement contracts, they nonetheless create enforceable obligations which may give rise to constitutional due process rights.

The pre-award cases discussed previously in this chapter support this finding. Utilizing a contract analogy, the courts in those cases held that disappointed grant applicants had no "mutually explicit understanding" with the Government. An important observation about these cases, however, is that, in each, the applicant's due process claim was not dismissed automatically because the application was for a Federal grant, and not a contract. Rather, the court examined, *in a contractual context,* the particular facts of each case to determine whether a mutually explicit understanding had been created between the applicant and the Federal Government. This examination is identical to that undertaken to determine if a contractor (or bidder on a contract) has a protected property interest.[43] Also supportive of this finding is a series of cases holding that terminating a participant from a Federal grant program may violate the participant's property interest if due process protections are not given.[44]

Similar holdings apply with respect to the termination of "providers" of grant services (e.g. physicians and hospitals in the Medicaid program, grocery stores in the Food Stamp program).[45]

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[42] See also Larionoff v. United States, 429 U.S. 997 (1976).

[43] See, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934); Art-Metal-USA, Inc. v. Solomon, 473 F. Supp 1, 4 (D.D.C. 1978); Pan World Airways, Inc. v. Marshall, 439 F. Supp. 487, 493 (S.D.N.Y. 1977).

[44] See, e.g. Goldberg v. Kelly, 397 U.S. 255 (1970); Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v. United States, 512 F.2d 1212 (4th Cir. 1975).

[45] Greenspan v. Klein, 442 F. Supp. 860 (D.N.J. 1977); Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975); Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976); Cross v. United States, 512 F.2d 1212 (4th Cir. 1975). In all of these cases, the courts found "mutually explicit understandings" between the parties—under-

[*ii*]—*The Grantee's Liberty Interest.* It appears that no court has reached the question of whether a grantee has a liberty interest in a post-award dispute involving a grantee's reputation or integrity. However, the cases discussed above with respect to preaward disputes (*Old Dominion Dairy v. Secretary of Defense, Transco of Ohio v. Freeman,* and *Conset Corporation, et al. v. Community Services Administration*) also should apply here.[46] Thus, for example, where a grant is suspended without notice and hearing because of the grantee's alleged fraudulent practices, *both* the grantee's property and liberty interests may be violated.[47]

[5]—What Process is Due: Constitutional Requirements for Grant Appeals Procedures

Finding that a grantee or grant applicant has a protected property or liberty interest does not necessarily mandate a trial-type hearing before adverse agency action may be taken. "It is by now axiomatic that a determination that a due process liberty or property right has been violated does not determine the amount or type of process that is constitutionally required." [48] In fact, the Supreme Court consistently has held that, "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [49]

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standings which were based, at least in part, upon the obligational, contractual nature of grant programs.

[46] See § 53.05[4][a][ii] *supra.*

[47] No part of the due process doctrine suggests that a violation of *both* a grantee's property and liberty interests would entitle the grantee to any greater due process procedures than violation of only the grantee's property interest. However, under the balancing of factors ordered by *Mathews v. Eldridge,* a court may believe that the loss of current grant funds (the property interest) plus the harm to reputation attached to losing a grant because of alleged wrongdoing (the liberty interest) is a sufficiently "grievous loss" so as to necessitate greater trial-type procedures before the taking of any adverse administrative action. See discussion of Mathews v. Eldridge at § 53.05[5][a] *infra.*

[48] Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 967 (D.C. Cir. 1980).

[49] Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Goss v. Lopez, 419 U.S. 565, 578 (1975), quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Nevertheless, there appear to be certain due process minimums. For example, a grantee or grant applicant with a protected property or liberty interest appears to be entitled to "some type of notice" and "some type of hearing." The Supreme Court has defined the notice requirement as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [50]

The right to a hearing is equally "fundamental." As the Supreme Court has made clear:

> "[Some] type of hearing is required at some time before a person is finally deprived of his property interest. . . . [A] person's liberty is equally protected. . . ." [51]

Given these standards, the issue becomes one of establishing the required nature of procedural protections in grant dispute resolution procedures.

There appears to be no case in which a court has faced the question of what process is constitutionally due to grantees or grant applicants which possess protected property or liberty interests.[52] In other contexts, Federal courts have adopted two distinct approaches to deciding the extent of process due: (1) The predominant, balancing-of-interests test used in *Mathews v. Eldridge*,[53] and (2) an alternative doctrine first announced in *Wong Yang Sung v. McGrath*[54] in which the adjudication provisions of the Administra-

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[50] Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 13 (1978), quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

[51] Wolff v. McDonnell, 418 U.S. 539, 557–558 (1974).

[52] As noted previously, N. 39 *supra*, in *State of New Jersey v. Hufstedler* the court's conclusion contained no analysis of when constitutional due process was necessary. Beyond State of New Jersey, we have been able to discover only one case, Connecticut Department of Public Welfare v. Department of Health, Education and Welfare, discussed N. 21 *supra*, in which a court even suggested the issue of what constitutional process was due to a grantee. However, because the court accepted the argument that Connecticut, as a State grantee, had no entitlement to the due process coverage of the Constitution, the case is of little help.

[53] 424 U.S. 319 (1976).

[54] 339 U.S. 33 (1950).

tive Procedure Act are invoked once a constitutionally-protected interest is found. These two approaches are discussed below in the particular context of grant dispute resolution.

[a]—The Current Approach: The Process Due Grantees and Grant Applicants Under *Mathews v. Eldridge.* In *Mathews v. Eldridge,*[55] the Supreme Court held that the determination of whether a particular agency process met due process requirements would be based on the weighing of three factors: (1) The private interest affected by the Government action; (2) the risk of an erroneous deprivation of such interest through existing procedures, and the probable value of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burden which additional procedures would entail.[56] The *Mathews v. Eldridge* decision was the culmination of a series of Supreme Court cases which held that the extensive, trial-type procedures ordered by the court in *Goldberg v. Kelly,*[57] were not to be invoked automatically when a constitutionally protected property or liberty interest was found.[58] Rather, under the three-part *Mathews v. Eldridge* test, the balance struck often results in due process requirements in the administrative setting which are far less than a trial-type hearing.[59]

The *Mathews v. Elderidge* balancing approach is the prevailing standard for determining the constitutional adequacy of grant dis-

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[55] 424 U.S. 319 (1976).

[56] 424 U.S. 319 at 335.

[57] 397 U.S. 255 (1970).

[58] See Goss v. Lopez, 419 U.S. 565 (1975) (suspension from public school without prior notice and hearing is constitutional); and Wolff v. McDonnell, 418 U.S. 539 (1974) (confrontation and cross-examination of adverse witnesses in prison disciplinary setting not required under due process clause). In *Goldberg,* 397 U.S. at 267-271, the Supreme Court listed at least ten procedures which must be granted before a recipient's welfare grant could be terminated. These include: opportunity to be heard; timely and adequate notice; an oral presentation of the case; confrontation of adverse witnesses; presentation of evidence to the decisionmaker; cross-examination of adverse witnesses; retention of counsel; decision based solely on the hearing record; statement of reasons for the decision by the decisionmaker; and decision made by an impartial decisionmaker. Goldberg v. Kelly, 397 U.S. at 267-271.

[59] See, e.g., Dixon v. Love, 431 U.S. 105, 115 (1977) (using *Mathews* test, trial-type hearing not required prior to revocation of a driver's license).

pute resolution procedures.[60] However, it must be noted that there are certain difficulties in applying that standard in the context of this discussion. *Mathews v. Eldridge* requires a careful balancing of a particular set of facts. Here, we do not have a specific grant dispute in front of us, in which certain facts, such as who the grantee is, the amount of money at stake, other potentially harmful effects, and whether the dispute revolves around factual or legal disagreements, are known.

Moreover, virtually all of the cases decided under *Mathews v. Eldridge* focus on specific agency procedures in the context of specific disputes. They do not attempt to establish broad guidelines as to whether a particular procedure is valid, and, if so, when and how it should be used. This problem, and the resultant difficulty in drawing larger prescriptive principles from due process cases, was noted by Dean Paul Verkuil:

> "The controversy occurs when one seeks to apply these criteria in particular contexts . . . what is lacking is a theory for refining the criteria and establishing a methodology for applying them to evaluate informal adjudication procedures in particular cases." [61]

Given this dual problem—the lack of a particular grant dispute in which to apply *Mathews v. Eldridge* balancing, and the absence of "a theory for refining the criteria and establishing a methodol-

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[60] See Catz, N. 15 *supra*, pp. 1118-1129, wherein the author applied this test to grant terminations. See also, Gray Panthers v. Schweiker, N. 72 *infra* (due process procedures of recipient seeking medicaid reimbursements); Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 967 (D.C. Cir. 1980) (contractor's right to notice and hearing prior to disqualification from receiving Federal contracts); Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980) (due process procedures prior to termination of veteran's educational benefits); Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977) (due process hearing prior to initiation of recoupment procedures to recover Social Security overpayments); Staton v. Maves, 552 F.2d 908 (10th Cir. 1977) (due process procedures prior to termination of public school superintendent). Stretten v. Wadsworth Veteran Hospital, 537 F.2d 361 (9th Cir. 1976) (resident physician's rights to notice and hearing prior to dismissal from residency program of hospital); National Association for the Advancement of Colored People v. Wilmington Medical Center, Inc., 453 F. Supp. 330 (D. Del. 1978) *rev'd other grds.* 599 F.2d 1247 (3d Cir. 1979) (federally-funded inner-city hospital seeking to move services to suburbs).

[61] Verkuil, "A Study of Informal Adjudication Procedures", 43 U. Chi. L. Rev. 739, 740 (1976).

ogy" [62]—we have chosen to analyze the problems of what process is due to grantees and grant applicants by taking the following approach: First, from the approximately twenty "due process procedures" which potentially could be required in a grant appeal,[63] we have consolidated and distilled this list to arrive at *five* procedures which have been discussed thoughout this report as the central concerns in grant appeals, namely: (1) notice of the adverse action taken by the Government; (2) opportunity for "some kind of hearing;" (3) right to timely action; (4) availability of "trial-type" procedures at a hearing, including cross-examination, compulsory process, witnesses under oath; and (5) use of an impartial decisionmaker.

Second, we will isolate each of these procedures, and will evaluate as specifically as possible whether the procedure is "due" under the *Mathews v. Eldridge* test.[64] In many instances, our evaluation of whether the procedure is due will depend on the particular factual circumstances surrounding a grant dispute; as the circumstances change, so might the procedures due.

Finally, drawing on this analysis, we will suggest three minimally necessary procedures which would be required under *Mathews v. Eldridge,* in *any grant dispute* in which the grantee or grant applicant has a protected property or liberty interest, regardless of the particular facts of the case.

[*i*]—*Notice.* At the outset, it must be noted that there are at least two notice issues involved in this discussion. First, whether grantees and rejected grant applicants should be notified promptly of adverse action taken against them? And, second, if so, to what extent that notice should specify the reasons for the action, available appeals procedures, and other pertinent information. Most agencies require that some sort of notice be provided to grantees or

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[62] *Id.*

[63] See Davis, *Administrative Law Treatise,* § 10.6, pp. 327–328 (2d ed. 1979); Goldberg v. Kelly, 397 U.S. at 267–171.

[64] Of course, if a grantee desires a particular procedure included in a hearing which we have not discussed here, a court would use the *Mathews v. Eldridge* formula to arrive at a decision as to whether such a procedure were due. For any procedure, the doctrinal approach would be the same as outlined in this chapter.

grant applicants when adverse agency action is taken.[65] Even with respect to the denial of discretionary grants, some notice generally is required.[66]

The required content of the notice varies considerably. Some agencies require that grantees and grantees with special entitlements receive complete notice of the specific reasons for the adverse action, the proposed sanction, a copy of the available appeals procedure, and advice concerning appeal rights while others specify no requirement for the content of notice.[67]

[*A*]—*The Private Interest Involved.*[68] The severity of potential harm to a grant applicant depends, of course, upon the nature of the action proposed by the Government. Earlier in this report, we discussed the range of pre-award and post-award actions giving rise to appeals. These include: denial of grant applications (initial and renewal), denial of requests for approval to incur expenditures, disapproval of indirect cost or other special rates, cost disallowances, cease and desist orders, voiding of a grant, suspension, termination, and debarment. Obviously, some of these actions may have a more significant effect upon a grantee or grant application than others.[69] For example, any complete or partial cut-off of grant

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[65] As indicated at § 53.05[1] *supra,* such notice is required under certain circumstances by the APA.

[66] See, e.g., § 54.16 *infra.*

[67] See § 53.03[2][e] *supra.*

[68] This discussion of the first prong of the *Mathews v. Eldridge* test—the private interest affected by a grant sanction—involves the same analysis under each of the procedures discussed herein (such as notice, oral hearing, and impartial decision-makers). Rather than repeat "the private interest factor" five different times, we intend to refer back to this discussion as the analysis of the first factor in the *Mathews v. Eldridge* balancing.

[69] In his now-famous article, "Some Kind of Hearing," 123 U. PA. L. Rev. 1267, 1295-6 (1975), Judge Friendly suggested a hierarchy under which to evaluate the magnitude of the private interest affected by adverse government action. In the hierarchy, individual interests generally ranked higher than institutional interests. While grant actions probably fall below the "grievous loss" felt by welfare recipients in *Goldberg v. Kelly,* the "institutional" character of a grant should not serve to obscure the devasting individual effects which can attend an adverse grant action, and which therefore might place such adverse actions high on Judge Friendly's hierarchy. Grant sanctions and the resultant withdrawal of money will involve program cutbacks, with possible loss of services or benefits to individuals. Moreover, many grant sanctions lead to staff layoffs, office closings and even ter-

funds—through termination, suspension, or voiding of a grant—probably will pose greater harm to a grantee than the mere denial of a request for expenditure of funds. Similarly, a debarment order (which prohibits an entity's receipt of grant funds, through grant or subgrant, for a period of several years) obviously is more serious than any denial of a single grant application. Moreover, there are gradations of severity within sanction categories. Thus, for example, cost disallowances totalling a million dollars obviously have a more harmful effect upon a grantee than cost disallowances totalling a hundred dollars.[70]

All of these variables must be considered in the first element of the *Mathews v. Eldridge* balancing. Indeed, it appears that many grantmaking agencies already have undertaken this kind of analysis. Thus, for example, some agencies (such as HUD) provide hearing rights only for the most serious types of disputes, namely debarment and termination. Furthermore, some agencies (such as HHS and EPA) provide different options for review, depending upon the amount of money at stake in a dispute.[71]

[*B*]—*The Probable Value of Additional Safeguards.* The relative weight of the second *Mathews v. Eldridge* factor in determining adequate notice procedures, the probable value of the additional safeguard of complete notice versus the risk of an erroneous decision using abbreviated notice, seems to have been decided already by the Federal courts. Thus, as indicated above, courts make clear that notice is "an elementary and fundamental requirement" of due process.[72] Such holdings stem from the basic notion that

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mination of businesses (with the resultant layoff of numerous employees). Such a drastic result can occur even in a "routine" case of an audit disallowance.

[70] A strict quantitative analysis, however, might be misleading. For some grantees—particularly those which are one-hundred percent federally-funded—a cost disallowance of even a few hundred dollars may have serious repercussions.

[71] See § 53.03[2][b] *supra.*

[72] Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 13 (1978), discussed at § 53.05[5] *supra.* See also Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C. Cir. 1981), wherein the Court of Appeals noted that:

> "It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process."

there would be no such thing as a "protected" property or liberty interest if such an interest could be taken by the Government without any notice or reason being given, so as to allow the grantee or grant applicant to make an informed assessment and/or appeal of any adverse action.

[*C*]—*The Government's Interest.* Consideration of the final *Mathews v. Eldridge* factor—the Government's interest, including the additional fiscal and administrative burden which complete notice (i.e. notice of the action and a brief statement of the reasons for the action) would entail—seems to depend upon the nature of the action.

With respect to post-award disputes, or disputes involving the denial of entitlement grants, the burden on the Government does not seem to be particularly onerous. Indeed, quite the opposite may be true: If grantees or grant applicants understood fully the reasons for proposed adverse action, they might be less inclined to pursue administrative appeals. Practitioners suggest that, on many occasions, grantees or grant applicants pursue appeals based upon assumptions of agency bias against them and/or an improper understanding of the facts. In any event, such notice is the general practice of agencies.

In cases involving the denial of discretionary grant applications, it first must be emphasized that, in the "real world," one probably never would reach this point of analysis. As shown above, no court has ever held that an applicant for a discretionary grant has a consitutionally-protected interest in the grant award—nor is such holding anticipated. Therefore, it is highly unlikely that a court would reach the issue of "what process is due" in this context.

Nonetheless, we should note that, in the Public Health Service alone, thousands of applications for competitive discretionary grants are awarded each year, and the imposition of *any* requirement upon the handling of those applications would add a burden to the agency.

[*D*]—*Balancing.* Considering these factors, it seems clear that, with respect to virtually all post-award disputes and the denial of entitlement grants, notice of adverse action and the reasons for such action would be required by constitutional due process. If this issue ever were reached with respect to the denial of discretion-

ary grants, the balancing would be more delicate in light of the facts that: (1) the applicant's interest most certainly would be less than that of the grantee in a post-award dispute or an applicant for an entitlement grant; and (2) the burden imposed on the Government would be greater. Factored into the balancing, however, must be the fact that most agencies (including the Public Health Service and National Science Foundation) currently give *some* notice of adverse action to disappointed applicants for discretionary grants. The incremental burden caused by *complete* notice, therefore, may be minimal.

[*ii*]—*Opportunity for an Oral Hearing.* The current availability of an oral hearing for grantees as part of an appeals procedure varies greatly, depending on the grant program and the agency. It is by no means a routine practice. In several agencies, the offer of an oral hearing is dependent on the amount of grant money in dispute.[73] This system suggests an at least implicit weighing of the first factor in the *Mathews v. Eldridge* test — the private interest at stake.

At the outset, it should be understood that the due process alternatives here are *not* between an oral hearing and no hearing at all. The latter situation would not satisfy due process requirements. As clearly stated by the Supreme Court in *Wolff v. McDonnell:*

> "The Court has consistently held that some type of hearing is required at some time before a person is finally deprived of his property interest . . . ."[74]

Instead, the issue is whether a "paper hearing," in which the grantee or grant applicant may submit briefs and exhibits to a decisionmaker, is sufficient process[75] or whether an oral hearing before the decisionmaker is required. Thus, it appears that once a grantee or grant applicant has a protected liberty or property interest, it is entitled *at least* to a paper hearing, in front of someone in the agency, at some time during the appeals process. This conclusion means that the many agencies which allow suspension or ter-

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[73] See § 53.03[2][b] *supra.*

[74] 418 U.S. at 557-558.

[75] See Basciano v. Herkimer, 605 F.2d 605 (2d Cir. 1978), *cert. denied,* 442 U.S. 929 (1979); Gray Panthers v. Schweiker, 652 F.2d 146, 165 (D.C. Cir. 1981).

mination of grants without providing for any hearing (paper or oral) may be acting unconstitutionally.

In determining when an oral, as opposed to a paper, hearing is required for grantees and grant applicants, we turn once again to the three-part *Mathews v. Eldridge* test. The first prong of that test, the private interest at stake, was discussed previously.[76] Suffice it to say that the potential loss inflicted on the grantee or grant applicant will vary.

An evaluation of the second factor, the risk of erroneous deprivation to the grantee without an oral hearing and its probable value if included, requires some analysis of the purpose of the oral hearing. Three reasons are given in the case law as to why an oral hearing may be important. First, an oral hearing is a more "flexible" procedure for the participants, in that it permits a party "to mold his argument to the issues the decisionmaker appears to regard as important."[77] Second, when a decision is based on questions of the veracity and credibility of certain parties and their witnesses, a paper hearing is a "wholly unsatisfactory" basis for such a decision.[78] Finally, an oral hearing is a mechanism by which to avoid "careless and arbitrary action when the decisionmaker can retreat behind the screen of paper and anonymity" possible in a non-oral hearing.[79]

Cutting against these advantages of an oral hearing is the third factor in *Mathews v. Eldridge:* The increased financial and administrative expense involved in holding an oral hearing. The magnitude of this additional expense is not clear, however, for two reasons. First, it is not really known how many grantees actually would partake of an oral hearing, especially when it might require coming to Washington to present a case. Second, while the scheduling and holding of an oral hearing would consume Government resources, it is not immediately evident how much additional resources would be involved over and above the time spent in reviewing a written

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[76] See § 53.05[5][a][i][A] *supra.*

[77] Goldberg v. Kelly, 397 U.S. at 269.

[78] Elliot v. Weinberger, 564 F.2d 1219, 1232 (9th Cir. 1977).

See also, Goldberg v. Kelly, 397 U.S. at 269; Gray Panthers v. Schweiker, 652 F.2d at 169-170.

[79] Gray Panthers v. Schweiker, 652 F.2d at 162.

file, and communicating with the parties over incomplete or ambiguous documents and pleadings.

In trying to balance these factors, no conclusive answer emerges, although a couple of points are worth noting. In those grant appeals where there is a factual dispute and several versions of the "same facts" are emerging, the balance clearly would tend to swing toward an oral hearing, especially where an appellant's potential loss is sizeable.[80] Such a flexible oral hearing requirement could be invoked *sua sponte* by the decisionmaker, or raised on motion by the appellant.

[*iii*]—*Timing of a Hearing.* Closely related to the issue of whether a hearing must be held is the question of *when* a hearing must be offered. On the assumption that an agency is required to hold either a paper or an oral hearing, must the hearing take place *before* a grant is suspended or terminated, or money returned to the agency, or can the Government go ahead and take the adverse action, and then entertain a grant appeal at some future time? Grantees obviously have a keen interest in this question; for a grantee whose grant is suspended and left entirely without operating funds, the possibility of an agency appeal one year after the disposition of the sanction could be meaningless.[81] However, as shown above, proceeding through an agency's formal appeals mechanism can be a time-consuming affair.[82]

In some cases, the question of the timeliness of an appeal is of less concern to grantees, because imposition of sanctions is delayed until the appeal is completed by the agency.[83] However, even with these provisions, grantees who face suspension may be unable to receive grant funds during the pendency of the appeal.[84]

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[80] Thus, HHS' procedures authorize an oral hearing where there are material facts in dispute. See § 53.03[2][k][ii] *supra.*

[81] This may be particularly so because of the absence of damages as a possible remedy for injured grantees or grant applicants.

[82] See § 53.03[2][l] *supra.*

[83] See , e.g., HHS and ED discussed at § 54.08 and § 54.05 respectively *infra.*

[84] See, e.g., HHS discussed at § 54.05 *infra.*

A number of court cases have focused on whether pre-hearing termination of benefits are constitutional.[85] Collectively, these cases stand for the proposition that, depending on the circumstances, hearings are not inherently required prior to adverse Governmental action. Utilizing the *Mathews v. Eldridge* approach, a major focus in these cases has been on the amount of harm faced by the party who is not given a pre-termination hearing. Also figuring significantly in the cases was the added cost to the Government of potentially providing two procedures: One before termination and a more complete one at some time following termination.

The focus of these cases was the particular factual setting of each case. To this setting the court applied the three *Mathews v. Eldridge* balancing factors. It therefore is virtually impossible to draw any general conclusions from these cases regarding the constitutional requirement of the timing of appeals in the grants context.

[*iv*]—*Use of Trial-Type Procedures.* When we discuss the possibility of constitutionally required "trial-type" procedures, we have grouped together five procedures which together cause an oral administrative hearing to resemble a judicial trial. These procedures are: confrontation and cross-examination of parties and witnesses; testimony under oath; compulsory process to compel testimony; and rules allowing discovery with sanctions for non-compliance. Such procedures are relatively absent from current grant appeal procedures. For instance, testimony under oath is permitted in only one agency.[86] Most agencies have not dealt with the issue of compulsory process; DOL and DOJ are two of the few agencies permitting discovery.[87]

This relatively casual approach to the need for trial-type procedures may be more a reflection of the agencies' desire to keep grant appeals informal and non-adversarial than it is either a reasoned decision as to what will lead to the most accurate decisionmaking or a reflection of what is legally required under due process. This

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[85] See Dixon v. Love, 431 U.S. 105 (1977) (revocation of driver's license prior to a hearing); Mathews v. Eldridge, *supra;* Goldberg v. Kelly, *supra;* Devine v. Cleveland, 616 F.2d 1080 (9th Cir. 1980) (termination of VA educational benefits prior to a hearing); Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977) (oral hearing prior to recoupment of social security overpayment).

[86] See § 53.03[2][k][iv] *supra.*

[87] See § 53.03[2][k][iii] *supra.*

comment is based on two observations. First, under due process jurisprudence, trial-type procedures, especially cross-examination and confrontation, are required when there are substantial, material factual (as opposed to legal) issues in dispute. "In almost every setting where important decisions turn on questions of fact, due process requires" an opportunity for confrontation and cross-examination.[88] In those cases where a request for use of trial-type techniques has been denied by a court, it has been because the court has found that there are no material facts in dispute, and, therefore, no perceived benefit to be gained from allowing cross-examination, compulsory process or oaths — procedures which may not be necessary to clarify policy or legal disputes.[89] Other than where a case lacked contested factual issues, courts have held that where the challenging party had the benefit of confrontation, cross-examination and compulsory process, the fact that the witnesses did not testify under oath was not sufficient to make the hearing constitutionally infirm.[90]

The second observation is that grant disputes frequently center around disputed factual issues. For instance, in a routine audit disallowance, areas of heated controversy often are factual questions, such as whether spending authority was given for a particular purchase, who gave that authority, and how other grantees are allowed to spend their grant funds.

Keeping these observations in mind — the purpose of trial-type procedures and the frequent factual disputes which arise under grants — one can postulate a distinct type of grant dispute in which trial-type procedures may be required by *Matthews v. Eldridge.* These would be the cases in which a proposed sanction would have significant detrimental effects on the grantee, and where, for reasons already discussed, an oral hearing would be re-

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[88] Davis, 2 *Administrative Law Treatise,* §§ 12:1-12:2 (2nd ed. 1979); Goldberg v. Kelly, 397 U.S. at 269-270; Potemra v. Ping, 462 F. Supp. 328, 334 (S.D. Ohio, 1978).

[89] See Connecticut Department of Public Welfare v. Department of Health, Education and Welfare, 448 F.2d 209, 212 (2d Cir. 1971); Woodbury v. Mckinnon, 447 F.2d 839, 844 (5th Cir. 1971); N.A.A.C.P. v. Wilmington Medical Center, 453 F. Supp at 342-3.

[90] Potemra v. Ping, 462 F. Supp 328, 334-335 (S.D. Ohio 1978).

quired.[91] With an oral hearing already necessary, the added fiscal and administrative burden put on the Government in making these hearings more formal by the addition of certain trial-type procedures may not be significant. Furthermore, under *Mathews v. Eldridge,* there would have to be significant, material facts in dispute so that the value of additional safeguarding procedures would be evident. Under this particular set of circumstances, a court may decide that due process requires some or all of the five trial procedures in the case of a grant appeal.

[*v*]—*Impartial Decisionmaker.* Just as "some kind of notice" and "some kind of hearing" are viewed by the courts as minimally necessary to any due process proceeding, an "impartial decisionmaker" also is viewed as an absolute requirement of constitutional due process.[92] However, beyond this most general statement, agreement virtually ceases as to what constitutes an "impartial decisionmaker" in a particular setting.

The type of class in which the Supreme Court has articulated a relatively clear doctrine of impartiality are not particularly helpful in the context of grant disputes. For example, the Supreme Court has stated that due process does not allow a hearing examiner to have a pecuniary interest in the outcome of a case[93] or have "been the target of personal abuse or criticism from the party before him."[94]

These forms of nonimpartiality are not the usual problems for grantees. Rather, the two recurrent issues concerning impartiality of decisionmakers in grant appeals are: (1) Can a hearing examiner be impartial when he/she has responsibility for both the investigative and the adjudicative functions in a grant dispute, i.e., an administrator who makes the adverse grant decision and then is the only person to whom the grantee appeals for reconsideration or reversal; (2) Can a hearing examiner be an impartial adjudicator when he/she is in a close working relationship with the personnel in the agency who were responsible either for the initial adverse

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[91] See § 53.03[2][k][ii] *supra.*

[92] See Goldberg v. Kelly, 397 U.S. at 271; Withrow v. Larkin, 421 U.S. 35, 47 (1975).

[93] Withrow v. Larkin, 427 U.S. at 47; Gibson v. Berryhill, 411 U.S. 566, 579 (1973).

[94] Withrow v. Larkin, 422 U.S. at 47.

grant decision, or for the prosecution of the case on behalf of the agency?

Federal agencies have no consistent practice as to providing or not providing impartial hearing examiners.[95] Only three agencies (DOL, DOJ, and HUD) appear to use administrative law judges. The Department of Education uses non-Government employees (attorneys and non-attorneys); HHS employs hearing officers who are HHS employees, but are removed from the offices which make adverse grant decisions. Less separated are the hearing officers at EPA, who are located in the same Office of General Counsel as the attorneys who represent the agency in grant appeals. Still further (or not at all) separated would be the many agencies which allow grant or program officials to review their own decisions or those of other officials in the same bureaucratic component.

In deciding what constitutes an "impartial decisionmaker" in a grant appeal, one must begin with the Supreme Court's statement that the combination of investigative and adjudicative functions is not a *per se* denial of due process.[96] Absent a specific set of facts to apply to a *Mathews v. Eldridge* balance, it is difficult to make a broader statement on due process separation of functions which would reliably apply to the permutations found in current agency procedures. As Professor Michael Asimow was forced to conclude in his report to the Administrative Conference:

> "This omelette of cases on due process and separation of functions yields few generalizations and many obscurities. A particular instance of combination of functions can be approached only through a balancing process, since there is no single, simple formula for applying due process, much less deciding separation of function issues . . . . All this indicates that procedural due process disputes arising from a combination of functions are almost completely unpredictable; one can only focus on the myriad of relevant variables."[97]

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[95] See § 53.03[2][f] *supra.*

[96] See Withrow v. Larkin, 421 U.S. at 47-55; Richardson v. Perales, 402 U.S. 389 (1971).

[97] M. Asimow, "When the Curtain Falls: Separation of Functions in Federal Administrative Agencies," *Report for the Administrative Conference of the United States,* 40-41 (August 10, 1980).

Still, it may be possible to go beyond this "omelette of cases" and suggest one useful criterion, applicable in some instances, by which to judge whether an agency is utilzing a constitutionally "impartial" decisionmaker in the grant disputes context: Is the decisionmaker's position within the agency such that he/she has already formed, in the words of Professor Kenneth Davis, *a "prejudgment of adjudicative facts" in the case*?"[98] Such a prejudgment, suggests Professor Davis, would arise when the supposedly impartial decisionmaker is more than just familiar with the facts of a case on which he/she must decide; rather, the decisionmaker has already formed and expressed a judgment on the facts.[99] In such a situation, the case law is fairly clear that this decisionmaker is not considered constitutionally impartial.[100]

With respect to current grant dispute procedures, these cases suggest that those agency practices which allow the same administrator to first make an adverse grant action and then to adjudicate the grantee's appeal may be considered to be constitutionally suspect. These procedures should be examined to determine whether prejudgment of a grantee-appellant's case is likely. Also potentially suspect (but requiring especially close scrutiny of the particular dynamics involved) would be those procedures in which the immediate supervisor of the administrator who took the initial decision now is asked to review the appeal. In such situations, it may be possible to content that there has been a *de facto* prejudgment of the facts by the supervisor. These practices, therefore, may raise constitutional questions regarding prejudgment of a grantee's case.

[*vi*]—*Conclusion on Process Due Under Mathews v. Eldridge.* As stated at the outset of this discussion, our analysis of the constitutional process due to grantees and grant applicants with protected property or liberty interests has been necessarily tentative, based on the absence of specific factual circumstances and the

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[98] Davis, 3 *Administrative Law Treatise* § 19:4, (2d ed. 1980); See also, Prygoski, "Due Process and Designated Members of Administrative Tribunals," 33 AD. L. Rev. 441, 461 (Fall, 1981).

[99] Davis, 3 *Administrative Law Treatise* § 19:4, pp. 382-385 (2d ed. 1980). A case apparently involving this issue was considered by EPA. See § 53.03[2][g] N. 19 *supra*, and accompanying text.

[100] See Stanton v. Mayes, 552 F.2d 908, 912-14 (10th Cir. 1977); Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

lack of broad principles in the case law. Still, this discussion has identified certain procedural minimums which must be given by an agency in any grant dispute brought by a grantee or grant applicant with a constitutionality protected interest: (1) There must be a *grant appeals procedure of some type* where a grantee or grant applicant with a constitutionally protected interest can contest the validity of an adverse agency action; (2) Such a grantee or grant applicant must receive *notice* which is sufficient to acquaint the grantee with all of the charges made against it, the legal and factual basis of the charges, and the proposed sanctions; (3) This grantee or grant applicant must receive a *hearing.* Whether there is an entitlement to an oral hearing or only a "paper" hearing will depend on the circumstances of the appeal; and (4) The hearing must be in front of *an impartial decisionmaker.* Beyond these minimums, any court or agency deciding whether a grantee or grant applicant was constitutionally entitled to additional procedures would have to balance the factors articulated in *Mathews v. Eldridge.*

[b]—An Alternative Approach: The Process Due Grantees and Grant Applicants Under *Wong Yang Sung.* In the 1950 case of *Wong Yang Sung v. McGrath,*[101] the Supreme Court was asked to rule on whether an alien could be deported from the United States after an administrative hearing which did not conform to Sections 554, 556 and 557 of the Administrative Procedure Act. After concluding that the alien had a constitutional right to due process, the Court addressed the problem of what process was due:

> "We think that the limitation to hearings 'required by statute' in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. *They exempt hearings of less than statutory authority, not those of more than stautory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing*

[101] 339 U.S. 33 (1950).

necessitated by the Constitution than one granted by it as a matter of expediency."[102]

Thus, under *Wong Yang Sung,* the first step of the due process inquiry would be exactly the same as that discussed above: Does the grantee or grant applicant have a protected interest deserving constitutional protections? However, upon finding this protected property or liberty interest in the context of a Federal administrative or regulatory scheme, the language in *Wong Yang Sung* suggests that at the least, all of the trial-type protections of the Administrative Procedure Act (§§ 554, 556 and 557) must be afforded to the grantee.[103]

The *Wong Yang Sung* opinion appears to conflict directly with the Supreme Court's current approach to deciding what process is due, as articulated in *Mathews v. Eldridge* and its progeny. The holding in *Wong Yang Sung* does not suggest a pragmatic balancing approach; rather, whenever a protected interest is being taken away, the adjudication procedures of the APA would be invoked automatically as constituting the minimum requirements of due process.

It is doubtful that the all-or-nothing approach of *Wong Yang Sung* would be currently accepted by a court adjudicating a procedural due process claim. In none of the due process cases decided in the 1970's has the Supreme Court referred to *Wong Yang Sung.* Indeed, there appears to be only one lower court decision, *Adams v. Witmer,*[104] which has completely adopted the *Wong Yang Sung* doctrine. In *Adams v. Witmer,* the appellant was denied patents to certain mining claims by the Bureau of Land Management. Appellant challenged the lack of due process in the Bureau's decision.

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[102] (Emphasis added.) 339 U.S. at 50.

[103] Another possible interpretation of the meaning of the excerpted portion of *Wong Yang Sung* is narrower and more consistent with *Mathews v. Eldridge:* Once a balancing of factors under *Mathews v. Eldridge* dictates that a full trial-type hearing is required in a case involving a Federal statutory scheme, then §§ 554, 556 and 557 of the APA are used to supply the procedures for that Federal hearing. However, Supreme Court cases decided after *Wong Yang Sung* put this interpretation in doubt in their extension of the *Wong Yang Sung* holding to statutes that had not previously been construed to require a full hearing. See Note, "The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act," 12 Harv. J. Legis. 194, 208 (1975).

[104] 271 F.2d 29 (9th Cir. 1959).

The Ninth Circuit found that the appellant's claim for procedural protections fell outside the adjudication provisions of the APA because no "hearing" was required by any relevant statute. However, the court ordered that the appellant still be afforded the protections of the APA on the following grounds:

> "[A]s the appellant's right to his mining claims was a property right, it follows that the requirements of due process necessitate that he have a hearing before he can be deprived of that property right. This constitutional requirement is no less mandatory than would be a mere statutory requirement for hearing. As stated in *Wong Yang Sung v. McGrath* [citations omitted], 'The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.' "[105]

Other fairly recent cases have cited *Wong Yan Sung* approvingly; however, none have found any constitutionally-protected interests which would give rise to a hearing.[106]

At least three cases have rejected explicitly the *Wong Yang Sung* approach, adopting a more flexible formula as to what process is due. In *Koniag, Inc. Village of Uyak* v. *Andrus,* [107] several Alaskan villages appealed an order by the Secretary of the Interior which found these villages to be ineligible to take land and revenues under the Alaska Native Claims Settlement Act. The villages claimed that they were denied due process in the decisionmaking of the Secretary. The Court of Appeals indicated that it was "guided" by *Wong Yang Sung,* but refused to invoke the APA solely because of the *Wong Yang Sung* decision. Instead, the Court of Appeals applied the *Matthews v. Eldridge* balancing test to decide how much process was due.

In *State of Colorado v. Veterans Administration,*[108] the court again side-stepped the implications of *Wong Yang Sung.* The case

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[105] 271 F.2d at 33. See also, United States v. Consolidated Mines and Smelting Co., Ltd., 445 F.2d 432 (9th Cir. 1971).

[106] See Chemical Leaman Tank Lines, Inv. v. United States, 368 F. Supp. 925, 936 (D. Del. 1973); DeVyver v. Warden, U.S. Penitentiary, 388 F. Supp. 1213, 1221 (M.D. Penn. 1974).

[107] 580 F.2d 601 (D.C. Cir. 1978).

[108] 602 F.2d 926 (10th Cir. 1979).

concerned the issue of whether the Veterans Administration could recoup alleged overpayments made to colleges on behalf of veterans. The colleges contended that they were entitled to due process protections before they could be required to repay the money. The District Court held that *Wong Yang Sung* controlled and that the plaintiffs were entitled to the procedures granted under the APA.[109] On appeal, the Tenth Circuit reversed, stating simply that the APA did not apply where no "hearing" was required by statute.[110]

Finally, the Ninth Circuit was confronted directly with its own earlier adoption of the *Wong Yang Sung* doctrine in the case of *Clardy v. Levi.*[111] In *Clardi v. Levi,* plaintiffs argued that they were entitled to full APA due process in Federal prison disciplinary proceedings. Rather than ignoring the *Wong Yang Sung* decision, the Ninth Circuit admitted that the decision appeared to demand that APA procedures be applied to the disciplinary proceedings. However, they refused to apply the *Wong Yang Sung* conclusion, holding that the APA procedures were not designed with the prison setting in mind, and that the Supreme Court lately had taken a more flexible approach in the prison situation.[112]

Because only one court in the last ten years has actually adopted the *Wong Yang Sung* decision, it appears that that decision has lost its vitality. Nonetheless, the case stands unreversed and undistinguished by the Supreme Court. If a court were to find that *Wong Yang Sung* still were good law, the case seems to demand that any agency which seeks to afford grantees less due process than required by the APA has the burden of justifying why APA procedures should not be invoked. It would be a difficult proposition for grantmaking agencies to accept.

[6]—Summary on Due Process

The argument that grantees and grant applicants have due process rights which govern dispute procedures is an argument which is essentially untested in the courts. Yet this report suggests that

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[109] State of Colorado v. Veterans Administration, 430 F. Supp. 551 (D. Colo. 1977).

[110] 602 F.2d at 938-9.

[111] 545 F.2d 1241 (9th Cir. 1976).

[112] 545 F.2d at 1245.

such an argument may have a solid foundation in the constitutional due process decisions announced by the Supreme Court and lower courts in the last decade. In selected pre-award dispute situations and in all post-award situations, a liberty or property interest may be involved, demanding constitutional protections. The extent of the process which is due in such situations has not been established; however, our conclusion is that due process requires that at least four minimum procedures be afforded to grantees and grant applicants who possess protected interests:

(1) *A grant appeals procedure of some type* in which the grantee or grant applicant may contest the validity of an adverse agency action;

(2) *Notice* to the grantee or grant applicant in sufficient detail to acquaint the grantee or grant applicant with the charges against it, the legal and factual bases of the charges, and the proposed sanctions;

(3) *"Some type of hearing"*—oral or by "paper"; and

(4) *Review by a impartial decisionmaker.* Further definition of these requirements, and the applicability of other procedural protections will depend upon the particular facts and circumstances of each case.

§ 53.06 Conclusions and Recommendations

In this study, we have sought to provide empirical data and analysis of existing grant dispute resolution procedures: The context in which they arise;[1] their nature;[2] the legal nature of the agreements underpinning them;[3] and their consistency with constitutional due process requirements.[4]

Three major themes have emerged from our study. First, there are enormous variations among grantmaking agencies regarding types of grant programs, types of grantees, types of potential disputes, types of appeal procedures, and attitudes towards grant dispute resolution. Most of the larger grantmaking agencies—such as the Department of Health and Human Services, Department of Labor, Department of Education, Environmental Protection Agency, and Department of Energy—have come to grips with the fact that disputes arise under Federal grants, and have developed fairly elaborate procedures for dealing with them. Others, such as the National Science Foundation, Department of Transportation, and Department of Agriculture, have been reluctant to develop elaborate procedures because: (1) they don't perceive the need for them; and (2) they are concerned that the development of such procedures would encourage disputes.

Regardless of the validity of these perceptions and concerns, the differences among agencies cannot be ignored. Thus, any recommendations issued by the Conference should afford to each agency as much latitude as possible in tailoring procedures to the characteristics of the agency's own grant programs and grantees.

The second major theme was that there was a decided preference on the part of both the agencies and grantees to resolve disputes informally, wherever possible. Thus, our study showed that even where grantees had seen fit to evoke more formal appeal mechanisms, they frequently favored settlement or informal negotiation and exchange of views. These findings, however, did not preclude recognition of the need for the existence of the more formal proce-

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[1] See § 53.02 *supra.*

[2] See § 53.03 *supra.*

[3] See § 53.04 *supra.*

[4] See § 53.05 *supra.*

dures. Several policy rationales emerged for the maintenance of such procedures. Chief among these: The protection of grantees' rights and avoidance of the agencies' involvement in needless and troublesome litigation in the courts; the fact and appearance of reasoned decisionmaking; and the prophylactic effect of having a formal procedure available so that the parties may have some incentive to settle disputes informally. These findings and considerations suggest that any recommendations issued by the Conference should encourage agencies to use informal dispute resolution procedures wherever possible, but to consider seriously all policy as well as legal reasons for making available more formal-type procedures.

The third major theme is that, at least under certain circumstances, grantees and grant applicants have legal rights to "some kind of notice" and "some kind of hearing." The Administrative Procedure Act requires "prompt notice" of adverse agency action. Under certain circumstances, this notice must include a statement of the reasons for the agency action. Where grant-enabling or other statutes or agency rules mandate greater notice—or hearing—rights and procedures, agencies must follow them scrupulously.

Where additional notice or hearing procedures are not required by statute or rule, agencies should consider the mandates of constitutional due process. Grantees, applicants for entitlement grants, and applicants which are denied funding because of an agency finding of incompetence or lack of integrity appear to have property and liberty interests, the loss of which must be accompanied by due process. In such case, *the agency should provide at a minimum* for:

(1) Notice to the grantee or grant applicant in sufficient detail to acquaint the grantee or grant applicant with the charges against it, the legal and factual bases of the charges, and the proposed sanctions;

(2) "Some type of hearing"—oral or by paper; and

(3) Review by an impartial decisionmaker.

Explicit in these procedures should be the opportunity for the parties to obtain information from each other (through compulsory process, if necessary), to examine and cross-examine witnesses, and to acquire testimony under oath. In addition, the agencies should assure the development of a record sufficient to reflect accurately

all significant factual submissions to the decisionmaker and provide a basis for decision.

Not all grantmaking agencies currently provide these procedures.

Finally, the Conference should recommend that agencies make whatever procedures that do exist known and available to all affected parties on an equal and consistent basis. Copies of the procedures should be published in the *Federal Register.* Agencies also should be urged to retain and make available copies of decisions emanating from dispute resolution procedures. Such decisions may assist in grants administration, and eliminate the need for duplicative litigation.

CHAPTER 54

Grant Dispute Resolution Procedures of Particular Agencies

SYNOPSIS

[a] Written Communications

[b] Board Delays in Contacting Program Agencies

[c] Decisions by at Least Three Members of the Board

[II] Board Members are too Divorced from the Board's Staff

[III] The Span of Control of the Chairman and Executive Secretary is too Great

[C] Management

[b] The Board's Current Organization and Procedures

[i] Expert, Full-Time Board Members

[ii] Staff Reorganization

[iii] New Rules of Procedure

[A] Availability of Procedures

[I] The Receipt of a Final Decision

[II] Exhaustion of Informal Review Procedures

[a] PHS Informal Review Committee

[b] Regional Rate Determinations

[c] Observations About Informal Review Proceedings

[B] Application For Review

[C] Preparation of the Appeal File

[D] Appeal Methods

[I] Written Records

[II] Conference Method

[III] Hearing Method

[IV] Expedited Process

[V] Mediation

[E] Other Provisions

[4] The Board's Jurisdiction

[a] General Authority

[i] As Defined in the Old Regulations

[ii] As Defined in the New Regulations

[iii] As Defined by the Board

[A] Jurisdiction Limited to HHS Grants

§ 54.01 ACTION

[1]—Grant Programs

ACTION is an independent Federal agency which was established in 1971[1] to encourage Americans to volunteer their services in programs which support the self-help efforts of low-income individuals and communities inside the United States.[2] ACTION's mission is to administer and coordinate programs which encourage and enable persons from all walks of life and all age groups to perform meaningful and constructive volunteer service in agencies, institutions, and other situations.[3]

ACTION administers a variety of domestic grant programs. By far the best-known[4] is the Volunteers in Service to America Program (VISTA).[5] The VISTA program was created in 1964 to provide opportunities for full-time volunteers to work with local sponsoring agencies (public or nonprofit private organizations) to strengthen and supplement community resources in the areas of education, day care, drug abuse, corrections, health, legal advocacy, architecture and city planning. Grants are awarded to sponsor agencies in poverty areas including urban ghettos, rural areas, Indian reservations and areas with large migrant populations. VISTA volunteers live and work in the communities served by the agencies.

In addition to VISTA, ACTION administers a variety of grant programs which use senior citizens as volunteers. Under the Foster Grandparent Program[6] grants are awarded to public and nonprofit private entities which establish their ability to recruit low income senior citizen volunteers, place them in appropriate settings, and provide sufficient non-Federal "matching" funds. Foster grandparents work with needy children in various community set-

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[1] Reorganization Plan 1 of 1971, and Executive Order 11603 of June 30, 1971.

[2] ACTION domestic grant programs are authorized by the Domestic Volunteer Service Act of 1973 (42 U.S.C. § 4951 *et seq.*).

[3] 42 U.S.C. § 4951.

[4] Although the VISTA program is well known, it is not a large grant program. ACTION directly enrolls and pays for most VISTA volunteers.

[5] 42 U.S.C. § 4951 *et seq.*

[6] 42 U.S.C. § 5011(a).

tings, including schools, hospitals for the retarded, handicapped and disturbed, day care centers, city hospitals, corrections institutions, and homes for neglected or disadvantaged children.

The Senior Companion Program[7] is a similar grant program which provides parttime volunteer opportunities for low-income senior citizens to work with needy adults. The grantee must design the program in conjunction with local community action agency activities and with input from the State Office on Aging. Grant funds may be used to support volunteer stipends, transportation, physical examinations, meals, staff salaries and fringe benefits, equipment and space costs.

ACTION also awards grants to support Retired Senior Volunteer Program (RSVP) projects.[8] The RSVP grantee must develop a wide variety of volunteer service opportunities for senior citizens and must generate local financial and other support. RSVP volunteers serve the community in a variety of settings, such as schools, courts, day care centers, and health and rehabilitation facilities.

Students are recruited as volunteers under the University Year for ACTION program.[9] Established in 1971, this is a program of grants to institutions of higher education or associations of such institutions, public agencies and nonprofit private organizations.

ACTION awards grants to State Offices of Voluntary Citizen Participation to establish and support state coordinators of volunteer services. These coordinators support volunteer citizen initiatives in conjunction with anti-poverty projects. They also sponsor volunteer training conferences and recognition ceremonies for participants.

In addition, ACTION administers a Mini-Grant Program, providing support to public agencies and non-profit private organizations (including hospitals and institutions of higher education), which use volunteers to deliver services. Finally, under the auspices of the Special Volunteer Program[10] and the Support Services Assistance Program[11] ACTION awards demonstration, training and

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[7] 42 U.S.C. § 5011(b).

[8] 42 U.S.C. § 5001 *et seq.*

[9] 42 U.S.C. § 4971 *et seq.*

[10] 42 U.S.C. § 4991 *et seq.*

[11] 42 U.S.C. § 4993.

technical assistance grants. The goal of these programs is to support the development of new ways to use community volunteers in innovative anti-poverty projects.

[2]—Grant Appeals Procedures

[a]—Statute. ACTION is required by statute to prescribe procedures to insure that: (1) assistance will not be suspended, except in emergency situations for thirty days, nor an application for refunding denied, unless the recipient has been given "reasonable notice and opportunity to show cause why such action should not be taken:" and (2) assistance will not be terminated unless the recipient has been given "reasonable notice and opportunity for a full and fair hearing."[12]

[b]—Regulations. ACTION has responded to the statutory mandate by adopting regulations which contain grant appeals procedures.[13] Subpart A of the regulations provides procedures applicable to suspension and termination actions taken because of a material failure of a recipient to comply with the terms of any of ACTION's domestic volunteer grant programs.[14] However, these procedures do not apply to actions based upon alleged violation(s) of Title VI of the Civil Rights Act of 1964 and other nondiscrimination laws.[15] Subpart B of the regulations provides procedures for appealing denials of applications for refunding arising out of the same programs.

[*i*]—*Suspension.* The term "suspension" is defined in the regulations to mean:

> "[A]ny action temporarily suspending or curtailing assistance in whole or in part, to all or any part of a program, prior to the time that such assistance is concluded by the terms and conditions of the document in which such assistance is extended, but

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[12] 42 U.S.C. § 5052.

[13] 45 C.F.R. Part 1206 (January 16, 1974), partially revised, 47 Fed. Reg. 5718 (1982).

[14] The terms of an ACTION grant include applicable laws, regulations, issued program guidelines, grant conditions or approved work programs. 45 C.F.R. § 1206.1-1(a).

[15] 45 C.F.R. § 1206.1-1(b).

does not include the refusal to provide new or additional assistance."[16]

There are two types of suspension: suspension on notice and summary suspension. ACTION, like the Community Services Administration (CSA), has separate procedures for the two different types of suspension actions. Indeed, in 1977, CSA adopted ACTION's suspension procedures as its own. Thus, the procedures of the two agencies are virtually identical. The only apparent difference is that, if CSA summarily suspends assistance and the grantee fails to show cause for rescission thereof, the suspension may continue in effect for 10 days, whereas ACTION permits continued suspension only for 7 additional days.[17]

[*ii*]—*Termination.* "Termination" is defined in the regulations to mean:

"[A]ny action permanently curtailing assistance to all or part of a program prior to the time that such assistance is concluded by the terms and conditions of the document in which such assistance is extended, but does not include the refusal to provide new or additional assistance."[18]

Again, CSA apparently adopted ACTION's termination procedures. They are virtually identical. Indeed, there are no substantive differences between the two.[19]

[*iii*]—*Denial of Applications for Refunding.* ACTION's denial of refunding appeal procedures, like CSA's, apply only where

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[16] 45 C.F.R. § 1206.1–1(i).

[17] Compare 45 C.F.R. § 1050.115–7(d)(6) with 45 C.F.R. § 1206.1–4(c)(6).

There also are some minor definitional variances. ACTION's grantees do not have "delegate" agencies, but they do deal with other agencies. These agencies are given the same rights under the procedures as enjoyed by delegate agencies under CSA grants. The term "responsible ACTION official" is defined in the regulations to mean: "the Director and Deputy Director of ACTION, appropriate Regional Director and any ACTION headquarters or regional official who is authorized to make the grant of asssistance." 45 C.F.R. § 1206.1–3(c). In addition, in the case of suspension proceedings, the designee of the ACTION official authorized to award the grant is a responsible ACTION officiai." *Ibid.*

Since CSA's and ACTION's suspension procedures are nearly identical, see § 54.04[2][b][ii][C] *infra*, for a discussion of CSA suspension procedures.

[18] 45 C.F.R. § 1206.1–3(h).

[19] See § 54.04[2][b][ii][D] *infra.*

an application for refunding is rejected or reduced to 80% or less of the recipient's current level of operations or where ACTION requires that a program account be eliminated or reduced to 80% or less. Furthermore, the procedures apply only to reductions based on circumstances related to the particular grant, such as ineffective or improper use of Federal funds or noncompliance with ACTION rules and guidelines. They do not apply to reductions based on legislative requirements, on general policy, or in instances where the application is not reduced by 20% or more.[20]

Before rejecting an application of a recipient for refunding, ACTION must notify the recipient of its intention, and offer the grantee an opportunity to submit written material and to meet informally with an ACTION official to allow the recipient to show cause why its application should be refunded. The notice must state the reasons for the tentative decision sent by ACTION and explain to the recipient its right to an informal meeting.[21]

If an informal meeting is requested, it shall be held on a date specified by ACTION but not less than 14 days after ACTION sent the notice of intent, or more than 21 days after the notice is mailed. If the recipient's budget period expires prior to the final decision after the informal meeting, the recipient is given authority to continue program operations until the final decision is made, but no additional funds from ACTION are awarded during this period.[22]

The official who conducts the informal meeting is an ACTION official who is authorized to award the grant, or his designee. The meeting must be held in the city or county in which the recipient is located, or the appropriate regional office, or another appropriate location.[23] Unlike the earlier regulations, the recipient is not entitled to fees to pay counsel, although counsel can be present at the hearing.[24]

In practice, the denial of refunding procedure is as follows. A tentative decision is issued by the grant officer from ACTION.

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[20] 47 Fed. Reg. 5720 (1982) (to be codified at 45 C.F.R. § 1206.2–4(a)).

[21] 47 Fed. Reg. 5720 (to be codified at 45 C.F.R. § 1206.2–4(b)).

[22] *Id.* at 45 C.F.R. § 1206.2–4(f).

[23] *Id.* at 45 C.F.R. § 1206.2–4(d).

[24] *Id.* at 45 C.F.R. § 1206.2–5.

That decision advises the grantee of its right to an informal show cause meeting. The meeting is held by a subordinate who then makes recommendations to the appropriate Regional Director or Deputy Regional Director. The Regional Director or his deputy then issues a final decision.[25]

Under VISTA grants, the Director's office sends a denial of refunding letter, then designates a show-cause meeting official to hear evidence. The Director makes the final decision.

[c]—Audit Matters. Although ACTION and CSA have similar procedures for appealing suspensions, terminations and denials of applications for refunding,[26] unlike CSA, ACTION has no formal mechanism to provide appeals of audit disallowances. According to ACTION officials,[27] audit appeals procedures have not been necessary, because ACTION's grants are relatively small and grantees are given several opportunities to present their side informally before a final disallowance is taken. In most instances, disallowances by ACTION are based on inadequate documentation of costs by the grantee.[28] Furthermore, according to ACTION officials, ACTION routinely assists the grantee in reconstructing its costs.[29] Furthermore, ACTION normally gives the grantee two years to correct problems, unless there is a clear indication of misuse of Federal funds. If a final disallowance is issued, ACTION often simply offsets the disallowance from the following year's grant. Recently, however, a number of audit disallowances have given rise to denials of refunding. When the problems arise in that context, grantees, of course, do have access to a formal appeals process.

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[25] In one instance, a grantee tried to appeal the Regional Director's decision to Headquarters officials. The appeal was denied on the ground that the Regional Director's decision was final. ACTION decisions in these cases never have been appealed to court.

[26] See § 54.04[2][b][ii] *infra*, for observations concerning procedures.

[27] Interview with Louise Maillett, Assistant General Counsel, ACTION, January 1981 (Washington, D.C.).

[28] *Ibid.*

[29] *Ibid.*

[3]—Specific Issues Involved in Action Appeals

As is the case with CSA, ACTION lacks a "system" for tracking decisions arising out of grant appeals. This may be attributed in part to the informality of all but the termination appeals process.[30]

Furthermore, the termination procedure is rarely invoked, because ACTION prefers to deny refunding and "work the problem out" in the informal show cause meeting rather than to take termination actions, with all of the attendant "adversarial" formalities.[31] In fact, this study showed only one instance of summary suspension and subsequent termination. On August 13, 1980, a Senior Companion Program grantee, was summarily suspended, effective August 16, 1980. The grantee was advised of its right to request an opportunity to show cause why the suspension should be rescinded, although the letter did not state that the grantee could submit written materials. On the same day, the grantee was notified of ACTION's intent to terminate and was advised of its right to request a hearing (no later than August 28, 1980). On September 3, 1980, ACTION terminated the grantee, having received no request for a hearing. The decision was based upon the grantee's "obvious financial difficulties." The grantee was advised that it could request review of this "final decision" no later than September 24, 1980. The grantee did not make such request.

Denials of refunding arise from the VISTA, Foster Grandparents, Senior Companion and Retired Senior Volunteer programs. Three recent appeals of such denials have been identified where ACTION's final administrative decision did not result in a court challenge; two appeals resulted in denials of refunding; one appeal resulted in a decision to refund.

The first denial of refunding case involved a Retired Senior Volunteer Program grantee. The decision was based primarily on the grantee's lack of leadership, failure to expand volunteer stations and a lower number of volunteers than projected. Although the letter did not indicate that the decision was "tentative" in nature, the Grants Officer did offer to meet with the grantee or consider written comments showing cause why its application for refunding

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[30] *Ibid.*

[31] Interviews with Maillett, *supra* N. 26 and Randy Greenwall, Assistant General Counsel, ACTION, January 1981 (Washington, D.C.).

should not be denied. The grantee was afforded three weeks in which to respond. A show cause meeting was held, and a final decision denying refunding followed.

A tentative decision to deny refunding of a grant under the Senior Companion Program was issued on May 29, 1980. The stated grounds for the denial were: failure to provide non-Federal support; failure to respond to an audit report; failure to comply with volunteer direct benefit requirements; and failure to provide an adequate plan for corrective action. The letter advised the grantee of its right to request an informal meeting with the Grants Officer (within 3 weeks), and stated that, "at a minimum" it should provide written responses to 12 specific items. The letter also advised the grantee that the Grants Officer would make recommendations to the Regional Director based on any written and oral presentations. Finally, the letter stated that the Regional Director would inform the grantee of his decision and reasons therefor.

An informal meeting was held on June 30, 1980, and the grantee was given until July 18, 1980, to submit additional information. Additional information was submitted; however, on July 29, 1980, the Regional Director issued a final decision denying refunding. The Regional Director was satisfied with the grantee's response to the audit report and the non-Federal share deficiency; however, the Regional Director concluded that management deficiencies, including volunteer recruitment problems, transportation, advisory council problems, had not been corrected. The Regional Director requested the grantee to identify a suitable locally-based sponsor.

ACTION decided not to deny refunding of a Foster Grandparent grant in Maine. The tentative decision to deny refunding was based on serious budgetary problems, and unacceptable work plan, failure to comply with fiscal and reporting requirements, unapproved expenditures and lack of management support. The letter advised the grantee of its rights to an informal meeting or to submit written materials. At a minimum, the letter urged the grantee to submit to the Grants Officer written responses to four specific items. A show cause meeting was held, after which the Regional Director determined that there were insufficient reasons to deny refunding. However, the Regional Director stated that serious concerns about the management of this project remained and indicated

that special conditions would be placed on the grant, with close monitoring to insure improvement.

At least two final decisions by ACTION to deny refunding under VISTA have resulted in successful court challenges by the recipients.[32]

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[32] See Kensington Joint Action Council v. Pauker, No. 81–4522 (E.D. Penn., Feb. 3, 1982); Tenant Action Group v. Pauker, No. 81–3888 (E.D. Penn., Oct. 29, 1981). In the *Kensington* case, the court found that ACTION's decision to deny refunding was arbitrary and capricious, with no basis in the regulations. In the *Tenant Action Group* case, the court found that ACTION had improperly applied non-final regulations to the plaintiff, thereby illegally denying refunding.

§ 54.02 Department of Agriculture

The United States Department of Agriculture (USDA) has twenty-seven separate agencies, of which five are engaged in grantmaking.[1] No Department-wide, uniform procedures govern grant disputes. One grantmaking agency (the Food and Nutrition Service) has established a full procedure for grant dispute resolution; three other agencies (Forest Service, Science and Education, and Soil Conservation Service) have no procedures at all.

On November 10, 1981, USDA took the first step toward eliminating the inconsistencies found in its grant dispute resolution and other policies pertinent to grant administration. On that date, USDA published final rules which would standardize USDA's administration of grants.[2] While the regulations do not specify procedures for grant dispute resolution, they at least require notice to a grantee before the suspension or termination of a grant is ordered.[3] USDA plans to amend the regulations next year, and, at that time to establish Departmentwide procedures for dispute resolution.[4] Until then, each agency has responsibility for establishing its own procedures. Those procedures, or lack thereof, are discussed below.

[1]—Food and Nutrition Service

For the five major grant programs administered by the Food and Nutrition Service (FNS),[5] FNS has established a grant appeals pro-

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[1] These agencies are: the Food and Nutrition Service, the Farmers Home Administration, the Soil Conservation Service, the U.S. Forest Service, and the Science and Education Administration.

[2] 46 Fed. Reg. 55636 (1981).

[3] *Id.* at 55653.

[4] Interview with Lynn Zimmerman, Supervisory Program Analyst, Office of Operations and Finance, Department of Agriculture, October 14, 1981 (Washington, D.C.).

[5] As shown below, these programs are: Food Stamps, 7 C.F.R. Part 271 *et seq.*, National School Lunch Progam, 7 C.F.R. Part 210; Child Care Food Program, 7 C.F.R. Part 226; Summer Food Service Program for Children, 7 C.F.R. Part 225; and Special Supplemental Food Program for Women, Infants and Children, 7 C.F.R. Part 246. In fiscal year 1981, these five programs awarded approximately $13.5 billion in grants. See Executive Office of the President, Office of Management and Budget, 1981 Catalog of Federal Domestic Assistance, 52–59 (15th ed. 1981).

cedure, operated by FNS' Administrative Review Staff (ARS). The ARS operates under the authority the FNS Deputy Administrator for Management, and has a full-time staff of about thirty persons.[6] As shown below, the ARS grant appeals process is not identical for all FNS programs.

[a]—Food Stamp Program. Under the Food Stamp Program,[7] the only parties considered grantees are the State agencies which administer the program. In November, 1980, FNS promulgated regulations which established an administrative review process under which these State agencies have a right to appeal claims filed against them by FNS.[8] The FNS claims which could be appealed consist of: billings to the State as a result of financial losses involved in accepting, storing and issuing food stamp coupons; billings to the State based on negligence or fraud; and disallowances by FNS of Federal grant funds for the alleged failure to comply with Food Stamp requirements.[9]

For appeals in which claims of negligence and Federal fund disallowances are at issue, a separate "State Food Stamp Appeals Board" is convened to hear the State's appeal. For all other claims, "unless circumstances warrant differently," a single hearing officer from the Administrative Review Staff will hear the case.[10] The State Food Stamp Appeals Board is composed of three persons appointed by the Secretary of Agriculture, each of whom is an official or employee of the Department, though not employed by FNS.

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[6] Interview with Joseph Shephard, Director, Administrative Review Staff, Food and Nutrition Service, U.S. Department of Agriculture, October 16, 1981 (Washington, D.C.). As of March 17, 1982, "there are plans within FNS to realign the Administrative Review Staff from its former position, reporting to the Deputy Administrator for Management, to a totally decentralized function. Under the planned realignment, each Review officer would report to a Regional Administrator . . . . There would be one Review Officer in Washington, reporting to the Deputy Administrator for Regional Operations, who would coordinate review policies nationally." Memorandum from Miguel Valdivielso, Acting Director, ARS, to Peter Ben Ezra, Chief Accounting Systems and Grants Management Division, FNS, March 17, 1982.

[7] 7 C.F.R. Part 271 *et seq.*

[8] 7 C.F.R. Part 276.

[9] 7 C.F.R. § 276.7.

[10] 7 C.F.R. § 276.7(a)(2).

The Board members also may be individuals employed outside of USDA.[11]

In all cases, the State agency may request an oral hearing.[12] If requested, the hearing represents an "informal proceeding" which is "designed to permit the State agency an opportunity to present its position before a neutral third party," either the Appeals Board or a hearing officer.[13] Federal Rules of Civil Procedure do not apply. Neither FNS nor State agency witnesses may be subject to cross-examination.[14]

Final determinations of the State's appeal must be made within 39 days of the hearing, or if no hearing is held, within 30 days of the receipt of the State's written appeal.[15] The decision of the State Appeals Board or ARS hearing officer is the final agency decision, and is not subject to further administrative appeal.[16]

To date, only two Food Stamp grant disputes have been adjudicated under this procedure, both of them before the State Food Stamp Appeals Board.[17] In one, decided in 1980, the State of Wisconsin challenged an FNS disallowance of $111,000 in reimbursements for administrative costs.[18] In the other, decided in 1981, the State of California was ordered by FNS to repay the Federal Government $396,000 for reduced receipts from Food Stamp purchases, caused by the State's allegedly illegal reduction of Food Stamp benefits to welfare recipients.[19] In both cases, the Appeals Board upheld FNS' actions.[20]

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[11] See N. 6 *supra.*

[12] 7 C.F.R. § 276.7(a)(2).

[13] 7 C.F.R. § 276.7(h)(1).

[14] 7 C.F.R. § 276.7(h)(3).

[15] 7 C.F.R. § 276.7(i).

[16] 7 C.F.R. § 276.7(k).

[17] See N. 6 *supra.*

[18] State Food Stamp Appeals Board Administrative Review No. 1–80, April 28, 1980.

[19] State Food Stamp Appeals Board Administrative Review No. 2–80, May 4, 1981.

[20] In addition to grant appeals, ARS adjudicates appeals received from commercial, retail and wholesale food firms involved in the Food Stamp program. These firms are not considered grantees because their only role in the Food Stamp program is to accept food stamp coupons from customers, and to cash in coupons

[b]—Child Care Food Program and Summer Food Service Program for Children. The Child Care Food Program,[21] and the Summer Food Service Program for Children,[22] also have grant dispute procedures directed by ARS. Of the grant cases which ARS reviews, almost all of them originate from one of these two programs.[23]

The ARS procedures for the Child Care and Summer Food programs are not published or codified in regulation form. Instead, they are outlined in internal FNS memoranda.[24] FNS' explanation for this lack of rules' publication is that both the Child Care Food Program and Summer Food Service program are to be administered primarily by State agencies. USDA administers the programs only when States choose not to.[25] When States administer the programs they are obligated to establish and use specified dispute resolution procedures.[26] The ARS process established by FNS essentially follows the review process required of the States.

In any event, under the ARS procedures, an FNS denial of an application or reapplication for grant funds is subject to review. In addition, ARS will review the full range of adverse post-award grant determinations, including denials of a grantee's claim for re-

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at the bank. The disputes which arise typically involve the appeal of an FNS determination that the firm should not be entitled to accept food stamps. Of the 1,951 cases processed by ARS in 1980, 1,877 of the cases were appeals by food firms, not grantees. Interview with Joseph Shepherd, N. 6 *supra.*

[21] 7 C.F.R. Part 226.

[22] 7 C.F.R. Part 225.

[23] 127 of the 128 grant cases which ARS had adjudicated through December 31, 1980, arose under either the Child Care of Summer Food programs. See Department of Agriculture, Administrative Review Board, Table IX *infra.* The data for all of these Tables was provided by Joseph Shepherd, Director, Administrative Review Staff.

[24] One memorandum is entitled, "Appeals Procedures for FNS-Administered Child Care Programs," and is dated June 16, 1980; the other is entitled "Summer Food Service Program for Children, Appeals Procedures for FNS-Operated Programs — FY 1980," and is undated.

[25] Interview with Joseph Shepherd, N. 6 *supra.*

[26] 46 Fed. Reg. 6285 (1981) (7 C.F.R. § 225.16); 7 C.F.R. § 226.7(j).

imbursement, suspensions, terminations, and debarments.[27] In the Summer Food program, a one-time notification that adverse actions are subject to ARS review is given to vendors and sponsors at the beginning of the summer season.

In the Child Care Food program, grantees have fifteen days from their receipt of notification of FNS' decision in which to file an appeal; in the Summer Food program, grantees have ten days in which to file. Upon filing, the grantees in both programs must be given access to the information in FNS' files upon which the adverse action was based. Both programs provide grantees with the right to an oral hearing before an ARS hearing officer.[28]

The FNS memoranda establishing appeal rights provide no description of the form the ARS hearings may take, or any discussion regarding rules of evidence, compulsory process, or oaths for witnesses. The director of ARS states that the hearings generally are "as informal as possible."[29]

For appeals under the Child Care program, a hearing officer must make a decision on an appeal within 60 days of receipt of the request for an appeal; for the Summer Food program, no time-table is given. In years 1978–1980, approximately thirty percent of ARS' grant cases were decided within two months after the appeals were filed, while sixty percent were decided within four months, and about ninety percent of appeals were decided within six months after the appeals were filed.[30] In all cases, the decision by the ARS hearing officer is the final review within the Department.[31]

[c]—Special Supplemental Food Program for Women, Infants and Children (WIC) and National School Lunch Program. Like the Food Stamp program, the only parties considered grantees in the WIC and School Lunch programs are the State agencies which administer the programs. These State agencies may appeal FNS deci-

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[27] See Department of Agriculture, Administrative Review Staff, Table 1 — Type of Determination by Year of Filing *infra.*

[28] FNS Memoranda, discussed at N. 24, *supra.*

[29] Interview with Joseph Shephard, N. 6 *supra.*

[30] See Department of Agriculture, Administrative Review Staff, Table IV *infra.* Unfortunately, it was not possible to determine the program breakdown ot these decisions, i.e., to what extent ARS met the 10-day requirement discussed above.

[31] Interview with Joseph Shepherd, N. 6 *supra.*

sions to withhold, recover or cancel WIC or School Lunch payments.[32]

The appeal procedures for these two programs are identical. Any proposed FNS sanction is subject to "hearing or review" by ARS or "an independent USDA Appeal Board outside of FNS."[33] The grantee has thirty days from its receipt of notification of proposed adverse agency action to request a hearing or review.[34] If a hearing is requested, it must be scheduled within sixty days. FNS must issue a final determination of the appeal within thirty days of the hearing, or (if no hearing is requested) within thirty days of the grantee's submission of a written appeal.[35] FNS regulations give no further explanation of the possible composition of an "independent USDA Appeals Board," or the procedures to be followed at any hearing. Presumably, the Secretary of Agriculture would appoint the Board.[36] There have been no appeals under these procedures.[37]

[2]—Farmers Home Administration

In January, 1981, the Farmers Home Administration (FmHA) published a uniform appeals procedure under which any applicant or grantee who is "directly and adversely affected by an administrative decision by FmHA has the right of appeal."[38] These proce-

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[32] 7 C.F.R. § 235.11; 7 C.F.R. § 246.19.

[33] 7 C.F.R. § 235.11(e); 7 C.F.R. § 246.19(b)(3).

[34] 7 C.F.R. § 235.11(e)(2); 7 C.F.R. § 246.19(b)(3)(ii).

[35] 7 C.F.R. § 11(e)(4)(6); 7 C.F.R. § 246.19(b)(3)(iii)–(v).

[36] Interview with Joseph Shepherd, N. 6 *supra.*

[37] *Ibid.*

[38] 46 Fed. Reg. 3819 (1981) (7 C.F.R. Part 1900, Subpart B). The FmHA administers seven grant programs, which expended approximately $300 million in fiscal year 1981. These programs include: Section 504 Rural Housing Grants, 7 C.F.R. 1904 Subpart G; Self-Help Technical Assistance Grants, 7 C.F.R. 1933, Subpart I; Development Grants for Community Domestic Water and Waste Disposal Systems, 7 C.F.R. § 1942, Subpart H; Technical and Supervisory Assistance Grants, 7 C.F.R. § 1944, Subpart K; Section 601 Energy Impacted Area Development Assistance Program, 7 C.F.R. § 1948, Subpart B; Area Development Assistance Planning Grants, 7 C.F.R. § 1948, Subpart A; and Farm Labor Housing Grants, 7 C.F.R. § 1944, Subpart D. See Executive Office of the President, Office of Management and Budget, 1981 Catalog of Federal Domestic Assistance 31–43 (15th ed. 1981).

dures apply to denials of requests for grant assistance, as well as to reductions, cancellations or non-renewals of grants.[39]

Any FmHA grant applicant or grantee who is directly and adversely affected by an FmHA decision must be informed of that action by letter within 15 calendar days of the date the action was taken. This letter must include, among other things: (1) "all the specific reasons" why the FmHA took the action; (2) an "invitation to call at the decisionmaking official's office" with additional information or a representative, such as an attorney; (3) a statement that, when not satisfied with the results of the meeting, the appellant has a right to a hearing so long as the request is made within 15 days of notification of the results of the initial meeting; and (4) notification to the appellant that a hearing officer may delay reduction or termination of grant assistance pending appeal of the FmHA action, if such a request is made by the appellant. However, any such request carries with it an automatic agreement to repay any reduced or terminated assistance should the FmHA decision be upheld.[40] If the initial meeting is unsuccessful, the case may be appealed to a "hearing officer." The hearing officer is an FmHA program official who was not involved in the initial adverse action against the grantee.[41] The hearing must be held within thirty calendar days of the agency's receipt of the request for the hearing.[42]

The hearing itself is an "informal proceeding," at which the appellant bears the burden of proving that the initial FmHA decision was erroneous. Federal Rules of Civil Procedure do not apply, but the appellant may present evidence and witnesses.[43]

A final decision of the hearing officer may be appealed by the appellant to a "review officer" who is a senior program official. Final review rests with the Administrator of FmHA.[44]

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[39] 46 Fed. Reg. 3819 (1981) (7 C.F.R. § 1900.52(b)).

[40] 46 Fed. Reg. 3820 (1981) (7 C.F.R. § 1900.56).

[41] 46 Fed. Reg. 3819 (1981) (7 C.F.R. § 1900.52(d)).

[42] 46 Fed. Reg. 3820 (1981) (7 C.F.R. § 1900.56(d)(2)).

[43] 46 Fed. Reg. 3821 (1981) (7 C.F.R. § 1900.57(a)).

[44] 46 Fed. Reg. 3822 (1981) (7 C.F.R. § 1900.58).

As of September 1981, no appeals had been filed under these regulations.[45] Moreover, no appeals were filed under prior FmHA appeal procedures which were substantially similar to those currently in effect.[46]

[3]—U.S. Forest Service

The U.S. Forest Service administers approximately $315 million in Federal grants, but has no regulations governing grant disputes arising under these programs.[47] According to the Forest Service, there never has been a need for such formal regulations; disputes, when they occur, have been resolved informally.[48]

[4]—Science and Education Administration

Like the U.S. Forest Service, USDA's Science and Education Administration expends its $41 million in federal grants without dispute regulations.[49] Administration officials report that, to date, there have been no major disputes with grantees, and any problems which may have arisen have been resolved informally.[50]

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[45] Interviews with John Madding, Deputy Director, Community Facility Loan Division, Farmers Home Administration, and Thomas Gerlitz, Branch Chief, Multi-Family Housing Division, Farmers Home Administration, U.S. Department of Agriculture, October 19, 1981 (Washington, D.C.).

[46] *Ibid.*

[47] The grant programs administered by the U.S. Forest Service are: Cooperative Forestry Assistance Forest Research Grants; Schools and Roads, Grants to States; and Schools and Roads, Grants to Counties. No regulations have been issued by the Forest Service governing these programs. In addition, the Forest Service co-adminsters, with the Department of the Interior, the Youth Conservation Corp., 36 C.F.R. § 214. For a discussion of dispute resolution procedures under the Youth Conservation Corp., see § 54.10 *infra*, on Department of the Interior grant programs.

[48] Interview with Darrold Foxworthy, Group Leader for Fiscal Management, Fiscal and Accounting Management Staff, Deputy Chief for Administration, U.S. Forest Service, Department of Agriculture, October 14, 1981 (Washington, D.C.).

[49] The Science and Education Administration Administers nine grant programs: Agricultural Research—Basic and Applied; Animal Health and Disease Research; Cooperative Extension Service; Cooperative Forestry Research; Grants for Agricultural Research; Higher Education Land-Grant Colleges and Universities; Payments to Agricultural Experiment Stations; Payments to 1890 Land-Grant Colleges and Tuskegee Institute; and Rural Development Research.

[50] Interview with Gene Spory, Chief Grants Administration Management Of-

[5]—Soil Conservation Service

The Soil Conservation Service administers three grant programs, extending approximately $125 million in fiscal year 1981.[51] The Service has no formal grant dispute procedures. Any potential disputes which have arisen have been resolved informally.[52]

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW STAFF

1. 1980 cases closed in 1980.
2. 1979 cases.
3. 1978 cases.
4. Pending cases.

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fice, Science and Education Administration, U.S. Department of Agriculture, October 13, 1981 (Washington, D.C.).

[51] These grant programs are: Watershed Protection and Flood prevention, 7 C.F.R. Parts 622, 623 and 624; Resource Conservation and Development, and Resource Appraisal and Program Development. For the last two grant programs, no regulations have been issued. Interview with Richard Holcomb, Contract Specialist, Division of Administrative Services, Soil Conservation Service, U.S. Department of Agriculture, October 19, 1981 (Washington, D.C.).

[52] Interview with Richard Holcomb, N. 51 *supra.* In addition to its grant programs, the Service administers three contract programs which provide cost share payments to individuals or private companies. These programs are the Abandoned Mine Program, the Great Plains Conservation Program, and the Melton-Mohawk Irrigation Improvement Program. Each program has formal dispute procedures at 7 C.F.R. §§ 631–633.

TABLE I

DEPARTMENT OF AGRICULTURE
Administrative Review Staff
Type of Determination by Year of Filing

	1978	1979	1980	Pending (80)	Total
A. Post award					
1. Demand for refund of overpayment	2	2	11	3	18
2. Audit funding of overclaim	0	0	2	0	2
3. Termination of site	0	0	3	0	3
4. Termination of sponsorship	9	0	3	0	12
5. Disallowance of meals	0	0	2	0	2
6. Withdrawal of authorization to purchase	0	0	1	0	1
7. Denial of claim for reimbursement of costs incurred prior to approval date	0	0	1	0	1
8. Denial of approval for sites	4	2	4	0	10
9. Partial denial of claim for reimbursement	4	10	8	3	25
10. Debarment	6	0	0	0	6
11. Adjustment in reimbursement claim	0	1	4	1	6
12. Denial of participation for fixed period. Suspension.	0	0	0	1	1
13. Denial of claim for reimbursement	7	3	11	7	28
B. Pre award					
1. Denial of application for sponsorship	0	3	11	2	16
2. Denial of claim for renewal sponsorship	0	4	3	1	8

* If more than one determination in case, counted more than once here.

TABLE II

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW STAFF

Outcomes of All Decisions
(Cases closed with review)

Filed in	For grantee	Against grantee	Part for, Part against	TOTAL
1978	9	8	6	
1979	6	14	3	
1980	9	41	3	
Pending	4	8	2	
Total	28	70	14	113

Outcomes of Withdrawn Cases
(Cases closed without Review)

1978	0	1	0	1
1979	0	1	0	1
1980	3	3	0	6
Pending	0	0	0	0
Total	3	5	0	8

Outcomes of Settled Cases

1978	0	0	2	2
1979	1	0	0	1
1980	0	0	1	1
Pending	0	1	2	3
Total	1	1	5	7
TOTALS				15
GRAND TOTAL	32	76	19	128

TABLE III

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW STAFF

Reviewed Cases where Appeals were Denied.

	1978	1979	1980	Pending	Total
Untimeliness	3	3	8	1	15
Premature	0	0	1	0	1
Application not completed	0	0	1	0	1
No Reason	0	0	1	0	1
	3	3	11	1	18

TABLE IV

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW STAFF

Duration of Appeals: From adverse detmination date to resolution

	1978	1979*	1980**	Pending***	Total
Less than 1 month	1	2	8		11
1–1/2 months	2	1	5		8
1–1/2–2	0	3	13		16
2–3	2	1	12		15
3–4	1	1	7	7	16
4–5	5	4	3	4	16
5–6	6	9	1	1	17
6–12	5	1	3	2	10
1 year and above	1	0	0	0	1
Total	23	22	52	14	110***

* No date on 1979–10, People Inst. AME Church.

** No date on 1980–14, Housing Authority of Atlanta.

*** As of December 31, 1980

TABLE V

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW STAFF

Dollar Outcomes (of cases with amount stipulated)

For Grantee[FG]	Against Grantee[AG]	Part For, Part Against[PF,P]
122,747.20(12)	428,698.05(28)	185,193(10)

TABLE VI

Dollar Outcomes by Year of Filing

	FG	AG	PF,PA
1978	13,200(1)	30,000(4)	6,704(3)
1979	57,960.20(5)	208,000(3)	10,400(2)
1980	51,507(5)	183,713.05(7)	137,500(2)
Pending	80(1)	6,985(4)	30,589(3)
Totals	122,747.20	428,698.05	185,193

TABLE VII

Breakdown of Split Decisions

Total Part For, Part Against	For Grantee	Against Grantee	Unknown
185,193	43,140	137,253	4,800

TABLE VIII

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW STAFF
Dollar Outcome by Type of Grantee

		State	Unit of Local Gov.	School	Church*	Non-profit organization	TOTAL
1978 (For)		0	0	0	0	13,200	13,200
(Against)		0	0	0	0	30,000	30,000
(Split)		0	0	0	0	6,704	6,704
1979	F	0	0	800	0	57,160.20	57,960.20
	A	0	0	0	0	208,000	208,000
	S	0	0	0	0	10,400	10,400
1980	F	0	0	16,000	0	35,507	51,507
	A	111,148	12,060.50	0	0	60,505	183,713.05
	S	0	0	0	0	137,500	137,500
Pending	F	0	0	0	0	80	80
	A	0	200	0	0	6,785	6,985
	S	0	0	0	2,800	27,789	30,589
Total	For	0	0	16,800	0	105,947.20	122,747.20
	Against	111,148	12,260.05	0	0	305,290	428,498.05
	Split	0		0	2,800	182,393	185,193

TABLE IX

DEPARTMENT OF AGRICULTURE
ADMINISTRATIVE REVIEW BOARD
Type of Grant Program by Year of Filing

Program	1978	1979	1980	Pending	Total
Food Stamp	0	0	1	0	1
Summer Food	1	5	7	1	14
Child Care	0	0	1	1	2
Summer Food or Child Care*	25	20	51	15	111
Total	26	25	60	17	128

* Unable to determine applicable grant program.

§ 54.03 Department of Commerce

[1]—Introduction

The Department of Commerce does not have a Department-wide formal procedure for handling grant disputes. At one time, the Department issued a Notice of Proposed Rulemaking which would have established such a procedure, but these rules were not adopted.[1] Attorneys in the Department's Office of Chief Counsel generally were opposed to having formal dispute resolution procedures on the grounds that such procedures would cause needless expense and would turn otherwise sympathetic program officals into "dispassionate judges."[2]

There are four components within the Department which currently adminster grant programs.[3] The dispute procedures employed by each of these components is discussed below.

[2]—National Telecommunications and Information Administration

National Telecommunications and Information Administration (NTIA) administers the Public Telecommunications Facilities Program (PTFP). PTFP is a discretionary grant program, authorized under the Public Telecommunications Financing Act of 1978.[4]

As stated in 47 U.S.C. § 390, the purpose of the program is

> "[T]o assist, through matching grants, in the planning and construction of public telecommunications facilities in order to achieve the following objectives: (1) extend delivery of public telecommunications services to as many citizens of the United

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[1] 44 Fed. Reg. 54908, 54910 (Sept. 21, 1979).

[2] Interview with Dan O'Neill, Associate Chief Counsel for the National Telecommunications and Information Administration, February 11, 1981 (Washington, D,C.).

[3] A fifth component, the Maritime Administration, has not awarded any grants thus far. It uses contracts for research and development projects. The Administration, however, has awarded at least one cooperative agreement, and reportedly has considered establishing a dispute resolution procedure for that form of assistance. Development of that procedure will await guidance from the Department's Office of Chief Counsel for Administration, February 11, 1981 (Washington, D.C.).

[4] 47 U.S.C. §§ 390–94.

States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies;(2) increase public telecommunications services and facilities available to, operated by, and owned by minorities and women; (3) strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public."

Pursuant to the Act, NTIA had established a Grant Appeals Board to review petitions for reconsideration of the following types of determinations: (1) rejections of grant applications because they are incomplete or not in accordance with PTFP requirements;[5] and (2) denials of petitions from grantees regarding the continued use of equipment acquired for public telecommunications services.[6] Additional types of determinations previously were authorized in the regulations.[7]

On March 15, 1982, NTIA issued Interim Rules and Policy Statement governing the PTFP program.[8] Under those rules, the Grant Appeals Board is abolished, and NTIA's regulations now contain no provision for the appeal of post-award grant disputes. A disappointed applicant may appeal an agency denial of eligibility to the Administrator of NTIA, whose decision is final.

Nothwithstanding this change in procedures, a review of the NTIA Grant Appeals Board may be useful. That review follows.

[a]—Grant Appeals Board Procedures. NTIA regulations provided that the Grant Appeals Board was comprised of the Deputy Administrator, the Chief Counsel, the Deputy Associate Administrator of the Office of Policy Analysis and Development, the Direc-

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[5] 15 C.F.R. § 2301.13(2).

Rejections of this sort are based upon a preliminary examination, and are distinguished from NTIA's ultimate denial of a grant application. (See 15 C.F.R. § 2301.13(c)). NTIA has not established an appeal or reconsideration process for such denials.

[6] *Id.* at § 2301.32(e)

[7] See, e.g., 15 C.F.R. § 2301.13(c) (described *supra* in N. 5), regarding the denial of grant applications; 15 C.F.R. § 2301.32(a), regarding the termination of grants and the Government's recovery of the Federal share; and 15 C.F.R. § 2301.32(d), regarding a grantee's relinquishment of or payment for property which has become ineligible for use as public telecommunications facilities.

[8] 47 Fed. Reg. 11228 (1981).

tor of the Office of International Affairs, the Director of the Office of Planning and Policy Coordination or such other senior level NTIA employees as the Administrator may select.[9] However, no member of the Board was to be employed in the Office of Telecommunications Applications.

The Board sat in panels of three members. Because the Chief Counsel represented PTFP staff in appeals before the Board, the Chief Counsel never had been designated as a panel member.[10]

A petition for reconsideration had to be filed with the Board within thirty days of the petitioner's receipt of an adverse determination. If there was a State telecommunications agency in the area served by the petitioner, that agency had to have been notified and given an opportunity to submit written comments on the petition to the Board. Other interested persons could also submit written comments.

The Board was directed to review the petitions and any comments received, and to make a written report detailing the basis of its decision. A copy of the report was sent to the petitioner and to any commentators (which would include the appropriate State telecommunications agency and any interested persons). If the Board granted the petition, it was empowered to direct the PTFP staff to take appropriate action. The decision of the Board constituted final NTIA action.

On February 7, 1980, the Board met for the first time to consider a petition for reconsideration filed by Washington Ear, Inc., an applicant which was found to be ineligible for funding.[11] The Board took the opportunity at that time to outline further the procedures it would follow.[12] Under those procedures, the Office of Chief Counsel was responsible for compiling a memorandum for the Board containing a summary of the facts, issues, and arguments of the agency and the petitioner. The memorandum also must contain copies of all relevant materials in the case. In addition, the Board

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[9] The composition and mandated procedures of the Board are established in 15 C.F.R. § 2301.33.

[10] O'Neill interview, N. 2 *supra.*

[11] For further dicussion of this petition, see § 54.03[2][b] *infra.*

[12] See Memorandum Opinion and Order, 45 Fed. Reg. 17053, 17054 (March 17, 1980).

could invite the petitioner and agency staff to make informal oral presentations. No information could be presented to the Board which had not been available for review by the grants officer in making the initial decision. *Ex parte* communications with the Board were prohibited.

The one obvious quirk in these procedures was the involvement of the Office of Chief Counsel. As indicated previously, the Office of Chief Counsel represented PTFP staff in Board appeals (and advised the staff on matters which subsequently may develop into disputes). As a result, the Chief Counsel did not sit on Board panels. Nonetheless, the agency had seen fit to assign Chief Counsel staff to serve, in effect, as law clerks to members of the Board. This approach seemed inconsistent, and contrary to fundamental notions of separation of functions.

[b]—Appeals Brought Before the Board. There have been four petitions for reconsideration brought before the Board. Three of the four petitions have involved determinations of applicants' eligibility. Two of these appeals have been decided.

The first Board decision involved a petition for reconsideration submitted by Washington Ear, Inc. The petition challenged PTFP's determination that Washington Ear was ineligible for an improvement grant. On February 7, 1980, the Board held an informal hearing and permitted oral presentations. On March 17, 1980, the Board reversed the PTFP determination. Concluding that PTFP had interpreted its authorizing statute too narrowly, the Board ordered the acceptance and consideration of Washington Ear's application.

The Board's second appeal involved a petition for reconsideration submitted by Independent School District Number 89 of Oklahoma County, Oklahoma. The School District received a grant in 1971 for construction and operation of an educational television station. PTFP regulations provide that the Federal Government may recover its proportionate interest in the value of facilities or equipment purchased with grant funds if they cease to be used for the provision of the telecommunications services. Prior to the expiration of the Federal interest, the School District ceased to operate the station and sold its facilities to a commercial broadcasting entity.

The School District filed a Petition for Forgiveness of its obligation to reimburse the Government. PTFP denied the petition. The grantee appealed, citing financial need as the "good cause" basis for waiver of recovery. The grantee proposed that the Board allow it to give the amount of the Federal interest to the Oklahoma Educational Television Authority. Subsequently (on March 14, 1980), the District filed an amended petition, proposing that forgiveness be granted so that it could use the funds to purchase equipment necessary to originate programming for a public channel on a local cable television system.

On August 20, 1980, the Board remanded the case to PTFP for further review because neither the initial nor amended proposal for use of forgiven funds had been presented to PTFP prior to PTFP's initial determination. The School District's request for forgiveness again was denied. The city subsequently filed an appeal to the Grant Appeals Board which was rejected as being untimely and moot.

Two other appeals to the Board were pending as of December 31, 1980. One involved a petition submitted on June 27, 1980 by the Board of Regents of the University of Wisconsin System. In the petition, the Board of Regents seeks reconsideration of a PTFP determination that a grant application submitted by the University was unacceptable. The basis for determination was that the licenses to operate the facility would be issued to the Wisconsin Educational Board rather than the University of Wisconsin, and that the licensee would not be sufficiently subject to the applicant's control.[13] The Board of Regents argued that it would have the requisite control. On December 23, 1980, the Board held an open meeting to consider the petition.

The other appeal pending as December 31, 1980, involved a petition submitted on behalf of the Wiconi Project of the South Dakota United Indian Association. The petition requested reconsideration of PTFP 's rejection of a grant application, PTFP's refusal to waive an application deadline, and PTFP's denial of a petition to allow the Project to become a substitute applicant for a proposal previously submitted by another party. The Project's petition for reconsideration was submitted to the Board on June 30, 1980. An

[13] After withdrawing its initial petition, the University submitted an amended application in January, 1981.

open meeting to consider the petition was scheduled for January 15, 1981.

[3]—Economic Development Administration

Economic Development Administration (EDA) awards categorical grants on an annual basis to approximately two-thirds of the Nation's counties.[14] According to EDA staff, few pre-award disputes arise from these grants because applicants know beforehand of the criteria and funding available for award. If any disputes were to arise, they would be handled informally.

Until the creation of an Office of Inspector General, EDA had few audit disputes because it only spotchecked grantee compliance. The number of audit disputes currently is rising. Complaints concerning audits are handled by regional office staff and may be reviewed thereafter by the Office of Chief Counsel. There is no formal appeals mechanism.

EDA has not terminated or suspended any grants, and has not perceived a need for any formal termination or suspension procedures.

[4]—National Oceanic and Atmospheric Administration

National Oceanic and Atmospheric Administration (NOAA) adminsters a research grant program and includes a disputes clause in its grant awards. At present, NOAA has no formal procedures for handling grant disputes. However, an attorney from the Office of General Counsel indicated that if any grant dispute were to arise, it conceivably would be handled by NOAA Administrative Law Judges, who are primarly responsible for enforcement activities.[15]

Previously, authority for handling NOAA grant disputes lay in the Department's Board of Contract Appeals. However, the Board recently was abolished. Procedures governing that Board appeared in Volume 15 of the Code of Federal Regulations, Part 3, and provided for an appeal on a written record.

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[14] Information reported in this section was obtained in an interview with Sy Ronald, Assistant Counsel for Administration and Legislation, February 11, 1981 (Washington, D.C.).

[15] Interview with Jerry Walz, Senior Staff Attorney for NOAA, OGC, February 11, 1981 (Washington, D.C.).

Prior to its abolition, the Board handled three NOAA grant disputes. All involved cost disallowances. The Board rendered decisions in two of the appeals; the third was settled by the parties and dismissed with prejudice.

The first appeal involved the denial of interest costs claimed by the University of California, San Diego, under three NOAA research grants.[16] The interest costs were incurred in connection with the acquisition of a computer system. The grantee argued that acquistion of the system was cost effective and that, under similiar circumstances, the Grant Appeals Board of the Department of Health, Education and Welfare had ruled in its favor. [17] Commerce's Board of Contract Appeals denied the appeal. Noting that the University of California had entered into a grant agreement which incorporated Office of Management and Budget cost principles prohibiting the payment of interest, the Board held that the University may not unilaterally rewrite its "contract."

In NOAA's second appeal,[18] the grantee challenged a disallowance of $11,115 in costs which NOAA determined were insufficently documented. The disputed expenditures were made by a subgrantee for travel, supplies, salaries and other costs.

Under the terms of its grant, the grantee was required to retain supervisory responsibility for all expenditures, including those made by subgrantees. However, the grantee did not have a formal agreement with the subgrantee which limited use of the funds to expenditures in direct support of the grant program, nor had the grantee informed the subgrantee of the conditions of the grant. Upon examination of the questioned costs, the Board agreed with NOAA that there was insufficient documentation. The Board, therefore, denied the appeal, concluding that the grantee had failed to exercise appropriate supervision of the subgrantee's expenditures. The Board stated that the agency's decision could be reconsidered if the grantee submitted adequate documentation within 30 days. Reconsideration was not sought.

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[16] In the Matter of University of California, Docket No. NOAA-8-79 (Dec. 26, 1979).

[17] University of California at San Deigo, HHS D.G.A.B. Docket No. 23, DecisionNo. 13 (Jan. 27, 1976).

[18] In the Matter of South Carolina Coastal Council, Docket No. NOAA-10-79 (Sept. 10, 1980).

NOAA's third appeal involved a disallowance of $58,333 in salary and fringe benefit matching costs.[19] The parties moved to dismiss the appeal on the basis of a settlement agreement in which the grantee agreed to pay $10,996, the Government agreed to release $32,276, and neither party confessed liability. The Board accepted the settlement.

[5]—Minority Business Development Agency

The Minority Business Development Agency (MBDA) administers a program of discretionary project grants to public and private organizations to provide management and technical assistance to minority business persons.[20]

MDDA has not published formal procedures for handling grant disputes. On at least two occasions, however, MBDA has terminated grants "for cause."[21] In one case, MBDA held an informal conference with the grantee to discuss the termination. In neither case did the termination letters advise the grantee of any procedural rights.

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[19] In the Matter of Appeal of State University System of Florida, Docket No. NOAA-9-79 (Dismissed Sept. 10, 1980).

[20] This program is authorized by Executive Order 11625 (1971) and 15 U.S.C. § 1512 (which generally authorizes the Secretary of Commerce to support programs which promote domestic and foreign commerce.

Interview with John Smith, Deputy Chief Counsel, MBDA, June 10, 1981 (Washington, D.C.).

[21] Interview with Harold McClendon, formerly Grant/Cooperative Agreement Specialist, Office of Planning, Budget and Evaluation, June 30, 1980 (Washington, D.C.).

§ 54.04 Community Services Administration

[1]—Introduction

The Community Services Administration (CSA) was established by Congress in the Headstart, Economic Opportunity, and Community Partnership Act of 1974.[1] It expired in 1981, with the enactment of the Community Services Block Grant Act.[2]

As the successor to the Office of Economic Opportunity (OEO), the main purpose of CSA was to assist the poor to attain the skills, knowledge, and opportunities needed to enable them to become self-sufficient. CSA's major tool for accomplishing these goals was the Community Action Program. Under this program, CSA awarded grants to almost nine hundred local Community Action Agencies (CAAs) located in over 2000 counties in the United States to support comprehensive anti-poverty activities at the local level.[3]

In addition to the basic Community Action grants, CSA administered seven special assistance programs.[4] These assistance programs (typically grants, although in some instances, other forms of assistance such as loans) were used to meet objectives which could not be achieved under the basic Community Action Program. The seven programs were:

(1) Community Food and Nutrition—to assist local communities in their efforts to combat hunger and malnutrition.

(2) Senior Opportunities and Services—to support local services for and with the elderly poor.

(3) Environmental Action—to pay low-income persons to work on environmental improvement projects.

(4) Rural Housing Development and Rehabilitation—to assist low-income families in rural areas to obtain standard housing.

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[1] Section 221, Economic opportunity Act of 1964, as amended, 42 U.S.C. 2701 note.

[2] Community Services Block Grant Act of 1981, Fed. Reg. (July 30, 1981).

[3] 42 U.S.C. § 2808.

[4] 42 U.S.C. § 2809.

(5) Emergency Energy Conservation Services—to explore and implement methods of providing cheaper energy to the poor.

(6) Summer Youth Recreation—to provide recreational opportunities to low-income children during the summer months.

(7) Demonstration Employment and Training Opportunities—to establish experimental employment and training projects for low-income persons who are unemployed or underemployed.

Additional CSA grant programs included: (1) National Youth Sports Program;[5] (2) Technical assistance and training;[6] (3) State agency assistance;[7] (4) Research and pilot programs;[8] (5) Demonstration community partnership agreements;[9] and (6) Assistance for Migrant and Other Seasonally Employed Farmworkers and Their Families.[10]

CSA awarded grants primarily to CAAs; however, in some areas not served by CAAs, CSA awarded funds to limited purpose agencies to carry out one or more specific programs. Public and nonprofit private organizations were eligible to receive most types of special grants. Research and demonstration grants were awarded to institutions of higher learning and to certain State agencies.

[2]—CSA's Grant Appeals Procedures

[a]—Statute. With respect to the basic and special community action programs and the migrant assistance program, the Director of CSA was required to prescribe procedures to assure that: (1) "special notice of and an opportunity for a timely and expeditious appeal to the Director" was provided to an agency or organization whose application to serve as a delegate agency to the CAA had been rejected (in whole or substantial part) or had not been acted upon within a reasonable period of time; (2) financial assistance was not suspended for noncompliance, except in emergencies, nor

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[5] 42 U.S.C. § 2814.

[6] 42 U.S.C. § 2823.

[7] 42 U.S.C. § 2824.

[8] 42 U.S.C. § 2825.

[9] 42 U.S.C. § 2828.

[10] 42 U.S.C. § 2901 *et seq.*

an application for refunding denied unless the recipient had been given "reasonable notice and opportunity to show cause why such action should not be taken;" and (3) financial assistance was not terminated for noncompliance unless the recipient had been afforded "reasonable notice and opportunity for a full and fair hearing."[11]

With respect to the State agency assistance program, if a CAA's board filed an allegation with CSA that the State agency was not in compliance with applicable requirements, the Director of CSA had to investigate. If the Director found reasonable cause to believe the CAA's allegations were true, a hearing had to be held, after which assistance could be terminated.[12]

[b]—Regulations

[*i*]—*Purpose and Scope of Applicability.* Pursuant to its statutory mandate, CSA issued regulations which prescribed procedures for handling: (1) an appeal by delegate agencies whose initial or refunding applications under the basic or special community action programs were denied by CAAs;[13] (2) denials of applications for refunding under the basic and special community action programs and the migrant program;[14] (3) suspensions;[15] and (4) terminations.[16] In addition, CSA adopted procedures by which grantees could appeal audit disallowances.[17] The procedures differed for each type of dispute; each procedure is discussed separately below.

[*ii*]—CSA Procedures

[*A*]—*Delegate Agency Appeals.* CSA regulations[18] provided for appeals to CSA by organizations whose applications to serve as

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[11] 42 U.S.C. § 2944.

[12] 42 U.S.C. § 2824(d). This statutory hearing requirement has not been expanded upon in CSA regulations.

[13] 45 C.F.R. § 1064.1.

[14] 45 C.F.R. § 1067.2 *et. seq.*

[15] 45 C.F.R. § 1050.115–7.

[16] 45 C.F.R. § 1050.115–8. These procedures do not apply, however, to any administrative action of CSA based upon alleged violations of Title VI of the Civil Rights Act of 1964.

[17] 45 C.F.R. § 1068.42–8(d).

[18] 45 C.F.R. § 1064.1.

delegate agencies under the basic and special community action programs[19] were rejected by a community action agency (CAA). Delegate agency applications had to be submitted no later than 6 months before the end of the CAA's funding period.[20] If the application was rejected (wholly or substantially) by the CAA, or if the CAA failed to act on the application in a timely manner, the would-be delegate agency could appeal the CAA's rejection or failure to act.[21]

The appeal was made to the CSA official responsible for approving the CAA's grant (normally, the appropriate Regional Director). The disappointed applicant had to send the CSA official a copy of all pertinent materials and a statement of its goals.[22] If the applicant sought to replace an existing delegate agency or to operate a program currently operated by a CAA, the rejected applicant also had to explain why its project would be more effective. If the applicant sought to operate a new program, it had to explain why the proposed program was superior to existing programs. Copies of these statements were sent to the CAA.[23] The CAA then had ten days within which to send a reply to CSA and to the rejected applicant.[24]

The responsible CSA official was required to decide the appeal before the CAA submitted its formal funding request. CSA was required to sustain the CAA's action unless it found that:

> "(1) The CAA did not give fair and adequate consideration to the rejected applicant's application, (2) Or the decision of the CAA will have a decidedly adverse effect on the quality of the overall community action program in the local community or would preclude achievement of the objectives of a Special Emphasis program . . ."[25]

If CSA determined that the CAA did not give the application fair and adequate consideration, the application was returned to the

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[19] 42 U.S.C. §§ 2808 and 2809.

[20] 45 C.F.R. at § 1064.1-5.

[21] *Id.* at § 1064.1-6(a).

[22] *Id.* at § 1064.1-6(b).

[23] *Id.* at § 1064.1-5(c).

[24] *Id.* at § 1064.1-5(d).

[25] 45 C.F.R. § 1064.1-7(a)(1) and (2).

CAA for reconsideration.[26] In deciding whether the CAA decision would adversely affect the community and/or statutory objectives, the CSA official must consider the amount of funding available to the CAA and/or the applicant. The responsible CSA could: uphold the CAA; directly fund the rejected applicant if authorized by the Act to do so; require the CAA to reconsider the application; take other appropriate steps (such as withholding funds from the CAA for the program which the applicant wanted to operate).[27]

The CSA official had to inform the rejected applicant and the CAA "promptly" and in writing of the decision reached.[28]

[B]—Denial of Application for Refunding

[1]—Applicability. Appeals of denials or reductions in refunding were available under limited circumstances; namely, (1) where a grantee's application was denied or reduced by at least twenty per cent; and (2) where the denial or reduction is based on circumstances related only to the particular grant, e.g. ineffective or improper use of Federal funds or noncompliance with CSA directives and grant conditions.[29]

The procedures did not apply to special community action program grants which specifically were identified as "one time only" fundings. Nor did they apply to reductions based on general policy, reduced appropriations or in instances where the reduction was less than twenty per cent.[30]

[II]—Procedures. CSA was required to notify the grantee in writing of its intent to deny or reduce an application for refunding, and to do so as far as possible in advance of the end of the grantee's current program. The notice had to be signed by "the responsible CSA official," i.e., CSA's Director, Deputy Director or the appropriate Regional Director.[31] The notice had to contain a state-

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[26] *Id.* at § 1064.1–7(b).

[27] *Id.* at § 1064.1–7(c).

[28] *Id.* at § 1064.1–7(d).

[29] 45 C.F.R. § 1067.2–4(a).

[30] *Ibid.*

[31] The regulations define "responsible CSA official" to mean: "the Director, Deputy Director, and any other official who is authorized to make the grant in question." 45 C.F.R. § 1067.2–3(c).

ment of reasons for the proposed denial or reduction. In addition, the notice had to offer the grantee an opportunity to show cause why CSA should not deny or reduce refunding. This opportunity could take the form of the submission of written materials and/or an informal meeting with "the responsible CSA official" or his designee. Any request for a meeting had to be made within 30 days of the grantee's receipt of the notice.[32]

If an informal meeting was requested, CSA was required to schedule it as soon as possible but at least fourteen days after issuance of the notice. The regulations further provided that CSA had to provide sufficient additional funds to support the grantee's operations pending a final decision on the appeal, when, through no fault of its own, the grantee ran out of money before the informal meeting was held.[33]

CSA determined where to hold the informal meeting.[34] The grantee and CSA had the right to be represented by counsel at the meeting. If the grantee hired an attorney, grant funds could be used to pay the fee.[35] In addition, if the meeting was held outside of the grantee's city or county, grant funds could be used to cover travel and per diem expenses for the attorney and two additional grantee representatives.[36] Following a meeting the responsible CSA official was to inform the grantee in writing of CSA's decision and the reasons therefor.[37]

[*C*]—*Suspension.* "Suspension", as defined in the regulations, was "an action by CSA that temporarily suspends Federal assistance under the grant, pending a decision by CSA to terminate the grant."[38] Such an action could be taken when a grantee had materially failed to comply with the terms and conditions of a grant.

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[32] 45 C.F.R. § 1067.2–4(b).

[33] 45 C.F.R. § 1067.2–4(c).

[34] *Id.* at § 1067.2–4(d).

[35] Grant funds may cover only $100 per day in legal fees, unless CSA's written approval to exceed that amount is obtained. 45 C.F.R. § 1067.2–5.

[36] *Ibid.*

[37] 45 C.F.R. at § 1067.2–4(e).

[38] 45 C.F.R. § 1050.115–2(b).

There were two types of suspension actions which CSA could take: (1) suspension on notice; and (2) summary suspension (without prior notice to the grantee). The appeals procedures for these two types of suspension actions were different.

[*1*]—*Suspension on Notice.* Under normal circumstances, the responsible CSA official was required to notify the grantee by letter or telegram of CSA's intent to suspend assistance. The notice had to specify reasons for the proposed suspension, and inform the grantee of its rights to submit written materials opposing suspension and request an informal meeting to show good cause why such action should not be taken.[39] The notice also was to invite the grantee to correct voluntarily the cited deficiencies.[40]

CSA decided when to hold a meeting or to require written submissions, but had to give the grantee at least 5 days from the date of notice within which to respond and/or request a meeting. CSA then had to allow another 5 days before actually holding the informal meeting.[41] CSA could schedule an informal meeting on its own motion, but, in such case, had to give the grantee at least seven days notice before holding the meeting.[42]

The regulations required CSA to send a copy of the meeting notice to any affected delegate agency "whose activities or failures to act are a substantial cause of the proposed suspension."[43] Such agency had to be informed of its right to submit written materials and to participate in the informal meeting. CSA also could give notice to other delegate agencies.[44]

Within 3 days of receiving a notice of suspension, the grantee had to send a copy of the procedures to all delegate agencies which would be affected financially by the proposed suspension. Any delegate agency could submit written materials and may request permission from CSA to participate in the informal meeting. The responsible CSA official could permit intervention by any such agency if the agency indeed would be affected, if intervention

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[39] 45 C.F.R. § 1050.115–7(c)(1) and (2).

[40] *Id.* at § 1050.115–7(c)(7).

[41] *Ibid.*

[42] 45 C.F.R. at § 1050.115–7(c)(3) and (4).

[43] *Id.* at § 1050.115–7(c)(5).

[44] *Ibid.*

would not unduly complicate the meeting, and if the agency would not be represented adequately by other participants.[45]

A decision to suspend a grant had to be based on all materials and evidence submitted prior to and at the meeting, including evidence that the grantee had corrected all deficiencies.[46]

Notice of suspension had to be transmitted promptly to the grantee and became effective upon date of delivery. Suspension could not exceed 30 days unless termination proceedings were initiated or the grantee and CSA agreed to an extension. If termination proceedings were initiated, the suspension remained in effect pending full resolution of the termination proceeding.[47] However, the responsible CSA official could modify the suspension or rescind it at any time if the grantee demonstrated that it had corrected the deficiencies. Suspensions so modified or rescinded could be reimposed; however, the total time of suspension could not exceed 30 days unless termination proceedings were initiated or the grantee agreed to an extension.[48]

[*II*]—*Summary Suspension.* Summary suspension meant suspension without prior notice to the grantee. Such an action could be undertaken only if the responsible CSA official determined that:

> "[A]n emergency situation exists because there is a serious risk of: (1) Substantial injury to or loss of project funds or property, or (ii) violation of a Federal, State or local criminal statute, or (iii) violation of section 603(b) or 613 of the Economic Opportunity Act of 1964, as amended . . . ."[49]

The official also had to determine that the risk "is sufficiently serious to outweigh the general policy in favor of notice and an opportunity to show cause."[50]

The summary suspension procedures were virtually identical to the regular suspension procedures except that no notice of intent to

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[45] *Id.* at § 1050.115–7(c)(6).

[46] *Id.* at § 1050.115–7(c)(8).

[47] *Id.* at § 1050.115–7(c)(9).

[48] *Id.* at § 1050.115–7(c)(11).

[49] *Id.* at § 1050.115–7(d)(1).

[50] *Ibid.*

suspend was sent to the grantee prior to the imposition of the suspension. Instead, the grantee and affected delegate agencies were sent a notice of summary suspension, advising them of the effective date of such action and informing the grantee of its right to request an opportunity to show cause why the summary suspension should be rescinded.[51]

Upon a grantee's request, the responsible CSA official was required to immediately inform the grantee of the reasons for the action and, within 7 days of receiving the request, to hold an informal show cause meeting. Such a meeting had to be held even if termination proceedings had already been instituted.

In any event, a summary suspension could be imposed for no more than 10 days unless termination proceedings were instituted, the parties agreed to an extension, or an informal meeting was requested.[52] In the latter instance, the suspension continued until a decision was reached. Delegate agencies had the same rights as in regular suspension proceedings.[53]

The responsible CSA official had to render a decision in a summary suspension proceeding within 5 days of the informal meeting. If the official concluded that the grantee had failed to show cause for rescinding the suspension, the suspension could be continued for an additional 10 days. However, if termination proceedings were initiated, the suspension could remain effective until the conclusion of the termination proceedings.[54]

Parties in a summary suspension proceeding had the same rights to counsel and legal and travel cost reimbursement as provided in the suspension on notice context.[55]

[*D*]—*Termination.* The first step in termination proceedings was the issuance of a notice of intent to terminate which set forth specific reasons for the proposed termination.[56] The notice was sent to the grantee and to any delegate agency whose activities formed a substantial part of the underlying reasons for the termination ac-

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[51] 45 C.F.R. at § 1050.115–7(d)(2) and (3).

[52] *Id.* at § 1050.115–7(d)(5).

[53] *Id.* at § 1050.115–7(d)(4).

[54] *Id.* at § 1050.115–7(d)(6).

[55] *Id.* at § 1050.115–7(e).

[56] 45 C.F.R. § 1050.115–8(c)(1).

tion. The notice informed the grantee that the matter was scheduled to be heard at a stated time and place, or advised the grantee of its right to request a hearing.[57]

CSA had to give the grantee at least 10 days within which to request a hearing.[58] The termination hearing had to be held within thirty days of the grantee's request, unless the grantee asked for a postponement.[59]

If the grantee requested a hearing, it had to send a copy of the request and the CSA letter setting a hearing date to all delegate agencies which would be affected financially or which were agencies identified in the CSA notice of intent to terminate (agencies whose conduct furnished a substantial basis for the proposed termination).[60] The latter type of delegate agency could participate in the proceedings "as a matter of right". Any other delegate agency could request CSA's permission to participate.[61] The results of the proceeding bound the grantee and all of its delegate agencies whether or not they participated.[62]

The grantee could waive its right to a hearing and instead could submit written information. A grantee's failure to request or to appear at a hearing could be excused for good cause.[63]

Termination hearings were required to afford the grantee a "full and fair opportunity to demonstrate that it is in compliance with all applicable laws, regulations and other requirements."[64] CSA had the burden of justifying the proposed termination; however, if the issue in the case involved the grantee's failure to act, the grantee had the burden of showing that such action was taken in a timely manner.[65]

CSA regulations contained detailed rules of procedure regarding the conduct of hearing. The time and place of the hearing was to be

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[57] *Ibid.*

[58] *Ibid.*

[59] 45 C.F.R. at § 1050.115–8(c)(2).

[60] *Id.* at § 1050.115–8(c)(3) and (4).

[61] *Id.* at § 1050.115–8(c)(5).

[62] *Id.* at § 1050.115–8(c)(6).

[63] *Id.* at § 1050.115–8(c)(7).

[64] *Id.* at § 1050.115–8(c)(2).

[65] *Ibid.*

decided by the responsible CSA official.[66] The presiding officer had to be either:

(1) the responsible CSA official, or

(2) at the discretion of the responsible CSA official, an independent hearing examiner designated 'promptly' in accordance with 5 U.S.C. 3105."

The functions of the presiding officer were summarized in the regulations as follows:

> "The presiding officer shall conduct a full and fair hearing, avoid delay, maintain order, and make a sufficient record for a full and true disclosure of the facts and issues. To accomplish these ends, the presiding officer shall have all powers authorized by law, and he may make all procedural and evidentiary rulings necessary for the conduct of the hearing. The hearing shall be open to the public unless the presiding officer for good cause shown shall otherwise determine."[67]

The presiding officer could request the assistance of an attorney designated by the General Counsel of CSA or the appropriate Regional Counsel. However, the attorney could not have had any prior involvement in the matter.[68]

In addition to the functions listed above, the presiding officer could determine which parties, in addition to CSA, the grantee, and delegate agencies could appear. Any party which had a right or permission to participate in the hearing had to notify CSA of its intention to do so at least three days before the hearing.[69] *Ex parte* ("off the record") communications with the presiding officer were prohibited.[70]

Unlike most other agencies which have appeals procedures, CSA regulations provide that the parties were *entitled* to present oral as well as documentary evidence, including the conduct of direct examination and cross-examination.[71] However, the presiding officer

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[66] 45 C.F.R. at § 1050.115–8(d).

[67] *Id.* at § 1050.115–8(e)(2)(i).

[68] *Id.* at § 1050.115–8(e)(2)(ii).

[69] *Id.* at § 1050.115–8(c)(4) and (7).

[70] *Id.* at § 1050.115–8(e)(2)(ii).

[71] *Id.* at § 1050.115–8(e)(3).

could attempt to settle the case by holding a prehearing conference.[72]

Detailed rules concerning notices, filing, service, evidence, depositions and official notice were specified in the regulations.[73]

Once a hearing was concluded, each party was given a "reasonable opportunity" to submit proposed findings of fact and conclusions of law. The presiding officer had to render a decision which set forth findings of fact and conclusions, including a statement of whether each proposed finding of fact and conclusion submitted by the parties had been accepted or rejected. The decision also had to specify the requirement(s), if any, with which the grantee had failed to comply.[74]

If the hearing was held by an independent hearing examiner, the decision was "initial" and had to be sent to all parties. The parties were given 20 additional days to take exceptions to the initial decision. Within twenty days after exceptions were filed, the responsible CSA official had to issue a final decision. Such decision could increase, modify, approve, vacate, remit or mitigate any sanction in the initial decision or could remand the matter to the presiding officer for further proceedings.[75]

If the hearing was waived, the responsible CSA official rendered a final decision.[76] If a hearing was conducted by the responsible CSA official, the decision was final unless the grantee requested the Director of CSA to review it within 15 days. The regulations required the Director to give "great weight" to the decision of the responsible CSA official but permitted the Director to hold a hearing or to allow the filing of briefs and arguments. The Director could approve, modify, vacate or mitigate any sanction imposed by the responsible CSA official or could remand the matter for further proceedings. Pending the Director's decision, the grant remained suspended unless the responsible CSA official or the Director (or

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[72] *Id.* at § 1050.115–8(e)(9).

[73] *Id.* at § 1050.115–8(e)(5)-(8), and (10)-(12).

[74] *Id.* at § 1050.115–8(f)(1).

[75] *Id.* at § 1050.115–8(f)(3).

[76] *Id.* at § 1050.115–8(f)(4).

his designee) determined otherwise. The Director was required to make "reasonable efforts" to complete review within 30 days.[77]

As with suspension proceedings, attorney's fees and travel costs associated with termination proceedings could be paid for, within certain limits, with grant funds.[78]

Finally, the CSA regulations provided that the responsible official or presiding officer could alter or eliminate any stage of the termination proceedings with the written consent of the grantee and delegate agencies which were entitled to participate in the proceedings as a matter of right.

[*E*]—*Audit Appeals.* CSA regulations contained abbreviated procedures for handling appeals of audit disallowances.[79] A grantee had to appeal a CSA audit determination within thirty days or that determination became final. The appeal had to be in writing and had to contain a clear statement of the issue(s) to be considered, along with any supporting facts or arguments.

Appeals from CSA Headquarters' determinations were reviewed by the CSA Deputy Director. Appeals from regional office determinations were reviewed by the appropriate Regional Director, or his designee.

The reviewing official considered the appeal submitted by the grantee, as well as any comments submitted by cognizant CSA offices (a copy of which had to be sent simultaneously to the grantee). The reviewing official could offer the grantee an informal hearing at which CSA officials also could be heard. The reviewing official's decision on the appeal was final.

[*iii*]—*Summary.* With the sole exception of termination actions, adverse determinations could be appealed only "informally" and only to the "responsible CSA official." It is only in the regulations providing for appeals of terminations that one found provisions for the conduct of formal hearings (including the rights to

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[77] *Id.* at § 1050.115–8(f)(5).

[78] *Id.* at § 1050.115–8(g).

[79] 45 C.F.R. § 1068.42–8(d).

The Office of Community Services at HHS, charged with the responsibility of closing out the grants awarded by CSA, has established procedures for handling appeals of audit disallowances which are slightly more detailed than those used by CSA.

make oral as well as written presentations) by a "presiding officer" (the responsible CSA official *or* an independent hearing examiner). Only the termination procedures provided for General Counsel assistance and expressly prohibited *ex parte* communications with the presiding officer. Only the termination regulations: (1) required a "full and fair" hearing which, in most cases, must be open to the public; (2) assigned burdens of proof; (3) specified detailed rules of evidence; and (4) provided for "initial" and "final" decisions.

[3]—Specific Issues Involved in CSA Appeals

[a]—Introduction. CSA does not have a "system" for keeping track of, or even retaining, decisions rendered in grant appeals. Requests for such decisions were sent to the CSA Regional Counsels in all ten Regions, as well as to the General Counsel in CSA Headquarters, Washington, D.C. Some Regional Counsels responded by saying that they could not retrieve such decisions due to inadequate staff and the burden which searching every grant file would impose.[80] In a few instances, the Regional Counsels indicated that there were no written decisions because the appeals were resolved in favor of the grantees at the informal show cause meetings.[81] Other Regional Counsels indicated that, although there were a few appeals each year, the decisions were contained only in letters to the grantees, and could not be retrieved.[82] In still other instances, the Regional Counsels indicated that no appeals had been brought.[83] The General Counsel's Office in Washington, D.C.

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[80] See, e.g., Letter from James E. Gonzales, II, Regional Counsel, Region IX (July 11, 1980).

[81] Letter from William L. Foreman, Jr., Regional Counsel, Region V (July 23, 1980); Letter from Julian Garza, Jr., Regional Counsel, Region VIII (September 9, 1980).

[82] Interview with Frank Moffitt, Regional Counsel, Region V (June 30, 1980); Interview with Floye Sumida, Regional Counsel, Region X (July 3, 1980); Letter from James E. Gonzales, II, N. 80 *supra*; Interview with Marvin Clark, Regional Counsel, Region IV (July 3, 1980).

[83] Letter from Alexander W. Porter, Regional Attorney, Region III (February 6, 1981); Interview with William L. Foreman, Regional Counsel, Region V (June 22, 1980); Interview with Vaughn Gearan, Regional Counsel, Region II (June, 1980).

would not get involved in appeals unless and until they wind up in court, which they never have.[84]

[b]—Denials of Refunding Appeals. Only two Regional Counsels provided records of grant appeals. These records include: two Region VII denials of refunding and three Region IX denials of refunding.

Both of the Region VII appeals were resolved in favor of CSA; denials of refunding resulted. The appeals involved performance deficiencies by Economic Opportunity Corporation of Greater St. Joseph, Inc. and the Human Resources Corporation of Kansas City, Missouri. The dollar amounts at stake were $152,000 and $1,269,000, respectively. The Region VII Counsel presided at the show cause hearing for Economic Opportunity Corporation and found that the grantee failed to show why refunding should not be denied. The Regional Director upheld this decision. The Regional Director presided at Human Resources Corporation's show cause meeting and similarly ruled against the grantee. Both appeals were resolved within four months.

All three of the Region IX appeals also resulted in the denial of refunding. The appeals were brought by CAAs located in Tucson, Arizona (Pima County Board of Supervisors), Rio Hondo, California (Rio Hondo Area Action Council), and Los Angeles, California (Greater Los Angeles Community Action Agency). The dollar amounts involved were $519,000, $1,207,850 and $10 million, respectively. The grounds for denial of refunding were: (1) cost overruns and poor fiscal management (Pima County); (2) illegally constituted Board (Rio Hondo); and (3) fraud and management deficiencies (Los Angeles). Informal hearings were held in each case by the Regional Director, and in two of the appeals, the grantees were represented by attorneys. The appeals were resolved within one to seven months.

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[84] Interview with Alan Dockterman, Assistant General Counsel for Litigation, CSA, January 21, 1981 (Washington, D.C.).

§ 54.05 Department of Education

[1]—Introduction

[a]—An Overview. The Department of Education (ED)[1] was established by the Department of Education Organization Act of 1979,[2] and became operational on May 4, 1980.[3] In an effort to consolidate all Federal education programs under one cabinet-level department, the Act transferred to ED almost all of the education programs previously administered by other Federal agencies. For example, the Act transferred to ED all programs and responsibilities of the Education Division of the former Department of Health, Education, and Welfare (now the Department of Health and Human Services). Also transferred from HHS were all Rehabilitation Services Administration education grant programs except for the developmental disabilities program. Other Federal education programs which were transferred include: science education programs previously administered by the National Science Foundation, the Law Enforcement Education Program and Law Enforcement Intern Programs previously administered by the Department of Justice, and migrant education programs previously administered by the Department of Labor.

The Omnibus Education Reconciliation Act of 1981[4] consolidated many of the grant programs administered by the Department. Under that Act and remaining categorical grant legislation, ED currently awards grants for general elementary and secondary school support, higher education, programs for handicapped and disadvantaged children, Indian and migrant education, vocational rehabilitation, adult education, research and development, education statistics, library services and construction and bilingual education programs.

As the foregoing list suggests, the grant programs administered by ED are quite diverse. The types of grants awarded and catego-

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[1] The abbreviation "ED" is used here in order to avoid confusion with the abbreviation commonly used in referring to the Department of Energy (DOE).

[2] Pub. L. 96–88.

[3] Executive Order 12212 of May 2, 1980, 45 Fed. Reg. 29557, implemented the Act with respect to the creation and initial operations of the Department.

[4] Title V of the Omnibus Budget Reconciliation Act of 1981, Pub L. 97–35.

ries of eligible recipients for ED programs also are varied. Thus, for example, ED awards formula grants, entitlement grants, "incentive" grants,[5] interest subsidy grants, and discretionary project grants. Eligible ED grant recipients include States[6] and units of local government, Indian tribes, educational institutions, non-profit organizations, and even profitmaking organizations.

[b]—The Education Appeals Board: An Historical Perspective. In 1972, the Commissioner of the Office of Education (OE) established an Audit Hearing Board to review appeals of adverse audit determinations in programs administered under Title I of the Elementary and Secondary Education Act of 1965, as amended (Title I, ESEA).[7] This Board was known as the Title I Audit Hearing Board.

Subsequently, it became clear that recipients of OE grants authorized under other legislation also needed an administrative appeals forum.[8] Responding to this need, Congress enacted legislation in 1978 which directed the Commissioner of OE to establish a general Education Appeal Board.[9] Under the Act, the Education Appeal Board's jurisdiction was essentially two-fold. First, the Board was authorized to hear and to determine audit appeals arising from ED grant programs designated in the statute.[10] Second, the Board was authorized to conduct withholding and termination hearings, cease and desist hearings, and other proceedings as designated by the Commissioner. In addition to these jurisdictional provisions, the

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[5] "Incentive" grants are grants with variable funding levels. The more a State contributes to the program, the higher its funding level will be.

[6] In order to participate in several of the programs, an application must be made by the "appropriate" State agency; e.g., education agency, vocational rehabilitation agency, library administrative agency, vocational educational agency.

[7] Title I of ESEA authorized formula grants to State and local education agencies to enable them to meet the special education needs of educationally disadvantaged children in low-income areas. Special provisions in the title addressed the special needs of children of Indian and migratory workers. Similar programs now are authorized under the Omnibus Education Reconciliation Act of 1981. See N. 4 *supra* and accompanying text.

[8] See preamble to interim final Education Appeal Board regulations, 45 Fed. Reg. 22634 (April 3, 1980).

[9] General Education Provisions Act of 1978, 20 U.S.C. § 1234 *et seq.*

[10] For further discussion of these designated grant programs, see § 54.05[2][b][i][B] *infra.*

Act established certain mandatory procedures for Board review, and deadlines for action.[11]

On May 25, 1979, OE issued interim final regulations to implement the 1978 legislation.[12] Those regulations (which were effective as of June 29, 1979) designated the existing Title I Audit Hearing Board as the general Education Appeal Board, and set forth interim rules for the conduct of proceedings. In addition to the types of appeals made subject to the Board's jurisdiction by statute, the rules authorized the Board to assume jurisdiction over any cases previously accepted for review by the OE Title I Audit Hearing Board. Those cases were listed in a notice of jurisdiction published in the Federal Register.[13]

On April 3, 1980, OE promulgated final regulations for the Education Appeal Board. These rules specified certain types of cases to be heard by the Board, and established rules for the conduct of Board proceedings.[14] As orginally drafted, the rules were to take effect 45 days after transmission to Congress. However, on May 15, 1980, Congress disapproved the regulations, finding them inconsistent with the statute.[15]

Specifically, Congress took issue with a provision in the regulations which authorized the Board Chairman to extend a statutory thirty-day time limit for the submission of an appeal.[16] According to the House committee, one of the main reasons for creating the Board was to expedite consideration of appeals; therefore, the legislation set strict timetables for each step in the appeals process. As described in the committee report, the possibility of a regulatory

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[11] For further disscussion of these statutory provisions, see text at N. 16 and § 54.05[2][b][i][A] *infra.*

[12] 44 Fed. Reg. 30528.

[13] 44 Fed. Reg. 43807 (July 26, 1979).

[14] 45 Fed. Reg. 22634.

[15] See Resolution of Disapproval, House Rep. 96–939, 96th Cong., 2d Sess., to accompany H. Con. Res. 318 (May 12, 1980) (Committee on Education and Labor). Such action was consistent with Section 431 of the General Education Provisions Act of 1978, which authorized Congress to disapprove any final regulation for education programs within forty-five days of publication and transmission if Congress found it to be inconsistent with the Act.

[16] *Id.* at 3.

extension would invite "circumvention of the legislative process and abuse of regulatory power." [17]

The Secretary of ED initially maintained that Congress' objection was unconstitutional, and directed the Board to behave as though the regulations were final. Accordingly, the Board operated in accordance with the April 3, 1980, rules until July 17, 1981. At that time, new rules, which were issued on May 18, 1981.[18] took effect. These rules, among other things, contained no provision authorizing the Board Chairman to waive the thirty-day filing deadline.[19]

[2]—Education Appeal Board: Structure, Jurisdiction, Rules of Procedure

[a]—Structure and Staffing. The General Education Provisions Act of 1978 provided that the Education Appeal Board would be composed of fifteen to thirty members, of whom no more than one-third could be ED employees.[20] One of the members was to be designated by the Secretary to serve as chairperson.[21]

Currently, the Education Appeal Board is composed of approximately twenty-nine part-time members, four of whom are Federal employees—from ED or elsewhere. Most of the other Board members are local (Washington, D.C.) attorneys and law professors. Board members who are not ED employees are paid an hourly rate for services rendered to the Board.[22] The Board currently is placed under the Deputy Undersecretary for Intergovernmental and Interagency Affairs.[23]

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[17] *Ibid.*

[18] 46 Fed. Reg. 27303.

[19] See preamble at 46 Fed. Reg. 27304.

Dr. David Pollen, Chairman of the Board, has explained that the absence of the waiver provision was caused by the congressional veto of the proposed regulations. According to Dr. Pollen, notwithstanding any earlier debate regarding the constitutionality of the congressional action, ED accepted the veto as a legislative prohibition of the waiver provision. Interview, April 29, 1982 (Washington, D.C.).

[20] 20 U.S.C. § 1234(c).

[21] *Ibid.*

[22] For a discussion of apparent advantages and disadvantages of independent, part-time Board members, see text at Ns. 91–92 *infra.*

[23] Under prior Administrations, the Board was placed bureaucratically under the Assistant Secretary for Management, who also was responsible for the admin-

For purposes of conducting hearings, the Chairman is authorized to appoint panels of three members, or to designate the entire Board to hear a case.[24] The majority of members on a panel may not be Federal employees.[25] Moreover, the membership of a panel may not include any individual who is a party to, or has any responsibility for, a matter assigned to the panel.[26]

With respect to each appeal, the Board Chairman selects a panel chairman, and the panel chairman directs the panel's work on the case. In all cases, the panel chairman is not a Federal employee. Unlike the HHS Board, panel members—not staff—undertake much of the required legal research and case analysis. The Board has one staff attorney who provides case analysis upon the specific request of Board members.

The staff of the Board includes, in its entirety, the Chairman (a full-time employee of the Federal Government), a staff attorney, and an office assistant.

[b]—Jurisdiction

[*i*]—*Types of Determinations and Programs Subject to Board's Jurisdiction.* The parameters of the Board's jurisdiction have changed several times since the statutory authorization for the Board in 1978. These changes are due largely to the fact that, as shown below, the General Education Provisions Act of 1978 authorized the Secretary to designate programs and types of determinations subject to the Board's jurisdiction. Furthermore, the 1980 transfer of administrative responsibility for education programs from the Office of Education, a component of HEW which had a Departmental Grant Appeals Board, to ED, a new Federal agency, resulted in the enlargement of the Board's jurisdiction. In any event, the current scope of the Board's jurisdiction is established by the following statutory and regulatory provisions.

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istration of ED grants and contracts. This placement raised some concerns about the appearance of impartiality.

[24] 20 U.S.C. § 1234(d).

[25] *Ibid.*

[26] *Ibid.*

[*A*]—*Statute.* The General Education Provisions Act of 1978 (GEPA) established Board jurisdiction for appeals of final audit determinations issued on or after March 1, 1979, arising from: (1) designated State-administered programs;[27] (2) programs conducted under the Bilingual Education Act; and (3) programs conducted under the Emergency School Aid Act.[28] In addition, the Act authorized the Board to conduct withholding hearings, pursuant to section 453 of GEPA, cease and desist hearings pursuant to section 454 of GEPA, and "other proceedings designated by the Commissioner." [29]

[*B*]—*Regulations*

[*1*]—*Historical Survey.* Since 1978, ED and its predecessor, OE/HEW, have issued regulations which have further defined the Board's jurisdiction. For example, interim final regulations (which took effect on June 29, 1979) stated that the Board's statutory authority to conduct "withholding" hearings included the authority to conduct termination hearings. When commentators questioned this interpretaion of "withholding hearings," ED specifically designated termination proceedings as being within the Board's jurisdiction.[30] In addition, the April 3, 1980, final regulations authorized the Board to hear appeals from State agencies which are notified of ED's intent to disapprove their Title I, ESEA applications, classifying such appeals as another type of "withholding".[31]

Relying upon prior Title I, ESEA audit appeal authority, the April 3, 1980, regulations also authorized the Board to hear appeals from final Title I, ESEA audit determinations issued prior to March 1, 1979. Finally, the regulations provided that the Board, under limited circumstances, may assume jurisdiction over appeals from final audit determinations in State administered programs other than Title I, ESEA, for final audit determinations issued prior to March 1, 1979. In deciding whether to review such appeals, the Board will consider such factors as: (1) the dollar

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[27] The specific programs are listed in Appendix A to the regulations which currently are set forth at 34 C.F.R. Part 78 (formerly 45 C.F.R. Part 100d). See 45 Fed. Reg. 77368 (redesignation).

[28] 20 U.S.C. § 1234 *et seq.*

[29] 20 U.S.C. § 1234(a)(4).

[30] 45 Fed. Reg. 22634 (April 3, 1980).

[31] 45 C.F.R. § 100d.2(b) (45 Fed. Reg. 22634).

amount involved; (2) the precedental value of the case; and (3) the workload of the Board.[32]

Specifically excluded from the ED Board's jurisdiction in the April 30, 1980, regulations were certain matters which remained cognizable by the HHS Grant Appeals Board. These matters included: cost disallowances in OE discretionary grant programs other than discretionary programs conducted under the Bilingual Education Act or the Emergency School Aid Act; and certain disputes involving indirect cost rates or fringebenefits.[33] The preamble to the regulations stated that, with the creation of ED, some of these proceedings might be phased into the Education Appeal Board's jurisdiction under the Commissioner's (Secretary's) statutory authority to designate additional programs as being within the Board's jurisdiction.

This phase-in occurred on January 5, 1981, when the Secretary of ED amended the Board's regulations to expand the Board's jurisdiction. The amended regulations (which became effective on March 30, 1981) authorized the Board to review appeals from final audit determinations in discretionary grant programs administered by ED. In addition, the amended regulations authorized the Board to hear appeals from any ED grant determination which: (1) voided a grant; (2) disapproved a recipient's written request for permission to incur an expenditure; or (3) disapproved a cost allocation plan negotiated with a State or unit of local government, indirect cost rate, computer, fringe benefit, or other special rate negotiated with a college, university, State or local government, hospital, or other nonprofit institution.[34]

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[32] 45 Fed. Reg. 22634.

[33] 45 Fed. Reg. 22634–22635.

Also excluded from ED Board jurisdiction were bypass actions under Titles I and IV, ESEA, and limitation suspension-termination hearings involving student financial assistance programs under the Higher Education Act. These actions were excluded because they were subject to special statutorily-mandated procedures. 45 C.F.R. § 100d.3.

[34] 34 C.F.R. § 78.2(a)(4).

In order to avoid the possibility of conflicting decisions, the preamble to these amendments stated that the Board would not have jurisdiction to review cost allocation and special rate issues which had been appealed to another agency's review board under a contract with ED. These matters could be appealed to the General Services Contract Appeals Board. 46 Fed. Reg. 882.

To resolve appeals which were in limbo as a result of the reorganization and creation of ED in May 1980, Education Appeals Board jurisdiction was designated specifically over nineteen ED cases which previously had been appealed and remained pending before the HEW Departmental Grant Appeals Board and its successor, the HHS Departmental Grant Appeals Board. Finally, the amendments provided that the Board would have jurisdiction to conduct cease and desist proceedings involving any recipient of grant funds authorized under an applicable program.[35]

On May 18, 1981, ED issued regulations which, as of July 17, 1981, superseded the earlier regulations. With respect to the Board's jurisdiction, these regulations eliminate the Board's authority to conduct hearings with respect to student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended. In addition, the regulations clarify the fact that the Board has jurisdiction to review determinations not only in discretionary grant programs, but also in any program subject to the Board's jurisdiction, including the Indian Education Act.[36]

Finally, in regulations issued on July 29, 1982, Board jurisdiction also was granted to hear cases involving final audit determinations and withholdings of grant funds which might arise under two sections of the Education Consolidation and Improvement Act of 1981. These regulations would make appealable cases arising under a broad range of ED grant programs which were made a part of block grants awarded to States and localities.[37] These regulations were scheduled to become effective as of August 12, 1982. However, at the time of the writing of this report, it was not clear whether Congress would exercise its prerogative to veto certain provisions of the regulations.[38]

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[35] The 1978 legislation granted jurisdiction over cease and desist orders only in cases involving State or local educational agencies.

[36] 20 U.S.C. 241aa *et seq.*

[37] See 47 Fed Reg. 32857, 32867–8 (July 29, 1982).

[38] See N. 15, *supra.*

[*II*]—*Current Summary.* Summarized briefly, the Board currently has jurisdiction over appeals from the following types of determinations arising under any applicable program.[39]

(1) final audit determinations;

(2) withholding or termination;

(3) cease and desist proceedings;

(4) a determination that a grant is void;

(5) the disapproval of a recipient's written request for permission to incur an expenditure during the term of a grant;

(6) a determination with respect to cost allocation plans negotiated with State and local units of government, and indirect cost, computer, fringe benefit, and other special rates negotiated with institutions of postsecondary education, State and local government agencies, hospitals and other non-profit institutions (except for determinations which are the subject of an appeal filed by the grantee to the General Services Contract Appeal Board or to the Armed Services Board of Contract Appeals regarding a contract with ED);

(7) a written notice of intent to disapprove a State educational agency's application for funds under Title I of the Elementary and Secondary Education Act of 1965, as amended; and

(8) Other proceedings as designated by the Secretary of ED in the Federal Register.[40]

[c]—Pending Question of Review Authority. As indicated above,[41] the ED Grant Appeal Board currently asserts jurisdiction over appeals involving grants awarded prior to the 1978 Act creating the Board. However, a recent U.S. Court of Appeals decision has cast doubt upon whether the Board has such authority.

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[39] The term "any applicable program" is defined in 34 C.F.R. § 78.3 to mean any ED program except student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended; National Direct Student Loan Program; College Work-Study Program; Pell Grant Program; Supplemental Educational Opportunity Grant Program; Guaranteed Student Loan Program; Parent Loans for Undergraduate Students Program; State Student Incentive Grant Program.

[40] 34 C.F.R. § 78.2.

[41] See § 54.05[2][b][i][A][I] *supra.*

In *State of New Jersey, et al. v. Hufstedler,*[42] the Secretary of Education was attempting to recover approximately $1.03 million from the State of New Jersey and $422,000 from the Commonwealth of Pennsylvania which the Department claimed was misspent under Title 1, ESEA. In each case, a hearing was held before the Title 1 Audit Hearing Board, the predecessor of the Education Appeal Board, with a finding made against the State. On appeal to the Third Circuit, the court found that ED was given no legislative authority prior to 1978 to order recoupments of grant funds from grantees. Therefore, according to the court, a recoupment of pre-1978 funds could occur, if at all, only after a court of competetent jurisdiction had determined that ED had a common law right to take such action. The Educational Appeal Board did not have the authority to make such determination.

ED has sought to appeal this ruling to the United States Supreme Court. The Supreme Court has not yet indicated whether it will grant review of the case. However, even if review is not granted, the case's precedential value may be in doubt. In October, 1981, just two days after the Third Circuit's *New Jersey* decision was handed down, the Fourth Circuit, in a similar case, held that ED did indeed have the authority to recoup misspent grant funds, whether or not the funds were awarded prior to the 1978 legislation.[43] Moreover, the Fourth Circuit Court of Appeals did not question the Education Appeal Board's authority to hear appeals of such cases.

Thus, there may be no clear or final resolution of the Board's authority *vis-a-vis* pre-1978 cases unless and until the Supreme Court reviews it.

[d]—Use of the Board's Jurisdiction. Between 1972 and March 1979, all but three of the appeals reviewed by the OE Title I Audit Hearing Board involved final audit determinations arising from Title I, ESEA programs.[44] In those years, the Board's juris-

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[42] 662 F.2d 208 (3d Cir. 1981), *pet. for cert. filed, sub nom,* Bell v. State of New Jersey, *et al.,* No. 81–2125 (May 19, 1982).

[43] State of West Virginia v. Secretary of Education, No. 80–1704 (4th Cir. Oct. 15, 1981) (unpublished decision), *motion to file late pet. for cert. denied,* 50 U.S.L.W. 3858 (April 15, 1982).

[44] Two of the three non-Title I, ESEA, appeals involved Library Services and Construction Grants. One was dismissed and closed without written decision,

diction was limited expressly to the review of this type of determination. Accordingly, appeals arising from other education programs or involving determinations other than audit disallowances were handled by HEW's Departmental Grant Appeals Board.[45]

Between March 1979 and December 31, 1980, there occurred no sharp upswing in non-Title I, ESEA appeals. Indeed, during that period, there were only four non-Title I appeals filed: two appeals involved audit determinations under the Vocational Education Program[46] and two involved audit determinations under Emergency School Aid Act grants.[47] All four of these appeals remained pending as of December 31, 1980. There has been no appeal in which the Board has examined its jurisdiction with respect to programs not specifically identified in the regulations.

All but one of the appeals to the Education Appeal Board as of December 31, 1980, involved audit determinations. Thus, the Board's experience in non-audit matters is limited. The one exception is *California State Department of Education and Richmond Unified School District*,[48] which involved a challenge to a cease and desist order issued under the Title I, ESEA program. Since the 1978 legislation specifically authorized the Board to conduct cease and desist hearings, there was no question of the Board's jurisdiction.

Finally, because most of the appeals brought before the Board involve Title I, ESEA programs, the type of recipients which have brought appeals to the Education Appeal Board has been fairly constant. Units of local government have appealed audit determi-

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having been resolved in the grantee's favor, and the other remained pending as of December 31, 1980. The Board never discussed its jurisdiction to handle these appeals. Ohio, 5-(41)-78 (closed, Nov. 20, 1980); Florida, 3-(49)-79 (pending). One other case involving an audit determination under the Education of Handicapped Act also remained pending as of December 31, 1980. Nebraska, 4-(40)-78.

[45] See § 54.08.

[46] Maryland, 10-(65)-80 and Washington, 3-(58)-80.

[47] Brooklyn, New York, 8-(63)-80 and City of Detroit, Michigan, 5-(60)-80.

[48] 4-(59)-80 (August 30, 1980).

nations in a few instances; the rest of the appeals have been brought by State agencies.[49]

[*i*]—*Authority to Rule on Validity of Agency Regulations.* The Board regulations specifically provide that: "[t]he Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity."[50] This issue was addressed in one Board decision: *California State Department of Education and Richmond Unified School District.*[51] In that case, the recipient challenged a cease and desist order which charged that the recipient had violated an interpretative rule by not allowing spouses to serve on the same advisory board. The recipient admitted that it had violated the rule, but challenged the rule's validity in light of a Federal district court order which approved the recipient's contrary practice. The Board upheld ED's action, stating that it could not judge the validity of an interpretative rule. As the Board stated:

> "The Panel concludes that under Section 100d.61(b) of the Board's regulations, which permits the Panel to interpret applicable statutes and regulations but not to waive them or rule on their validity, the Panel has no choice but to enforce the Interpretative Rule. . . . Section 431(a)(l) of the General Education Provisions Act defines "regulation" as "any rules, regulations, guidelines, interpretations, . . . prescribed by the Commissioner [now the Secretary]. The Interpretative Rule clearly falls within this definition. Since the Panel is precluded under its own rules from waiving the Interpretative Rule, the Panel must enforce the Rule . . .
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> "The Panel notes that it does not intend its enforcement of the Interpretative Rule to be construed as an affirmation or a denial of the Interpretative Rule in either a substantive or procedural sense.

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[49] It should be noted, however, that on January 5, 1981, the Board accepted jurisdiction over nineteen appeals which previously were pending before the HHS (formerly HEW) Departmental Grant Appeals Board. Most of these appeals were brought by universities and Indian councils. 46 Fed. Reg. 882.

[50] 34 C.F.R. § 78.61(b) (formerly, 45 C.F.R. § 100d.61(d)).

[51] 4-(59)-80 (August 30, 1980).

* * *

"Accordingly, since the Panel may not waive or rule on the validity of the Interpretative Rule, the Rule is applicable to the Richmond LEA [Local Educational Agency].[52]

Because the Richmond LEA had admitted that it was out of compliance with the ED rule, the Board ordered it to cease and desist from not allowing spouses to serve on the same advisory board. In addition, the Board found that the State had failed to fulfill its administrative responsibilities under Title I, ESEA, insofar as it had not enforced the ED rule. The Board, therefore, ordered the State to take appropriate steps to ensure compliance by the LEA.

[e]—Rules of Procedure. The rules of procedure governing the Education Appeal Board currently are set forth[53] and organized into subparts covering the different types of determinations subject to Board review.

[i]—General Rules of Practice and Procedure

[A]—Conduct of Proceedings. The regulations provide that the Administrative Procedure Act applies with respect to the admissibility of testimony, notice of issues to be considered, the right to counsel, intervention of third parties and transcripts of proceedings.[54] In addition, the regulations contain fairly technical rules of procedure relating to the filing of documents and motions, preparation of transcripts, and rules of evidence. (The Federal Rules of Evidence do not apply.) There is no discovery as contemplated by the Federal Rules of Civil Procedure, and the Panel is not authorized to issue subpoenas; however, the parties are encouraged to exchange information and the Panel may ask the parties to examine witnesses.[55]

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[52] (Footnotes omitted.) Slip op. at page 5.

[53] 34 C.F.R. Part 78.

The Board procedures discussed in this section are not substantially changed by the regulations issued on July 29, 1982. As indicated above, see text at N. 38 *supra*, those regulations govern final audit determinations for block grants authorized under the Education Consolidation and Improvement Act of 1981. 47 Fed. Reg. 32857, 32885.

[54] 34 C.F.R. § 78.42.

[55] *Id.* at §§ 78.49 and 78.50.

The regulations prohibit off-the-record communication by any party to an appeal with the Panel or Board chairman concerning matters under review, "except minor procedural matters", unless all parties are given timely notice and an opportunity to respond.[56]

Decisions of the Board Panel assigned to conduct the appeals are reached by majority vote. The regulations provide that the parties may not seek Secretarial review of any dispute until the Panel has reached a decision.[57]

The authority and responsibilities of Board Panels are described in section 78.61 of the regulations. Generally, each Panel is authorized to "take all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order . . ." Each Panel's specific responsibilities may be summarized as follows:

(1) The Panel may hold conferences to clarify, simplify or define the issues, or to consider other matters which might aid in appeal resolution.

(2) The Panel may require the parties to submit written evidence, testimony, statements of position, and to exchange relevant information. The Panel also may examine witnesses and may set reasonable time limits for written submissions. A panel may dismiss an appeal if deadlines are not met or if a party otherwise causes delay in proceedings.

(3) The Panel rules on the admissibility of evidence and disposes of motions.

(4) The Panel may establish reasonable rules for public attendance and media coverage of appeal proceedings.

The regulations also provide that the Board chairperson may schedule a prehearing conference of the parties and Panel members. A Panel member or a party may request such a conference except in the case of a show cause proceeding. Upon such request, the Panel chairperson must decide whether a conference is necessary. At any such conference, the Panel and parties may seek to clarify and narrow the issues, to determine the type of hearing needed, to establish timetables, and to explore possibilities of settlement.

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[56] *Id.* at § 78.47.

[57] *Id.* at §§ 78.52 and 78.53.

Thereafter, the Panel may issue a written statement summarizing the actions taken at the hearing.[58]

Normally, the parties must present their positions through briefs and written documentation; however, oral arguments or evidentiary hearings may be requested. The Panel assigned to an appeal determines whether an oral argument or evidentiary hearing is needed, and if so, notifies the parties of the time and place for such hearing.[59] Hearings typically are conducted by all Panel members, but may be conducted by fewer members if necessary. However, all Panel members must participate in the Panel's decision.[60]

[*B*]—*Decisions and Orders.* The decision of a Board Panel on any appeal must be submitted by the Board chairperson to the Secretary and must be sent to the parties.[61] The parties must be given fifteen days within which to file comments and recommendations concerning the Panel decision with the Board chairperson.[62] The Board chairperson must send copies of any comments and recommendations to all other parties. Any response to those comments and recommendations must be filed within seven days.[63] The Board chairperson must submit all comments, recommendations and responses to the Secretary.[64]

Throughout this process, the chairperson acts in the role of intermediary, facilitating communication between the parties and the Board and between the Board and the Secretary. The chairperson is not authorized to alter the Panel's decision.

The Panel's decision automatically becomes the Secretary's final decision sixty days after the recipient receives the decision "unless the Secretary, for good cause shown, modifies or sets aside the Panel's decision."[65] If a decision is modified or set aside, the Secretary must issue a decision stating reasons for such action.[66] That deci-

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[58] 34 C.F.R. § 78.62.

[59] *Id.* at §§ 78.71 and 78.72.

[60] *Id.* at § 78.73.

[61] *Id.* at § 78.81.

[62] *Id.* at § 78.82(a).

[63] *Id.* at § 78.82(b).

[64] *Id.* at § 78.82(c).

[65] *Id.* at § 78.83(a).

[66] *Id.* at § 78.83(b).

sion becomes final sixty days after issuance.[67] In any event, the Board chairperson must send the Panel and parties a copy of the Secretary's final decision or a notice that the Panel's decision is final.[68] As of December 31, 1980, the Secretary had never modified or reversed a Board decision.[69]

If the Secretary's final decision sustains an audit determination, notice of intent to withhold or terminate funds or other determination, ED must take "immediate steps" to collect the disallowance, withhold or terminate funds or other steps necessary to enforce the Secretary's decision.[70]

The Board chairperson must maintain Board files and make decisions available to the public on request.[71]

[*ii*]—*Specific Types of Proceedings*

[*A*]—*Final Audit Determinations.* In order to appeal, a recipient must file a written application for review with the Board Chairperson within thirty days of receipt of notice of final audit determination. A copy of the notice of final audit determination and a statement of facts and issues in dispute and the appellant's position with respect to those issues must accompany the application.[72]

Upon the filing of an application for review, the Board must review the notice of the final audit determination to ensure that it properly lists the disallowances, indicates the reasons underlying the disallowances (in sufficient detail to allow the recipient to respond), and advises the recipient of its appeal rights.[73] If the notice is inadequate, it is returned for proper revision to the appropriate

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[67] *Ibid.*

[68] 34 C.F.R. at § 78.83(c).

[69] Subsequent to December 31, 1980, the Secretary modified a Board decision by calling for a different method of calculating amounts owed to the Department as a result of audit disallowances. This action resulted in the grantee owing less to the Department than the amount previously determined by the Board. Kentucky, 1-(31)-(77), May 18, 1982, appeal pending. Pollen interview, *supra* N. 19.

[70] *Id.* at § 78.84.

[71] *Id.* § 78.46.

[72] 34 C.F.R. § 78.13.

[73] See 34 C.F.R. § 78.11(b).

ED official. After the determination is revised, the recipient may resubmit its appeal.[74]

If an application for review is sufficient, the Board Chairperson must issue a notice of acceptance to the appellant and the ED official who issued the decision, and must publish the notice in the Federal Register. The Chairperson also must refer the appeal to a Board Panel, arrange for the scheduling of initial Panel proceedings, and transmit to the Panel and parties an initial hearing record. Such record should include the final audit determination, the application for review, and all other relevant documents (such as audit reports).[75]

If an application for review is inadequate, it is returned to the appellant, who has twenty days thereafter to file an acceptable application. If a revised application is found to be inadequate, the underlying agency decision becomes final.[76]

The appellant has the burden of proving the allowability of disputed expenditures at issue.[77]

[*B*]—*Withholding, Termination, Voiding, and Other Cost Determinations.* The procedure for filing an appeal — and the acceptance or rejection of an application for appeal — with respect to withholding, termination, voiding, disapproval of request to incur expenditure, cost allocation plans or other special rates is currently the same as the procedure for appealing audit determinations. However, the required contents of the agency's written notice of such determinations are slightly different. With respect to these determinations, the responsible ED official must issue a notice of intent to take a particular remedial action. This notice must state the basis for the initial finding of noncompliance or the reasons for the adverse agency decision, the legal requirement(s) which allegedly have been violated, and the procedures which the recipient must follow in order to appeal the decision.[78]

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[74] 34 C.F.R. § 78.12.

[75] 34 C.F.R. § 78.14.

[76] 34 C.F.R. § 78.15.

[77] 34 C.F.R. § 78.16.

[78] Regulations issued pursuant to the Education Consolidation and Improvement Act change the procedures which govern the withholding of grant funds for those programs covered by the 1981 Act. Rather than using the current rules of

In the case of suspension pending the withholding or termination of a grant, the agency's notice of intent must indicate the reasons for suspension, and advise the recipient that suspension will take effect within 10 days unless the recipient requests an opportunity to show cause why payments should not be suspended.[79] If the recipient makes such request, the ED official seeking suspension must notify the recipient of the time and place of the hearing, and must designate a person to conduct the hearing. The hearing officer does not have to be a Board member, but (s)he may have had no involvement in the underlying dispute. At the hearing, the hearing officer must consider such matters as the need to suspend, factual errors in the notice of intent to withhold or terminate, the nature of the alleged violation(s) charged in the notice, and possible hardship to the recipient.[80]

The hearing officer must issue a written decision which includes a statement of reasons for or against suspension. The decision is effective upon receipt by the recipient; it is not subject to Secretarial review. In addition, the decision must be submitted to the Board chairperson, for inclusion in the withholding or termination record.[81]

[*C*]—*Cease and Desist Orders.* ED may use a cease and desist proceeding as an alternative to a withholding or termination hearing. The authorized ED official must issue a written notice of a cease and desist complaint. The notice must state facts to support alleged findings of substantial noncompliance, cite the requirement(s) allegedly violated, and give the recipient notice of a hearing to be held at least thirty days after the recipient receives the notice.[82]

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procedure of the Appeal Board, a withholding hearing now would be governed entirely by Section 554 and 556 of the Administrative Procedure Act. 34 C.F.R. §§ 200.100(b), 298.51(b), 47 Fed. Reg. 32868, 32893-4. As a result, grant recipients subject to withholding hearings would be afforded substantially greater procedural rights before the Board than they now possess, especially in the area of discovery.

[79] 34 C.F.R. §§ 78.25 and 78.26.

[80] *Id.* at § 78.27.

[81] *Id.* at § 78.28.

[82] 34 C.F.R. § 78.31.

The recipient is entitled to appear at the hearing and show cause why a cease and desist order should not be issued. The hearing is conducted by a Panel of the Board. If the Panel decides after the hearing that the recipient has violated the requirement(s) as stated in the notice, it must make a written report (which contains findings of fact) and issue a cease and desist order.[83]

Cease and desist orders are treated slightly differently than other orders issued by the Board. If a Panel issues a cease and desist order, it becomes final 60 days after the recipient receives it. The Secretary is not authorized to review the order.[84] The recipient thereafter must take "immediate steps" to comply. If, after a "reasonable period of time", the Secretary finds that the recipient still is out of compliance, the Secretary may withhold funds without providing the recipient with further opportunity to appeal, or may refer the matter to the Attorney General for enforcement.[85]

[3]—Appeals Brought Before the Board

[a]—Nature of Appeals. With one exception,[86] all of the 65 appeals filed with the Board as of December 31, 1980, involved audit disallowances; the vast majority involved Title I, ESEA grants to States. As previously discussed, this pattern is due largely to the fact that the Education Appeal Board is the successor to the Title I, ESEA Audit Appeal Board, which between 1972 and 1978 was authorized only to review Title I audit appeals.[87]

Since most appeals to the Board (or its predecessor) involved Title I audit disallowances, it is hardly surprising that only a few issues tended to recur:

(1) improper expenditure of funds for services to ineligible schools or students;[88]

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[83] *Id.* at §§ 78.32–78.34.

[84] *Id.* at § 78.85.

[85] *Id.* at § 78.86.

[86] The exception was the appeal of a cease and desist order in California State Department of Education and Richmond Unified School Dist., 4-(59)-80 (Aug. 30, 1980), discussed N. 50 *supra.*

[87] Our study showed that 21 of the 22 written decisions reported emanated from the Title I Audit Appeals Board during 1974-1977.

[88] See e.g., New Jersey, 14-(29)-76 (May 3, 1980); Pennsylvania, 10-(25)-76

(2) violation of "general aid" prohibition;[89]

(3) supplanting of Federal funds;[90]

(4) unallowable costs;[91] and

(5) inadequate documentation of costs.[92]

[b]—Dollar Amounts Involved in Appeals. At least $10,355,716 has been involved in cases culminating in written decisions; $3,530,620 in cases closed without written decisions; and $52,837,582 in cases pending before the Board as of December 31, 1980. The markedly higher dollar figure in the "pending" category is not attributable to any sharp upswing in appeals. Rather, it may be explained by the fact that (a) of the 65 appeals to the Board filed between 1973 and 1980, 34 (more than fifty percent) remained pending as of December 31, 1980; and (b) one audit in the pending category accounts for more than $26 million.

[c]—Duration of Appeals. As shown in Tables V-VII, resolving appeals through the Education Appeal Board (or its predecessor, the Title I Audit Appeal Board) has been a time-consuming process. Two-thirds of the appeals culminating in written decisions or closed without written decisions have taken two to four years to be resolved. The vast majority of appeals filed between 1977 and 1980 remained pending as of December 31, 1980.

The chairman of the Board cites two primary reasons for these delays, neither of which relates to Board performance. First, according to the Board chairman, there has been an insufficient number of attorneys in the Department's Office of General Counsel as-

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(July 12, 1980); Wisconsin, 8-(23)-76 (Dec. 4, 1979); California, 6-(21)-76 (Aug. 21, 1978); New Mexico, 5-(20)-76 (May 25, 1979).

[89] See e.g., California, 11-(26)-76 (Nov. 10, 1978); Pennsylvania, 10-(25)-76 (July 12, 1980); Wisconsin, 8-(23)-76 (Dec. 4, 1979); California, 6-(21)-76 (Aug. 21, 1978); Idaho, 2-(17)-76 (June 27, 1979).

[90] See e.g., Wisconsin, 8-(23)-76 (Dec. 4, 1979); Idaho, 2-(17)-76 (June 27, 1979); California, 3-(14)-75 (July 6, 1977); Florida, 2-(13)-75 (Dec. 10, 1977); Nebraska, 8-(10)-74 (Dec. 23, 1975).

[91] See e.g., West Virginia, 3-(33)-77 (Aug. 30, 1980); California, 3-(14)-75 (July 6, 1977); Arkansas, 8-(11)-74 (Oct. 7, 1976); Iowa, 3-(5)-74 (Dec. 7, 1977).

[92] See e.g., California 6-(21)-76 (Aug. 21, 1978); New Mexico, 5-(20)-76 (May 25, 1979); California, 4-(15)-75 (July 2, 1977); Florida, 2-(13)-75 (Dec. 10, 1977).

signed to Board cases.[93] Therefore, the Department has been unable to prosecute cases before the Board in a timely manner. Second, according to the chairman, the Department generally had failed to move expeditiously to appoint new members to the Board. The Board chairman indicated, however, that recent progress has been made in both of these areas.

In discussing this issue, the chairman dismissed the theory that the delays were caused primarily by the Department's decision to keep Board members on a part-time basis.[94] In prior discussions, the Board chairman had indicated that this arrangement and Board composition made it difficult to coordinate the schedules and assignments of panel members. In addition, the chairman noted that non-attorneys often had to be given time in order to allow them to deal with complex legal issues sometimes involved in appeals, and that non-Government attorneys assigned to Board cases sometimes have had to postpone action on Board cases in deference to the urgent demands of their practice. While these problems may continue, the chairman emphasized that the part-time status of these members significantly enhances Board operations in at least a couple of respects. First, they provide independent perspective on case reviews, generally considered to be a very important consideration in the eyes of appellants concerned with the objectivity of a Federal review proceeding. Second, they enhance the quality of the decisionmaking process and render "first-rate" decisions which, according to the Board chairman, generally reflect the "highest standard of legal competence." Further, part-time members eliminate the need for the agency to use full-time slots and salaries that — particularly in this time of agency cutbacks — the agency could ill afford. Moreover, according to the Board chairman, there is no clear assurance that full-time Board members would eliminate the current backlog of cases. In this respect, the Board chairman noted that the experience of other agencies with full-time hearing officers does not support the view that full-time work on cases necessarily eliminates the problems of backlogs.[95]

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[93] Pollen interview, N. 19 *supra.*

[94] In addition to being of part-time status, some current Board members are, by design, from outside the Washington, D.C. metropolitan area.

[95] Pollen interview, N. 19 *supra* and subsequent telephone discussions. It must be noted, however, that the chairman's observations on this point are only par-

In any event, the delays which parties have encountered before the Board may be substantially eliminated under the regulations issued pursuant to the Education Consolidation and Improvement Act. Under those regulations, the Appeal Board would be required to issue decisions in appeals from final audit determinations or notices of intent to withhold funds within 180 days after receiving the parties' final submissions unless the Board chairman extended that deadline for good cause shown.[96]

[d]—Outcome of Appeals

[*i*]—*Cases Closed with Written Decisions.* The outcome of appeals culminating in written decisions has been, in "win-loss" terms, distinctly anti-grantee, but in monetary terms has resulted in a "draw." Eleven of the twenty-two appeals have been resolved completely in favor of ED ($2,377,750). The remaining eleven decisions have been split decisions ($2,135,179 pro-ED, $5,664,199 against). Grantees have lost approximately $4.5 million, but have won nearly $5.7 million in the split decisions.

[*ii*]—*Cases Closed Without Written Decisions.* The cases which have been closed without written decisions have been resolved largely in the grantees' favor. In four of the nine cases, the agency moved to dismiss the appeal. In only one of those four cases did the grantee agree to repay a portion of the disallowance.[97]

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tially supported by our findings with respect to other Federal grantmaking agencies with appeals processes. At least one agency — the Department of Health and Human Services — recently changed its practice of utilizing part-time Grant Appeals Board members, and hired three full-time members in addition to the full-time Board Chairman. This change occurred in late 1980 and early 1981. HHS statistics show that, at least partially as a result of this change, there has been a more than seventy-five percent reduction in the mean age of appeals pending before the Board. Currently, the HHS Board reports that it is well within its stated time goals of resolving average cases within six months of filing, and expedited cases within three months of filing. Information obtained from Neil Kaufman, Executive Secretary to the HHS Grant Appeals Board, Sept. 1, 1982. As indicated above, ED's timeframes are much longer.

[96] 34 C.F.R. §§ 200.101(a) and 298.52(a). 47 Fed. Reg. 32868, 32894 (July 29, 1982).

[97] North Carolina, 12-(27)-76.

In 1974, a statute of limitations was enacted (ESEA, 20 U.S.C. § 884) which

Three of the nine appeals were settled (the parties compromised) and the remaining two were dismissed because of the statute of limitations.

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excused audit disallowances of expenditures made five years prior to receipt of the final determination letter. This statute of limitations has operated to reduce agency recovery by approximately $3.4 million in appeals resulting in written decisions and $655,000 in cases closed without written decisions.

§ 54.06 Department of Energy

[1]—Introduction

The Department of Energy (DOE) was created in 1977 by the DOE Organization Act.[1] The Act consolidated major Federal energy functions by transferring to DOE all of the responsibilities of the Energy Research and Development Administration, Federal Energy Administration, Federal Power Commission, and certain energy-related functions of the Department of Interior, Interstate Commerce Commission, Department of Commerce, Department of Housing and Urban Development, and Department of the Navy. DOE's mission is to provide the framework for a comprehensive and balanced national energy plan through coordinated administration of Federal energy functions.

As one means of accomplishing its mission, DOE is responsible for implementing a variety of grant programs. Within DOE, these programs are administered through the Office of Procurement and Contracts Management, and include:

(1) State Energy Conservation Grants[2]

(2) Weatherization Assistance for Low-Income Persons[2a]

(3) Grant Programs for Schools, Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions[3]

(4) Grants for State Offices of Consumer Services[4]

(5) Financial Assistance Programs for State Utility Regulatory Commissions and Eligible Nonregulated Electric Utilities[5]

(6) Energy Extension Service[6]

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[1] 42 U.S.C. 7131, effective October 1, 1977 pursuant to Executive Order 12009 (September 13, 1977).

[2] 42 U.S.C. § 6321 *et seq.*

[2a] 42 U.S.C. § 6861 *et seq.*

[3] 42 U.S.C. § 6372 *et seq.*

[4] 42 U.S.C. § 6805.

[5] 16 U.S.C. 7001 *et seq.*

[6] 42 U.S.C. 7001 *et seq.*

(7) Appropriate Technology Small Grants Program[7]

(8) Electric and Hybrid Vehicle Research, Development, and Demonstration Program Small Business Planning Grants[8]

In addition, DOE awards grants to support research and development in energy conservation, in fossil, solar, geothermal, electric energy and storage systems, and in nuclear energy.

In fiscal year 1979, DOE awarded approximately 1,530 grants, totalling $342,000,000, while in fiscal year 1980, DOE awarded approximately 9,880 grants, totalling §537,000,000.[9] At least in part because of this dramatic increase in DOE's grantmaking activities, in May 1980, DOE issued final regulations establishing a Financial Assistance Appeals Board to handle grant disputes.[10]

[2]—Doe's Grant Appeals Procedures

[a]—Purpose and Structure of the Board. The stated purpose of the Financial Assistance Appeals Board is "to provide a timely, just and inexpensive resolution of disputes involving grants, cooperative agreements, loan guarantees, loan agreements, or other financial assistance instruments."[11]

The Financial Assistance Appeals Board is a separate administrative tribunal within DOE. The Board's authority, as described in the regulations, derives from a direct delegation from the Secretary of DOE "to hear and decide finally for the Department appeals from any decision brought before it on disputes arising under financial assistance agreements."[12] The Board currently is composed of three Administrative Law Judges (ALJs) all of whom hear each appeal.[13] One of the ALJs serves as Chairman. The Board is designed to be removed from, and independent of, the legal and policy-making divisions of DOE. Accordingly, off-the-record (*ex*

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[7] 42 U.S.C. § 5907a.

[8] 15 U.S.C. 2501 *et seq.*, as amended by Pub. L. 95-238.

[9] Interview with Mary Lynn Scott, Procurement Analyst, DOE, June 29, 1981 (Washington, D.C.).

[10] 45 Fed. Reg. 29764 (May 5, 1980) (to be codified at 10 C.F.R. Part 1024).

[11] 10 C.F.R. § 1024.1.

[12] 10 C.F.R. § 1024.2.

[13] Interview with John Farmakides, Chairman, Financial Assistance Appeals Board, DOE, June 25, 1981 (Washington, D.C.). The regulations do not require AJs to serve as hearing examiners.

parte) communications with Board members or Board staff are prohibited.[14]

[b]—Jurisdiction. On March 19, 1982, DOE issued proposed regulations[15] which would alter the jurisdiction of the Financial Assistance Appeals Board. Because no final action on these proposed regulations has taken place, we will discuss both Appeals Board procedures as they currently exist and the changes which would result if the proposed regulations were implemented.

[i]—Current Regulations

[A]—Programs Subject to the Board's Jurisdiction. As presently written, DOE's Financial Assistance Appeals regulations, unlike those of most other agencies, do not contain a jurisdictional statement. In fact, the preamble to the regulations states that the appeals regulations do not provide a right of appeal; rather they merely provide the procedure for handling an appeal. The regulations apply only where DOE program regulations independently provide financial assistance recipients a right to appeal "final" agency decisions issued by DOE grants or contracting officers.[16]

Accordingly, Section 1024.3(a) of the Board rules provides:

> "A recipient or a party to a grant, cooperative agreement, loan guarantee or agreement, or other such financial assistance *may* have a right to appeal disputes with the Department. Such a right may be set forth in statutes, in Departmental regulations dealing with the type of financial assistance involved, or in the agreement itself." [Emphasis added].

Thus, unless a statute, program regulation or the specific grant award so provides, a recipient of a DOE grant or cooperative agreement has no right of appeal to the Board with respect to any DOE decision, whether it be a termination, suspension, audit disallowance, disapproval of written request to incur costs, nonrenewal, or denial of initial application.

Section 600.41 of DOE's general Assistance Regulations, entitled "Disputes", is reserved, and therefore, does not generally authorize

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[14] 10 C.F.R. § 1024.4, Rule 10.

[15] 47 Fed. Reg. 12,038 (1982).

[16] 45 Fed. Reg. 29764 (May 5, 1980).

recipients to appeal adverse DOE determinations.[17] However, Section 600.14 of the Assistance Regulations states that the termination and suspension procedures in OMB Circular A-102, Attachment L, ¶¶ 4 and 5, and OMB Circular A-110, Attachment L, apply to all DOE grants and grantees. These circulars require all Federal grantor agencies to provide appeal procedures for all terminations (in whole or in part) and suspensions. In such cases, the DOE Financial Assistance Appeals procedures presumably would apply, and the Board presumably would have jurisdiction.[18]

Aside from the general Assistance Regulations, very few of DOE's program regulations afford appeal rights to grantees and, even when such rights exist, there is no explicit right of appeal to the Board.[19]

In the absence of a statute, regulation or agreement authorizing appeals, the DOE Board of Financial Assistance Appeals still will hear a case in which DOE and the grantee mutually agree to submit to an appeal to the Board.[20] The Board also will hear appeals in which DOE is not the respondent, i.e. where the grantee and a subrecipient agree to resolve their differences through the Board's appeal mechanism.[21] However, the regulations do not expressly au-

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[17] In contrast, recipients of cooperative agreements presently are entitled to appeal final decisions to the Board pursuant to 10 C.F.R. § 600.290(g) (DOE's Assistance Regulations specifically relating to cooperative agreements.) See 45 Fed. Reg. 46059 (July 8, 1980). That provision requires that a Disputes Clause be included in every DOE cooperative agreement advising recipients of their appeal rights. Clearly, this regulation permits the appeal only of *post-award* decisions, since the right of appeal is couched in the cooperative agreement itself.

[18] It is arguable that audit disallowances which result in a grantee being required to return Federal funds amounts to partial termination and that, accordingly, the DOE appeals procedures are available in this context.

[19] See, e.g., State Energy Conservation Plan program regulations at 10 C.F.R. § 42.10 (appeals permitted for denial of annual State application, suspension, termination); Weatherization Assistance Program for Low-Income Persons program regulations at 10 C.F.R. § 440.30 (denial of application, suspension, termination); Energy Extension Service program regulations at 10 C.F.R. § 465.15 (denial of application, suspension, termination). These regulations permit appeals to a Regional review panel, *not* to the Board.

[20] Interview with Farmakides, N. 13 *supra.*

[21] In Akron-Summit Community Action Agency, Inc., F.A. No. 2-12-80 (Feb. 20, 1980), a grantee did not agree to resolve differences with a subgrantee in an

thorize the Board to hear such appeals.[22]

[*ii*]—*Types of Disputes Which May Be Appealed.* As presently written, the grant appeals regulations are silent not only with respect to the programs over which the Board has jurisdiction, but also with respect to the type of dispute which may be reviewed. The general regulations provide only for appeals of "adverse final decisions made by financial assistance officers or contracting officers."[23] The Board has yet to determine what types of grant disputes are considered to be "adverse final decisions." In one of the three appeals which the Board has heard to date, a question was raised as to whether the Board had jurisdiction to review a challenge to the denial of an initial grant application. DOE's General Counsel's Office claimed that the Board lacked jurisdiction to hear the appeal because it involved a "pre-award" dispute. Subsequently, the appellant withdrew its request for a hearing.[24] Thus, even this most basic issue of whether the Board has jurisdiction of pre-award disputes has not yet been decided, although the proposed regulations explicitly deny the Board jurisdiction to hear pre-award disputes.

[*iii*]—*Proposed Regulations.* The proposed regulations address the current absence of a grant of jurisdiction by providing a general right of appeal for grantees, but only for certain types of grant disputes. Under the proposed regulations,[25] jurisdiction to review only a limited variety of grant disputes (apart from any appeal right established by the individual grant program), which include: a DOE determination that a recipient has failed to comply with applicable program regulations, terms and conditions of the grant; termination of a grant award or DOE determination that the award is invalid; the application by DOE of an indirect cost rate; and DOE audit disallowances. The Board is not given authority to review any preaward dispute, nor a withholding of payment or sus-

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appeal to the Board, and was successful in getting the appeal dismissed for lack of jurisdiction. For further discussion of this case, see § 54.06[3] *infra.*

[22] See 10 C.F.R. 1024.4, Rule 7.

[23] 10 C.F.R. § 1024.1.

[24] State College at Buffalo Faculty Development Project Energy Education 1980 Program, F.A. No. 1–4–80 (1980).

[25] 10 C.F.R. § 600.26(d) (47 Fed. Reg. 12055).

pension of an award.[26] Even with the restrictions contained in these proposed regulations, the jurisdiction of the Board would increase considerably over its present situation.

[c]—Rules of Procedure. DOE regulations prescribe rules of procedure governing the conduct of the Board.[27] Assuming a right to appeal, a financial assistance recipient must file a notice of appeal with the Board within sixty days after the grants officer has issued a final decision on the matter. Copies of the notice must be sent to the grants officer and to the General Counsel of DOE.[28] The Board must acknowledge receipt of the notice and notify the parties of the docket date.[29]

Within 20 days of receiving the notice of docketing, the recipient must select one of three methods for processing the appeal.[30] These methods may be summarized as follows:

(1) Appeal on the basis of a written record. All appeals involving less than $10,000 are decided on this basis unless one of the parties applies to the Board for an exception, or if the Board rules otherwise. In appeals involving more than $10,000, this method is available if the recipient elects it.

(2) Appeal on the basis of a written record supplemented by a conference-type hearing. The hearing is informal in nature, requiring little testimony (if any) and may be conducted by telephone, where deemed appropriate.

(3) Appeal on the basis of an adversary evidentiary hearing. This method is more time-consuming and expensive, and generally is used only if there are complex facts in dispute.[31]

If the parties disagree as to the appeal method to be used, the Board makes the final decision.[32] The election letter must identify the attorney or other person who will represent the recipient.[33]

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[26] 10 C.F.R. § 600.26(d).

[27] 10 C.F.R. § 1024.4.

[28] *Id.* at Rule 1(a) and (b).

[29] *Id.* at Rule 1(c).

[30] *Id.* at Rule 2.

[31] 10 C.F.R. §'1024.3(d).

[32] *Id.* at Rule 2.

[33] *Ibid.*

Within thirty days after receiving the docketing notice from the Board, the recipient must submit either a complaint or a request that the final DOE decision and the notice of appeal be considered adequate to serve as the complaint. The complaint must include: the decision appealed from; relevant portions of the assistance agreement; a statement of the amount in dispute; and, if the appeal is pursued under the first or second method, a copy of any relevant documents, in chronological order and properly indexed. To reduce the burden on the recipient, it may specify in the index documents already in the DOE grants officer's possession. The grants officer must submit those documents with its answer to the appeal.[34]

The grant officer must submit an answer within thirty days after receiving the complaint. If (s)he fails to do so, the Board may enter a general denial on the grant officer's behalf. The grant officer must submit with the answer copies of any additional documents which (s)he considers material. These documents must be organized chronologically and indexed.[35] The Board is authorized to require the submission (by either party) of additional documents.

Rule 4 specifies the timing of objections to the inclusion of documents in the record. The Federal Rules of Evidence are used by the Board as a "guide" in determining the admissibility of evidence.

The rules contain detailed procedures attendant to the three different methods of appeal.[36] Under the written record method, the parties are permitted to file briefs in accordance with a specific timetable.[37] The procedure may be accelerated, at the appellant's option, by: (1) the submission of a single brief with its election letter, which, in turn, may be combined with the notice of appeal; or (2) in appeals involving less than $10,000, requesting the Board to issue an order without a written decision.[38] The record for decision under the written record method consists of the complaint, the answer, briefs and other documents specifically allowed by the Board. After these submissions are filed, the Board must issue a decision as quickly as possible (normally within thirty days).

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[34] 10 C.F.R. at Rule 3(a).

[35] *Id.* at Rule 3(b).

[36] *Id.* at Rule 5.

[37] *Id.* at Rule 5(a)(1).

[38] *Id.* at Rule 5(a)(2).

Under the conference hearing method of appeal, a complaint and answer are required. Within twenty days after the answer is filed, both parties must file witness statements, and fifteen days thereafter, responses and objections to the opponent's witness statements may be filed. The Board then sets a time and place for the conference hearing.[39] The rules contain detailed procedures for handling the hearing, including provisions concerning opening statements, testimony, closing statements and post-hearing briefs. Witnesses are required to testify under oath, although the proceedings are informal. The Board normally has sixty days to issue a decision.[40]

When the full evidentiary hearing method of appeal is adopted, the rules provide that the Board may use the Rules of Procedure of the DOE Board of Contract Appeals[41] to provide an orderly proceeding.[42] Generally, the evidentiary hearing is preceded by a prehearing conference which is designed to narrow the issues in dispute and to explore possibilities of settlement.[43] The record for decision under this appeal method consists of the complaint and answer, other pleadings, orders, and stipulations that result from prehearing conferences, the transcript and testimony of witnesses, any additional papers or exhibits introduced at the hearing, and briefs. The Board generally has 120 days within which to issue a decision.[44]

Rule 6 provides that, generally, the only parties to an appeal are the recipient and DOE; however, the Board may allow a third party to intervene if it is the "real party in interest." Rule 7 permits the appellant to appear before the Board in person or through a representative. DOE always is represented by an attorney.

If a party fails to meet filing deadlines, Rule 8 provides that the Board may: (1) issue an order requiring the offending party to show cause why the appeal should not be dismissed or granted, as appropriate; and (2) if the response is inadequate, take such action

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[39] *Id.* at Rule 5(b)(1)–(3).

[40] *Id.* at Rule 5(b)(3) and (4).

[41] 10 C.F.R. Part 1023.

[42] 10 C.F.R. at Rule 5(c)(1).

[43] *Id.* at Rule 5(c)(2).

[44] *Id.* at Rule 5(c)(5).

as it deems reasonable and proper. If the offending party fails to obey an order of the Board, the Board may issue such orders as it considers necessary to permit "the just and expeditious conduct of the appeal, including dismissal."[45]

Rule 9 summarizes the powers, functions and responsibilities of the Board as follows:

> "The Board has been delegated all powers necessary for the performance of its duties, including, but not limited to the authority to conduct hearings, call witnesses, dismiss appeals with or without prejudice, order the production of documents and other evidence, administer oaths and affirmations, issue subpoenas, order depositions to be taken, take official notice of facts within general knowledge, and decide all questions of fact and law. In discharging its functions, the Board shall provide an expeditious, just, and relatively inexpensive forum for resolving the dispute."

Rule 10 prohibits any party to engage in *ex parte* ("off the record") communications relating to the merits of the appeal with a member of the Board or the Board's staff. Rules 11 and 12 prescribe procedures for notice and location of hearings, and calculation of time periods.

The decision of the Board is reached by a majority vote of the members (three ALJs), and represents the final DOE decision.[46] The Secretary of DOE is not authorized under these rules to review the Board's decisions.

[3]—Nature of Specific Appeals to the Board

To date, the Board has reviewed only three appeals and reached a decision in only one. All three cases have revolved around the issue of the Board's jurisdiction. The Chairman primarily attributes this paucity of appeals to the fact that DOE only has been awarding grants for approximately two years. Assuming a lag time of three or more years from the initial award of grants to the surfacing of disputes, the Chairman predicts a substantial increase in the Board's caseload over the next few years.[47]

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[45] *Id.* at Rule 8(b).

[46] 10 C.F.R. § 1024.3(b).

[47] Interview with Farmakides, N. 13 *supra.*

Both appeals thus far reviewed by the Board have been disposed of on jurisdictional grounds. The first appeal to the Board was filed by a disappointed applicant.[48] As indicated above, the appellant withdrew its appeal after the DOE General Counsel argued that the Board lacked jurisdiction over "pre-award" disputes.

The second appeal was filed by a subgrantee, which sought to contest the grantee's decision to terminate four subgrants.[49] The grantee, the Ohio Department of Economic and Community Development (DECD), moved to dismiss the appeal on the ground that the Board lacked jurisdiction over the subgrantees. The grantee opposed the motion, arguing that it was an "implied party" to the contract between DOE and DECD.

The Board granted DECD's motion and dismissed the case, because the subgrantee could point to no regulation or provision in the agreement giving it a right of appeal to the Board.[50] The Board rejected the subgrantee's argument that the Contract Disputes Act of 1978 gave it such a right.

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[48] See N. 24 *supra.*

[49] Akron-Summit Community Action Agency, Inc., F.A. No. 2-12-80 (Feb. 20, 1981).

[50] The Board made note of the fact that its own rules of procedure do not provide a right of appeal, citing 10 C.F.R. § 1024.3(a) and the preamble thereto.

§ 54.07 Environmental Protection Agency

[1]—Introduction

[a]—EPA Assistance Programs. The Environmental Protection Agency (EPA) currently administers assistance programs authorized under six statutes.[1] However, the vast majority of appeals brought before the Board arise from programs authorized under one statute: the Clean Water Act. This is hardly surprising since most of EPA's grants budget is devoted to the Clean Water Act grant programs.

The Clean Water Act (formerly the Federal Water Pollution Control Act), authorizes two mandatory grant programs: The Reimbursement Grant Program, which allows up to 55 (originally 50 percent Federal reimbursement to municipalities which previously had acquired wastewater treatment facilities without Federal assistance;[2] and the Construction Grant Program, which allows 75 per cent Federal financial participation in the costs of construction of municipal waste sewage treatment plants.[3]

There are three steps under the Construction Grant Program:

Step 1: Preliminary Planning

Includes planning of the scope and necessity of a project, getting approval, and so forth.

Step 2: Preparation

Includes development of architectural plans, buying land, passing necessary ordinances, and so forth.

Step 3: Actual Construction

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[1] The Clean Water Act, as amended (33 U.S.C. § 1251 *et seq.*); the Clean Air Act, as amended (42 U.S.C. § 1857 *et seq.*); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6901 *et seq.*); the Safe Drinking Water Act (42 U.S.C. §§ 300–1, 300–2, 300–3); Section 301 *et seq.* of the Public Health Service Act, as amended (42 U.S.C. §§ 241, 242b, 243 and 246); and Sections 20 and 23 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 135).

[2] 33 U.S.C. § 1286.

[3] 33 U.S.C. § 1282(a). For grants made after September 30, 1978, and before October 1, 1981, the Federal share may be 85 per cent. *Id.* at § 1282(b).

Each step is fundable with prior approval of EPA. Most appeals arise in connection with Step 3 grants.

In addition to Clean Water Act grants, EPA administers a variety of small categorical grant programs to support research, training, and program development and maintenance. Appeals in connection with these programs arise infrequently.

[b]—EPA Board of Assistance Appeals. EPA has a well-established grant appeal procedure, the heart of which is the EPA Board of Assistance Appeals. Created in the early 1970's, the EPA Board has many distinctive characteristics. For example, it handles some pre-award, as well as post-award, disputes. Its decisions represent final agency action, and are not reviewable by EPA's Administrator. The Board has assumed the authority to review the validity of Agency regulations, and to overrule policy interpretations of such regulations.

This section examines these and other characteristics of the Board. Part II of the section focuses upon the Board's authority, structure, and procedures. Part III discusses the Board's jurisdiction. Part IV describes certain decisions of the Board, and gives a profile of all closed and pending appeals as of December 31, 1980.

[2]—The Board's Authority, Structure, and Procedures

[a]—Historical Background. In 1971, EPA first afforded its grantees the right to appeal from adverse determinations made by grant officials.[4] In its Interim General Grant Regulations, EPA required that a "Disputes" clause be included in all EPA grants.[5] The clause, which applied to "any dispute arising under this grant," provided basic review procedures.

In 1972, EPA extended appeal rights to disappointed applicants for grants which essentially are "mandatory" in nature.[6] By "mandatory," the Agency means grants authorized by legislation providing that the Administor "shall award" a grant, or substantially

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[4] Zorc, "U.S. Environmental Protection Agency: Procedures for Administrative Resolution of Grant Disputes and Bid Protests," Reference Materials, Federal Bar Association Seminar on Grant Law at 136 (February 27, 1978).

[5] 40 C.F.R. Part 30, published on November 27, 1971 (36 Fed. Reg. 22724). Appendix A of EPA's current regulations (still at 40 C.F.R. Part 30) contains the dispute clause at section 8.

[6] 37 Fed. Reg. 11651 (June 9, 1972).

limiting the Administrator's discretion to refuse to award a grant.[7] Since 1972, approximately one-half of all appeals to the Board have involved this type of dispute.[8]

Initially, appeals were addressed directly to the Administrator, and handled on an *ad hoc* basis. There were no formal procedures to guide the Administrator's review.

On August 9, 1974, the Administrator delegated authority to the Agency's General Counsel to establish formal appeal procedures and to appoint hearing examiners. In furtherance of that authority, EPA published final General Grant Regulations, which codified the essential elements of the Agency's appeal process.[9] Section 30.1150 of those Regulations provides that:

> The procedures for grant appeals under this subpart shall be those designated by the General Counsel. A copy of such procedures may be obtained from the Office of General Counsel."

The General Counsel did not immediately issue comprehensive rules of procedure.[10] Instead, the General Counsel advised potential appellants that, at least for an interim period, EPA appeals would be handled in accordance with the rules of procedure of the Department of Transportation's (DOT's) Board of Contract Appeals.[11]

DOT's procedures, with minor differences, were adopted formally by EPA on May 8, 1975.[12] The regulations required that the following Disputes Clause be included in all grant agreements.

> "[Article] 8. *Disputes.* (a) Except as otherwise provided by law or regulations, any dispute arising under this grant agreement shall be decided by the grant approving official or the Project Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the grantee. Such a decision shall be final and conclusive unless, within thirty (30) days from the date

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[7] *Ibid.*

[8] See Table I *infra.*

[9] 40 C.F.R. § 30.1100, published on May 8, 1975 (40 Fed. Reg. 20232), and revised on June 30, 1978 (43 Fed. Reg. 28489).

[10] Zorc, *supra* N. 4.

[11] *Ibid.* The General Counsel's adoption of DOT procedures first was recorded in an internal memorandum dated July 14, 1976.

[12] 40 Fed. Reg. 20232 and codified in Subpart J of 40 C.F.R. Part 30.

of receipt, the grantee mails or otherwise delivers to EPA (generally to the Project Officer), a written appeal addressed to the Administrator.

"(b) The decision of the Administrator or his duly authorized representative for the determination of such appeal shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or capricious, or arbitrary, or so grossly erroneous as to imply bad faith, or not supported by substantial evidence.

"(c) In connection with an appeal proceeding under this article, the grantee shall be afforded an opportunity to be heard, to be represented by legal counsel, to offer evidence and testimony in support of any appeal, and to cross-examine Government witnesses and to examine documentation or exhibits offered in evidence by the Government or admitted to the appeal record (subject to the Government's right to offer its own evidence and testimony, to examine documentation or exhibits offered in evidence by the appellant or admitted to the appeal record). The appeal shall be determined solely upon the appeal record, in accordance with the applicable provisions of Subpart J of Part 30 of Title 40 C.F.R.

"(d) This 'Disputes' article shall not preclude consideration of any question of law in connection with decisions provided for by this article; *Provided,* that nothing in this grant or related regulations shall be construed as making final the decision of any administrative official, representative, or board, on a question of law." [13]

The regulations themselves contained little additional guidance, except to reflect the delegation of authority to the General Counsel to appoint hearing examiners and to designate appeals precedures. Under the regulations, the General Counsel could appoint either a single attorney or a panel of three persons, including at least one attorney, as the hearing examiner for each appeal. Hearing examiners were authorized to hear and to determine appeals. Persons designated as hearing examiners were required to be organizationally and geographically removed from the EPA official responsible for the disputed decision. Determinations of the hearing examiners rep-

[13] Appendix A of 40 C.F.R. Part 30.

resented final agency actions, and were appealable only to the courts.[14]

The essential elements of DOT's appeal process were retained by EPA when, on June 29, 1979, it finally issued its own set of comprehensive appeal procedures. These procedures—which subsequently were published in the Federal Register on August 8, 1979[15]—authorized three types of appeal processes: decisions based only on written records, conference hearings, and full-scale evidentiary hearings.[16]

Most significantly, the 1979 rules formally established an EPA Board of Assistance Appeals.

[b]—The Board's Structure

[*i*]—*Structure and Staffing.* The Board's staff is comprised of a chairman, a full-time lawyer, two lawyers (including the Assistant General Counsel for Contracts and Administration) who act as standing members on a part-time basis, and five attorneys from other General Counsel divisions who act as "special members" to handle a few cases.[17] All of these Board members are designated by the General Counsel. In addition, the Board is staffed with a part-time docket clerk, a paralegal and part-time law students. Under the rules, members of the Board may be appointed and removed for cause by the Agency's General Counsel.[18]

Until recently, the chairman of the Board was the Assistant General Counsel for Contracts and General Administration. As time permitted, the Board Chairman/Assistant General Counsel for Contracts and General Administration also handled matters relating to patents, contracts and Freedom of Information Act requests,

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[14] *Ibid.*

[15] 44 Fed. Reg. 46770.

[16] Rules, § 115.

[17] Until recently, the Board's permanent staff was composed of the chairman and a full-time lawyer/administrator. A major upswing in the Board's caseload over the past few years has necessitated expansion of the Board's staff. Board officials estimate that 160 appeals currently are filed each year. Accordingly, there are plans to add one or two additional full-time attorneys to the Board's staff. Interview with Thomas A. Darner, Assistant General Counsel for Counsel for Contracts and General Administration, EPA, Washington, D.C., May 12, 1982.

[18] Rules, §§ 103 and 135(q).

but had no other official contact with grant-related matters. In April 1982, the General Counsel appointed a new Chair (now called "Chief") whose sole responsibility is to chair the Board.[19]

Additional hearing examiners may be appointed by the General Counsel to hear particular appeals.[20] Typically, such hearing examiners have included regional attorneys (from regions other than the one involved in the appeal), or other EPA employees who reported directly to the Board Chairman. Such appointments have been made in roughly 25 per cent of the appeals; however, there has been a gradual move away from this practice.[21]

There are four standing members of the Board who are not assigned cases on an individual basis, and who are not lawyers within the Office of the General Counsel. These members are three engineers (from the Facility Requirements Division, Clean Water Act Program) and one grants administration officer (from the Grants Administration Division, Office of Planning and Management). These members do not have a formal say in the outcome of appeals. Rather, they are viewed as technical advisors to the Board and are consulted on discrete issues requiring their expertise. Pursuant to the delegation which created their standing memberships, these technical advisors may not participate in an appeal if they have had prior contact with the underlying matters in dispute.[22]

[*ii*]—*Observations*

[*A*]—*The Board's Placement.* At least two features of this structure deserve special note. First, as indicated previously, there is some concern about the Board's placement within the Office of General Counsel. The primary reason for this concern is that members of the General Counsel's Office also provide legal advice to EPA program officials and represent the Agency in appeals before

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[19] Interview with Barbara Sidler, Chief, EPA Board of Assistance Appeals, Washington, D.C., May 13, 1982.

[20] See 40 C.F.R. § 30.1130.

[21] Interview with Nell Minow, formerly Attorney-Advisor, Contracts and General Administration Branch, Office of General Counsel, June 23, 1980, June 16, 1981 (Washington, D.C.). Ms. Minow indicated that the appointment of additional hearing examiners is not favored because it tends to add to delay in resolving appeals.

[22] *Ibid.*

the Board. According to critics, this arrangement creates the appearance—if not the fact —of bias and the lack of independent decisionmaking.

EPA does not believe these concerns to be justified. First, it points out that the Board and Agency representatives are in two separate branches of the Office of General Counsel.[23] The Board is lodged under the Assistant General Counsel for Contracts and General Administration; persons representing the Agency in grant appeals serve under the Assistant General Counsel for Grants.[24] Second, Board officials state that, in any event, the Board conducts itself in a professional manner and is not unduly influenced by other General Counsel staff.[25]

Notwithstanding these justifications, EPA has recently decided to place the Board in a separate organizational unit reporting directly to the Deputy General Counsel.[26] Although this reorganization will remove the Board from the Division which handles grants matters, the Board will remain in the General Counsel's Office.

[*B*]—*The Role of the Technical Advisors.* As indicated above, three engineers and a grants policy specialist are standing members of the Board. The Board views these members as playing the same role as court-appointed expert witnesses, and notes that parties always have the opportunity to challenge the designation of individual Board members, and the involvement of particular technical personnel.[27] Moreover, the Board notes that the technical advisors only provide interpretive advice to other Board members, and do not impose their technical judgment upon Board decisions. However, the Board's use of other Agency personnel may serve to

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[23] *Ibid.*

[24] Both branches are within the Division of Grants, Contracts and General Administration, of the Office of General Counsel. However, the Associate General Counsel for this Division (the direct supervisor of the Board Chairman) has recused himself from all Board matters.

[25] Minow interview, N. 21 *supra.*

[26] Darner interview, N. 19 *supra.*

[27] Minow interview, N. 21 *supra.* However, if past decisions are any indication, this opportunity to challenge the designation of Board members may have a limited effect. See Kansas Turnpike Authority, Docket No. 75–3 (March 2, 1979), discussed at § 54.07[2][c][ii][B] *infra.*

strengthen the impression that the Board is inadequately isolated from the rest of the Agency and is not an independent decision-maker.

[c]—The Board's Procedures

[*i*]—*Current Procedures.* EPA's grant appeals procedures were revised most recently in 1979, and appeared as an attachment to a memorandum, dated June 29, 1979, from the General Counsel to "Appellants and others concerned." In the memorandum, the General Counsel appointed a Board chairman and designated by name the chairman and a lawyer/administrator[28] as standing members of the Board. The memorandum stated that the new procedures would apply to all current and future appeals, except that the chairman was authorized to exempt appeals heard under the prior procedures (*i.e.,* Department of Transportation contract appeal procedures). The new procedures subsequently were published in the *Federal Register.*[29]

The stated objective of the new procedures is "to provide quick, fair and flexible ways of resolving disputes concerning final decisions of EPA officials about issues in assistance programs, with minimal formality and expense."[30] The Board's powers, functions and responsibilities, are outlined in Section 135 and may be summarized as follows:

(1) The Board may issue orders, examine witnesses, take all steps necessary for the conduct of an orderly hearing, rule on requests and motions, dismiss for failure to prosecute,

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[28] Before the recent expansion of the Board's staff, the Chairman was assisted only by one full-time attorney/administrator. The lawyer/administrator had at least three major areas of responsibility: (1) Administration of the Board, including the screening and orientation of new or specially designated Board members, and the assignment of cases; (2) Handling appeals prior to their being assigned to individual hearing examiners, including the review and disposition of preliminary motions, communications with the parties regarding the process and admissibility of evidence, and the encouragement of settlement discussions; and (3) Review and approval of all written decisions issued by hearing examiners. In addition, the lawyer/administrator served as the presiding Board member in most appeals heard by the Board and drafted a majority of the appeal decisions. Minow interview, N. 21 *supra.*

[29] See 44 Fed. Reg. 46770 (August 8, 1979).

[30] Rules at § 102.

dismiss for lack of jurisdiction, dismiss frivolous claims, order or assist the parties to obtain testimony or information, and take all other actions necessary to resolve disputes in accordance with the objective of these procedures.

(2) The Board may take whatever steps are necessary to resolve the dispute informally.

(3) The Board, at any time, may require additional information which it deems necessary to resolve the dispute.

(4) The Chair may waive or modify any of these procedures for good cause.

(5) The Board may determine the weight to be given any evidence in the record.

(6) A Board member may not receive *ex parte* communications about the merits of an appeal.

(7) Each Board member must conduct fair and impartial proceedings, keep order at hearings, avoid unnecessary delays and issue an opinion as promptly as is feasible after the record is complete.

Any EPA grantee (or party to a cooperative agreement) has a right of appeal to the Board (i.e., post-award disputes). Moreover, in certain instances specified in EPA regulations, some applicants for funds also have this right (i.e., pre-award disputes).[31]

As before, this right of appeal must be exercised by the grantee or applicant within 30 days of receipt of the final, written adverse determination. The appeal must be submitted in writing to the EPA project officer, and must state the basis for the appeal. Within one working day of his or her receipt of the appeal, the project officer must send copies of the appeal and the underlying decision to the Board, the Assistant General Counsel for Grants, and the appropriate Regional Counsel (if a regional official's decision forms the basis for appeal). The Board must write promptly to the appellant, acknowledging receipt of the notice of appeal, enclosing its procedures, advising the appellant of its responsibilities and identifying a Board contact.[32] Upon receipt of the notice of appeal, the Board assigns a docket number to the appeal.

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[31] *Id.* at § 103.

[32] *Id.* at § 106.

The appellant must specify, either in the notice of appeal or its election letter, who will represent it in the appeal.[33] The Assistant General Counsel for Grants (or the Regional Counsel if appropriate) determines who will represent EPA.[34] In practice, EPA usually is represented by the Regional Counsel involved in the dispute. Attorneys from the Grants Division assist the Regional Counsel.

Within thirty days after the appellant receives the Board's acknowledgment of the notice of appeal, the appellant must submit to the Board all documents relevant to the dispute and a designation of relevant documents in the Agency's possession.[35] At the same time, the appellant must elect one of the following procedures for review:

(1) Decision on a written record without an oral hearing. This is the fastest and simplest process, and is the only one available for disputes involving less than $50,000;

(2) A conference hearing. This is non-adversarial and may be conducted by telephone, if appropriate. It is, therefore, moderately fast; and

(3) A full-scale evidentiary hearing. This process is more expensive and time-consuming; thus, the appellant is urged to choose this process only if the dispute is factually complex.[36]

In cases involving more than $50,000, the appellant is entitled to elect whichever appeal procedure it chooses. The agency and the Board have no authority to override that decision.

However, the Board is authorized to use preliminary procedures to help the parties clarify issues and to resolve disputes informally. These procedures may include the use of a mediator. The results of

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[33] *Id.* at § 107. Eighty to ninety percent of all appellants are represented by counsel before the Board.

[34] *Id.* at § 107.

[35] *Id.* at § 111. As indicated above, under the pre–1979 procedures, the Agency was responsible for compiling the appeal file. The new procedures, which placed the burden on the appellant to compile the file, were applied to all appeals, even those pending. Some appellants protested. The Board held that this change in procedures was not "burdensome" to the appellants. City of Columbus, Ohio, Docket No. 78–17 (December 2, 1980).

[36] *Id.* at § 115.

mediation are not binding on the parties unless they so agree in writing.[37] The Board and mediator may not communicate about the merits of the case in the absence of the parties.[38]

As stated earlier, the appellant is responsible for submitting a chronological, indexed compilation of relevant documents. The Agency must complete the appeal file by submitting documents in its possession to the Board and appellant within 30 days receiving the appellant's submission. Promptly thereafter, the Board consolidates the submissions and prepares a consolidated index. The Board oversees the preparation of the appeal file, resolves objections to the inclusion of material, and, if necessary, orders the inclusion of additional documentation. In the interests of preserving informality, the Board is not required to apply the Federal Rules of Evidence with respect to admission of documents to the appeal file.[39] Discovery issues are resolved informally.[40]

After the appellant has elected an appeals process and the appeal file is complete, the case is assigned to a hearing examiner. Assignments currently are divided among Board members by regions. For example, the Chief handles all appeals arising out of Region IV (Atlanta office) decisions.[41] The appellant and EPA must be notified as quickly as possible of the names of the assigned board members.

EPA has specified detailed requirements concerning the procedures to be followed in each of the three appeals processes: For all three processes, briefing schedules (including provisions for expediting the appeal);[42] for the second and third processes, witness

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[37] *Id.* at § 133.

[38] *Ibid.*

[39] Rules at § 117.

[40] According to the former lawyer/administrator, formal discovery is not necessary in EPA appeals because, as a practical matter, both parties make available relevant data. Minow interview, N. 21 *supra.*

[41] Sidler interview, N. 19 *supra.*

[42] One way for an appellant to expedite resolution is to waive its right to a written decision. However, the Board may nevertheless render a written decision if it deems appropriate. Other ways to expedite the appeal include: (1) the appellant may choose to submit only one brief or statement and may consolidate the election letter with its notice of appeal; and (2) the appellant may elect to have the case submitted for a final decision on the basis of the appeal file without a brief (although the agency may still submit a brief).

statements, oral communications, and transcripts; for the third process, oral hearing procedures.[43]

Appeals may be dismissed for failure of the appellant to meet deadlines or other procedural requirements.[44] Generally, an appellant is given one "free" extension and must request any additional ones. When Agency counsel causes delay, the Board reports it to the General Counsel for appropriate action.

The burden of persuasion is always on the appellant. The appellant must show that the Agency decision was wrong, i,e., in violation of applicable requirements, based on an erroneous interpretation of facts or law, or otherwise unreasonable.[45]

Generally, the only parties to the appeal are the grantee (or applicant) and the agency. However, after consultation with the parties, the Board may allow a third party to present the case or appear with a party in the case when the Board determines that the third party is a "real party in interest,"[46] or where the intervention of a third party with "an identifiable and substantial interest in the outcome of the dispute" would sharpen issues or otherwise aid in resolution, and would not cause substantial delay.[47]

Decisions of the Board are reached through a consensus of all hearing examiners assigned to the case. No formal vote is taken. All decisions are decisions of the Board and each decision is issued in writing and signed by the chairman and presiding Board member(s).

[ii]—Observations

[A]—The Assignment of Cases to Individual Hearing Examiners. With the exception of technical personnel, all persons cur-

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[43] See 44 Fed. Reg. 46770 (August 8 1979) §§ 119.121, and 123.

[44] Rules at § 125.

[45] *Id.* at § 127; see also, Douglas County Sewer Improvement District No. 1, Nevada, Docket No. 75–8 (Dec. 16, 1980).

[46] The Board has permitted a third party to participate in one case: Louisville and Jefferson County, Docket No. 79–38 (pending) (case involves denial of an application for a corrective action program). The Board is allowing the third party to attend the hearing (none has been held yet), cross-examine the parties' witnesses, and file one brief. The third party will not be permitted to offer its own witnesses.

[47] Rules at § 131.

rently assigned to hear appeals are under the authority of the Chief of the Board of Assistance Appeals. Prior to June, 1979, the assignment procedure was different. Hearing examiners typically were not under the direct authority of the Chair (now "Chief"). In practical terms, this meant that the Chairman of the Board could not push a hearing examiner to expedite his decision. Great delay in case completion frequently ensued.[48] Since implemention of the new procedure, most appeals initiated under the old system have been closed.[49] Those still pending present problems because of their age; Board officials indicate that they are as flexible as possible in resolving them, and often encourage settlement of the appeals through negotiation.

[*B*]—*Appellant's Right to Object to an Individual Hearing Examiner.* While still operating under the pre–1979 procedures, EPA considered a claim of hearing examiner bias.[50] The issue in that case was whether the hearing examiner (Regional Counsel for Region I) was organizationally removed from the Regional Administrator of Region VII. EPA refused to replace the examiner, stating that the requirement (in the DOT/EPA procedures)[51] that a hearing examiner be organizationally and geographically removed from the decision being appealed must not be carried to extremes; otherwise, no official of the Agency could hear an appeal from a decision of any other official of the Agency.

EPA's current appeals procedures do not provide parties with any rights to object to an individual hearing examiner. However, Board officials state that they routinely advise appellants that they may object to the designation of any Board member. Thus far, no objections have been raised.[52]

[*C*]—*The Frequency of Hearings.* The vast majority of cases handled by the Board are decided on a written record.[53] According to the Agency, evidentiary hearings are requested infrequently be-

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[48] See Tables V and VI *infra,* which chart the duration of appeals, generally and by date of filing.

[49] See Table VII *infra,* which contains a historical breakdown.

[50] Kansas Turnpike Authority, Docket No. 75–3 (March 2, 1979).

[51] See § 54.07[2][a] *supra.*

[52] Minow interview, N. 21 *supra.*

[53] See Chart I ("documents" designation) *infra.*

cause factual disputes rarely remain after the appeal file is complete. As of this writing, there has been only one case in which a full evidentiary hearing has been held.[54] And, even in that case, according to the Board's former lawyer/administrator, it was not clear that a full hearing was necessary.[55] In any event, the authority to request a hearing lies with the appellant. The Board has no authority to override the appellant's election.

[*D*]—*The Closing of Cases Without Written Decisions.* The Board encourages negotiation and settlement. Since many of the appellants are relatively unsophisticated and unable to spend much time or money in pursuit of a formal appeal, informal resolution often is sought. Consequently, many cases are closed without following the procedure through to a written decision. The reasons for such closings include: withdrawal of the appeal by the grantee or applicant; withdrawal of the adverse decision by the agency; settlement; and failure to pursue the appeal.[56]

[*E*]—*Filing the Notice of Appeal.* Under the Board's old procedures, an appellant filed its notice of appeal with the appropriate EPA regional director. Because of a lack of communication within the Agency, the regional director frequently did not know what to do with the appeal, and consequently did nothing. In many cases, several months elapsed before the appeal was properly forwarded to the Board.

[*F*]—*The Responsibility for Compiling the Appeal File.* As indicated above in 1979, EPA shifted the responsibility for compiling an appeal file from the Agency to the appellant. The rationale behind this change was that, because the appellant was involved directly with problem(s) culminating in the adverse determination, it was in the best position to put a file together quickly and completely. In several instances, however, appellants have faltered in their responsibility, and the Board has taken the initiative to perfect faulty files. This nursefeeding by the Board may void the time-

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[54] Chart III *infra.* The single case in which there was a hearing was Olathey, Kansas, Docket No. 79–12. (pending).

[55] Minow interview, N. 21 *supra.*

[56] See Table VIII *infra.*

Other reasons include: Appellant chose to pursue another grant or made arrangements eliminating the need for the grant; appellant did not file appeal within thirty (30) days. See Table VIII *infra.*

saving advantage which was envisioned in shifting responsibility to the appellant to prepare the file.[57]

[*G*]—*The Duration of Appeals.* Perhaps the most critical problem attendant to EPA's administration of grant appeals has been the lengthy duration of appeals. Tables V and VI provide breakdowns of the duration of appeals from the date appeals were filed[58] to the date of resolution. Even a cursory glance at these tables indicates that it has taken EPA at least one year—and, in a significant number of cases, more than three years—to resolve the vast majority of appeals. Table VII, which provides a historical breakdown of appeals, shows that, as of December 31, 1980, the Board had yet to dispose of twenty-one of seventy appeals filed between 1974 and 1977, sixteen of thirty-three appeals filed in 1978, and twenty-seven of forty-one appeals filed in 1979. Given the mission of the Board to provide "quick, fair and flexible ways of resolving disputes",[59] these statistics are, to say the least, somewhat disturbing.

Board officials offer several explanations for the delays.[60] With regard to past problems, they note that, prior to the formal establishment of the Board in 1979, the agency often delayed proceedings by failing to compile the appeal file in a timely manner. In addition, they note that, until recently, the General Counsel often had no supervisory control over appointed hearing examiners, and, therefore, could not control the timing or expedition of decisions. Delays in resolving appeals under current procedures are attributed to the Board's encouragement of settlements. If the parties agree to negotiate settlement, the Board automatically suspends the appeal for four months and "willingly" grants further extensions.[61]

[*H*]—*Additional Matters.* Several features of the Board's operations appear to work particularly well. For example:

(1) The Board's rules regarding *ex parte* communications appear to be followed closely, with notes of any such commu-

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[57] For further discussion of this issue, see N. 35, *supra*, and accompanying text.

[58] Where the filing date was unascertainable, the docket date was used.

[59] See 44 Fed. Reg. 46770 (August 8, 1979) § 102.

[60] Minow interview, N. 21 *supra.*

[61] *Ibid.*

nications recorded by the Board member who received the communication and sent to all parties.

(2) The early assignment of each case to an individual panel member seems to expedite the making and drafting of final decisions.

(3) The current use of full-time Board members appear to produce greater efficiency and consistency.

[3]—The Board's Jurisdiction

[a]—As Defined by Regulation. The Board's regulatory jurisdiction is divided essentially into two components: Post-award and pre-award disputes. With respect to the former, EPA's General Grant Regulations plainly authorize appeals of "[*a*]*ny* dispute arising under a grant . . ."[62]

This broad statement of jurisdiction does not seem to require further definition. Nonetheless, EPA's General Grant Regulations specifically authorize appeals of termination and annulment actions[63] and stop-work orders.[64] In addition, program regulations specifically authorize appeals of cost disallowances.[65] All of the post-award appeals taken to the Board have involved specifically authorized disputes, i.e., terminations or cost disallowances.[66] The Board has not yet considered whether it would have jurisdiction over disputes involving other types of adverse determinations, such as the withholding of grant payments.[67] However, a plain reading of the "any dispute" language would suggest jurisdiction.

On the pre-award side, the General Grant Regulations are more circumspect. They provide for appeals of "any preaward dispute

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[62] 40 C.F.R. § 30.1100(a) (Emphasis added).

[63] 40 C.F.R. § 30.920–6.

[64] 40 C.F.R. § 30.915–5.

[65] See, e.g., 40 C.F.R. § 35.880 (Reimbursement Grants, Section 206 of the Clean Water Act); 40 C.F.R. § 35.940–5 (Grants for Construction of Treatment Works, Clean Water Act); 40 C.F.R. § 35.1537–11 (Grants for Water Quality Planning, Management and Implementation, Section 501(a) of the Clean Water Act).

[66] See § 54.07[4][b] *infra.*

[67] See 40 C.F.R. § 30.615–3. In its forthcoming proposed rulemaking, the Board plans to expand its jurisdiction to cover debarment of grantees.

authorized by this subchapter . . ."[68] Such preaward disputes include:

(1) Appeals of final determinations made by the Administrator concerning an applicant's eligibility or the amount of reimbursement which an applicant is entitled to receive as a Reimbursement Grant under Section 206 of the Clean Water Act of 1977, as amended;[69]

(2) Appeals under the grants for Construction of Treatment Works Program of final Regional Administrator's decisions concerning the ineligibility of a project,[70] the ineligibility of an applicant,[71] or the proper amount of Federal share;[72]

(3) Appeals of Regional Administrators' denials of grant funds under the State Management Assistance Grant Program;[73] and

(4) Appeals of Regional Administrators' denials of grant funds under the Water Quality Planning, Management and Implementation Grant Program.[74]

[b]—As Defined by the Board

[*i*]—*Jurisdiction to Review the Validity of Agency Regulations.* One of the most difficult issues in the current study of Federal grant dispute mechanisms is whether such mechanisms should have the authority to review the validity of agency regulations.[75]

The issue in the *Carlstadt* appeal was whether EPA erred in denying the appellant's application for assistance under the Clean Water Act to support a project for planning and designing a permanent pumping facility. EPA denied the application on the ground that EPA regulations barred assistance for projects (such

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[68] 40 C.F.R. § 30.1100(a).

[69] 33 U.S.C. § 1251 *et seq.;* 40 C.F.R. § 35.880.

[70] 40 C.F.R. § 35.915(h).

[71] 40 C.F.R. § 35.920–1.

[72] 40 C.F.R. § 35.930–5(b).

[73] 40 C.F.R. § 35.1050.

[74] 40 C.F.R. § 35.1537–11.

[75] For further discussion of this issue, see § 54.08 *infra,* on the Department of Health and Human Services. At EPA, the Board of Assistance Appeals has faced the issue squarely in the appeal of Carlstadt Sewerage Authority, Docket No. 79–49 (April 13, 1981).

as this) designed exclusively, or almost exclusively, to serve industrial sources. Appellant argued that these regulations were inconsistent with the Act and therefore invalid. The Board held:

"This Board has been delegated all the authority of the Administrator, which includes the authority to find a regulation inconsistent with statutory authority. As we stated in our reconsideration in the *Appeal of City of Casselberry, Florida et al.*, Nos. 75–6, 74–8, 74–9 & 75–5 (April 18, 1980), p. 4:

> 'There is nothing in the Administrator's delegation of authority to the General Counsel to decide grant disputes, or in the General Counsel's delegation of that authority to the Board, to indicate that the delegated authority is less than the Administrator may exercise. The regulations which give the Board the authority to resolve grants disputes explicitly provide that "(a)ny questions of law may be considered" (40 C.F.R. § 30.1125). The Administrator has the authority to find an Agency regulation unlawful, and has in fact done so (*In re Public Service Company of New Hampshire,* 10 ERC 1257 (1977), *In the Matter of National Pollutant Discharge Elimination System Permits for 170 Alaska Placer Mines, More or Less,* NPDES Appeal No. 79–1). While duly promulgated regulations are entitled to great deference, to the extent that they exceed statutory authority they are void, and the Board will not apply them.' [Footnote omitted].

"We continue to hold that this Board has authority to review the legal validity of Agency regulations. Indeed, in the context of applying the exhaustion doctrine, the courts expect administrative tribunals to review the validity of challenged regulations and have refused to take jurisdiction until administrative procedures have been exhausted, even where the validity of regulations was the sole issue. *St. Regis Paper Company* v. *Marshall,* 591 F.2d 612 (10th Cir. 1979)."[76]

The Board continued by describing its scope of review:

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[76] Slip op. at p. 10. In addition to citing the Casselberry decision, the Board, in Carlstadt, noted that it also had referred to this principle in City of Sycamore, Illinois, No. 77–18 (Dec. 29, 1978), p. 8, City of Casselberry, Florida, No. 75–6 (Aug. 8, 1979), pp. 9 and 12; City of Terre Haute, Indiana, No. 75–14 (Dec. 21, 1979), p. 7; and Rice Water Supply and Service Corporation, No. 75–7 (March 20, 1980), p. 5.

"Of course, this is not to say that the Board will substitute its judgment of the wisdom of Agency regulations for that of the program officials who developed them. Our function is to consider 'any question of law' necessary to decide an appeal and, consistent with the decision of the Supreme Court in *Udall* v. *Tallman,* 380 U.S. 1, 16 (1975), we accord 'great deference' to the interpretation of a statute by the officials charged with its administration. *City of Sycamore, Illinois,* No. 77–18 (December 29, 1979); *City of Casselberry, Florida,* No. 75–6 (August 8, 1979); and *City of Terre Haute, Indiana,* No. 75–14 (December 21, 1979). This principle has particular force where, as here, Congress has specifically provided in Section 501(a) of the Clean Water Act that the Administrator 'is authorized to prescribe such regulations as are necessary to carry out his functions under the Act.' 33 U.S.C. § 1361. We are also mindful of the apparent finality of Board decisions which favor an appellant, especially where, as here, the head of the Agency has delegated full appellate authority to the Board without reserving the power to review or reject its decisions. *See, Fischbach and Moore International Corp.* v. *United States Pierce Associates, Inc.,* 617 F.2d 223 (Ct. Cl. 1980).

"The Board therefore defers to EPA's implementing regulations unless they are plainly inconsistent with Congressional intent. Moreover, where the statute is ambiguous and the regulation is reasonable and consistent with the statute, we recognize that EPA has the authority under Section 501(a) of the Clean Water Act to fill in gaps which Congress did not address. *Udall* v. *Tallman,* 380 U.S. 1 (1965); *Red Lion Broadcasting Co.* v. *FFC,* 395 U.S. 367 (1969); *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973); *Morton* v. *Ruiz,* 415 U.S. 199 (1974)."[77]

The full impact of the *Carlstadt* decision is not yet known. However, any effect may be short-lived. EPA plans to issue proposed rules on or about June 1, 1982, which would modify the regulations defining the Board's authority to make clear that: (1) the Board is bound by all applicable "regulations," and may not rule on their validity; and (2) for these purposes, agency "regulations" shall be defined to include any agency guideline published in the *Federal*

[77] *Id.* at 10–11.

Register.[78] In addition, the proposed rules will state that policy decisions of EPA's Audit Resolution Board[79] are binding on the Board, and will declare that the Board may not review National Environmental Policy Act decisions.

[*ii*]—*Other Matters.* In addition to the rule validity issue, the Board has considered other aspects of its jurisdiction. For example, the Board has held that it does not have authority to overrule a Regional Administrator's decision denying a grantee's request for a deviation from, or waiver of, valid EPA regulatory requirements.[80]

The Board also has recognized that it has jurisdiction only with respect to *final* agency decisions[81] and has dismissed appeals of non-final decisions.[82] In the *McEwen* appeal, the Board stated that the appellant "has a right to a final decision, and any unreasonable delay in issuing a decision raises the possibility that a final negative decision from which appeal can be taken may be implied."[83]

In addition, the Board has held that it may waive the deadline for filing a notice of appeal for good cause shown.[84]

The Board has held that it must decide each appeal on its own merits, and is not bound to follow precedents set by the Agency in making determinations in comparable situations.[85] Furthermore, the Board has rejected, in two appeals, the argument that the Agency is "estopped" by its own actions from making an adverse

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[78] Darner interview, N. 17 *supra.*

[79] EPA's Audit Resolution Board is a high-level review panel which was created to resolve recurring problems arising in the audit context. Requests for decisions concerning such problems may be made by auditors or EPA grant officials. Darner interview, N. 17 *supra.*

[80] Village of Elburn, Illinois, Docket No. 77–13 (June 20, 1980); Hiawassee Utilities Commission, Docket No. 75–36 (Dec. 9, 1980).

[81] 40 C.F.R. § 30.1100(b) (notification in writing to recipient that the decision is final unless appealed).

[82] McEwen, Tennessee, Docket No. 77–21 (March 5, 1980); see also, City of Baconton, Georgia, Docket No. 80–47 (withdrawn, July 30, 1980); St. Charles, Missouri, Docket No. 79–45 (withdrawn, Dec. 30, 1980); Downington, Pennsylvania, Docket No. 79–14 (dismissed, Sept. 2, 1980).

[83] *Ibid.*

[84] Village of Deer Creek, Illinois, Docket No. 78–1 (January 4, 1980).

[85] Kansas Turnpike Authority, Docket No. 75–3 (March 2, 1979).

determination, finding absent certain critical elements necessary to support such an argument.[86] Those elements are:

(1) The party to be estopped must know the facts;

(2) He must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended;

(3) The latter must be ignorant of the true facts; and

(4) He must rely on the former's conduct to his injury.[87]

Finally, the Board has stated that it has inherent authority to reconsider its own decisions.[88]

[4]—Appeals Brought Before the Board

As stated earlier, the vast majority of appeals brought before the Board arise from programs authorized under one statute: the Clean Water Act. The statistics tell the story. Of the thirty-nine appeals which culminated in written decisions, only one did not arise under the Clean Water Act.[89] Of the sixty-five appeals which were closed without written decisions (having been withdrawn, settled, or dismissed for other reasons), only two appeared to involve grants authorized under other statutes.[90] Of the 104 appeals pending before the Board as of December 31, 1980, only seven appeared to involve

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[86] City of Spokane, Washington, Docket No. 75–37 (Nov. 30, 1977); City of Miami Beach, Florida, Docket No. 75–25 (July 15, 1980); Carlstadt Sewerage Authority, Docket No. 79–49 (April 13, 1981).

[87] Fink Sanitary Services, Inc., 53 Comp. Gen. 502 (1974); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); and Emeco Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973).

[88] City of Casselberry, Florida, *et al.;* Docket Nos. 75–6, 74–8 and 74–9, 75–3 (April 18, 1980).

[89] Brooklawn Dairy Farm, Docket No. 76–2 (May 14, 1979) (involving a discretionary research and development grant for demonstration of dairy farm waste treatment methods). EPA records did not reveal what type of grant was involved in Docket Nos. 78–1 and 77–21.

[90] Macomb County Health Department, Michigan, Docket No. 79–7 (withdrawn, May 25, 1979); Ohio EPA, Docket No. 76–13 (settled, November 5, 1980) (both involved grants for air pollution control under the Clean Air Act). EPA records did not reveal the type of grants involved in Docket Nos. 80–86, 80–20, 79–45, 79–41, 79–28.

grants under other statutes.[91] Thus, many of the recurring issues in EPA grant appeals involve technical, and often sophisticated, interpretations of the Clean Water Act.

[a]—Pre-Award Matters

[*i*]—*Types of Pre-Award Appeals.* There have been approximately 70 appeals of determinations that projects are ineligible for Federal funds under the reimbursement or construction grant programs of the Clean Water Act.[92] These programs are mandatory, i.e., if an applicant is eligible and the project fits the statutory framework, the applicant is *entitled* to funding.

Several issues which affect applicants' entitlements to funding recur in the cases. These issues include:

(1) Classification of a sewer system as an "interceptor" or a "collector." The statute authorizes the award of grant funds for the construction of interceptor sewers, whose primary purpose is to *transport* sewage. Collector sewers, whose primary purpose is to *collect* sewage, are not eligible for grant funding. Although the statute defines the two types of sewers, many disputes have arisen over the application of the definitions.[93]

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[91] Five of the pending appeals involved grants for air pollution control. Lake County Health Dept., Indiana, Docket No. 80–28; RAPCA, Ohio, Docket No. 79–29; Flint, Michigan, Docket No. 79–9; Anderson, Indiana, Docket No. 78–6; Gary, Indiana Air Pollution Control Agency, Docket No. 77–6. One involved a research grant under the Clean Water Act. Oklahoma Department of Health, Docket No. 79–4. And one involved a demonstration water pollution control grant. Gulf Coast Development Corp., Docket No. 75–8. EPA records did not reveal the type of grant involved in Docket Nos. 80–37, 80–36, 80–34, 80–25, 79–43, 78–26.

[92] Tables I and II *infra.*

[93] See, City of Sycamore, Illinois, Docket No. 77–18 (Dec. 29, 1978); Milan, Illinois, Docket No. 75–41 (Sept. 30, 1980); Sanitary District of Elgin, Illinois, Docket No. 75–39 (Sept. 2, 1980); City of Joliet, Illinois, Docket No. 75–21 (July 21, 1980); City of Batavia, Illinois, Docket No. 75–19 (April 28, 1980); City of Willoughby, Ohio, Docket No. 75–17 (July 1, 1980); Fort Wayne, Indiana, Docket No. 75–14 (Dec. 21, 1979); City of Columbus, Ohio, Docket No. 75–13 (May 22, 1980); Stark County, Ohio, Docket No. 75–12 (June 16, 1980); City of Springfield, Ohio, Docket No. 75–11 (April 18, 1980); City of Maple Heights, Ohio, Docket No. 75–10 (July 24, 1980).

(2) Determination of whether a project involves an applicant's "acquisition" or "construction" of a wastewater treatment facility. The statute authorizes the award of grants ". . . for the *construction* of publicly owned treatment works."[94] Several disputes have arisen because EPA refused to share in the costs of acquisition of existing facilities, claiming that these were not costs of "construction."[95]

(3) Designation of an applicant as a "municipality" or the project as "publicly owned." The statute authorizes the award of grants to "any State, *municipality,* or intermunicipal or interstate agency for the construction of *publicly owned* treatment works."[96] Disappointed applicants have challenged EPA determinations that they did not meet these eligibility requirements.[97]

(4) Compliance with other statutory or regulatory requirements, such as a requirement that a Federally assisted project be for "primary" wastewater treatment. EPA regulations implementing the Act require as a condition of eligibility that the project be designed to give "at least primary treatment or its equivalent."[98] The application of this requirement has been the subject of dispute in several appeals.[99]

[*ii*]—*Outcomes of Pre-Award Appeals.* With respect to pre-award appeals closed with or without written decisions, Table I provides a breakdown by type of grantee of the types of determinations described above. Table II provides the same information with

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[94] 33 U.S.C. § 1281(g)(1). (Emphasis added.)

[95] See Heart of the Valley Sewer District, Wisconsin, Docket No. 76–18 (Feb. 28, 1980); Arnold, Missouri, Docket No. 76–1 (June 30, 1977); City of Casselberry, Florida, Docket No. 75–6 (Aug. 8, 1979); Uwchlan Township Municipal Authority, Docket No. 75–5 (Nov. 26, 1979); Western Monmouth Utilities Authority, New Jersey, Docket Nos. 74–8 and 74–9 (Sept. 21, 1979).

[96] 33 U.S.C. § 1281(g)(1). (Emphasis added.)

[97] See Kansas Turnpike Authority, Docket No. 75–3 (Mar. 2, 1979).

[98] 18 C.F.R. § 601.25.

[99] See City of Sanborn, Iowa, Docket No. 80–31 (Sept. 15, 1980); Wheaton Sanitary District, Illinois, Docket No. 77–2 (Oct. 4, 1979); City of Washington, Missouri, Docket No. 75–30 (Aug. 15, 1977); City of Miami Beach, Florida, Docket No. 75–25 (July 15, 1980); City of Warren, Michigan, Docket No. 75–1 (May 25, 1977).

respect to cases pending before the Board as of December 31, 1980. The reader should allow for some duplication; i.e., some of the appeals involved more than one kind of determination.

In pre-award cases culminating in written decisions, the outcomes have been split: nine in favor of the appellant: eleven upholding EPA's determination; and five partly for and partly against the appellant. In monetary terms, where amounts involved in the appeals were ascertainable, the results were as follows: $10,596,723 in favor of the appellant; $1,958,346 in favor of EPA; and $1,335,916 partly for and partly against the appellant.[100] It should be noted that $9,230,666 of the $10,596,723 involved in the decisions favorable to the appellants was attributable only to two of the appeals.[101]

[b]—Post-Award Matters. Approximately 130 of the 208 appeals which have been decided, dismissed or remain pending before the Board involve post-award disputes.[102] As indicated previously, the great majority of these appeals arose in connection with reimbursement or construction grants under the Clean Water Act.[103]

As shown below, the Board's post-award appeals occasionally have involved grant terminations. However, the most significant types of dispute, both in terms of frequency and dollar amounts involved, clearly lie in the cost determination field.

While precise figures are not ascertainable,[104] the dollar amounts of post-award appeals also are telling. For example, available records show that the dollar amount of appeals involving cost disallowances total more than $9.5 million.[105] In comparison, the dollar

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[100] The amount was unascertainable in 5 appeals wherein the Board upheld EPA (Docket Nos. 75–41, 75–38, 75–25, 75–17, 75–7), and in 2 of the split decisions (Docket Nos. 75–19) (re: 1 issue), and 75–13).

[101] See City of Warren, Michigan, Docket No. 75–1 (May 25, 1977); Western Monmouth Utilities Authority, N.J., Docket Nos. 74–8 and 74–9 (Sept. 21, 1979); see also Tables III and IV *infra* (breakdown of dollar amounts per type of determination).

[102] Tables I and II *infra.*

[103] *Ibid.*

[104] In almost one-half of the pending cost determination appeals, the dollar amount of the appeals was not ascertainable from EPA files.

[105] See Tables III and IV *infra* (cost disallowances include amounts listed in

amount in all nondisallowance appeals for which such amounts were ascertainable totalled less than $600,000.[106]

More specific information regarding various types of EPA post-award appeals is provided below.

[*i*]—*Termination, Suspension or Annulment.* The Board has rendered a written decision only in one appeal involving grant termination. In *Brooklawn Dairy Farm,*[107] the appellant was the recipient of a grant to develop, evaluate and demonstrate a wastewater treatment facility. The grant was terminated due to delays, failure to demonstrate compliance, and subsequent resale of the farm. The grantee argued that it had not sold the farm, and that, if it had, EPA's remedy was to obtain title to the farm, not reimbursement. The Board analyzed the case in terms of contractual principles and concluded that the grantee had breached its grant agreement by failing to perform in accordance with various obligations set forth in the agreement. It further concluded that EPA was entitled to reimbursement.[108]

Other appeals involving terminations have been closed without written decisions. *Town of New Palestine, Indiana,*[109] involved a termination because of undue delays by the grantee in starting construction. The grantee withdrew its appeal because it decided to apply for another grant. In *Taos Ski Valley Water and Sanitation Dist.,*[110] EPA annulled a grant because the grantee was determined to be ineligible. As in the *New Palestine* case, the grantee withdrew its appeal in order to pursue other grants. *Snellville, Georgia,*[111] involved a termination for failure of the grantee to start construction within two years. In this case, EPA decided to stop the termination proceedings because the state was reviewing the grantee's

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the tables under "disallowed costs," "pre-award costs," "inadequate documentation" and "prior approval").

[106] See N. 103, *supra.*

[107] Docket No. 76–2 (May 14, 1979).

[108] Jackson v. Weinberger, 407 F. Supp. 792 (W.D. N.Y. 1976); United States v. Brady, 385 F. Supp. 1347 (S.D. Fl. 1974); 51 Comp. Gen. 162 (1971).

[109] Docket No. 79–31 (withdrawn and dismissed, Nov. 14, 1979).

[110] Docket No. 75–4 (withdrawn and dismissed, Dec. 21, 1977).

[111] Docket No. 74–4 (dismissed, date unknown).

plans, and it seemed likely that review would be completed and construction initiated before the deadline.

As of December 31, 1980, two cases pending before the Board involved suspension and termination actions. In *Fallbrook Sanitary District, California,*[112] the grantee is appealing EPA's decision to suspend further payments under a grant, pending a final audit of a second grant. In *Lower Saucon Township Authority, Pennsylvania,*[113] the issue is whether, upon termination, EPA may reimburse only paid bills as opposed to allowable costs incurred but not paid. Civil action has been brought against the grantee to collect the outstanding bills.

[*ii*]—*Unallowable Expenditures and Improper Accounting.* Approximately eighty-seven of the 208 disputes appealed to the Board have involved cost disallowances.[114] Of these, at least fifty-eight cases were pending before the Board as of December 31, 1980.[115] EPA officials currently estimate that 75 per cent of the appeals pending before the Board involve cost disallowances. The Chief of the Board believes one major contributing factor is the increased emphasis on auditing by the Agency over the last year.[116]

Specific issues which arise on a recurring basis are: the allowability of costs incurred prior to the grant award;[117] and inadequate documentation of costs.[118] Specific cost categories which often are subject to audit disallowance and appeal include:

- *Fringe Benefit Costs.*[119]

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[112] Docket No. 80–03.

[113] Docket No. 79–27.

[114] See Tables I and II, *infra.*

[115] See Table II, *infra.*

[116] Sidler interview, *supra* N. 19, and Darner interview, *supra* N. 17.

[117] See, e.g., City of Columbus, Ohio, Docket No. 78–17 (Dec. 2, 1980); Hiawassee Utilities Commission, Docket No. 75–36 (Dec. 9, 1980).

[118] See, e.g., Sacramento Regional County Sanitation District, California, Docket No. 79–15 (July 29, 1980); City of Fairfield, California, Docket No. 77–22 (March 5, 1980); Cowlite County, Washington, Docket No. 76–6 (Jan. 24, 1980).

[119] *See, e.g., City of Olympia, Washington,* Docket No. 79–34 (May 22, 1980); *City of Fairfield, California,* Docket No. 77–22 (March 5, 1980); *Flint, Michigan,* Docket No. 79–9 (pending, air pollution control grant).

- *Engineering Fees.* [120]
- *Technical Service Costs.* [121]
- *Inspection Costs.* [122]
- *Indirect Costs.* [123]
- *Salary Costs.* [124]
- *Subcontract Costs.* [125]
- *Legal fees.* [126]

The outcomes of the cost disallowance cases in which the Board has rendered written decisions may be broken down as follows:

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[120] See, e.g., Clarksville, Tennessee, Docket No. 79–33 (November 7, 1980); City of Fairfield, California, Docket No. 77–22 (March 5, 1980); See also, Co. Sanitation Dists. of L.A. County, California, Docket No. 80–16 (pending); Dunsmuir, California, Docket No. 80–09 (pending); Happy Camp, California, Docket No. 80–08 (pending); Pima County, Arizona, Docket No. 80–07 (pending); San Mateo County, California, Docket No. 80–05 (pending); Kansas City, Docket No. 79–47 (pending).

[121] See, e.g., Yorkville - Bristol Sanitation District, Illinois, Docket No. 80–45 (pending); Minden - Gardnerville Sanitary District, Nevada, Docket No. 80–32 (pending).

[122] See, e.g., Downington, Pennsylvania, Docket No. 79–14 (dismissed, Sept. 2, 1980); Spring City, Tennessee, Docket No. 79–36 (pending); Geneva-on-the-Lake, Ohio, Docket No. 79–30 (pending); Bingen/White Salmon, Washington, Docket No. 79–22 (pending).

[123] See, e.g., Bear Creek Sanitary Authority, Oregon, Docket No. 78–12 (settled, Dec. 5, 1979); County of Sacramento, California, Docket No. 80–30 (pending); Cardiff Sanitation Dist., California, Docket No. 80–11 (pending); Indiana State Board of Health, Docket No. 79–8 (pending).

[124] See, e.g., Sacramento Regional County Sanitation Dist., California, Docket No. 79–15 (July 29, 1980); Los Angeles, California, Docket No. 80–10 (pending); Humboldt Bay Wastewater Authority, California, Docket No. 80–04 (pending); Flint, Michigan, Docket No. 79–9 (air pollution control grant, pending); Gary; Indiana Air Pollution Control Agency, Docket No. 77–6 (pending).

[125] See, e.g., City of Spokane, Washington, Docket No. 75–37 (Nov. 30, 1977); Harris County Boone Road Utility Dist., Docket No. 76–8 (pending); Chicago, Illinois, Docket No. 74–13 (pending).

[126] See, e.g., Klickitat County, Washington, Docket No. 78–16 (settled, date unknown); Aliso Water Mgmt. Agency, California, Docket No. 78–3 (settled, Dec. 12, 1979); Orange County, California, Docket No. 75–35 (settled, date unknown).

	Favorable to Grantee	Upheld Agency	Split
No. of Cases	1	7	1
Dollar Value	$18,928	$272,351	$435,000

In the one "split decision,"[127] the Board found that both the grantee and EPA had acted wrongfully with respect to the award of a subcontract and called for a "compromise." In remanding the case to the Agency for reconsideration, however, the Board stated that the grantee might be awarded an amount not to exceed $435,000 (the full amount requested).

[*iii*]—*Disapproval of Request for Permission to Incur Expenditure.* Apparently only one case has been decided by the Board concerning denial of a grantee's request for prior approval of a proposed expenditure. *City and Borough of Juneau, Alaska,*[128] involved EPA's disapproval of a grantee's proposed user charge system as inconsistent with a statutory requirement that each user pay its proportionate share of the cost of the system. The Board affirmed the denial, but suggested ways in which the grantee could amend its proposal to be consistent with the statute.[129]

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[127] City of Spokane, Washington, Docket No. 75–37 (November 30, 1977).

[128] Docket No. 76–4 (July 28, 1976).

[129] See also, Village of Elburn, Illinois, Docket No. 77–13 (June 20, 1980) (grantee sought waiver of prior approval requirement); Arnold, Missouri, Docket No. 76–1 (June 30, 1977) (prior approval requirement examined in pre-award context).

TABLE I

EPA Board of Assistance Appeals

Type of Determination by Type of Grantee

	Written Decisions		Closed Without Written Decision		
Preaward	Clean Water Act	Other	Clean Water Act	Air	Total
1. Eligibility for reimbursement-general	8		15		23
2. Interceptor vs. collector	12		8		20
3. Acquisition vs. construction	5				5
4. "Municipality" vs. Other	2		4		6
Postaward					
1. Disallowed costs-general	7		22		29
2. Costs incurred prior to award	2		5		7
3. Inadequate documentation	2		2	2	6
4. Protest special conditions	1				1
5. Lack of or Denial of Prior Approval	2		4		6
6. Termination		1	3		4
7. Other (untimely appeal, no final agency action)	3		3		6

TABLE II

EPA Board of Assistance Appeals

Type of Determination by Type of Grantee
Cases Pending as of December 31, 1980

	Clean Water Act	Other	Total
Preaward			
1. Eligibility for reimbursement-general	10		10
2. Interceptor v. Collector	8		8
3. Acquisition vs. Construction	1		1
4. "Municipality" vs. Other	0		0
Post-award			
1. Disallowed costs-general	53	5	58
2. Costs incurred prior to award	1		1
3. Inadequate Documentation	1		1
4. Protest Special Conditions	0		0
5. Lack of or Denial of Prior Approval	8		8
6. Suspension or Termination	2		2
7. Other	9		9

TABLE III

EPA Board of Assistance Appeals
Dollar Amounts Per Type of Determination

	Written Decisions	Closed Without Written Decision	Total
Preaward			
Eligibility-General	4,209,294	3,260,563	7,469,857
Interceptor v. Collector	2,764,653	277,250	3,041,903
Acquisition v. Construction	6,380,788		6,380,788
Municipality v. Other	536,250		536,250
Subtotal	13,890,985	3,537,813	17,428,798
Postaward			
Disallowed costs	595,740	744,700	1,340,440
Preaward costs	97,230	1,118,711	1,215,941
Inadequate documentation	22,905	38,635	61,540
Prior Approval	10,404	1,957,183	1,967,587
Termination	46,491	488,920	535,411
Other		8,530	8,530
Subtotal	772,770	4,356,679	5,129,449
Total	14,663,755	7,894,492	22,558,247

No case is double-counted. Excluded all cases where unascertainable amount (see other charts).

TABLE IV

EPA Board of Assistance Appeals
Dollar Amounts Per Type of Determination

	Pending Cases
Preaward	
Eligibility-general	18,931,865
Interceptor-collector	719,970
Subtotal	19,651,835
Postaward	
Disallowances-general	4,561,446
Preaward costs	10,040
Inadequate documentation	376,587
Prior Approval	87,755
Subtotal	5,035,828
Amounts in cases where issue unknown	+4,048,173
Total =	28,735,836

* No amount shown in 49 out of 104 cases!

TABLE V

EPA Board of Assistance Appeals

Duration (Notice of Appeal* through Resolution)

Duration	Cases with Written Decisions	Cases Closed Without Written Decisions
Less than 1 month	0	0
1–3 months	0	2
4–6 months	1	10
7–12 months	1	9
1–3 years	13	22
Longer	22	16
Unascertainable*	2	6
	(76–4; 76–2; excludes motion for reconsideration in 75–6, 74–8, 74–9, 75–5)	(78–22; 78–16; 76–12; 76–9; 75–35; 74–4)

* If date of appeal unknown but docket number gives fairly accurate indication of duration, the case is included.

TABLE VI

EPA Board of Assistance Appeals

Duration of Appeal By Date of Filing

Written Decisions

Duration	1974	1975	1976	1977	1978	1979	1980	Total
Less than 1 month								
1–3 months								
4–6 months							1	1
7–12 months						1		1
1–3 years		2	2	5	2	2		13
Longer	4	14	2	1				21
Total	4	16	4	6	2	3	1	36

Unascertainable: 76–4, 76–2, 75–39
Excludes motion for reconsideration (75–6, 74–8, 74–9, 75–5)

Closed Without Written Decisions

Duration	1974	1975	1976	1977	1978	1979	1980	Total
Less than 1 month								
1–3 months						1	1	2
4–6 months				1	2	2	5	10
7–12 months				1	2	4	1	8
1–3 years		2	1	6	9	4		22
Longer		10	5	2				17
Total		12	6	10	13	11	7	59

Unascertainable: 78–22, 78–16, 76–12, 76–9, 75–35, 74–4

TABLE VII

EPA Board of Assistance Appeals
Historical Breakdown

Appeals Filed In	Written Decisions	Closed Without Written Decisions	Pending	Total
1974	4	1	4	9
1975	17	13	7	37
1976	6	8	3	17
1977	6	10	7	23
1978	2	15	16	33
1979	3	11	27	41
1980	1 (Excluded motion for reconsideration)	7	40	48
Total	39	65	104	208

Docket number date used if no notice of appeal date.
Not broken down by Act because only a few were not under Clean Water Act.

TABLE VIII

EPA Board of Assistance
Appeals

Breakdown of Reasons for Case Closings
Where No Written Decision

Appeal withdrawn by grantee–Gen'l : 12

Appeal settled : 35
Of these, in at least 9, EPA conceded in whole or in part

Appeal withdrawn by grantee in order to apply for new EPA grants : 2

Appeal withdrawn because funds obtained elsewhere : 2

Dismissed for failure of grantee to prosecute : 4

Dismissed for Lack of Jurisdiction, i.e., no Final Agency Action : 4

Stipulated dismissal : 1

No Reason Given for Closing : 5

TABLE IX

EPA Board of Assistance Appeals
Outcomes of Written Decisions

Favorable to Grantee	Against Grantee	Part for, Part Against	Total
10	22	8	40

Dollar Outcome

Favorable to Grantee	Against Grantee	Part for, Part Against	Total
10,615,651	2,271,205	1,770,916	

Unascertainable amounts: 78–1, 77–21, 77–20, 76–4, 75–41, 75–38, 75–25, 75–19 (partial), 75–17, 75–13, 75–7, motion for reconsideration (75–6, 74–9, 74–8, 75–5)

§ 54.08 Department of Health and Human Services

[1]—Introduction

The Department of Health and Human Services (HHS) has pioneered the area of grant dispute resolution. With the largest number of grant programs in the Federal Government, the largest number of grant recipients, and the most extensive audit authority, HHS has long recognized that disputes arise in Federal grant programs, and that those disputes should be handled fairly.

Accordingly, in 1972, HHS' predecessor—the Department of Health, Education and Welfare—established a Departmental Grant Appeals Board. The Board, which was placed bureaucratically within the Office of the Secretary, has jurisdiction to hear and to determine all post-award disputes arising from designated grant programs. Initially, the Board's jurisdiction was limited generally to post-award disputes arising out of discretionary grant programs. However, in 1978, the Board's jurisdiction was expanded to include mandatory grant programs authorized under the Social Security Act.

The addition of Social Security Act cases to the Board's jurisdiction had major impact upon the Board's operations. The number of cases brought before the Board increased dramatically. The relative complexity of the cases—and the amount of dollars at issue—virtually skyrocketed. State governments became one of the leading groups of appellants. Questions regarding the validity of agency regulations appeared more frequently. For the first time, a significant number of board decisions, i.e., those in the Social Security Act cases, represented final agency actions, with no opportunity for subsequent review by the Secretary or any program official.

Significant problems came with these changes. A bigger and more complex caseload caused increased delays in case handling. Controversy grew in the Department as to whether the Board should retain final authority over appeals which typically involved millions of dollars and challenges to agency regulations. Controversy also grew regarding the perceived rigidity of Board procedures.

HHS attacked these problems in a variety of ways. To ameliorate the delays and backlog, a newly-appointed Chairman of the Board designed and implemented a management scheme based on the hiring of full-time Board members, staff reorganization, and timetable goals. New procedural regulations allowed for expedited and streamlined review. Staff training in mediation techniques encouraged efficient, informal resolution of disputes.

Most of these reforms have been undertaken within the last two years. Although it still may be early to assess their full implications, two things seem clear. First, the new management scheme has resulted in sharply accelerated written decision making.[1] Second, as in the past, HHS at least has taken the initiative to deal with some of the most vexing problems in grant dipute resolution.

Not all of the issues regarding the Board's operations are as yet fully resolved. For example, the Secretary of HHS has not yet issued final regulations on the subject of the finality of decisions. Nor is it clear how recent changes in the Board's jurisdiction (with respect to certain pre-award and block grant matters) will affect Board operations and caseload.

As in the past, the grants community will continue to look at HHS to see how it handles these challenges.

[2]—Organizational Structure

HHS is one of the largest and most complex agencies in the Federal Government. For the student of grant disputes, it offers the biggest challenge. HHS administers more grant dollars and programs than any other Federal agency.[2] It delivers grant funds to virtually every State, hospital, and welfare agency in the country.[3] Moreover, HHS has comprehensive audit authority for large numbers of grants administered principally by other agencies.

Before analyzing HHS grant disputes, it may be helpful to take a look at the basic structure of the Department, and how the Departmental Grant Appeals Board fits into that structure.

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[1] During the period from March 1974 through March 1980, 89 written decisions were issued by the Board; 188 written decisions were issued between March 1980 and March 1982.

[2] Federal Grants Management Handbook, chapter on Department of Health and Human Services (Grants Management Advisory Service: 1981), p. 1.

[3] *Ibid.*

[a]—The Department of Health and Human Services: An Overview of Grant-Related Components. The two chief executive officers of the Department are the Secretary and Under Secretary. Beneath these officials are eight staff offices and four operating agencies, each of which is responsible for a separate area of activity. Those components which are most directly relevant to HHS' grant-making activities are described below.

[*i*]—*Office of Assistant Secretary for Management and Budget.* This Office contains an Office of Grants and Procurement, which performs two significant functions. First, the Office's Division of Grants Policy and Regulations Development is responsible for the development of Departmentwide grant administration policies and procedures. Second, an Office of Grant and Contract Financial Management is responsible for establishing Departmental policies on indirect costs and audit resolution.

[*ii*]—*Office of Inspector General.* Pursuant to the Inspector General Act of 1976,[4] the Department established an Office of the Inspector General. This Office is responsible for conducting audits of all HHS grants, and other grants for which HHS has been designated as the cognizant audit agency.[5] In addition, the Office is responsible for the investigation of fraud, abuse, and mismanagement in all HHS-sponsored activities.

[*iii*]—*Office of General Counsel.* The Office of General Counsel performs many functions pertinent to grant administration. It is responsible for reviewing all agency regulations before their formal promulgation, for interpreting such regulations, for advising grant program officials as to the legality of proposed and completed actions, and for representing program officials in disputes arising from grant administration.

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[4] Pub. L. 94–505, 42 U.S.C. § 3522 *et seq.*

[5] Under Office of Management and Budget (OMB) circulars generally applicable to all Federal granting agencies, specific agencies are given the responsibility to conduct and resolve audits of all Federal grants held by particular grantees. The system was developed primarily to avoid excessive Federal auditing of grantees, and to ensure comprehensive audit controls. When a Federal agency assumes this responsibility for a particular grantee, it is known as the "cognizant audit agency" for that grantee.

[*iv*]—*Principal Operating Agencies.* HHS currently has four principal operating agencies, each of which is described briefly below.

[*A*]—*Public Health Service.* Public Health Service, (PHS) consists of six component agencies: the Center for Disease Control; Health Services Administration; Health Resources Administration; National Institutes of Health; Food and Drug Administration; and the Alcohol, Drug Abuse, and Mental Health Administration. Each of these components has various grant-making authorities; combined, they administer well over 200 mandatory and discretionary grant programs.[6] Generally stated, grants are provided to support the provision of health services (in community and migrant health centers, health maintenance organizations, etc.), health professions training, national health surveys, comprehensive health planning and health-related research.

[*B*]—*Social Security Administration.* Social Security Administration (SSA) administers direct assistance programs, such as the Supplemental Security Income (SSI) and Retirement, Survivors and Disability Insurance programs. SSA also administers various prorams of open-ended reimbursement grants to State Welfare agencies which are responsible for distributing funds to eligible individuals. The best-known of these programs is Aid to Families with Dependent Children (AFDC), which is authorized under Title IV of the Social Security Act. In addition, SSA administers two reimbursement grant programs which provide for refugee assistance, and a small research project grant program.

[*C*]—*Office of Human Development Services.* Office of Human Development Services (OHDS) was established to assist special groups of Americans, such as children, the aged, native Americans and disabled persons. It administers a variety of formula and project grant programs targeted to assist each of these groups. Some of the better known OHDS programs are: Head Start, Runaway Youth, Child Welfare Services, Social Services for Low Income and Public Assistance Recipients (and related training grants) under Title XX of the Social Security Act, Work Incentive Program—Child Care—Employment Related Supportive Services (WIN), Rehabilitation Services and Training, Nutrition Program

[6] 1981 Catalog of Federal Domestic Asistance, pp. AI5–AI8.

for the Elderly, Model Projects on Aging, and the Native American Programs.

[*D*]—*Health Care Financing Administration.* Health Care Financing Administration (HCFA) is responsible for administering Medicare and Medicaid. These programs are authorized by Titles XVIII and XIX of the Social Security Act and are mandatory in nature, providing Federal financial participation in the reasonable and necessary costs of providing health services to eligible individuals. The states serve as intermediaries, entering into reimbursement agreements with qualified providers and certified facilities for their costs of providing these services.

[b]—Bureaucratic Placement of the Board. Since its establishment in 1974, the Departmental Grant Appeals Board has been structurally apart from the Department's principal operating agencies and Office of General Counsel.[7] Until about 1978, the Board was lodged directly within the Office of the Under Secretary, and the Chairman of the Board reported only to the Under Secretary. In 1978, the Board was moved to the Office of Assistant Secretary for Personnel Administration (ASPER).

The move has been described as purely administrative in nature.[8]

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[7] This separation apparently came as a result of deliberate decisionmaking. In commenting upon proposed changes to the Board's bureaucratic placement, Malcolm S. Mason, former chairman of the Board, noted the history and rationale of the Board's isolation from the Assistant Secretary for Management and Budget ("ASMB" or "MB"), and the Office of General Counsel ("OGC"):

> MB notes as possible alternatives OGC and ASMB. Both of these possible locations were actively considered four years ago and then again two years ago and were rejected because of a serious conflict of interest problem that would result from the necessity for the Board to make independent judgments in cases in which OGC appears as counsel for the agency and in cases that involve interpretation of regulations and manual provisions drafted by ASMB or administered by ASMB units. The problem is both the real conflict of interest that would exist and the clear appearance of conflict of interest that would be broadcast to the affected States and other grantees."

Memorandum from Malcolm S. Mason, Chairman, Departmental Grant Appeals Board to Mike Andrews, Executive Secretariat on Subject of Comments on Interim MB Report on Board Organization dated June 12, 1979, ("Mason Memorandum"), pp. 7–8.

[8] Interview with Malcom S. Mason, and Frank DelAcqua, Acting Chairman of the Board, July, 1980. See also, Memorandum and accompanying report of Frederick M. Bohen, Assistant Secretary for Management and Budget to the Secretary

Thus, although technically under ASPER, the Chairman of the Board continues to report directly to the Under Secretary on all substantive matters, including the Board's jurisdiction, procedures, budget and staff requests.[9] Only logistical, personnel, and accounting matters are handled through the Assistant Secretary.

In 1979, a study of the Board by the Assistant Secretary for Management and Budget revealed certain unforeseen problems with the Board's placement within ASPER. Reviewing larger issues of the Board's resources and productivity, the report of the Assistant Secretary for Management and Budget (MB) indicated:

> "At present, the Board has slots which it cannot fill because of the hiring freeze in ASPER. Because the Board is in ASPER for housekeeping and not for programmatic reasons, the spillover of the ASPER freeze to the Board is an unplanned hindrance to the Board's completion of its duties."[10]

In light of this finding, the report recommended that the Board be returned to the immediate Office of the Under Secretary.

In commenting on the MB study, the then-Chairman of the Board agreed that it would be desirable to move the Board back into the Office of the Under Secretary. To avoid any misunderstanding, the former Chairman noted in his comments that ASPER had "scrupulously respected the programmatic independence of the Board."[11]

Notwithstanding this dialogue, the Board remains in the Office of the Assistant Secretary for Personnel Administration. No continuing problems regarding this placement have been reported.

[c]—The Board's Interrelationship With Other Parts of the Department. Notwithstanding its bureaucratic isolation, there were numerous ways by which, prior to the revision of its rules of proce-

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of HHS on the Departmental Grant Appeals Board, undated ("MB report"), p. 4, and as discussed, *infra.*

[9] Indeed, the Under Secretary is the Board chairman's boss, with responsibility for evaluating the chairman's job performance. Interview with Norval D. (John) Settle, Chairman, Departmental Grant Appeals Board, Washington, D.C., April 23, 1982.

[10] MB report, N. 8 *supra,* p. 4.

[11] Mason Memorandum, N. 7 *supra,* p. 10.

dure in August 1981,[12] the Board interacted with program and administrative components of the Department. For example, in certain types of cases heard by the Board, the heads of HHS principal operating agencies were entitled to review and revise decisions of the Board. Furthermore, on occasion, program personnel and/or OGC staff sought to engage in discussions with Board members and staff regarding the application or interpretation of current policy. Moreover, the Board's actions continue to relate to other parts of the agency with respect to the enforcement of Board decisions. Such enforcement may be either with respect to a particular appeal involving one grantee, or with respect to a change of policy applicable to all grantees. Each of these issues is discussed below.

[*i*]—*The Review of Board Decisions.* A significant issue at HHS has been whether and to what extent Board decisions may be reviewed by the Secretary or designated program officials. Historically, Board regulations did not provide for Secretarial review. However, under certain circumstances, Board decisions could have been reviewed by heads of constituent agencies.[13]

The Board's 1981 rulemaking directly addressed the issue of possible review of Board decisions. As initially drafted, circulated, and approved within the Department, the proposed rules provided for finality of all Board decisions. However, immediately before the submission of the proposed rules to the Federal Register, the Secre-

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[12] On August 31, 1981, the Secretary of HHS published comprehensive revisions to the regulations governing the Board (45 C.F.R. Part 16, revisions published in 46 Fed. Reg. 43816 *et seq.*). The revisions became effective as of September 30, 1981. For purposes of this chapter, the regulations in effect prior to September 30, 1980, will be referred to as the "old regulations," and the regulations in effect after that date will be referred to as the "new regulations."

[13] Thus, § 16.80 of the old regulations provided that following the submission of an initial decision by a panel of the Board, each party to the proceeding "shall have an opportunity to submit written comments on the initial decision to the head of the constituent agency within the time specified by the panel." § 16.81 further provided that:

> "If the head of the constituent agency advises that he intends to review the initial decision, the Board chairman shall notify the parties of this within ten days of the notice."

These sanctions expressly did not apply to reconsiderations of disallowances arising under the Social Security Act. *Id.* § 16.91(e).

tary added a section providing that the Secretary could review all Board decisions.

According to the current Chairman of the Board, more written comments were received on this provision than on any other in the proposed rules. Furthermore, according to the Chairman, virtually all of the comments were negative.[14] In light of these comments, the Chairman prepared the following pro-con analysis of Secretarial review.[15]

Option 1: To Provide for Secretarial Review of Board Decisions

Pros:

(1) would give the Secretary control over decisions with which the Secretary might disagree on some policy basis

(2) would give the Secretary a means to correct errors in decisions

(3) might make the Board's job easier, and therefore faster, if difficult questions could, in effect, be passed to the Secretary and Staff

Cons:

(1) would subject the Secretary to frequent pressures from conflicting interests inside and outside the Department to change decisions

(2) would appear to detract from the appearance of fairness and impartiality of the process

(3) would introduce further delay in resolving disputes, contrary to the Department's audit resolution policy

(4) would require the Secretary to devote considerable personal and staff time to responding to requests for review from losing parties, reviewing decisions (and the underlying voluminous records), and writing new decisions

(5) an action of the Secretary summarily overturning a considered Board decision might not fare well in court, and might be subject to criticism from Congressional sources

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[14] Memorandum to the Secretary fro Norval D. (John) Settle, Chairman, Departmental Grant Appeals Board, "Should the Secretary review all decisions of the Departmental Grant Appeals Board?" April 8, 1981.

[15] *Ibid.*

(6) would appear to renege on the determination of the Secretary in 1978 that Board decisions in Social Security Act disallowance cases—our largest category of cases—would be final

(7) might reduce the incentive of the parties to present their best case to the Board

(8) is an unnecessary means to correct errors since the new procedures provide explicitly for reconsideration at the request of the agency or grantee

Option 2: To Provide for Finality of Board Decisions

Pros:

(1) The Board's procedures specify that the Board is bound by Departmental regulations, which reduces the risk of a Board decision conflicting with Departmental policy

(2) well established precedent requires the Board to give deference to agency expertise and programmatic judgment

(3) the nature of disputes before the Board—generally, contesting audit findings—rarely involves policy attributes of sufficient importance to justify review at the Secretarial level

(4) would enhance grantee and public perceptions of fairness and impartiality of the dispute resolution process

(5) would avoid delay (the new procedures set specific time goals for Board review)

(6) would avoid need for commitment of extra personnel and resources to dispute resolution

(7) would be responsive to comments received on the proposed procedures

(8) judicial review is likely to be less critical of a considered final three-member Board decision based on a fair process and a well-developed record

Cons:

(1) could mean that the Secretary would relinguish some control over decisions otherwise within the Secretary's authority

(2) in some matters, the Board may not have the expertise of the HHS component, and if poorly briefed, may be led to err

(3) the Board cannot be sensitive to political pressures

Upon such analysis, the Chairman recommended that the Secretary adopt Option 2, i.e. the finality of Board decisions. Furthermore, the Chairman recommended that if Option 2 were rejected, the Secretarial review prescribed in Option 1 should be subject to the following constraints:

"(a) Secretarial review should be completed within a specified time (for example, a decision to review/not review within ten days from the date of a Board decision); and (b) Secretarial review should be subject to a standard (for example, review to determine whether the court decision was clearly erroneous)."[16]

As of August 31, 1981, when the revised Board regulations were issued in final form, the Secretary apparently still was considering these options. In the preamble to those rules, HHS explained the situation as follows:

"The Department continues to study whether Board decisions should be 'final' or should be subject to Secretarial review. In order to avoid further delay in implementing the other provisions, these procedures are being published without § 16.21(c), and that section is reserved for the addition of a provision dealing with the matter of the finality of Board decisions. In the interim, the decisions of the Board will be the final administrative action of the Department on the matter in dispute."[17]

To date, the Secretary has taken no further action to provide for review of Board decisions. Accordingly, the Board's decisions currently represent final agency action.

[*ii*]—*Involvement of Program Personnel and Office of General Counsel Staff in Board Decisionmaking. Ex parte* communications have been another sensitive issue in HHS proceedings. Old Board rules were explicit and absolute. They provided that:

"No person who participated in prior administrative consideration of, or in the preparation or presentation of, a case submit-

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[16] *Ibid.*

[17] 46 Fed. Reg. 43817 (Aug. 31, 1981).

ted to the Board shall advise or consult with, and no person having an interest in such case shall make or cause to be made an *ex parte* communication to, the Panel, Board, or head of the constituent agency with respect to such case, unless all parties to the case are given timely and adequate notice of such advice consultation, or communication, and reasonable opportunity to respond is given all parties."[18]

The new regulations may be considered—depending on your point of view—as being either more reasonable or more equivocal. They provide as follows:

"§ 16.7 Ex parte communications (communications outside the record).

"(a) A party shall not communicate with a Board or staff member about matters involved in an appeal without notice to the other party. If such communication occurs, the Board will disclose it to the other party and make it part of the record after the other party has an opportunity to comment. Board members and staff shall not consider any information outside the record . . . about matters involved in an appeal.

"(b) The above does not apply to the following: communications among Board members and staff; communications concerning the Board's administrative functions or procedures; requests from the Board to a party for a document (although the material submitted in response also must be given to the other party); and material which the Board includes in the record after notice and an opportunity to comment.

Interviews with the former Board Chairman and Executive Secretary revealed a particular sensitivity to this issue.[19] In the past, there apparently were incidents in which program officials and/or members of the Office of General Counsel sought to influence Board decisionmaking in an unauthorized, *ex parte* manner. On one occasion, the Board Chairman and Executive Secretary were called to a meeting at which program and OGC staff sought to impress upon the Board certain regulatory and policy implications of a matter then pending before the Board. On another occasion, the

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[18] 45 C.F.R. § 161.11.

[19] Mason interview, N. 8 *supra;* interview with Thomas Reynolds, former Executive Secretary of the Board, August, 1980.

Board was advised of a memorandum which had been written by a member of the Office of General Counsel, and intended for *ex parte* submission to the Board. In both cases, the Board reportedly resisted efforts to be influenced improperly. However, both persons involved—the former Chairman and former Executive Secretary—expressed concern that this type of effort may not be uncommon in administrative grant dispute procedures, and emphasized that resistance to such efforts may be the key to fair decision-making.

The current Board Chairman reported that there have been no problems of *ex parte* communications in the last two years.[20]

[*iii*]—*Dissemination and Enforcement of Board Decisions.* Board decisions currently are disseminated throughout the Department. However, no part of the Department has specific responsibility or authority to enforce Board decisions.

Within the Board structure, prior decisions generally are given precedential value.[21] There is no assurance that similar treatment will be afforded Board decisions by other parts of the Department.

On at least one occasion, a component agency of HHS determined that Board decisions do not have precedential value. The case involved Wayne State University and the National Institutes of Health (NIH); the issue was whether certain types of compensation should be charged as "research fellowships" or "stipend payments."[22] NIH vigorously opposed the appeal. For example, when NIH lost the case before the Board, the agency petitioned the Assistant Secretary for Health requesting further review of the case,

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[20] Settle interview, N. 9 *supra.*

[21] But see, Ohio Dept. of Public Welfare, Docket No. 78–50–OH–HC, Decision No. 66 (Oct. 10, 1979) (Board will not necessarily apply decision as precedent if regulations interpreting statute are enacted); New Mexico Human Services Dept., Docket No. 79–8–NM–HC, Decision No. 83 (Feb. 25, 1980) (Board reached decision, in part, on basis of inadequate briefing by agency; it might reach opposite conclusion in subsequent case if better analyzed); California Dept. of Health Services, Docket No. 80–132–CA–HC, Decision No. 234 (Nov. 30, 1981) (reveral of disallowance in one case does not estop disallowance in similar but distinguishable case).

[22] Wayne State University, Docket No. 21, Decision No. 12 (Dec. 12, 1975).

and the reversal of the Board's decision.[23] In support of this action, NIH warned about the "potential impact" of the precedent that would be established by the Board's decision in this case:

> "If this decision is not considered, a cost that according to policy is clearly not allowable to a research grant . . . somehow may be 'legitimized' as the result of an appeal. This abrogates the authority of the policy and potential inequity in that those who elect to appeal may be given relief while others not appealing will be required to be in compliance with published policy."[24]

There appears to be an obvious answer to NIH's concern; namely, that the Board decision should be accepted by the Department, and incorporated into prospective policy decisions. Such action would eliminate the kind of inequities described.

Nonetheless, NIH may have been right in its concern. Upon review of the Wayne State appeal, the Assistant Secretary for Health upheld the Board's decision. Subsequently, however, there was no change in NIH policy. Indeed, quite the opposite occured. When other educational institutions sought to use the *Wayne State* decision as precedent for research fellowship classification, they were told flatly that the *Wayne State* decision did not govern. Thus, the Chief of Audit Resolution for NIH advised an educational institution that:

> "The Wayne State case was not precedent setting for a later case involving the same principal issue."[25]

This type of agency response to Board decisions suggests a number of important implications. First, even if a grantee were to receive a favorable ruling from the Grant Appeals Board, it could not be assured of continued proper treatment by HHS without further appeals to the Board. Second, as NIH previously suggested, there may be an inequity between those grantees which are willing

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[23] Letter from Donald S. Frederickson, M.D., Director, NIH, to the Assistant Secretary for Health, January 9, 1976, regarding DHEW Grant Appeals Board Decision No. 12, Wayne State University. This appeal was brought under the old rules of procedure; accordingly, the agency was authorized to request reconsideration by the Assistant Secretary. Under the new rules, however, only the Board may reconsider its decision.

[24] *Ibid.*

[25] Confidential letter from Jacob Seidenberg, Chief, Audit Resolution Section, NIH, to counsel for educational institution, Dec. 4, 1978.

and financially able to bring appeals before the Board and those which are not. Third, the Board's caseload may be burdened with repetitive appeals of virtually the same issue. Although these appeals presumably could be handled in some form of expedited manner, they nonetheless would impose an added workload upon Board members and staff.

To address this issue, past and present HHS officials suggest that the Board should bear the responsibility of notifying the heads of all component agencies of the full range of Board authority, and operating procedures.[26] In such a way, the Board may convince the agencies that, regardless of their inclinations, Board decisions have some legal precedential value and may be enforceable in the courts. Furthermore, HHS officials suggest that any continuing problems with program officials be directed to the attention of the Under Secretary. At that level, efforts to ensure the enforcement of Board decisions, and the making of consistent policy, may be effective.

[3]—Internal Organization and Operating Procedures

[a]—Overview of Board Organization and Procedures Prior to 1980

[*i*]—*The Board's Organization and Operations Under the Old Rules of Procedure.* In 1974, the Departmental Grant Appeals Board was established in the Office of the Secretary. Detailed rules of procedure governing Board operations were issued in the following year.[27]

The old rules authorized the Secretary to appoint Federal employees to serve as members of the Board on a full-time or part-time basis. Until 1980, all of the Board members except the Chairman were former or present Department officials who served on a part-time basis. Each appeal was heard by a panel of three Board members, assisted by a full-time professional staff (hired by the Board Chairman).[28]

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[26] Mason interview, N. 8 *supra;* Settle interview, N. 9 *supra.*

[27] 40 Fed. Reg. 33936 (August 12, 1975).

[28] The professional staff typically was composed of attorneys and analysts. The staff was responsible for reviewing the appeals and preparing them for presentation to Board members. The size of the staff increased to approximately twelve persons in 1980, ten of whom were attorneys.

As of mid-1980, there was no internal staff organization, with the exceptions of the Chairman, who reviewed virtually all papers filed in the course of Board appeals, and the Executive Secretary, who was responsible for administering the Board and communicating certain matters to the parties. In addition, there were no internal staff assignments based on subject matter or Board member. As a result, individual staff members often worked on a variety of matters at one time, and with different Board members. Accordingly, several pending cases involving virtually the same legal issues were handled by several different staff persons.

The old rules of procedure governing Board operations, in most respects, were similar to new rules issued on August 31, 1981. However, a few significant changes were made. For example, under the old rules, no provision was made for the expedited consideration of challenges to the Board's jurisdiction. Accordingly, when the Chairman was unable to make an immediate determination in this regard, the parties were asked to brief the jurisdictional issue prior to consideration of the merits. Delays in resolving appeals often resulted. Another significant difference is that the old rules, except in cases of disallowances arising under Social Security Act public assistance programs (e.g. Medicaid), required the panel to issue an initial written decision and transmit it to the parties. The grantee and responsible agency officials could submit comments on the initial decision to the head of the appropriate constituent agency. The agency head was authorized to modify or reverse the initial decision.

[*ii*]—*HEW's Self-Evaluation of Board Operations.* Beginning in 1979, HEW sought to examine Board operations, and to identify strengths and weaknesses of Board management and procedures. Apparently the first stage of HEW's self-examination came in the form of a study of the Departmental Grant Appeals Board by the Assistant Secretary for Management and Budget. In an interim report filed in mid-1979, the Assistant Secretary for Management and Budget reported that the Board's chief problem was a serious backlog of cases which was growing steadily. As the Assistant Secretary stated simply: "[T]he Board is receiving substantially more cases each month than it can resolve."[29]

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[29] Memorandum to the Secretary from Assistant Secretary from Management and Budget, Frederick M. Bohen, regarding the Departmental Grant Appeals

On June 12, 1979, Malcolm S. Mason, at that time the Chairman of the Departmental Grant Appeals Board, presented comments to the Secretary on the interim report made by the Assistant Secretary for Management and Budget. While acknowledging the basic problems identified by the Assistant Secretary, the Mason memorandum disagreed with many of the Assistant Secretary's conclusions regarding the causes and possible cures of the backlog problem. Shortly after the dialogue between the Assistant Secretary for Management and Budget and the former Board Chairman took place, another office within HEW, the Office of General Counsel, scrutinized the Board's operations. The Assistant General Counsel (AGC) for the Business and Administrative Law Division reported to the General Counsel that there were various ways in which the Board's decision-making process could be expedited "in a manner consistent with basic principles of due process and fairness."[30]

A brief summary of the findings of the Assistant Secretary for Management, and response by the former Chairman of the Grant Appeals Board, as well as the AGC's recommendations, follow.

[*A*]—*Staffing.* The Assistant Secretary noted four separate problems with regard to the Board's staffing:

(1) Lack of professional staff;

(2) Lack of clerical support;

(3) Use of part-time Board members produced delay;[31] and

(4) A hiring freeze in ASPER hindered the Board's acquisition of needed staff.

Board, undated. Supplementing this conclusion was the recitation of a series of specific Board problems which contributed to the backlog, and a series of tentative recommendations for improving the Board.

[30] Memorandum, Darrel J. Grinstead, Assistant General Counsel, to Richard I. Beattie, General Counsel, "Review of the Department's Grant Appeals Board Processing of Cases" (Sept. 5, 1979).

[31] Both the Assistant Secretary and the AGC found that existing part-time members served on the Board as a "secondary function" and, therefore, tended to subordinate Board work to their own work, producing delays in deciding cases. To ameliorate the situation, the Assistant Secretary recommended that the Board hire full-time Board members. The permanent Board members, according to the Assistant Secretary, should be attorneys because "the Board must prepare decisions which can be defended in court proceedings."

The Chairman of the Board agreed with the recommendations for the hiring of full-time Board members and additional professional and clerical staff.[32]

[*B*]—*Procedures.*

[*1*]—*Board Procedures are too Formal and Legalistic.* The Assistant Secretary cited three specific problems with regard to the formality and legal nature of existing Board procedures. Each of these problems is discussed below.

[*a*]—*Written Communications.* Both the Assistant Secretary and the AGC criticized the Board's practice of communicating only in writing and only with both parties simultaneously. They found that this practice caused delay in fact-gathering. As stated by the Assistant Secretary:

> "We see no demonstrable threat to fairness in allowing the use of the telephone to gather factual information, with follow-up written communications to inform both parties."

In order to expedite this process, the Assistant Secretary recommended that the Board hire two professional data collectors—"examiners"—who would collect information from parties by tele-

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[32] Interestingly, the Board chairman disagreed with one aspect of the Assistant Secretary's recommendation for a phase-in of permanent full-time Board members. In his report, the Assistant Secretary recommended that, as an interim measure, the Board obtain six full-time members on detail to "clean up the present backlog" of pending cases. The Assistant Secretary suggested that possible sources for such detailed members would be the Bureau of Hearings and Appeals of the Social Security Administration, the Environmental Protection Agency, and the Department of Defense. In his response, the Board Chairman agreed with the recommendation for obtaining interim members detailed from other agencies, but disagreed with the suggestion that the Department of Defense would be a possible source for detailees. The Chairman's objection was as follows:

> "Armed Services Board of Contract Appeals member, to whom I assume MB refers, are wholly oriented in their work to procurement contract, not grant cases, and I believe DOD personnel would not be useful to the Board without a disproportionate amount of retraining. It is a distinctive aspect of the Board's mission that it is to 'preserve the uniqueness of the grant process, as distinguished from the procurement process.' Preamble to the Board's charter, comment C2 (38 F.R. 9906, April 30, 1973). This distinction between the grant and procurement is strongly re-emphasized by Public Law 95–224, Federal Grant and Cooperative Agreement Act, now being implemented by OMB."

phone or personal conference and then notify all parties of the event in writing. The Assistant Secretary stated that such examiners would play no part in the decisionmaking process, but would work directly for the Executive Secretary to facilitate review.[33]

The Board Chairman objected to this finding and recommendation. In making this objection, the Chairman stressed the importance of the perception of fairness, as well as fairness itself. In addition, the Chairman noted the difficulty in making telephone inquiries to gather information, and not at the same time "unwittingly biasing the building of the record." According to the Chairman, the Board had made limited use of this method of factfinding, but concluded that only a limited number of particularly mature staff members, separated from the decisionmakers, could be entrusted with this kind of task. Commenting on the value of existing Board procedures and re-emphasizing the need for the appearance as well as the fact of fairness, the Board Chairman concluded:

> If States and other grantees have indicated to MB [Assistant Secretary for Management and Budget] that they would have no objection to such a process, it is because they are now convinced by our careful procedures of our fairness. But if we change the process and especially when new officials become involved, I am convinced that the Board's reputation for fairness would be severly hurt."

In the opinion of the Board Chairman, the Assistant Secretary's recommendation that specially designated examiners be used to conduct the telephone inquiries would diminish but not cure the danger to the Board's reputation and appearance of fairness.

[*b*]—*Board Delays in Contacting Program Agencies.* Another of the procedural problems cited by the Assistant Secretary was the apparent delay of the Board in notifying program agencies of pending appeals. The Assistant Secretary's study showed that an average of forty-seven days passed between the time that the Board first learned of a grantee's intention to appeal, and the Board's first communication with the program agency involved. According to

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[33] The AGC recommended that telephone calls and simple letters be used, rather than formal Orders to Show Cause and Orders to Develop the Record. Furthermore, he recommended reduction of the "formalistic" filing, service and computation of time rules which result in a "flurry of paperwork" by the parties on mere procedural details.

the Assistant Secretary, this time could have been used by the agency to collect its data from regional offices and elsewhere, thereby reducing the ultimate number of days required for an agency's response to an appeal. In light of these findings, the Assistant Secretary recommended that the Board notify the appropriate program agency as soon as it became aware of an appeal or the intent to appeal.

In response, the Board Chairman noted that the Board generally did not notify a program agency of the existence of an appeal until the Board first had decided whether it, in fact, had jurisdiction of the appeal. Such determination, according to the Board Chairman, could take as long as one or two months to resolve. Other delays generally were caused by the shorthandedness of the staff, and, in any event, were characterized by the Board Chairman as being "relatively minor." Longer delays sometimes occurred with respect to reconsideration cases under the Social Security Act. According to the Chairman, these delays were caused by the failure of Department—or Health Care Financing Administration—officials to issue proper notices of disallowance. Because of this failure, Board appeals and formal notification to the agency of the filing of such appeals often were suspended indefinitely pending the agency's correction of its notice.

In this regard, the AGC criticized the Board's preoccupation with procedural issues, stating, for example, that the Board should not on its own initiative raise issues relating to the authority of a particular official to render the appealed decision. Rather, the Board should presume the validity of the agency's action and proceed to the merits of the case unless the grantee raises the question.

[*c*]—*Decisions by at Least Three Members of the Board.* The Assistant Secretary questioned the necessity of a provision in the Board's charter requiring that at least three Board members decide each case. The Assistant Secretary apparently based this question upon its finding that Board staff were aware of no decisions where a Board member provided a dissenting opinion. As a result of this finding, the Assistant Secretary recommended that the Board

change its procedure to allow individual Board members to hear and decide cases.[34]

The Board Chairman agreed that the authorization of one-member decisions would be a "desirable change" in the Board's charter. However, he indicated that one-member decisions should be limited to those cases involving a relatively small amount of money, and little precedential value. Moreover, the Chairman recommended that even under those circumstances, one member decisions should have the general concurrence of the Chairman. The Chairman explained his recommended limited use for one member decisions as follows:

> "While it is true that no dissenting opinions have ever been issued, many cases reflect in the final decision a give and take among the Board members which produced a better, sounder, and more acceptable decision than would have been received by a single member. This is an important benefit of three member decisions since it reflects the combined perspectives of experienced and well-informed Board members approaching a case with significantly different backgrounds. It is an important element of stable, creditable, wise decision-making that the Board member drafting the decision must convince experienced colleagues that his analysis is sound."

The AGC had one further criticism relating to the scope of the Board's review. He criticized the Board's reluctance to dismiss summarily cases in which there were no legal and factual issues to be decided, e.g. where the grantee admits that, under the agency's regulations or policies, the agency action is correct, but the grantee challenges the validity of the regulation or policy. The AGC recommended that the Board's charter be revised to make clear that it has no jurisdiction to review the validity of agency regulations or other issuances.[35]

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[34] The AGC also made this criticism, recommending that three-member panels be used only for cases involving more than $50,000 or significant precedential issues.

[35] It should be noted that this recommendation would bind the Board not only to follow agency rules but also would exclude from Board review any generally applicable policies issued by the agency. This would have represented not merely a clarification of the Board's jurisdiction, but a significant new limitation.

[*II*]—*Board Members are too Divorced from the Board's Staff.* The Assistant Secretary and AGC both criticized the fact that staff members analyzed appeals without guidance from Panel members, resulting in delays when a Panel decided on a different approach and required the staff to go back to the drawing board. Delays also were caused by staff persons who wasted time trying to cover every possible point. The Board Chairman strongly disagreed with this last criticism, stating that in order to assure fairness, an appeal must be thoroughly analyzed for all possible perspectives.

With respect to the basic premise (that members and staff are "divorced"), the Chairman agreed, attributing the problem to the use of part-time Board members. However, he rejected the Assistant Secretary's recommendation that individual staff be permanently assigned to individual full-time Board members on the ground that such an arrangement would drastically reduce flexibility and therefore efficiency in the Board's work. The AGC recommended a greater emphasis on forcing the parties to frame the issues and develop the facts of an appeal, with the Board's role limited to resolution.

[*III*]—*The Span of Control of the Chairman and Executive Secretary is too Great.* Another reason for inordinate delays, commented the Assistant Secretary, was that the Chairman and/or the Executive Secretary reviewed "every piece of paper." One consequence of this autonomy was that staff persons could not obtain on-going, timely guidance and therefore flaws in analysis were detected relatively late in the process. The Assistant Secretary stated that the use of full-time permanent Board members with direct supervision of their staff would ameliorate this problem.

The Board Chairman disagreed both with the suggestion that his span of control was too great and that the staff was not being given on-going and timely guidance. While the Chairman did not object to the development of an intermediate supervisory level, he was not convinced that there was a need for it and expressed concern that creating a new layer might result in an overly rigid structure.

[*C*]—*Management.* The Assistant Secretary criticized the fact that the Board lacked a uniform system for logging and tracking cases and lacked a completed case precedent index. These shortcomings caused staff to rely too heavily on the Executive Sec-

retary's memory in searching for precedents and resulted in delays because due dates were not automatically set. In addition, the Assistant Secretary noted as another delay factor the lack of specialization of staff, due in part to personnel shortages.

In addressing these management problems, the Assistant Secretary recommended that: (1) the Board be returned to the immediate office of the Under Secretary; (2) his own staff design and implement a management information system for the Board; (3) the Chairman set due dates for Board staff; and (4) funds be allotted to the Board to contract for implementation of a case precedent system. The AGC recommended that deadlines not be extended routinely, and that cases be dismissed when the grantee inexcusably missed deadlines. Delays by agency attorneys should be reported to the General Counsel.[36]

The former Board chairman agreed that the Board's case index was not well-organized or complete. He stated that some specialization of staff currently was being attempted but expressed concern that the benefits of "binocular vision" not be overlooked in favor of rigid specialties. The Chairman agreed that due dates should be set by the Executive Secretary but, because of the varying complexities of each case, cautioned that those dates could not be unduly stringent. He welcomed the Assistant Secretary's assistance in developing a better information system, and stated that moving the Board to the Office of the Under Secretary would be desirable.

[b]—The Board's Current Organization and Procedures. Several observations and recommendations for change made by the Assistant Secretary for Management and Budget and the Assistant General Counsel for Business and Administrative Law have been addressed by Norval D. (John) Settle, who assumed the position of Board Chairman in September 1980.[37] The new Chairman perceived the need for, and implemented, change in three major areas: (1) the use of full-time Board members under the Chairman's direction; (2) reorganization of staff with an emphasis on productivity;

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[36] The AGC acknowledged that agency attorneys often were responsible for delays, resulting in part from the press of other business and in part from late referrals of the cases by the agency officials to them.

[37] Information in this section was obtained in a series of interviews with Mr. Settle, in Washington, D.C., in 1981 and 1982.

and (3) streamlined procedures, emphasizing fair and expeditious dispute resolution. Each of these goals, and efforts made to reach them, are discussed below.

[*i*]—*Expert, Full-Time Board Members.* The Board now has four full-time Board members (including the Chairman). The Chairman uses part-time members only in emergencies, because they are not solely responsible to him. With respect to the full-time members, the Chairman retains the ability to set management priorities and otherwise remain in control of their caseload.[38]

In nominating full-time Board members, the Chairman has sought out individuals with relevant experience and a balance of different perspectives. This balance has been accomplished through the designation of: (1) Celia Ford, who previously had litigated before the Armed Services Board of Contract Appeals on behalf of HHS, and before that, had worked for the Office of Economic Opportunity; (2) Alexander Teitz, who previously was employed by the Illinois Department of Public Aid and handled Social Security Act cases on behalf of the State; and (3) Donald Garrett, who previously worked in the Social Security Administration Division of HHS's OGC. Thus, the full-time Board membership is composed of an expert on procurement contracts, a former grantee advocate and a former agency advocate.

[*ii*]—*Staff Reorganization.* The new Chairman perceived the need to reorganize and re-orient the Board's staff.[39] Viewing his role as essentially managerial, the new Chairman has implemented various changes in approach.

First, the Chairman has organized the staff into two teams, each composed of staff individuals and a supervisory attorney. The supervisory attorney of each team trains and supervises the team's staff and acts as liaison between the team and Board members. Within one day after an appeal is filed, the Executive Secretary and the two supervisory attorneys review the case and assign it to a staff attorney and a Board member.[40] Assignments are made on the

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[38] Settle interview, N. 37 *supra.*

[39] Settle interview, N. 37 *supra.*

[40] The Chairman insists that Board members have their own caseload, including responsibility for preparing decisions, in the interest of keeping their analytic (as well as supervisory) skills sharp. Settle interview, N. 37, *supra.*

basis of the expertise of the individual staff members, their workload and the complexity of the case. The suitability of the case for mediation also is considered. Although primary responsibility for case development rests with the staff attorney and presiding Board member, each recommended decision is reviewed by the Chairman, other Board members and a supervisory attorney.

Second, the Chairman has initiated a training program for Board members and staff. Substantive training in areas such as cost principles and grants management has been provided. Management techniques also are taught. In this regard, the Chairman has sought to impress upon members and staff that their role is to resolve disputes, not to develop and expand disputes.[41] In addition, training in the use of mediation skills has been provided to members and staff by the Federal Mediation and Conciliation Service. The Chairman hopes that mediation training will improve the staff's conduct of informal conferences. Moreover, the Chairman envisions the Board as a mechanism for resolving informal, as well as formal, disputes through the use of trained mediators.

Third, in order to foster productivity and lessen the flurry of paperwork, the Chairman has encouraged staff to use informal telephone conferences. All parties are included in these conferences unless the issue is merely technical, so as to avoid running afoul of *ex parte* prohibitions. Show cause orders are used less frequently, especially if a pre-hearing conference and hearing are conducted.

Fourth, the Chairman has instituted a case indexing system which is updated on a monthly basis. Essentially, the system consists of an index card file in which the major issues in each of the cases are broken down into various "key word" categories (e.g., "Board jurisdiction"). This index is used by the Board to identify relevant precedents in handling related appeals. The Chairman hopes eventually to put the system on computer and make it available to the public.

Finally, the Chairman has attempted to re-orient staff by setting timetables and establishing internal goals. Faced with a serious backlog of cases, the Chairman's initial goal was to decide all ap-

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[41] In particular, the Chairman encourages the teams to expedite cases where the only issue is the validity of an agency rule, in the belief that those cases should be considered by the courts, not the Board.

peals filed before 1980 by June 1981, and all 1980 cases by the end of 1981. His goal with respect to all new appeals was to resolve them within six months unless a hearing is necessary, in which case the appeal should be resolved within nine months. The Chairman decided to test these deadlines by seeing how long it would take to resolve a major New York Medicaid case which was appealed at the same time he became Chairman (September 1, 1980). A final decision was rendered by the Board approximately six months later. In fact, the Chairman reports that the average duration of appeals filed between March 1980 and March 1982 is six months.

In order to implement all of these changed priorities during this transition period, the Chairman has restricted his own substantive involvement in Board activities. Although he is willing to take on a small caseload, the Chairman spends one-half to three-fourths of his time managing the Board. He reviews all Board decisions, show cause orders and requests for extensions of time, consistent with his goal of handling appeals fairly, flexibly and expeditiously.

[*iii*]—*New Rules of Procedure.* The third priority of the new chairman was to streamline the procedures governing Board operations. This was accomplished with the issuance of new procedures on August 31, 1981.[42] Major features of these rules are discussed below.

[*A*]—*Availability of Procedures.* The new rules contain an Appendix which lists in detail the types of programs and types of decisions subject to the Board's jurisdiction. The rules are similar to the old rules in that they limit the Board's review to final decisions (Section 16.3(b)), and they require that any preliminary review process established by regulation be exhausted (Section 16.3(c)).

[*I*]—*The Receipt of a Final Decision.* Section 16.5(a) of the Board's old regulations defined the Board's jurisdiction in terms of certain categories of "determinations of a cognizant officer or employee of a constituent agency adverse to a grantee." Old Section 16.5(b) refined this requirement by stating that a determination described in subparagraph (a) could not be reviewed by the Board unless: "an officer or employee of a constituent agency has notified the grantee *in writing* of such determination." (Emphasis added.)

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[42] 46 Fed. Reg. 43816 (effective September 30, 1981).

As further described by the old regulations, notification of a final determination was required to "set forth the reasons for the determination in sufficient detail to enable the grantee to respond and shall inform the grantee of his opportunity for review . . ." *Ibid.* In the case of determinations regarding the failure of a constituent agency to approve a grantee's request for expenditures within a grant period, the old rules had a special provision:

> "[T]he failure of a constituent agency to approve a grantee's request within a reasonable time, which shall be no longer than thirty days after the postmark date of the grantee's request, unless the constituent agency demonstrates to the Board Chairman good cause for not acting upon the request within such time period and has so notified the grantee within thirty days after the postmark date of the grantee's request, shall be deemed by the Board notification for purposes of this paragraph."

Characteristic of their streamlined nature, the new rules simply provide that the appellant must have received a "final written decision" and must appeal within 30 days after receipt of the decision.[43] The rules refer appellants to 45 C.F.R. § 74.304 for details on what constitutes a final written decision. That provision states that agency officials are expected promptly to issue final decisions in disputes and other matters affecting the interests of grantees. The decision must be brief but contain: (1) a complete statement of the background and basis of the official's decision, including reference to pertinent statutes, regulations or other governing documents; (2) enough information to enable the grantee to understand the issues and the official's position; and (3) a statement of the grantee's appeal rights (with deadlines and an explanation of initial procedures to be followed).

One significant change has been made under the new rules. The failure of the agency to act within 30 days upon a request for approval to incur an expenditure no longer is deemed a disapproval which may be appealed. The rationale proffered by the Board for this change is that "[i]t is administratively very difficult to determine the scope of an undefined dispute, and thus in most cases virtually impossible to adjudicate it."[44] The Board commits itself,

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[43] § 16.3(b).

[44] 46 Fed. Reg. 43817.

however, to try to impress upon agency personnel the need to issue timely final decisions, both to reduce legal and political risk and to foster good grantee/grantor relationships.

[*II*]—*Exhaustion of Informal Review Procedures.* Like the old rules, the new regulations require that the Board may not review determinations unless the appellant has exhausted any preliminary appeals process required *by regulation.*[45] The decision of the preliminary review body in such cases is the final written decision which may be appealed to the Board.

Two informal procedures have been established by regulation at HHS. The first set of procedures deals with grants administered by the Public Health Service (PHS).[46] The second set of procedures involves informal review by regional officials of disputes arising in the negotiation of indirect cost rates and certain other cost negotiations.[47] Each of these procedures is described briefly below.

[*a*]—*PHS Informal Review Committee.* Post award disputes arising from PHS grants, if appealed, must be considered by a review committee of PHS officials. This review committee is appointed by the head of the appropriate PHS component and must include at least three PHS officials.

Upon receipt of the grantee's request, the PHS review committee notifies the officials responsible for the adverse determination and requests from them copies of all materials and documents relevant to the dispute. At any stage in the review, the review committee may invite the grantee and/or responsible PHS officials to participate in an informal conference to discuss the dispute or to submit additional information.

When it has completed its review, the committee submits a written decision to the grantee and responsible PHS officials. If the decision is adverse to the grantee, it may be appealed directly to the Departmental Grant Appeals Board.

When a grantee files a request for review under this procedure, PHS generally may not take any action to implement or to enforce the adverse determination pending the outcome of review. Excep-

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[45] § 16.3(c).

[46] See Subpart D of 42 C.F.R. Part 50.

[47] See 45 C.F.R. Part 75.

tions to this rule occur where the adverse determinations involve the suspension, withholding, or other deferral of grant funds.[48]

[*b*]—*Regional Rate Determinations.* Departmental regulations provide that disputes arising in the negotiation of the following rates or amounts are subject to informal review procedures:

(1) Indirect cost rates negotiated with colleges and universities, state and local government agencies, hospitals and non-profit institutions.

(2) Patient care rates and amounts associated with the care of patients participating in research programs supported by the Department.

(3) Cost allocation plans negotiated with state and local units of government.

(4) Computer, fringe benefit, and other special rates negotiated with colleges and universities, state and local government agencies, hospitals, and non-profit institutions.[49]

All of the negotiations covered by this part are conducted under the supervision of an assistant regional director for financial management.

This review procedure is triggered by notification from the Assistant Regional Director for Financial Management to a grantee when there is an apparent controversy or agency determination adverse to the grantee involving any of the cost rates identified above. Within thirty days of the postmark date of such notification, the grantee may apply to its regional director for reconsideration of the determination. Within 30 days after receipt of the grantee's application, the grantee is to be provided an opportunity to meet with appropriate regional officials to discuss the dispute. Within 45 days after such meeting (or after the submission of any supplemental information by the grantee), the grantee is to be notified, in writing, of the decision of the Regional Director. Such decision may be appealed directly to the Departmental Grant Appeals Board.

[*c*]—*Observations About Informal Review Proceedings.* One interesting note about the PHS informal review procedure is that there seems to be absolutely no control over the time involved in

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[48] For a full description of these procedures, see 42 C.F.R. § 50.401 *et seq.*

[49] 45 C.F.R. § 75.2(a).

processing informal appeals. Thus, many of the informal appeals take six months or longer before reaching a point at which they may be appealed to the Departmental Grant Appeals Board. Recent management reforms at the Departmental Board apparently have not yet permeated the PHS informal process.

In addition, the new rules provide for a special expedited procedure where there already has been informal review and the case involves $25,000 or less. The Board's scope of review will be limited in such cases to deciding whether the preliminary reviewer's decision was clearly erroneous. The grantee need only submit a statement of why the decision was clearly erroneous. The agency may submit a statement of why the decision was not clearly erroneous.[50]

[*B*]—*Application For Review.* The new rules require prospective appellants to file a notice of appeal to the Board within thirty days after receiving the final decision.[51] As was required under the old rules, the notice must include a copy of the final decision. In addition, the notice must contain a statement of the amount in dispute and a *brief* statement of why the decision is wrong.[52]

Within ten days after receiving the notice of appeal, the Board must send an acknowledgement of the appeal along with a copy of the procedures and advice on how to proceed.[53] In addition the Board must send copies of the notice of appeal, attachments and acknowledgement to the agency which issued the final decision.

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[50] § 16.12(d).

[51] § 16.7(a).

[52] A frequent problem occurred when applications were filed in a timely manner, but were incomplete. The most common problem of this sort was a grantee's failure to attach to its application for review a copy of the notification it had received of the adverse determination. (See, e.g., Harrison County Community Action Agency, Docket No. 77–10, Decision No. 51 (Nov. 22, 1978); State of Wyoming, Docket No. 76–16, Decision No. 53 (Dec. 1, 1978); West Virginia Dept. of Welfare, Docket No. 78–100, Decision No. 69 (Oct. 26, 1979); New Mexico Human Services Dept., Docket No. 79–8–NM–HC, Decision No. 83 (Feb. 25, 1980). In such cases, extensions of time typically were granted in order to allow the grantee to submit the necessary documentation.

[53] § 16.7(b).

[*C*]—*Preparation of the Appeal File.* Except in expedited cases,[54] within thirty days after the appeal has been acknowledged, the appellant must submit a file containing documents which support its claim. The file must be tabbed and organized chronologically, and accompanied by an index.[55] In addition, the appellant must submit a brief.

Within thirty days after receipt of the appellant's file, the agency must supplement the file with any additional documentation, properly organized and indexed, and submit its brief.[56] The appellant then has fifteen days to reply.[57]

Section 16.9 authorizes the Board to promote development of the record at any time by requesting additional documents or information, issuing orders to show cause, holding preliminary conferences, establishing schedules and so on.

[*D*]—*Appeal Methods.* The new rules contain a summary of the procedures, emphasizing that the Board prefers to decide cases on a written record, and perhaps an informal conference, but discouraging full-scale evidentiary hearings except when there are complex issues or material facts in dispute. Of special interest, new expedited procedures have been implemented to resolve cases involving $25,000 or less and the Board now has the capability to provide mediation services.[58] The different types of appeal methods are described below.

[*I*]—*Written Record.* The regulations provide that the Board's basic process is "review" of a written record (which both parties are given ample opportunity to develop)."[59] The written record consists of relevant documents submitted by both parties in the course of developing the appeal file.

[*II*]—*Conference Method.* In addition to review of the appeal file, the Board may schedule an informal conference.[60] The conference is conducted by the presiding Board member. The

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[54] See § 54.08[3][b][iii][D][IV].

[55] § 16.8(a).

[56] § 16.8(b).

[57] § 16.8(c).

[58] § 16.4.

[59] *Ibid.*

[60] § 16.10(a).

parties may make oral presentations and respond to the opponent's arguments. In addition, the Board may question the parties in order to clarify the issues. Conferences are recorded and transcripts are provided to the parties upon request (at the Department's expense). Additional documentation may be submitted only under exceptional circumstances.[61] Post-conference briefs generally are not permitted.

[*III*]—*Hearing Method.* The conference method described above is used in most appeals. However, the appellant may request a hearing. The rules require the appellant to make its request for a hearing at the earliest possible time.[62] The Board will approve the request (or schedule a hearing on its own initiative) only if there are complex issues or material facts in dispute the resolution of which would be significantly enhanced by a full hearing; or provision of a hearing is otherwise required by law or regulation.[63] Generally, the Board will hold a prehearing conference to explore settlement possibilities, to simplify and clarify issues, obtain stipulations, limit evidence and schedule the hearing.[64]

Hearings usually are held in Washington, D.C. They are conducted by the presiding Board member, and are kept as informal as possible. Evidence is admitted unless clearly irrelevant, immaterial or unduly repetitious. The parties may make opening and closing statements, present witnesses and conduct cross-examination. Exhibits may be introduced only if the party explains satisfactorily why they were not submitted earlier. Although the Board has no authority to administer the oath to witnesses, the rules state that a witness may be prosecuted for false statements under 18 U.S.C. §§ 287 and 1001.[65] The hearing is recorded at HHS's expense and transcripts are provided to each party so that they may advise the Board of prejudicial errors. The Board may permit post-hearing briefs.[66]

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[61] § 16.10(c).

[62] § 16.11(a).

[63] *Ibid.*

[64] § 16.11(b).

[65] § 16.11(d)(3).

[66] § 16.11(e).

[*IV*]—*Expedited Process.* The rules provide for use of expedited procedures where the amount in dispute is $25,000 or less or the parties otherwise agree.[67] Essentially, the expedited process provides for submission by both parties of documents and a cover letter (up to ten pages) containing their respective arguments within thirty days of acknowledgement of the appeal. Promptly after receiving the submissions, the presiding Board member schedules a telephone conference call to receive the oral responses of each party. The call is recorded (upon notice to the parties). The Board member then decides whether further briefing or presentations are needed.[68]

[*V*]—*Mediation.* The new rules provide for the use of mediation techniques both in cases pending before the Board and in other grant disputes where the parties agree to mediate.[69] With respect to pending cases, if the Board decides that mediation would aid resolution of the dispute, it may *suggest* use of mediation to the parties[70] and provide a mediator. However, the results of mediation are not binding unless the parties so agree in writing. The mediator is authorized to take any steps agreed upon by the parties to resolve the dispute or clarify issues. The Board must insulate the mediator from any Board and staff members assigned to handle the appeal.[71]

The rules provide that the Board also may offer the assistance of its mediators to resolve any other grants dispute, provided the responsible agency program official requests or concurs in the request for such assistance.[72] Again, the mediator must be insulated from Board members and staff in the event that an appeal subsequently arises.[73]

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[67] § 16.12(a).

The Chairman reports that despite efforts by Board members to encourage parties to use the expedited process, it is rarely used.

[68] § 16.12(c).

[69] § 16.18.

[70] The rules do not permit the Board to require the parties to enter mediation.

[71] § 16.18(a).

[72] § 16.18(b).

[73] *Ibid.*

To date, nine cases have been mediated by staff members of the Board.[74] The mediation sessions generally have been conducted *via* telephone conference calls because of budgetary restrictions on travel. The mediator feels free to point out Board precedents, explain regulations, and so forth, in the interest of helping the parties to compromise. Indeed the agency generally is more willing to accept alternative forms of documentation in the mediation setting.[75] Furthermore, grantees who appeal decisions simply because they do not understand what they have done wrong are effectively taught through the mediation process how to correct problems and avoid recurring problems.

Lawyers often represent the parties during mediation process; although in two cases the grantees were not represented by counsel.[76] According to Board officials, this may create problems because lawyers tend to treat mediation proceedings as adversarial in nature rather than as a means of effecting compromise. Another problem which Board mediators have experienced is that the Agency's program representative in the mediation process often lacks the authority to settle the matter. In such cases, the program official must obtain a supervisor's go-ahead; meanwhile, the process is delayed and negotiations may break down.

At this point, the Board's regulations do not specify any time limit on mediation. However, the Chairman has indicated his desire to impose a 60 day limit in order clearly to separate the mediation process from the more formal adjudicatory process. Another goal of the Chairman is to make the mediation process available to resolve issues before they ripen into disputes which are formally appealable to the Board.

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[74] Board officials were asked why so few cases had been mediated. They stated that staff attorneys informally mediate disputes through the use of telephone conferences. However, they admitted that Board members simply are more accustomed to using the formal appeals process. Settle interview, N. 37 *supra;* Interview with Linda Sedivic, Staff Attorney, Departmental Grant Appeals Board, April 23, 1981.

[75] Board officials noted that because of a new audit resolution policy at HHS which requires resolution within six months, the agency often takes disallowances at the last minute to meet the deadline. However, once an appeal is filed, they have time to reconsider the matter and more readily accept alternative proof.

[76] Sedivic interview, N. 73 *supra.*

[*E*]—*Other Provisions.* The powers of the Board are outlined in Section 16.13 and are quite broad. The new rules expressly state that the Board may reconsider its decision where a party *promptly* alleges a clear error of fact or law. The Board continues to be bound by all applicable laws and regulations.[77]

The new rules expressly provide that failure of a grantee to meet deadlines may result in dismissal of the appeal; such a failure by the agency may result in a decision on the record up to that point.[78]

The new rules, like the old rules, provide that only the appellant (grantee or grant applicant) and the agency are parties to the appeal.[79] However, the Board may allow a third party to intervene if it is the real party in interest[80] or if the Board otherwise determines that the third party has a clearly identifiable and substantial interest in the outcome of the dispute.[81]

Section 16.17 prohibits *ex parte* communications without notice to the other party. If such a communication occurs, the Board must disclose it to the other party and make it a part of the record after the other party has had the chance to respond. Communications concerning administrative matters (rather than substantive issues) are not viewed as *ex parte* communications subject to the disclosure requirements outlined above.

Despite recommendations by the Assistant Secretary for Management and Budget that appeals be handled by one Board member, the Board has retained the requirement that each decision be

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[77] § 16.14.

[78] Commentors on the rules stated that agency failure to meet deadlines should result in reversal of the agency's decision. The Board rejected these comments, concluding that "there is a substantial legal and policy question whether the Board could or should take an action effectively precluding HHS from recouping funds which HHS determines the grantee possesses or claims illegally . . ." 46 Fed. Reg. at 43817.

[79] § 16.16.

[80] The Board recognizes in the rules that a subcontractor may be a real party in interest where the subject of an appeal is a cost disallowance, the major impact of which would fall on the subcontractor.

[81] The Board permitted the National Association of College and University Business Officers to appear as *amicus* in a case involving the indirect cost rate for campus organized research. University of California, Docket No. 76–6, Decision No. 40 (Oct. 11, 1977).

issued by three Board members.[82] The decision must be based on the appeal record which consists of the appeal file, transcripts and evidence (if a hearing or conference is held), written statements and other party submissions.[83]

The new rules eliminate the requirement for initial decisions, and no longer permit agency heads to modify or reverse the Board's decision. As discussed earlier, there has been debate over whether the Secretary should be able to review Board decisions, however, the Secretary has not addressed the issue in over a year. Unless and until a decision is reached on this issue, the Board's decisions are final.[84]

The rules generally provide that the agency may not implement the disputed decision until the Board disposes of the appeal. However, the agency may: suspend funding; defer or disallow related claims; implement disallowances of federal financial participation under certain mandatory Social Security Act programs; and take other actions to withhold, recover or offset funds if specifically authorized by statute or regulation.[85]

Finally, the chairman's goals with respect to timeframes for resolving appeals are described in the new rules.[86]

[4]—The Board's Jurisdiction

[a]—General Authority

[*i*]—*As Defined in the Old Regulations.* The Board is a regulatory creation.[87] The old regulations, in effect until September 30, 1981, specified jurisdictional limitations, both in terms of types of grant programs subject to the Board's jurisdiction[88] and types of adverse agency determinations emanating from those programs

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[82] The Chairman believes that the three-member decision assures the internal checks and balances critical to fair decisionmaking. Settle interview, N. 37 *supra.*

[83] § 16.21(a).

[84] See 46 Fed. Reg. at 43817.

[85] § 16.22.

[86] § 16.23.

[87] 45 C.F.R. Part 16.

[88] See § 54.08[4][b] *infra.*

which may be appealed to the Board.[89] As generally stated in the "purpose" section of those regulations,[90] the Board was authorized to review "*post-award* disputes which may arise in the administration of or carrying out of grants under grant programs (as described in § 16.2) . . ."

Regardless of the type of grant program or type of determination, however, the Board was not authorized to review: (1) actions taken pursuant to Title VI of the Civil Rights Act of 1964;[91] (2) actions for which a grantee is entitled to an opportunity for a hearing;[92] and (3) actions for which the constituent agency of HHS has established an appropriate alternative review procedure in order to meet special needs applicable to a particular program (which is available to the grantee and has been approved by the Secretary.[93]

[*ii*]—*As Defined in the New Regulations.* On August 31, 1981, HHS published a Final Rule in the Federal Register which contains new requirements and procedures applicable to the Board and those who use the Board's dispute resolution services.[94] The new rules took effect on September 30, 1981.

Provisions relating to the Board's jurisdiction appear in Appendix A of the new rules and, in at least one respect, represent a significant departure from the old regulations. The new rules vest in the Board jurisdiction over one type of *pre*-award dispute arising in the context of discretionary grants or cooperative agreements, i.e. "[a] denial of a noncompeting continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award."[95]

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[89] See § 54.08[4][c] *infra.*

[90] § 16.1.

[91] § 16.2(d).

[92] See 5 U.S.C. § 554 (the Administrative Procedure Act). § 16.2(b)(1).

[93] § 16.2(b)(2).

[94] 46 Fed. Reg. 43816 *et seq.*

[95] Appendix A, Section C(3). However, the new rules still would not permit review of any other types of pre-award disputes, i.e., determinations of award amount, agency selection in the assistance document of an option for disposition of program-related income, or denials of refunding based on the unavailability of funds. This latter type of dispute was rejected by the Board in East Bronx Community Health Association, Inc., Docket No. 81–191 (January 29, 1982). In addition, the Board may not review appeals by non-selected applicants.

Another new feature related to the Board's jurisdiction is a provision in the Appendix designed to expedite a determination as to whether the Board has jurisdiction in ambiguous cases. Section G of the appendix provides that, if the Chair is in doubt as to whether the Board has jurisdiction of an appeal, the Board will request the written opinion of the HHS component agency which issued the decision being appealed. The Board is bound by that opinion unless the Chair determines it to be "clearly erroneous." If the HHS component does not respond in a timely fashion, or cannot decide whether the Board has jurisdiction, the Board will take the appeal.

[*iii*]—*As Defined by the Board.* The Board has had occasion to construe the general nature of its jurisdiction in numerous cases. It has entertained virtually every conceivable type of attack on its jurisdiction. The different types of general jurisdictional challenges are treated separately below.[96]

[*A*]—*Jurisdiction Limited to HHS Grants.* In *California State University, Chico,*[97] the Board ruled that it lacks jurisdiction over HHS *contracts* and *non-HHS* grants.

This decision—and the regulations which gave rise to it—create two special problems. First, Office of Management and Budget (OMB) Circular A–88, entitled "Indirect Cost Rates, Audit, and Audit Followup at Educational Institutions" (Dec. 5, 1979), provides that one Federal agency (the "cognizant" agency) shall be responsible for negotiating indirect costs and other special rates for resolving audits with educational institutions (which frequently receive grants from more than one Federal agency). Section 6 of the Circular states that:

> "Where the cognizant agency is unable to reach agreement with an institution with regard to indirect cost rates or audit resolution, the appeals system of the cognizant agency will be followed for resolution of the disagreement."

HHS is the cognizant agency for several educational institutions. See Attachment to OMB Circular A–88 for a complete list of cognizance assignments.

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[96] Challenges to the Board's jurisdiction over certain grant programs or specific types of determinations are discussed in § 54.08[4][b] and [c], *infra.*

[97] Docket No. 78–6, Decision No. 91 (April 28, 1980).

It appears that the circular contemplates jurisdiction in the HHS Board over disputes arising from indirect cost and special rate negotiations, as well as audits, where HHS is the cognizant agency, regardless of whether or not the underlying grant was awarded by HHS.[98] Nevertheless, HHS Board officials have indicated that: (1) they have no knowledge of the Board's cognizance of these types of disputes; (2) it is their undersatanding that, under general cognizance arrangements, HHS is responsible only for auditing and not dispute resolution for non–HHS grants; and (3) in any event, the Board lacks jurisdiction under 45 CFR Part 16 to handle such disputes.[99]

A second, related problem arose in connection with appeals stemming from grants awarded by the former Office of Education, now the Department of Education (ED). Initially, it was unclear whether appeals which arose during the transitional stage should be handled by the HHS Board or by the Department of Education's Grant Appeal Board. The HHS Board rejected at least one of these appeals for lack of jurisdiction.[100] Soon after ED was created, the HHS Board tried to clear up the confusion by offering to decide the pending ED-related appeals. However, the Chairman of ED's Board never responded to this offer; accordingly, the cases were transferred to ED.

[*B*]—*Post Award Dispute Limitation.* The Board has denied appeals in a number of cases involving decisions which the Board characterized as "pre-award" in nature, and therefore not subject to its jurisdiction. For example, the Board has held that a request to carry over funds from one grant year to another is not appealable since it is "pre-award" in nature.[101]

The *Pinellas* and *Yakima* cases also involved expenditures in excess of budgeted amounts and resulting requests for supplemental funding. The Board consistently has maintained that it lacks au-

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[98] See § 54.15 *infra.*

[99] Settle interview, *supra* N. 9.

[100] Detroit Public Schools, Docket No. 80–50 (closed, April 28, 1980).

[101] Kent State University, Docket No. 10, Decision No. 3 (July 26, 1974); Pinellas Opportunity Council, Inc., Docket No. 79–58, Decision No. 80 (Feb. 6, 1980); Yakima Public Schools, Docket No. 79–3, Decision No. 81 (Feb. 6, 1980).

thority to award supplemental grants, characterizing this issue as "pre-award" in nature[102]

The witholding of discretionary continuation grants ("non-renewals") also has been classified by the Board as a pre-award determination, not subject to its jurisdiction.[103] As discussed above, however, the new regulations expand the Board's jurisdiction to permit appeals of these non-renewal decisions.

[C]—*Authority to Review Validity of Agency Regulations.* The Board has had several opportunities to decide whether it has authority to review the validity of agency regulations, and to overrule such regulations if found to be invalid. However, in most (if not all) of these cases, the Board has found the regulations to be reasonable and consistent with the governing statute; thus, it has not addressed squarely the jurisdictional issue.[104] In the Michigan case, the Board did articulate a standard of review, suggesting that it does have authority to review the validity of agency regulations. The Board stated that:

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[102] See also, Macon County Community Action Committee Inc., Docket No. 78–7, Decision No. 93 (April 29, 1980); Clayton County Community Services Authority, Inc., Docket No. 79–74, Decision No. 100 (May 20, 1980); Mary Holmes College, Docket No. 77–5, Decision No. 102 (June 2, 1980); Hinds County Human Resources Agency, Docket No. 79–11, Decision No. 109 (July 3, 1980); Sumter County Opportunity, Inc., Docket No. 78–112, Decision No. 112 (July 16, 1980).

However, in the *Hinds County* case, the Board stated that, although it lacks authority to award supplemental funding, this is a matter of remedy, not jurisdiction. (At p.5).

[103] See, e.g., Rural Improvement Council, Docket No. 76–15 (Rejection of Appeal, Oct. 6, 1976); Missouri Health and Medical Organization, Docket No. 77–24 (Rejection of Appeal, June 21, 1978). But see, Southern Mutual Help Association v. Califano, 574 F.2d 518 (D.C. Cir. 1977) (court found "non-renewal" in fact to be a "termination" and remanded the case to HEW to be handled in accordance with the appeal procedures).

[104] As indicated § 54.08[4][a][ii] *supra,* this issue has been addressed squarely in the Board's new rules.

See, e.g., New Mexico Department of Human Services, Docket No. 78–32–NM–HC, 79–33–NM–HC, 79–37–NM–HC, Decision No. 70 (Dec. 11, 1979); Michigan Department of Social Services, Docket No. 78–70–MI–CS, 79–159–MI–CS, Decision No. 76 (Jan. 31, 1980).

"Under National Welfare Rights Organization v. Mathews, 433 F.2d 637 (D.C. Cir. 1976), [the regulation] is valid if it does not conflict with the Act and is reasonably related to its purpose."[105]

The Board also seems to have addressed the jurisdictional issue in Hinds County Human Resources Agency.[106] In that case, OHDS took the position that the Board lacked jurisdiction to sustain the grantee's appeal concerning specific cost disallowances, because the grantee was requesting waiver of agency rules. The agency argued that its rules are binding on the Board.[106a] The Board rejected this argument, stating:

"This argument has no merit with respect to the issue of jurisdiction. When an agency makes a determination of a type subject to the Board's jurisdiction, it is the Board which must decide whether the requirements cited as a basis for the determination are applicable, whether they are binding on the grantee, and whether they have been properly interpreted. If a grantee does not present arguments which would furnish an adequate legal basis for sustaining the appeal this is a question of the merits of the appeal, not of the Board's jurisdiction."[106b]

The Board seems to have had this statement in mind when it held in the grantee's favor in Maryland Department of Health and Mental Hygiene.[107] At issue in that appeal was whether an age limitation on federally-funded sterilizations, alluded to in the preamble to a "moratorium regulation," was binding on grantees. The Board held that the ambiguous language in the preamble could not itself be read as a rule, and, therefore, was not not binding on grantees. Since rulemaking procedures had not been followed to effectuate the age limitation policy, the Board held that the policy did not furnish a proper basis for the disallowances.[108]

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[105] The current Board Chariman, however, expressed uncertainty as to whether the Board could overrule a regulation which clearly is inconsistent with the enabling statute. Settle interviews, N. 37 *supra.*

[106] Docket No. 79–11, Decision No. 109 (July 3, 1980).

[106a] 45 C.F.R. § 16.8(a).

[106b] *Id.* at 5.

[107] Docket No. 78–45–MD–HC, Decision No. 85 (Feb. 28, 1980).

[108] See also, California Department of Health Services, Docket No. 80–61–CA–HC, Decision No. 123 (Oct. 2, 1980); Point Park College, Docket No. 75–12, Decision No. 16 (May 20, 1976).

Although the new regulations provide at § 16.14 that "[t]he Board shall be bound by all applicable laws and regulations," the old regulations also contained this limitation. Consequently, this issue may still surface in appeals to the Board.

In several other appeals, the Board has examined a somewhat related issue; i.e. its authority to overrule the agency's interpretation of a statute or regulation. In early cases, the Board hesitated to expound on whether it had authority to review the validity of agency interpretations upon finding the agency interpretation to be sound.[109] In this appeal, the Board was asked to hold invalid an agency's interpretation (contained in an "Action Transmittal") of the statute. Although it upheld the agency's interpretation, the Board stated that it "does not regard as controlling the interpretation of a statute or regulation made by a constituent agency of the Department".[110] The Board stated that it would give deference to the interpretation given a statute by an agency, but "must balance an appropriate respect for clearly stated administrative construction with its own responsibility for independent decision".[111] The Board further indicated that it is "neither obligated nor permitted to rubber-stamp affirmance of administrative decisions if they are inconsistent with a statutory mandate or frustrate the Congressional policy underlying the statute".[112] However, the Board finally did address the issue in *New York* where agency officials had not formally adopted such interpretation).

[*D*]—*Authority to Review Regional Determinations.* Finding that it has authority to review certain determinations of regional officials, the Board has articulated the following standard of re-

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[109] See, e.g., Michigan Department of Social Services, Docket Department of Social Services, Docket Nos. 78–66–NY–CS, 78–162–NY–CS, 79–36–NY–CS, 79–234–NY–CS, Decision No. 101 (May 23, 1980).

[110] *Id.* at 5–6.

[111] *Id.* at 6.

[112] *Ibid.*

See also, Montana Department of Social and Rehabilitation Services, Docket Nos. 80–31–MT–HD, 80–78–MT–HD, 78–43–MT–HD (partial), 78–93–MT–HD (partial), Decision No. 119 (Sept. 30, 1980); Social Service Board of North Dakota, Docket No. 79–160–ND–HC, Decision No. 166 (April 30, 1981); University of Arizona, Docket No. 78–11, Decision No. 58 (June 19, 1979) (Board refused to apply *auditor's* interpretation of regulation No. 78–15–MI–ME, Decision No. 64 (Aug. 16, 1979).

view: the Board will not substitute its judgment for discretionary judgments of a regional official where the decision is reasonable and in accord with explicitly applicable rules.[113] This standard of review has been adopted in several subsequent decisions.[114]

[*E*]—*Authority Limited to Review of Final Decisions.* The old regulations provided that the Board could not review an adverse determination[114a] unless: (1) the grantee has been notified in writing of the determination; and (2) any informal appeal procedures established by regulation have been exhausted.[115] With respect to Social Security Act disallowances, the regulations permitted review only where the head of the constituent agency (or his designee) has notified the grantee in writing of the disallowance.[116]

Simply stated, the old regulations permitted appeals only of *final* agency decisions. The new regulations explicitly state this limitation on the Board's jurisdiction.[117] The old regulations provided one major exception to this requirement of finality. If a grantee made a written request for permission to incur an expenditure,[118] the failure of the constituent agency to approve that request within a reasonable time, not to exceed 30 days unless the agency showed good cause for an extension, was deemed by the Board to be a notification of an adverse determination.[119] In other words, failure of the agency to render a final decision could have resulted in an appeal to the Board. It is interesting to note that the new regulations do not contain a similar exception to the finality requirements; yet there is no explanation offered for the change. In fact, the new regulations do not expressly authorize the Board to review appeals

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[113] Oregon State-Wide Cost Allocation Plan, Docket No. 75–7, Decision No. 22 (June 25, 1976).

[114] See, e.g., University of California, Docket No. 76–6, Decision No. 40 (Oct. 11, 1977); Harrison County Community Action Agency, Inc., Docket Nos. 75–5 and 76–7, Decision Nos. 35 and 36 (March 14, 1977); Wisconsin Department of Health and Social Services, Docket No. 80–36–WI–SS, Decision No. 116 (Aug. 14, 1980); The Neighborhood House Association, Docket No. 80–81, Decision No. 136 (Dec. 1, 1980).

[114a] As described in § 16.5(a).

[115] See 45 C.F.R. § 16.5(b).

[116] See 45 C.F.R. § 16.91(a).

[117] See § 16.3(b) in Fed. Reg. 43818 (Aug. 31, 1981).

[118] 45 C.F.R. § 16.5(a)(3).

[119] 45 C.F.R. § 16.5(b).

from agency denial of grantees' written requests to incur expenditures under the grant.

The Board has dismissed for lack of jurisdiction several appeals on the ground that the underlying determination was not the *final* decision of the cognizant agency official.[120]

In a few appeals, the Board has asserted jurisdiction despite arguments that the agency's decision was not final. For example, in *Kentucky Department for Human Resources,*[121] the grantee argued that the notification of disallowance was inadequate. The Board agreed, but held that the Agency's response to the appeal was sufficiently informative, thereby curing any possible defect in the disallowance letters. The grantee offered no substantive support for its appeal of the disallowance; accordingly, the Board sustained the disallowance.[122]

In another case the Board found an inadequate agency notification to furnish the basis for reversal of the agency's disallowance.[123] It is interesting to note that the Board did not analyze the issue of proper notification in terms of its jurisdiction to review the appeal, but rather addressed itself solely to the merits, finding that the agency failed to sustain its burden of proof.

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[120] State of Florida, Docket No. 79–132–FL–CS (closing date unknown) (appeal filed before final disallowance taken); State of New Jersey, Docket No. 79–138–NJ–CS (closed, Aug. 15, 1979) (same); Wisconsin Department of Social Services, Docket No. 79–195–WI–CS (closed, Feb. 11, 1980) (same); Department of Public Welfare, Docket No. 80–24–MA–HC (closed, Feb. 20, 1980) (same); Maryland Department of Human Resources, Docket No. 79–69–MD–SS (closed, Mar. 17, 1980) (grantee was seeking informal and formal appeals simultaneously); West Side Community Mental Health Center, Docket No. 80–57 (closed, Mar. 7, 1980) (grantee had not exhausted informal appeal).

[121] Docket Nos. 78–137–KY–HC, 79–22–KY–HC, Decision No. 121 (Sept. 30, 1980).

[122] See also, New York Dept. of Social Services, Docket No. 80–108–NY–HC, Decision No. 151 (Feb. 26, 1981); Pennsylvania Department of Public Welfare, Docket No. 80–20–PA–HC, Decision No. 205 (Aug. 21, 1981) (Board has authority to make its own legal findings to support disallowance, independent of agency's findings).

[123] California Department of Health Services, Docket No. 80–61–CA–HC, Decision No. 123 (Oct. 2, 1980).

The Board examined the issue of what constitutes a *final* agency decision in *New Mexico Human Services Department.*[124] The underlying facts in this appeal are quite interesting. The grantee appealed from a determination of the Director, Medicaid Bureau, HCFA, disallowing FFP claimed for administering family planning services. The grantee argued that this determination was improper because almost two years earlier another agency official had advised the grantee that the costs in question were allowable, rejecting the recommendation of the regional audit director.

The Board took jurisdiction of the appeal and held for the grantee without addressing the merits. The threshhold issue was whether the earlier decision of the agency, allowing the costs, was a final decision by a cognizant official. The Board held that the earlier decision was indeed final and found HCFA's reopening of the matter inconsistent with a clearly defined procedure for handling audit recommendations, noting a "traditional pattern" wherein the auditor expresses only opinions and the cognizant agency official makes the final determination upon review of the auditor's recommendations. The Board rejected as contrary to this pattern the agency's argument that the HEW Audit Agency and Social and Rehabilitation Service (predecessor to HCFA) were "parallel agencies" and that differences of opinion between the two agencies had to be resolved finally by a higher authority in HEW.

[*F*]—*Authority With Regard to Estoppel Arguments.* The Board consistently has held that it has authority to rule on estoppel arguments. Indeed, on occasion, the Board has held that the agency was estopped from making a challenged determination by prior action or inaction of its duly authorized officials. Nevertheless, appellants rarely prevail on the basis of estoppel arguments because the prerequisites are quite stringent.[125] The issue of estoppel was raised indirectly in the Board's very first decision, *University of Texas Medical School at San Antonio.*[126] That appeal involved a reduction in second-year grant funding, based on budget restrictions rather than because of any violation by the grantee of grant conditions. The Board held that the grantee was "entitled" to

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[124] Docket No. 79-8-NM-HC, Decision No. 83 (Feb. 25, 1980).

[125] For discussion of prerequisites to estoppel relief, see Text at § 54.07[3][b][ii] *supra.*

[126] Docket No. 4, Decision No. 1 (Mar. 7, 1974).

rely on the original commitment, finding no basis in agency policies for partial termination as a matter of fiscal restraint.

The Board rejected estoppel-type arguments in its next decision, *University of Miami.*[127] In that case, the grantee appealed from an agency determination that costs in excess of the applicable ceiling were charged improperly to the grant, arguing that an agency official previously had approved the costs and that the agency had waived the applicable limitation in other cases. Without much elaboration, the Board held that these arguments were not "significant," noting that the agency's approval was given with respect to plans, not the actual costs, and that the agency official could not have authorized expenditures in excess of the applicable ceiling.[128]

In *University of California, Los Angeles,*[129] the Board addressed a different aspect of the estoppel issue. The appeal involved a disallowance of interest costs charged to the grant in violation of applicable cost principles. However, a duly authorized agency official in a letter attached to the grant agreement authorized such costs. The Board found that the letter was part of the grant agreement, and that the authorization in the agreement superseded the cost principles. Accordingly, the disallowances were reversed.

Southern University,[130] in part, involved a disallowance of costs incurred without the agency's written approval. The grantee apparently incurred the costs relying in good faith on oral representations made by persons it believed to be authorized agency spokesmen, but these persons in fact did not have such authority. The Board upheld the disallowance, noting that the grantee's reliance, though in good faith, was questionable; yet, expressed sympathy

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[127] Docket No. 3, Decision No. 2 (April 1, 1974).

[128] See also, American Foundation for Negro Affairs, Docket No. 79–4, Decision No. 73 (Dec. 28, 1979) at p. 2; Yakima Public Schools, Docket No. 79–3, Decision No. 81 (Feb. 6, 1980) at p. 3; Macon County Community Action Committee, Inc., Docket No. 78–7, Decision No. 93 (Apr. 29, 1980) at p. 4. These cases stand for the proposition that any reliance on the advice of Federal officials who lack authority to render such advice is unjustified.

[129] Docket No. 6, Decision No. 4 (July 26, 1974).

[130] Docket No. 29, Decision No. 24 (June 29, 1976).

for the grantee's "plight". The Board concluded that the failure to obtain written approval was the grantee's responsibility.[131]

The Board rejected a grantee's argument that prior failure of the agency to enforce certain requirements estopped later enforcement in *State of Minnesota, Department of Public Welfare.*[132] The Board found evidence of prior agency enforcement efforts. More significant is the Board's suggestion that, even if the agency had not enforced requirements in the past, such a failure "could not estop a later effort at enforcement."[133]

The Board accepted, "with considerable reluctance", an estoppel-type argument in the appeal of *Lane County Community Mental Health Center.*[134] Upon a thorough examination of the grantor-grantee relationship, the Board found that:

> "[T]he Regional Office had sufficient indication of deficiencies that it owed a duty to assure full development and a prompt decision on approvability even though the matter was before it at a time when no further expenditures of the type questioned were involved. The Center would have been justified in believing that the Regional Office had accepted its explanation and that, therefore, it and the affiliates need not make contingent plans based on the possibility of disallowance."[135]

The failure of the agency to fulfill an affirmative duty to act surfaced again in *Operation SHARE.*[136] Here, a request for approval of a revised budget was not acted upon formally, but the grantee was advised informally to expand its operations rather than to return any money to the agency. The Board reversed the disallowance, refusing to permit the agency's inaction to place the grantee in financial jeopardy.

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[131] Grantees have argued unsuccessfully that the actions resulting in adverse determinations were taken pursuant to agency officials' oral instructions. See, e.g., Southern Methodist University, Docket No. 76–8, Decision No. 41 (Oct. 19, 1977); Michigan Department of Social Services, Docket No. 78–15–MI–ME, Decision No. 64 (Aug. 16, 1979); Mary Holmes College, Docket No. 77–5, Decision No. 102 (June 2, 1980) at p. 3.

[132] Docket No. 75–15, Decision No. 26 (Aug. 17, 1976).

[133] *Id.* at 3.

[134] Docket No. 26, Decision No. 33 (March 3, 1977).

[135] *Id.* at 9.

[136] Docket No. 77–19, Decision No. 96 (May 2, 1980).

Misconduct on the part of a high-ranking agency official who was authorized to make the grant, to dictate its terms, and to evaluate the grantee's performance, formed the basis for reversal of a disallowance in *United States International University.*[137] The Board quoted with approval the following passage from Davis:[138] *Administrative Law Treatise,* Section 17.09:

> "Even though the courts commonly assert without qualification that equitable estoppel does not apply to governmental units, and even though numerous holdings are based upon such assertions, still the number of holdings in which governmental units are estopped is substantial and growing, both in the federal courts and in the state courts."

Feeling "constrained" to rule against the agency, the Board cautioned that its holding was "without prejudice to other cases where the issue [estoppel] may be briefed."[139]

An interesting wrinkle on estoppel-type arguments appeared in *University of Arizona.*[140] In that case, a disallowance was taken on the basis of negative audit recommendations which contained an interpretation of the applicable regulations never before expressed by the constituent agency (Office of Education). The Board reversed the disallowance stating:

> "It would be unreasonable to hold this grantee—after a site visit by a duly authorized OE program coordinator and his [favorable] review of the grantee's conduct of the program and report thereon—to established policies and procedures or interpretations of regulatory requirements expressed to it for the first time in an after-the-fact audit by auditors, rather than by a program official . . ."[141]

Grantees also have argued that the agency is estopped from denying claims where cognizant officials have provided inaccurate, incomplete or misleading information upon which the grantee re-

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[137] Docket No. 76–12, Decision No. 42 (Oct. 19, 1977).

[138] *Administrative Law Treatise,* § 17.09, p. 6.

[139] *Id.* at 7.

[140] Docket No. 78–11, Decision No. 58 (June 19, 1979).

[141] *Id.* at 6.

lied to its detriment.[142] The *New Jersey* case involved a disallowance of Federal Financial Participation under the Medicaid program for the costs of covering persons who were eligible but not covered by the State plan. The State argued that the agency had an affirmative duty to assist it in developing a Medicaid program which would include such persons. The Board rejected the theory that the agency had a legally enforceable obligation to provide advice and guidance to grantees regarding the content of State plans, concluding that the State alone was responsible for its errors or omissions.

Recent decisions indicate that grantees will be hard-pressed to persuade the Board to apply the estoppel doctrine. The prerequisites to obtaining such relief, e.g. detrimental reliance on the improper instructions of a duly authorized HHS official, simply are too difficult to fulfill.[143]

[*G*]—*Miscellaneous.* The Board has examined various other aspects of its authority to review constituent agency determinations subject to its jurisdiction. For example, the Board has held that "it will not engage in grant administration by transferring authorizations from one account to another, at least in the absence of a showing that the administering officials *arbitrarily* refused to make such a transfer."[144]

Furthermore, the Board has held that it has inherent authority to reconsider its own decisions.[145] The Board, in determining whether

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[142] New Jersey Department of Human Services, Docket No. 78–159–NJ–HC, Decision No. 115 (Aug. 8, 1980); Delaware Department of Health and Social Services, Docket No. 78–108–DE–HC, Decision No. 87 (Feb. 29, 1980) at p. 6.

[143] See Montana Dept. of Social and Rehabilitation Services, Docket Nos. 78–25–MT–HC, 80–119–MT–HC, Decision No. 171 (April 30, 1981); Washington Dept. of Social and Health Services, Docket Nos. 79–103–WA–HC, 79–151–WA–HC, Decision No. 176 (May 26, 1981); Louisiana Dept. of Health and Human Resources, Docket Nos. 78–127–LA–HC, 79–156–LA–HC, Decision No. 188 (May 31, 1981).

[144] (Emphasis added.) Community Action Agency of Memphis and Shelby County, Docket No. 78–44, Decision No. 103 (June 9, 1980), at p. 4; Community Action Agency of Memphis and Shelby County, Docket No. 76–9, Decision No. 38 (July 5, 1977), at p. 2.

[145] Community Relations—Social Development Commission in Milwaukee County, Docket No. 77–12, Decision No. 108 (July 3, 1980), Motion for Reconsideration denied (Nov. 20, 1980); Florida Department of Health and Rehabilita-

to reconsider its decision, considers such factors as: the nature of the alleged error or omission prompting the reconsideration request, the length of time which has passed since the original decision was issued, and any harm that might be caused by reliance on that decision.[146] The new rules explicitly authorize the Board to reconsider its decisions "where a party promptly alleges a clear error of fact or law."[147]

[b]—Types of Grant Programs Involved in Health and Human Services Appeals. The old regulations[147a] provided that the dispute procedures applied to certain determinations[147b] arising out of grants awarded by a constituent agency pursuant to:

> "(1) Any program which authorizes the making of direct, discretionary project grants or (2) any other program (including any State plan, formula program) which the head of the constituent agency, with the approval of the Secretary, may designate in whole or in part."

Section 16.2(c) stated that programs to which the procedures apply *and* which have current authority to award grants *shall* be listed in the Appendices to 45 CFR Part 16. Programs to which the regulations would apply, but which do not have current grant-making authority were not to be listed in the Appendices.

The Board has examined the effect of the old requirement that programs to which the procedures applied be listed in the Appendices. In *St. Landry Parish School Board,*[148] the constituent agency (Office of Education) took the position that the grantee had no right of appeal to the Board because the Emergency School Assistance Program was not included in the list of programs in the Appendices to 45 CFR Part 16 as required by Section 16.2(c). The Board disagreed, stating:

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tive Services, Docket Nos. 79–68–FL–HC, 80–88–FL–HC, Motion for Reconsideration granted (Sept. 11, 1980).

[146] As discussed in § 54.08[2] *supra* of this chapter, this reconsideration process has been viewed as an alternative to Secretarial review of Board decisions in the current rulemaking process.

[147] See § 16.13 (46 Fed. Reg. 43820, Aug. 31, 1981).

[147a] § 16.2(a).

[147b] § 54.08[4][c] *infra.*

[148] Docket No. 75–4, Decision No. 17 (May 28, 1976).

"The programs with current authority to make grants listed in the Appendices are subject to change from day to day as program authorizations may be added by legislation and old ones may expire or be replaced. The Appendices are a useful checklist but it is not possible nor was it contemplated that they should constitute a definition of the Board's jurisdiction which instead is defined in 45 CFR 16.2 and applies so far as is relevant to: '(1) Any program which authorizes the making of direct discretionary project grants . . . Since the program in question involves a direct discretionary project grant and the decision appealed from was made after the effective date of the Board's Charter, the grantee does have the right of appeal to this Board.' "[149]

As stated above, the old section 16.2(a)(2) stated that the procedures apply to non-discretionary (mandatory) grant programs (including any State plan, formula program) which are designated by the head of the constituent agency, with the approval of the Secretary. On March 6, 1978, a new Subpart C was added to 45 CFR Part 16, providing for reconsideration of disallowances arising under Sections 3, 403, 422, 455, 603, 1003, 1403, 1603 (AABD), 1903, and 2002 of the Social Security Act.[150] Most of the Board's procedures, except the requirement for initial decisions, were made applicable to reconsiderations of such disallowances.

In one case, *Maine Department of Human Services,*[151] the Board rejected a request for reconsideration of Social Security Act disallowances for lack of jurisdiction. At issue was a disallowance of Federal Financial Participation (FFP) amounting to $997,668 for insurance premiums paid on behalf of recipients eligible for assistance under Title XIX of the Social Security Act. The constituent agency took the disallowance on the ground that the beneficiaries were eligible for medical, *not* financial, assistance. The determination was rendered prior to March 6, 1978, although the notice of appeal was dated June 3, 1978. The Board ruled that it lacked jurisdiction over the appeal, because the amendments to the regula-

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[149] *Id.* at 2.

[150] 42 U.S.C. 303, 603, 622, 655, 803, 1203, 1353, 1383 (AABD), 1396b and 1397a. 45 C.F.R. § 16.90.

[151] Docket No. 78–34–ME–HC (closed, Feb. 8, 1979).

tions were prospective in nature and could not be applied to agency decisions made prior to the effective date of the amendments.

The Board's jurisdiction over mandatory grant programs has been examined in other cases. For example, in *University of Arizona,*[152] the Board recognized that mandatory grant programs (here, the Veterans' Cost-of-Instruction Program[153]) are not automatically subject to its jurisdiction. However, in this instance, in accordance with the old Section 16.2(a), the Secretary had approved designation of the program by the Commissioner of Education as subject to the Board's jurisdiction on July 31, 1977. The determination at issue in the appeal was rendered on March 23, 1978. The Board therefore had no trouble in accepting this appeal.

[c]—Types of Determinations Subject to the Board's Jurisdiction

[*i*]—*As Defined in the Old Regulations.* The old regulations specified the types of post-award determinations from which an appeal might be taken. Assuming that the underlying grant program was within the Board's jurisdiction, i.e., a direct, discretionary grant program or a designated mandatory grant program, the Board had jurisdiction over the following types of adverse determinations of a cognizant officer or employee of a constituent HHS agency:

"(1) Termination, in whole or in part, of a grant for failure of the grantee to carry out its approved project proposal in accordance with the applicable law and the terms of such assistance or for failure of the grantee otherwise to comply with any law, regulation, assurance, term, or condition applicable to the grant.

"(2) A determination that an expenditure not allowable under the grant has been charged to the grant or that the grantee has otherwise failed to discharge its obligation to account for grant funds.

"(3) The disapproval of a grantee's written request for permission to incur an expenditure during the term of a grant.

"(4) A determination that a grant is void.

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[152] Docket No. 78–11, Decision No. 58 (June 19, 1979).

[153] 20 U.S.C. 1070e–1

"(5) Determinations with respect to cost allocation plans negotiated with State and local units of Government, and indirect cost rates, research patient care rates and amounts, computer, fringe benefit, and other special rates negotiated with colleges and universities, State and local Government agencies, hospitals, and other nonprofit institutions (except where the grantee has appealed to the Armed Services Board of Contract Appeals with respect to such determination under a contract with the Department)."[154]

The old Section 16.5(b) qualified Section 16.5(a), providing that a determination described in Section 16.5(a), could be reviewed by the Board unless: (1) the constituent agency has notified the grantee in writing of such determination,[155] and (2) the grantee has exhausted any informal appeals procedures which the agency has established by regulation. The notification had to be sufficiently detailed, setting forth the reasons for the determination, and informing the grantee of its appeal rights.[156]

[*ii*]—*As Defined in the New Regulations.* The new regulations attempt to clarify the types of disputes which the Board will review. The new Section 16.3 permits review only of "final written decisions." New amendments to HHS's general grants administration regulations[157] elaborate upon the meaning of the term "final written decisions," and provide standards which HHS components are expected to meet in stating final decisions.[158]

The following types of final written decisions may be appealed under the new regulations (Appendix A):

1. *Mandatory Grant Programs*

   Disallowances under Titles I, IV, VI, X, XIV, XVI, XIX, and XX of the Social Security Act, including penalty disal-

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[154] Old § 16.5(a).

[155] Under the old § 16.5(b), if a constituent agency failed to act upon a grantee's request for approval to incur an expenditure within a reasonable time (not to exceed 30 days unless the agency demonstrates to the Board Chairman good cause for the delay and has so notified the grantee within the 30-day period), the failure to act was deemed by the Board to be a notification.

[156] See discussion of final decisions, *supra* at § 54.08[4][a][iii][E].

[157] 45 C.F.R. Part 74.

[158] See 45 C.F.R. § 74.304 (46 Fed. Reg. 43822, Aug. 31, 1981).

lowances, e.g., under Sections 403(g) and 1903(g) of the Act, and fiscal disallowances based on quality control samples. Disallowances in mandatory grant programs administered by the Public Health Service, including Title V of the Social Security Act.

Disallowances in the programs under sections 113 and 132 of the Developmental Disabilities Act.

Disallowances under Title III of the Older American Act.

2. *Direct, discretionary project programs* (grants or cooperative agreements)

A disallowance or other determination denying payment of an amount claimed under an award, or requiring return or set-off of funds already received. This does not apply to discretionary agency determinations of award amount or disposition of unobligated balances, or selection in the award document of an option for disposition of program-related income.

A termination for failure to comply with the terms of an award.

A denial of a noncompeting continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award.

A voiding (a decision that an award is invalid because it was not authorized by statute or regulation or because it was fraudulently obtained).

3. *Cost allocation and rate disputes*

These include decisions related to cost allocation plans negotiated with State or local governments and negotiated rates such as indirect cost rates, fringe benefit rates, computer rates, research patient care rates, and other special rates.

4. *SSI agreement disputes*

These include disputes arising under agreements for Federal administration of State supplementary payments under section 1616 of the Social Security Act or mandatory minimum supplements under section 212 of Pub. L. 93–66.

[*iii*]—*As Handled By the Board.* Appeals to the Board have included all of the five types of determinations covered in the old regulations at Section 16.5(a). Allowing for some duplication (i.e., appeals in which more than one type of determination was involved), the breakdown is as follows:

Cases Closed with Written Decisions[159]

Type of Determination	Discretionary Grants	Mandatory Grants	Total
(1) Termination	2	1	3
(2) Unallowable costs and improper accounting	67	42	109
(3) Denial of requests to incur expenditures	6	0	6
(4) Voidness of grant award	2	1	3
(5) Cost allocation plans and rate determinations	4	0	4

A discussion of how these and other appeals were resolved appears in the following subsection.

[159] This chart covers cases closed with written decisions as of December 31, 1980. It does not include cases which involve several grants or cases in which the type of grant program involved was not ascertainable.

[5]—Appeals Brought Before the Board

[a]—The Nature of the Assistance Programs Involved in the Appeals

[*i*]—*Mandatory Versus Discretionary.* Few generalizations can be made about the nature of the programs involved in HHS appeals. Understandably, certain of the larger programs, i.e., Medicaid and Head Start, have given rise to several appeals, whereas appeals in connection with the smaller programs, i.e., health professions training, health maintenance organizations, community and migrant health centers, surface infrequently.

Table 1 provides a breakdown of closed appeals by type of determination. Among other things, this table shows that, of the 140 appeals in which the Board rendered written decisions, at least 84 arose in connection with the discretionary grant programs and at least 43 arose in connection with the mandatory grant programs.

An examination of the charts which describe each of the appeals culminating in written decisions (through December 31, 1980), reveals that the majority (approximately 25) of the "mandatory" grant program appeals involved the Medicaid program. The AFDC and OHDC Social Services programs are each the subject of 7 or 8 appeals.

The various grant programs formerly administered by the Office of Education (now the Department of Education) have been the subject of roughly one-third of the "discretionary" grant appeals culminating in written decisions. Head Start grants have given rise to approximately 20 appeals.[160] Research grants administered by the National Institutes of Health have been the subject of at least 10 appeals. Approximately 15 appeals have involved discretionary grants for support of health services in community and migrant health centers, health maintenance organizations and community mental health centers.

[*ii*]—*Historical Breakdown.* Table 2 provides a historical breakdown of appeals which have been closed with or without

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[160] One reason for the large number of Head Start cases is the Head Start requirement that all recipients of program funds be audited annually. Nineteen of the 20 Head Start cases culminating in written decisions were appeals of audit findings.

written decisions between 1973 and 1980. It is interesting to note the steady pattern of appeals arising out of the discretionary grant programs: approximately 8–15 appeals per year. However, appeals concerning disallowances under the mandatory Social Security Act programs were not subject to the Board's jurisdiction until March 6, 1978.[161] A virtual "explosion" of appeals of such disallowances occurred during 1978 (32 appeals, 31 of which involved Social Security Act reimbursement programs). In 1979, only 16 such appeals were filed, and in 1980, the number of such appeals dwindled down to 9.

[b]—Types of Grantees Involved in Appeals. Table 3 provides a breakdown of appeals in terms of the types of grantees involved. States are the only eligible recipients for the mandatory Social Security Act grants, and also are eligible for support under most of the HHS discretionary grant programs. It therefore comes as no surprise that the overwhelming majority of appeals to the Board have been brought by States. Running a distant second are educational institutions[162] and nonprofit organizations. Communiy action agencies and units of local government take third place, and a few appeals have been brought by medical institutions.

[c]—Dollar Amounts Involved in Appeals. Table 4 provides a general breakdown by type of grantee of the dollar amounts involved in appeals to the Board. The majority of appeals involve $10,001–$100,000 and almost all of the other appeals are in the $1001–10,000 or $100,001–$1 million range. The majority of appeals involving more than $100,000 are brought by States, which is not surprising since only the reimbursement grant programs, e.g., Medicaid, provide such vast sums of money to grantees, and the States are the only eligible recipients under these programs. Table 5 provides a historical breakdown of actual amounts involved in appeals by type of grantee.[163] Appeals by States have involved more

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[161] See discussion *supra* at § 54.08[1].

[162] However, now that most education grant programs are administered by the Department of Education, it is unlikely that many appeals will continue to be brought by educational institutions. Such institutions are eligible to receive grants under a few discretionary grant programs, *i.e.*, health professions, training programs and NIH research grants.

[163] This table excludes cases where the amount in controversy was not ascertainable or where no filing date was shown.

than $82.5 million of a total of approximately $86.1 million involved in all appeals (approximately 95 per cent).

[d]—Specific Issues Involved in Appeals. Until September 30, 1981, the Board's jurisdiction was confined to appeals of post-award determinations.[164] Thus, the issues involved in the appeals fell into five major categories: (1) Termination; (2) Unallowable Costs and Improper Accounting; (3) Denials of Requests to Incur Expenditures; (4) Voidness or Reduction of Grants; and (5) Cost Allocation Plans and Rate Determinations. Issues arising in each of these categories are discussed separately below.

[*i*]—*Termination.* Prior to January 1981, only 2 of the appeals culminating in written decisions involved terminations "for cause."[165] In both cases, the agency decision to terminate was upheld by the Board upon a finding that the alleged deficiencies which resulted in the termination action in fact existed and were sufficiently serious to warrant such action.[166]

Two other appeals to the Board involved a reduction, or "partial termination," of grant awards.[167]

In the *University of Texas* case, the grantee appealed from a decision of the Social and Rehabilitation Service to reduce its second year grant by an amount equal to the amount of funds awarded in the first year but not obligated in that year, i.e., $55,229. During the first funding year, the grantee had advised the agency that it had these *unused funds and* was told that these funds could be carried over to the next year, in addition to second year funding as originally proposed.

The Board characterized the reduction as a "partial termination" and overturned it on the ground that the reduction was not based on any "for cause" determination that the grantee had failed to

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[164] See discussion § 54.08[4] *supra.*

[165] Health Maintenance Organization of South Carolina, Docket No. 25, Decision No. 11 (Dec. 3, 1975); State of Texas, Governor's Committee on Aging, Docket No. 78–37, Decision No. 59 (June 20, 1979).

[166] See also, Lakota Indian Alcohol and Drug Abuse Program, Inc., Docket No. 79–212, Decision No. 196 (June 30, 1981) (summary termination upheld upon finding of material failure to comply with grant conditions).

[167] University of Texas Medical School at San Antonio, Docket No. 4, Decision No. 1 (March 7, 1974); Operation SHARE Foundation, Docket No. 77–19, Decision No. 96 (May 2, 1980).

comply with the grant terms, but was based instead on an agency policy of fiscal restraint. The Board found that this policy could not be read to vitiate prior agency commitments to the grantee, upon which the grantee had relied in good faith. The Board further held that these policies did not constitute a valid basis for termination.

The Board also reversed the agency's reduction of a grant award in *Operation SHARE.* In that case, the appellant was a grantee under the Emergency School Aid Act, providing tutorial services to three school districts. The Office of Education (OE) issued a letter reducing the grant award by $15,714 because the grantee was serving only three school districts rather than four, as it originally had proposed. However, during the funding period, the grantee had requested OE to approve a program change whereby the grantee would use the funds originally allocated to serving the fourth school district for purposes of providing increased services to the other three districts, because the fourth school district did not want to participate in the program. OE did not respond until one month after the grant period ended; however, OE officials had disapproved alternatives of returning the funds or substituting another school district.

The Board held that, under the unusual circumstances of this case, OE's failure to respond to the grantee's written request for prior approval violated applicable regulations. Accordingly, the disallowance was reversed.

[*ii*]—*Unallowable Costs and Improper Accounting.* The vast majority of appeals to the Board arise in connection with cost disallowance determinations.[168] Out of the 140 appeals culminating in written decisions as of December 31, 1980, 111 involved cost disallowances. In monetary terms, appeals of disallowances account for approximately $95.1 million. All of the other types of determinations combined only account for approximately $10.7 million.[169]

Specific issues which arise on a recurring basis are: (1) the allowability of costs incurred prior to the grant award;[170] (2) the allowa-

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[168] See Table 1.

[169] See Table 6.

[170] See, e.g., Texas A&M University System, Docket No. 75–2, Decision No. 10 (Nov. 6, 1975); State of Minnesota Dept. of Public Welfare, Docket No. 75–15,

bility of expenditures in excess of budget amounts;[171] (3) whether costs may be transferred between cost categories;[172] (4) inadequate documentation of costs;[173] (5) failure to obtain prior approval;[174] and (6) failure to meet matching or maintenance of effort requirements.[175]

Decision No. 26 (Aug. 17, 1976); Pinellas Opportunity Council, Inc., Docket No. 79–58, Decision No. 80 (Feb. 6, 1980); Yakima Public Schools, Docket No. 79–3, Decision No. 81 (Feb. 6, 1980); Community Action Agency of Memphis and Shelby County, Docket No. 78–44, Decision No. 103 (June 9, 1980).

[171] See, e.g., Soul City Foundation, Inc., Docket No. 76–18, Decision No. 43 (April 4, 1978); Harrison County Community Action Agency, Docket No. 77–10, Decision No. 51 (Nov. 22, 1978); American Indian Center of Dallas, Inc., Docket No. 76–19, Decision No. 52 (Dec. 4, 1978); Knox County Economic Opportunity Council, Inc., Docket No. 78–14, Decision No. 68 (Oct. 29, 1979); Pinellas Opportunity Council, Inc., Docket No. 79–58, Decision No. 80 (Feb. 6, 1980); Yakima Public Schools, Docket No. 79–3, Decision No. 81 (Feb. 6, 1980); Anderson-Oconee Headstart Project, Inc., Docket No. 79–80, Decision No. 90 (April 28, 1980); Macon County Community Action Committee, Inc., Docket No. 78–7, Decision No. 93 (April 29, 1980).

[172] See, e.g., Tulane University, Docket No. 2, Decision No. 7 (Nov. 1, 1974); Point Park College, Docket No. 75–12, Decision No. 16 (May 20, 1976); Community Action Agency of Memphis and Shelby County, Docket No. 76–9, Decision No. 38 (July 5, 1977) (supplemented Oct. 6, 1977); Soul City Foundation, Inc., Docket No. 76–18, Decision No. 43 (April 4, 1978).

[173] See, e.g., Harrison County Community Action Agency, Docket Nos. 75–5 and 76–7, Decision Nos. 35 and 36 (Mar. 14, 1977); Chinle, Arizona School Dist. No. 24, Docket No. 77–15, Decision No. 60 (June 29, 1979); Jamestown College, Docket No. 76–14, Decision No. 63 (July 31, 1979); Head Start of New Hanover County, Inc., Docket No. 78–94, Decision No. 65 (Sept. 26, 1979); Neighborhood Services Dept., Docket No. 79–7, Decision No. 110 (July 15, 1980).

[174] See, e.g., Southern Mutual Help Assoc., Inc., Docket No. 30, Decision No. 20 (June 23, 1976); Sencland Community Action, Inc., Docket No. 24, Decision No. 21 (June 25, 1976); Southern University, Docket No. 29, Decision No. 24 (June 29, 1976); East Central University, Docket No. 31, Decision No. 31 (Jan. 7, 1977); Soul City Foundation, Inc., Docket No. 76–18, Decision No. 43 (Apr. 4, 1978); American Indian Center of Dallas, Inc., Docket No. 76–19, Decision No. 52 (Dec. 4, 1978); Zavala County Health Assn., Docket No. 77–21, Decision No. 57 (June 15, 1979); Columbia University, Docket No. 78–147, Decision No. 72 (Dec. 28, 1979); and Kent Community Mental Health Center Services Board, Docket No. 78–110, Decision No. 138 (Dec. 1, 1980).

[175] See, e.g., Topeka Public Schools, Docket Nos. 77–7, 77–8 & 77–9, Decision No. 47 (Sept. 28, 1978); Harrison County Community Action Agency, Docket No. 77–10, Decision No. 51 (Nov. 22, 1978); Jamestown College, Docket No.

Specific cost categories which often are subject to audit disallowance and appeal include:

(1) Fringe Benefit Costs.[176]

(2) Salary Costs.[177]

(3) Equipment Costs.[178]

(4) Training Costs.[179]

76–14, Decision No. 63 (July 31, 1979); Head Start of New Hanover County, Inc., Wilmington, N.C., Docket No. 78–94, Decision No. 65 (Sept. 26, 1979); Trenton Board of Education, Docket No. 78–2, Decision No. 74 (Jan. 11, 1980); Bloomfield College Cooperative Education Program, Docket No. 78–4, Decision No. 82 (Feb. 22, 1980). Human Services, Inc., Docket No. 78–3, Decision No. 88 (Mar. 3, 1980); Mary Holmes College, Docket No. 77–5 Decision No. 102 (June 2, 1980); Louisiana Dept. of Health and Human Resources, Docket No. 79–134–LA–HC, Decision No. 126 (Oct. 31, 1980); The Neighborhood House Association, Docket No. 80–81, Decision No. 136 (Dec. 1, 1980).

[176] See, e.g., State of Minnesota Department of Public Welfare, Docket No. 75–15, Decision No. 26 (Aug. 17, 1976); American Indian Center of Dallas, Inc., Docket No. 76–19, Decision No. 52 (Dec. 4, 1978); Jamestown College, Docket No. 76–14, Decision No. 63 (July 31, 1979); Trenton Board of Education, Docket No. 78–2, Decision No. 74 (Jan. 11, 1980).

[177] See, e.g., Univ. of the Pacific, Docket No. 18, Decision No. 15 (Apr. 21, 1976); St. Landry Parish School Board, Docket No. 75–4, Decision No. 17 (May 28, 1976); San Antonia Ind. School District, Docket No. 28, Decision No. 23 (June 29, 1976); University of Guam, Docket No. 76–5, Decision No. 28 (Nov. 29, 1976); Community Action Agency of Memphis and Decision No. 38 (July 5, 1977, supplemented as of Oct. 6, 1977).

[178] See, e.g., San Antonio Ind. School District, Docket No. 28, Decision No. 23 (June 29, 1976); Chinle, Arizona School District No. 24, Docket No. 77–15, Decision No. 60 (June 29, 1979); Knox County Economic Opportunity Council, Inc., Barbourville, Kentucky, Docket No. 79–26, Decision No. 94 (Apr. 30, 1980); Neighborhood Services Dept., Detroit, Mich., Docket No. 79–7, Decision No. 110 (July 15, 1980); University of California—General Purpose Equipment, Docket No. 78–156, Decision No. 118 (Sept. 29, 1980).

[179] See, e.g., Medical Care Center of Louisiana, Inc., Docket No. 77–16, Decision No. 95 (May 1, 1980); Utah Dept. of Social Services, Docket No. 80–33–UT–HD, Decision No. 106 (July 1, 1980); Montana Dept. of Social and Rehabilitation Services, Docket Nos. 80–31–MT–HD, 80–78–MT–HD, 78–43–MT–HD (partial), 78–93–MT–HD (partial); 79–115–MT–HD (partial), Decision No. 119 (Sept. 30, 1980); Alabama Dept. of Pensions and Security, Docket No. 80–59–AL–HD, Decision No. 128 (Oct. 31, 1980); Oregon Dept. of Human Resources, Docket No. 80–76–OR–HD, Decision No. 129 (Oct. 31, 1980).

(5) Travel Costs.[180]

(6) Consultant Costs.[181]

Recurring causes of disallowances with respect to the Social Security Act reimbursement programs include determinations that: (1) the State lacks valid provider agreements or facility certifications;[182] and (2) the State has provided services to individuals who are ineligible under Federal requirements or who are not covered by the State plan.[183]

The outcomes of the cost disallowance cases in which the Board has rendered written decisions may be broken down as follows:

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[180] See, e.g., Southern Mutual Help Assoc., Inc., Docket No. 30, Decision No. 20 (June 23, 1976); East Central Univ., Docket No. 31, Decision No. 31 (Jan. 7, 1977); United States International University, Docket No. 76–12, Decision No. 42 (Oct. 19, 1976); University of Arizona, Docket No. 78–11, Decision No. 58 (June 19, 1979); Head Start of New Hanover, County Inc., Wilmington, N.C., Docket No. 78–94, Decision No. 65 (Sept. 26, 1979).

[181] See, e.g., United States International University, Docket No. 76–12, Decision No. 42 (Oct. 19, 1980). 1976); Afro-American Cultural Education Center, Inc., Docket No. 76–1, Decision No. 46 (Jan. 6, 1976); Florida Educational Research & Development Council, Inc., Docket No. 77–3, Decision No. 54 (Mar. 29, 1979).

[182] See, e.g., Delaware Dept. of Health & Social Services, Docket No. 78–108–DE–HC, Decision No. 87 (Feb. 29, 1980); New Jersey Dept. of Human Services, Docket Nos. 78–54–NJ–HC, 79–14–NJ–HC, Decision No. 98 (May 8, 1980); New Jersey Dept. of Human Services, Docket Nos. 78–41–NJ–HC, 78–16–NJ–HC, 78–106–NJ–HC, Decision No. 104 (June 9, 1980); Maryland Dept. of Health and Mental Hygiene, Docket No. 79–157–MD–HC, Decision No. 107 (July 2, 1980); Nebraska Dept. of Public Welfare, Docket No. 78–36–NB–HC, Decision No. 111 (July 16, 1980).

[183] See, e.g., California State Department of Health, Docket No. 78–69–CA–HC, Decision No. 55 (May 14, 1979); New York Dept. of Social Services, Docket Nos. 78–66–NY–CS, 78–162–NY–CS, 79–36–NY–CS, Decision No. 101 (May 23, 1980); New Jersey Dept. of Human Services, Docket No. 78–159–NJ–HC, Decision No. 115 (Aug. 8, 1980); New Jersey Dept. of Human Services, Docket Nos. 80–43–NJ–CS, 80–48–NJ–CS, 80–56–NJ–CS, Decision No. 135 (Nov. 28, 1980).

	Favorable to Grantee	Upheld Agency	Split[184]
No. of Cases	20	66	30
Dollar Value (where known)	$3,162,247	$95,015,920	419,534

It should be noted that approximately $50 million was at issue in one of the appeals which culminated in a decision adverse to the grantee.[185]

Although its rules do not assign burdens of proof to the parties, the Board chairman has stated that, in the cost disallowance context, the grantee generally has the burden of showing a defect in the disallowance. Once such a showing is made, the agency has the burden of demonstrating that the disallowance nevertheless is appropriate.[186]

On occasion, the Board has been asked to review agency denials of grantee requests for permission to incur expenditures. Two such appeals involved denials of requests to use "carryover" funds.[187] In the *Kent State University* case, the Board held that the constituent agency's denial of the grantee's request for permission to use carry-

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[184] Where it was possible to ascertain the amounts for and against the grantee in a split decision, those amounts were included in the "Favorable to Grantee, and "Upheld Agency" categories.

[185] See California Department of Social Services, Docket No. 78–161–CA–SSI, Decision No. 86 (Feb. 26, 1980).

[186] Interview with Norval D. Settle, N. 37 *supra.*

[187] When projects are funded over a multi-year period, grantees may request permission from the agency to use funds which were awarded but not obligated to meet costs in succeeding years. If the request is denied, the unused funds either are returned to the agency or "set off" (deducted) against the next year's grant award.

Kent State University, Docket No. 10, Decision No. 3 (July 26, 1974); Kent Community Mental Health Center Services Board, Docket No. 78–110, Decision No. 138 (Dec. 1, 1980).

over funds was not appealable, characterizing the request as "pre-award" in nature.

However, the *Kent Community Mental Health Center* case was not so easily disposed of. In that case, the grantee requested permission to use carryover funds, however, the agency did not act on that request. Thereafter, audit disallowances were taken in connection with the grantee's expenditure of the funds on the ground that their expenditure was not authorized. On the basis of the audit, the agency then retroactively disapproved the grantee's use of carry-over funds.

The Board overturned the audit disallowances for the following reasons. First, the Board stated that it was the agency's responsibility to act on the grantee's request to use carry-over funds. Second, if the agency had acted favorably upon the request, the grantee would not have suffered the audit disallowances; if the agency had denied the request, the grantee might not have continued to spend these funds—again, there might have been no basis for disallowance. Third, the agency's retroactive disapproval of the request was improper since it was based only on the audit disallowances (in turn, based on lack of authorization), rather than programmatic considerations. The Board held that the agency could have approved the request retroactively, and remanded the case to the agency to consider whether programmatic reasons justified withholding such approval.

In two appeals, the Board was asked to review denials by constituent agencies of requests to transfer funds among various cost categories in the grantees' budgets.[188] In *Point Park*, the grantee overexpended funds budgeted to certain categories, but had not overexpended its overall budget. Thereafter, the grantee requested permission to make these cost transfers; i.e., by revising specific "line" items in the budget. The agency denied the request on the ground that advance approval was required. The Board reversed upon a finding that advance approval was not required by any statute or regulation with respect to the kinds of "minor" deviations involved in this case.

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[188] Point Park College, Docket No. 75–12, Decision No. 16 (May 20, 1976); American Foundation for Negro Affairs, Docket No. 79–4, Decision No. 73 (Dec. 28, 1979).

In the *American Foundation* case, the Board sustained the agency's denial of the grantee's request to transfer costs among budget categories. The grantee argued that it had received approval of the transfer from a program official prior to the denial by the agency. The Board found insufficient evidence of such prior approval and concluded that, in any event, the official was not authorized to render such a decision.[189]

In *University of Minnesota,*[190] the grantee appealed from the agency's denial of its request to revise its current budget to cover excess expenditures incurred in the previous year. The agency denied the request on the ground that it was untimely, i.e., the grantee should have made this request in its proposed budget, prior to the award for the current year. The Board reversed the agency, concluding that prior approval was not required, and remanded the case to the agency to determine whether the expenditures were otherwise allowable and whether there were any unused grant funds from the previous year which could have been used instead of current year funds.

Finally, the Board reviewed an appeal wherein the grantee argued that the denial of its repeated requests to increase a program coordinator's salary was unfair.[191] The Board sustained the agency's decision, noting that the grantee was not *entitled* to additional funds to support an increased salary, and concluding that the grantee had failed to justify its request.

The outcome of the cases in which denials of requests for permission to incur expenditures have been appealed, and which culminated in written decisions, may be broken down as follows:

	Favorable to Grantee	Upheld Agency	Remand
No. of Cases	1	3	2
Dollar Value (where known)	$2,626	$27,501+	$75,083

[189] See discussion of estoppel at § 54.08[4][a][iii][F], *supra.*

[190] Docket No. 77-4, Decision No. 44 (Aug. 14, 1978).

[191] Harambee Child Development Council, Inc., Docket No. 77-17, Decision No. 67 (Oct. 17, 1979).

[*iii*]—*Determination That a Grant is Void.* Only one appeal to the Board involved a determination that a grant was void. In *Southern Illinois University—Carbondale,*[192] the appellant had received a grant under the Veteran's Cost-of-Instruction Program, and ran an "exemplary"program. However, two-thirds of the way into the grant year, the grantee discovered that, due to mathematical errors in calculation, it had failed to meet one of the eligibility criteria of the program, i.e., a 10 percent increase in the number of undergraduate veteran students enrolled. The grantee notified the Office of Education of this fact, whereupon the Commissioner of Education determined that grant funds amounting to $86,663 had to be repaid, because the grant was void.

Although it conceded that it was ineligible, the grantee appealed this determination, seeking waiver of recovery because of mitigating circumstances, i.e., it had made an "honest error,"it ran a good program, and it had invested substantial non-Federal resources into the program. The Office of Education also urged the Board to waive recovery. The Board applied princples articulated in several Comptroller General decisions and that the unusual circumstances of this warranted a waiver of recovery.

[*iv*]—*Cost Allocation Plans and Rate Determinations.* The Board has rendered several written decisions relating to appeals of adverse cost allocation or rate determinations. The major issues involved in these appeals may be summarized as follows:

(1) Whether interest on loan to purchase computer may be charged to indirect costs;[193]

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[192] Docket No. 78–5, Decision No. 49 (Oct. 31, 1978).

[193] Oregon Statewide Cost Allocation Plan, Docket No. 75–7, Decision No.22 (June 25, 1976); State of Wyoming, Docket No. 76–16, Decision No. 53 (Dec. 1, 1978); Oregon Statewide Allocation Plan, Docket No. 79–57, Decision No. 75 (Jan. 31, 1980); Vermont Statewide Cost Allocation Plan, Docket No. 79–198, Decision No. 84 (Feb.26,1980). The Board ruled against the grantee in each of these cases in light of OMB Circular A–87 (FMC 74–4) which prohibits payment of interest on loans. However, the Board has expressed its view that the circular is unfair.

(2) Whether grantees may seek retroactively to adjust indirect cost rate to allow full reimbursement;[194]

(3) Whether contributions to employee retirement fund may be charged as indirect cost;[195]

(4) Whether separate rather than consolidated indirect cost for four campuses was proper;[196]

(5) Whether it was proper to reduce indirect cost rate where grantee received reimbursement for adminstrative costs from another Federal agency;[197]

(6) Whether certain elements of cost, e,g., value of donated services and space, salaries and wages, use of property, *should be included in determination of indirect cost rate*;[198]

(7) Whether certain costs should be given indirect cost treatment;[199]

The Board has articulated quite clearly its standard of review of agency indirect cost determinations in *University of California*.[200] Briefly stated, the Board described its scope of review as follows:

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[194] Donald Gutherie Foundation for Medical Research, Docket No.11, Decisions No. 6 (Sept. 12, 1974). The Board ruled against the grantee.

[195] State of Connecticut, Docket No. 9, Decision No. 8 (Feb. 7, 1975); State of Rhode Island, Docket No. 75–19, Decision No. 29 (Dec.6, 1976). The Board ruled against the grantees on the ground that the States did not provide consistent treatment of Federal and non-Federal charges (OMB Circular A–87).

[196] University of Missouri, Docket No. 75–11, Decision No. 19 (June 21, 1976). The Board found the use of separate rates to be proper (FMC 73–8, ¶ G.1.b.).

[197] Economic Opportunity Corp. of Greater St. Joseph, Docket No. 77–11, Decision No. 45 (Aug. 29, 1978). The Board upheld the agency.

[198] Eunice Kennedy Shriver Center for Mental Retardation Inc., Docket No. 75–1, Decision No. 18 (June 4 1976); Oregon Dept. of Higher Education, Docket No. 75–9, Decision No. 27 (Sept. 27, 1976); Action for Boston Community Development, Inc., Docket No. 76–4, Decision No. 32 (Jan. 31, 1977); University of California, Docket No. 76–6, Decision No. 40 (Oct. 11, 1977).

[199] Oregon Research Institute, Inc., Docket No. 76–2, Decision No. 34 (Mar. 9, 1977) (legal services); Legis 50/The Center for Legislative Improvement, Docket No. 76–17, Decision No. 48 (Sept. 26, 1978) (bidding and proposal costs, citizen participation costs); Mass. Rehabilitation Commission, Docket No. 79–190, Decision No. 122 (Sept. 30, 1980).

[200] Docket No. 76–6, Decision No. 40 (Oct. 11, 1977).

(1) The Board must implement applicable Federal law and policy;

(2) The Board will not provide a *de novo* review of the underlying agency decision;

(3) The Board will not presume the underlying decision to be valid or dispose of the case in terms of failure to meet preassigned burdens of proof;

(4) The standard of review is one of the reasonableness of the agency decision,viewed in the context of the entire record and the provisions of appendix D (which accords grantee wide latitude in adhering to their own institutional objectives and accounting practices);

(5) In reviewing the reasonableness of the agency decision, the Board will consider; (a) the history of prior agency determinations with respect to the particular grantee; (b) the extent of changes in past practices involved in the current agency position; (c) the apparent reasonableness of the grantee's proposals; and (d) the consistency and uniformity of the current agency position vis-a-vis this grantee and other grantees similiarly situated and the availability of rulemaking procedures to articulate that position;

(6) If the Board reverses the agency decision, it will remand the matter to the appropriate offical for further proceedings.

The outcome of the cost allocation and indirect cost cases in which the Board has rendered written opinions may be broken down as follows:

	Favorable to Grantee	Upheld Agency	Split
No. of Cases	1	12	3
Dollar Value (where known)		$12,462,356	$3,472

HHS
Grant Appeals Board
Outcomes of Written Decisions

Type of Grantee	Favorable	Split	Adverse	Total
State Govt	5	8	39	52
Educational Institution	13	7	13	33
Nonprofit Organization	6	11	14	31
Community Action Agency	1	3	8	12
Local Govt	1	3	6	10
Medical Institution			1	1
Totals	26	32	81	139

Decision No. 138 was remanded

Dollar Volume in Determination
By Grantee

Type of Grantee	Favorable	Split	Adverse	Total
State Govt	1,154,416	111,697	100,354,703	101,620,821
Educational Institution	1,567,254	194,146	2,284,715	4,046,115
Nonprofit Organization	189,053	56,014	303,297	548,364
Community Action Agency	33,474	–	433,089	466,563
Local Govt	302,719	–	591,476	894,195
Medical Institution	–	–	5,400	5,400
Total	3,246,916	361,857	103,972,685	107,581,458

Excludes decisions where account unascertainable or outcome unknown (remand): 8, 11, 18, 32, 40, 48, 75, 84, 122, 138, ($64,943-remand)

HHS
Duration of Appeal By Date of Filing
Written Decisions

Duration	1973	1974	1975	1976	1977	1978	1979	1980
1–3 mos.								1
4–6 mos.				1			2	3
7–12 mos.	5		4	3		1	9	3
1–3 yrs.	3	10	9	6	17	40	12	
Longer than 3 years				1				
Totals	8	10	13	11	17	41	23	7

Excludes Decisions 4, 25, 40, 65, 101, 102, 105, 108, 114, 117, 118, 119, 122, 125, 126, 127, 128, 129, 130, 138, 139–No filing date stated

Cases Closed Without Written Decision*

Duration	1973	1974	1975	1976	1977	1978	1979	1980
Less than 1 month	1	2				1	8	4
1–3 mos.	2	2	1		1	2	16	4
4–6 mos.	1	1		1		9	30	
7–12 mos.		1	2			14	21	
1–3 yrs.	3	3	2		2	4	2	
Longer								
Totals	7	9	5	1	3	30	77	8

*Current to July 15, 1980

HHS

Duration of Appeals
Time Elapsed Between Filing and Resolution

Duration	Cases Closed With Written Decision	Cases Closed Without Written Decision
Less than 1 month	–	16
1–3 months	4	28
4–6 months	7	42
7–12 months	33	38
Between 1–3 years	99	16
Longer than 3 years	1	–

If more than 1 docket number given for a decision, i.e. consolidated cases, counted each docket number's file date.

HHS

Number of Cases per Type of Determination

Type of Determination	Closed With Written Decision (12-31-80)			Closed w/o Written Decision as of July 15, 1980	Total
	Discretionary	Mandatory	All Grants		
Termination	4			1	5
Cost Allocation Plans & Rate Determinations	4		6	24	34
Unallowable Costs and Improper Accounting	68	42	1	115	226
Denial of Request to Incur Expenditures	6			4	10
Voidness of Grant	2	1		1	2
Other				2	2

This chart does not reflect determinations in Decision Numbers
13, 19, 32, 34, 40, 45, 52, 53, 55, 84, - Grant programs unascertainable
Seven of these were appeals concerning cost allocation and rate determinations

HHS
Historical Breakdown

Written Decisions	1973	1974	1975	1976	1977	1978	1979	1980	Total
Discretionary:									
Headstart		1	1	1	4	4	7	1	19
Others	8	8	10	9	12	9	5	2	63
Mandatory:									
SS Act						31	16	9	56
Others					1	3			4
All Grants	1		2				1		4
Subtotal	9	9	13	10	17	47	29	12	146
Closed Without Written Decisions	8	10	5	1	4	31	74	8	141
Total	17	19	18	11	20	74	102	19	287

HHS

Volume of Cases by Types of Grantees
Closed Cases

	Written Decision	Without Written Dec.*	Total
A. State Governments	51	103	154
B. Hospitals	1	5	6
C. Educational Institutions	34	15	49
D. Community Action Agencies	12	10	22
E. Nonprofit Organizations	31	9	40
F. Local Governments	10	5	15
G. Other	1	1	2
H. Unknown		1	1
Total	140	149	289

*Current to July 15, 1980

Pending as of July 15, 1980 (minus cases decided as of December 31, 1980)	
A. State Governments	108
B. Medical Organizations	3
C. Educational Institutions	9
D. Community Action Agencies	0
E. Nonprofit Organizations	9
F. Local Govt	0
G. Other	2
	131

Totals for All Cases	420
State Governments	262
Medical Organizations	9
Educational Institutions	58
Community Action Agencies	22
Nonprofit Organizations	49
Local Govt	15
Other (including unknown)	5

HHS—Written Decisions
Dollar Amounts in Appeals By Type of Grantee

Dollar Amounts $1–$100	State Govt	Educational Institution	Nonprofit	Community Action Agency	Local Govt	Medical Institution	Total
$101–$1000	1		1				2
$1001–$10,000	4	10	10	1	2	1	28
$10,001–$100,000	20	16	16	10	5		67
$100,001–$1 million	13	4		1	3		21
Over $1 million	8	2					10

Figures represent only those cases where amount was ascertainable.

HHS
Dollar Amounts by Type of
Grantee by Year of Filing

	State Govt	Educational Institution	Community Action Agency	Nonprofit Organization	Local Govt	Medical Inst.
1973		281,439				5400
1974		1,169,312	14,151	57,214	64,860	
1975	12,094,241	52,344	49,994	98,657	20,270	
1976	347,024	89,833	28,008	17,546	2,500	
1977		96,803	136,964	81,066	366,632	
1978	68,898,303	123,123	32,548	137,980	419,119	
1979	376,166		16,687	94,353	24,078	
1980	823,743		39,406	55,518		
TOTAL	82,539,477	1,812,854	317,758	542,334	897,459	5400

Totals = 86,107,560

1973–$286,839
1974–$1,305,537
1975–$12,315,506
1976–$484,911
1977–$681,465
1978–$69,742,235
1979–$511,284
1980–$918,667

Excludes cases where no $ amounts or filing date shown: Decision Nos. 4, 8, 11, 18, 25, 32, 40, 48, 65, 75, 84, 101, 102, 105, 108, 114, 117, 118, 119, 122, 125, 126, 127, 128, 129, 130, 138, 139

HHS

Dollar Amounts Per Type of Determination By Grantee
Written Decisions

Type of Determination	State Govt	Educational Institution	Nonprofit Organization	Community Action Agency	Local Govt	Medical Institution	Total
Termination	12,834	55,229	15,714				83,777
Cost Allocation and Rate Determinations	12,358,926	40,000	3,472	58,030		5,400	12,465,828
Unallowable Costs and Improper Accounting	89,418,586	3,831,457	542,686	418,821	897,459		95,109,009
Denial of Request to Incur Expenditures		32,766	72,444				105,210
Voidness of Grant		86,663					86,663
Total	101,790,346	4,046,115	634,316	476,851	897,459	5,400	107,850,487

§ 54.09 Department of Housing and Urban Development

[1]—Overview

The Department of Housing and Urban Development (HUD) was established in 1965 to administer the major Federal programs which provide assistance for housing, and to guide community development in the Nation's cities. Almost all of HUD's grantmaking is centered in three areas: the Community Development Block Grant (CDBG) program,[1] the Urban Development Action Grant Program,[2] and various programs which assist local low-income housing efforts.[3] In fiscal year 1981, HUD spent approximately $4.5 billion in Community Development Block Grants to urban communities and Indian tribes; approximately $675 million in Urban Development Action Grants to cities; and approximately $7.5 billion in low income housing grants to local public housing authorities; landlords and developers.[4]

Notwithstanding the size of its grantmaking operations, HUD maintains no Departmentwide general grant dispute resolution procedures. HUD's Board of Contract Appeals however, does have

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[1] The Community Development Block Grant Program was authorized under the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301 *et. seq.* Its purpose was to consolidate and replace the following grant programs: Urban Renewal under Title I of the Housing Act of 1949; Model Cities under Title I of the Demonstration Cities and Metropolitan Development Act of 1966; Water and Sewer facilities under Section 702 of the Housing and Urban Development Act of 1965; Neighborhood facilities under Section 703 of the Housing and Urban Development Act of 1965; and Open Space under Title VII of the Housing Act of 1961. Regulations governing the program appear at 24 C.F.R. Part 570.

[2] Like Community Development Block Grants, Urban Development Action Grants are authorized under the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301 *et seq.* Regulations governing the program appear at 24 C.F.R. Part 570, Subpart G.

[3] These grants are authorized in the National Housing Act of 1974, as amended, 42 U.S.C. § 1437 *et seq.;* the Housing and Community Development Act of 1974, *supra;* and the Department of Housing and Urban Development Act, 42 U.S.C. § 3531 *et seq.* Regulations governing the grants are codified in 24 C.F.R. Parts 800–899.

[4] Executive Office of the President, Office of Management and Budget, 1981 Catalog of Federal Domestic Assistance, 398–214 (15th ed. 1981).

jurisdiction to hear all cases "assigned to it by the Secretary;"[5] and, on one occasion, had a grant case assigned to it.[6] In that case, general Board of Contract Appeals procedures applied.[7]

[2]—Departmentwide Procedures Governing the Debarment and Suspension of Grantees

HUD's only Departmentwide regulations pertaining to grant disputes are those covering "Debarment, Suspension and Ineligibility of Contractors and Grantees." [8] These regulations dictate the procedures which HUD must follow before debaring or suspending a grantee.

For HUD to debar a grantee or grant applicant, HUD's actions must be based on one of the "causes" listed in its regulations.[9] These causes include, among others, conviction of criminal or civil offenses incident to obtaining and administering a grant, violations of grant provisions, and "any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary to warrant debarment."[10]

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[5] 24 C.F.R. § 20.4(b).

[6] Interview with Judge Jean Cooper, Board of Contract Appeals, U.S. Department of Housing and Urban Development, October 13, 1981 (Washington, D.C.). This case, Appeal of Home Investments Fund, HUD BCA No. 79–371–G1, concerned an appeal by a non-profit corporation of a grant termination. Pursuant to a provision in its grant agreement, the grantee requested the Secretary of HUD to review the termination decision of its grant officer. The Secretary referred the case to the Board of Contract Appeals.

[7] These procedures include discovery, a pre-trial conference, an optional accelerated hearing procedure (for contract claims of less than $25,000 in which the filing of pleadings and briefs, and discovery is waived in exchange for a decision within thirty days of appeal), or a regular hearing procedure which "shall be as informal as may be reasonable and appropriate under the circumstances." 24 C.F.R. § 20.10, Rule 21. See generally, 24 C.F.R. Part 20 *et seq.*

[8] 24 C.F.R. Part 24.

In July, 1980, HUD issued, as a proposed rule, modifications of these regulations. 45 Fed. Reg. 46012 (1980). The proposed rules have not yet been issued in final form, and although they make some changes in particular procedures to be used in debarments, suspensions and temporary denials of participation, most current regulations emerge intact or modified only slightly.

[9] 24 C.F.R. § 24.6.

[10] C.F.R. § 24.6(a)(5).

When HUD seeks to debar a grantee or grant applicant, the party must be given written notice, and an opportunity for an oral hearing, with witnesses testifying under oath.[11] Hearing officers from HUD's Board of Contract Appeals are assigned to hear such cases.[12] The only exception to the hearing requirement is in cases where HUD's action is based upon a grantee's indictment or conviction of a crime. In those cases, the grantee may submit only documentary evidence and/or written briefs.[13] In any event, the decision of the hearing officer is final, unless the Secretary of HUD agrees to review the findings.[14]

The procedures used to suspend a grantee are identical to those used for debarment.[15] When HUD seeds to "temporarily deny" participation to a grant applicant because of "irregularities" in the applicant's past performance, failure of the applicant to maintain the prerequisites of eligibility necessary to participate in the program, or for any cause which would warrant suspension, other procedures apply.[16] In such cases, the applicant is entitled only to an "informal hearing," before the official who originally ordered the denial of participation, with the right of appeal to an Assistant Secretary.[17]

HUD's debarment, suspension, and denial of participation procedures never have been used against a grantee or grant applicant under either the Community Development Block Grant or Urban Development Action Grant Program.[18] However, HUD's Office of Assisted Housing, which administers low-income housing grants,

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[11] 24 C.F.R. § 24.7.

[12] Interview with John Pitts, Director, Division for Participation and Compliance in Housing, Office of Assisted Housing, U.S. Department of Housing and Urban Development, October 13, 1981 (Washington, D.C.).

[13] 24 C.F.R. § 24.5.

[14] 24 C.F.R. § 24.8.

[15] 24 C.F.R. § 24.16(4).

[16] 24 C.F.R. § 24.18.

[17] 24 C.F.R. § 24.18(a)(5).

[18] Interviews with Jack Barnet, Management Analyst, Organization and Management Services, Office of Management, Community Planning and Development Office, U.S. Department of Housing and Urban Development, October 9, 1981 (Washington, D.C.), and Michael McMann, Director, Program, Policy and Support Division, Urban Development Action Grants, U.S. Department of Housing and Urban Development, October 15, 1981 (Washington, D.C.).

each year debars, suspends, or denies participation to about a dozen grantees or related parties.[19] Generally, these actions are taken against private landlords, private housing developers, or individual members of Boards of Directors of public housing authorities.[20] No city, housing authority, or other public entity ever has been debarred or suspended.[21]

[3]—Dispute Resolution Procedures in Specific Grant Programs

As noted earlier, almost all of HUD's grantmaking is done through the Community Development Block Grant program, the Urban Development Action Grant program, and low-income housing assistance programs administered by the Office of Assisted Housing. Each of these programs has at least some additional dispute resolution procedures.

[a]—Community Development Block Grant Program. The Housing and Community Development Act requires the Secretary of HUD to review each CDBG grant annually and to

> "[M]ake such reviews and audits as may be necessary or appropriate to determine whether the grantee has carried out a program substantially as described in its application, whether that program conformed to the requirements (of the CDBG), and whether the applicant has a continuing capacity to carry out in a timely manner the approved Community Development Program." [22] Following this review, the Secretary of HUD "may make appropriate adjustments in the amount of the annual grant." [23] Under a separate section of the Act, if the Secretary finds that a grantee has "failed to comply substantially" with the

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[19] Interview with John Pitts, N. 12 *supra.*

[20] *Ibid.* Virtually all actions against individual Board members have been based upon evidence or convictions of crimes related to the individuals' abuse of authority.

[21] *Ibid.* HUD officials note, however, that this lack of debarment or suspension activity with respect to public entities may be caused by the fact that jurisdictions which have performed inadequately on previous grants typically do not reapply for futher HUD funding.

[22] 42 U.S.C. § 5304(d).

[23] 42 U.S.C. § 5304(d).

Act, the grant may be terminated or reduced "after reasonable notice and opportunity for hearing." [24]

In implementing these statutory provisions, HUD has established two distinct sets of appeal procedures. For grantees receiving funding under the "Small Cities" (discretionary) part of the CDBG program,[25] before a grantee can have its funds reduced or withdrawn, HUD will hold an "informal consultation" with the grantee regarding the proposed action. However, no funds which the grantee has "already expended on otherwise eligible activities" may be recaptured or deducted from future grants.[26] The grantee has no right to a formal hearing. These procedures have been used "occasionally." [27]

For larger municipal grantees receiving funds under the "Entitlement Grants" part of the CDBG program,[28] a similar procedure applies. Before reducing a grant for a *succeeding* program year, HUD must hold only an "informal consultation" with the grantee.[29] Reductions of future entitlement grants after this informal consultation has happened on "numerous occasions." [30] However, if HUD desires to terminate or reduce *current* program year payments to an Entitlement grantee, HUD regulations provide for "reasonable notice and opportunity of hearing" before an administrative law judge (ALJ).[31] Such hearings are to be conducted pursuant to Section 7 of the Administrative Procedure Act.[32]

A decision of an ALJ may be appealed to the Secretary within thirty days of the ALJ's decision.[33] The Secretary's decision repre-

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[24] 42 U.S.C. § 5311.

[25] 24 C.F.R. § 570, Subpart F.

[26] 24 C.F.R. § 570.911(a) and (c).

[27] Interview with Vincent Landau, Assistant General Counsel, Office of General Counsel, U.S. Department of Housing and Urban Development, October 14, 1981 (Washington, D.C.).

[28] 24 C.F.R. § 570, Subpart D.

[29] 24 C.F.R. § 570.911(a) and (b).

[30] Interview with Paul Webster, Financial Analyst, Financial Management Division, Office of Block Grant Assistance, U.S. Department of Housing and Urban Development, October 14, 1981 (Washington, D.C.).

[31] 24 C.F.R. § 570.913(c).

[32] 5 U.S.C. § 556. See 24 C.F.R. § 570.913(e).

[33] 24 C.F.R. § 570.913(1).

sents final agency action.[34] These formal procedures never have been used, because HUD never has suspended or terminated current program year entitlement grants.[35]

[b]—Urban Development Action Grants. Urban Development Action Grants (UDAG) are discretionary grants. Under the UDAG program, a grant may be reduced or withdrawn or other "appropriate action" taken without the grantee having an opportunity for a hearing or even an informal conference, so long as "funds already expended on otherwise eligible activity shall not be recaptured or deducted from future grants." [36] HUD has used this regulation to suspend or terminate UDAG grantees.[37] However, HUD generally holds informal conferences with grantees before taking any final suspension or termination action.[38]

[c]—Low-Income Housing Assistance Programs. The Office of Assisted Housing has no formal procedures to govern grant disputes other than the debarment and suspension procedures discussed above. Any other disputes which may arise in low-income housing programs are resolved generally by informal negotiations between the Office of Assisted Housing and the affected party.[39]

[d]—Other Grants. While almost all of HUD's grantmaking culminates in Community Development Block Grants, Urban Development Action Grants, or low-income housing assistance grants, HUD's Office of Policy Development and Research does make a small number of discretionary grants for research and planning.[40] In FY 1982, these grants may total approximately $4–5 mil-

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[34] 24 C.F.R. § 570.913(m).

[35] Interview with Vincent Landau, N. 27, *supra.*

[36] 24 C.F.R. § 570.910(b)(11).

[37] Interview with Michael McMann, N. 18 *supra.*

[38] *Ibid.*

[39] Interviews with June Auerbach, Attorney-Advisor, Office of General Counsel, U.S. Department of Housing and Urban Development, October 13, 1981 (Washington, D.C.), and Joseph Gelletich, Assistant General Counsel, Office of General Counsel, U.S. Department of Housing and Urban Development, October 21, 1981 (Washington, D.C.).

[40] See Executive Office of the President, Office of Management and Budget, 1981 Catalog of Federal Domestic Assistance, 427 (15th ed. 1981). Prior to fiscal year 1982, HUD maintained several other major grant programs, which have been discontinued. These were the Neighborhood Self-Help Development Program, 24 C.F.R. Part 3610, a part of the Office of Neighborhoods, Voluntary Associations

lion. No regulations have been issued to govern either pre-award or post-award disputes arising from these grants. To date, there have been virtually no disputes between grantees and the Office of Policy Development and Research.[41] According to Office officials, when potential disputes arise, they are resolved informally.[42]

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and Consumer Protection, and the Comprehensive Planning Assistance Program, 24 C.F.R. Part 600, Part of the Office for Community Planning and Development. None of these programs had regulations governing grant dispute procedures.

[41] Interview with Arthur Newberg, Director, Management and Program Control, Office of Policy Development and Research, Department of Housing and Urban Development, October 9, 1981 (Washington, D.C.).

[42] *Ibid.*

§ 54.10 Department of the Interior

Although the Department of the Interior (DOI) administers over one billion dollars in grants per year.[1] DOI has no formal, uniform grant dispute resolution procedure covering all programs within the Department.[2] DOI does have an administrative tribunal, the Board of Contract Appeals, which hears cases involving procurement contract disputes. However, this Board of Contract Appeals has no apparent authority to review disputes relating to grants, and has never heard such a case.[3]

Lacking any formal, uniform grant dispute resolution procedures, specific DOI grant program regulations contain a variety of provisions governing termination or reduction of grants. One variation is found in DOI's Office of Surface Mining which administers several grant programs related to regulation and control of surface mining.[4] The regulations governing the Office of Surface Mining's

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[1] Interview with William Opdyke, Chief, Policy and Regulations, Division of Acquisition and Grants, Office of Interior, June 25, 1981 (Washington, D.C.). Within the Department of the Interior, the Fish and Wildlife Service, the National Park Service, the Bureau of Indian Affairs, the Office of Surface Mining, the Bureau of Land Management, and the Office of Water Resources Research all administer grant programs. The Reagan Adminstration's FY 1982 Budget request would either terminate or severely scale down the programs adminstered by the Heritage Conservation and Recreation Service (HCRS). No action on this request has been taken by the Congress; however, on May 31, 1981, DOI transferred all the recreation and historic preservation functions of HCRS to the National Park Service, effectively abolishing the HCRS. The Bureau of Mines, which used to award grants under the Solid Waste Disposal Act of 1965 (42 U.S.C. 3253, 3255) and the Coal Mine Health and Safety Act of 1969 (30 U.S.C. 482), as well as general research grants, now treats these grants as procurement contracts. Interview with Charles Dozois, Branch of Procurement, Bureau of Mines, Department of the Interior, October 6, 1981 (Washington, D.C.).

[2] Interview with William Opdyke, N. 1 *supra.*

[3] See 43 C.F.R. § 4.10-1 (1980); Interview with Judge G. Herbert Packwood, Administrative Judge, Board of Contract Appeals, Department of the Interior, June 25, 1981 (Washington, D.C.).

[4] See 30 C.F.R. Parts 725, 735, and 890, governing reimbursement to States, grants for program development, administration and enforcement, State reclamation grants, and grants for mining and mineral resources research. These grants total approximately $150,000,000 per year. Interview with Charles McNulty, Chief, Grants Administration Branch, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, October 6, 1981, (Washington, D.C.).

grant programs allow a Regional Director to reduce or terminate an existing grant, so long as: (1) 10 days' advance written notice is given to the grantee; (2) the grantee is told the reasons for the termination or reduction; and (3) the grantee is allowed an opportunity to consult with the Regional Director and to take remedial action prior to termination or reduction of the grant.[5] If grant termination or reduction occurs, the grantee may appeal the decision within 30 days to the Director of the Office of Surface Mining.[6] The Director must act on appeals within 30 days, or as soon thereafter as possible. The Director's decision constitutes the final DOI decision. To date, no terminations or reductions have taken place, and there have been no appeals to the Director; all disputes have been resolved informally before reaching the Director.[7]

The Department's Bureau of Indian Affairs (BIA) provides different dispute resolution procedures for its grantees.[8] BIA has promulgated a uniform set of regulations which "apply to all grants awarded by the Bureau of Indian Affairs" unless the specific grant program provides otherwise.[9] Under these regulations, BIA may suspend a grantee who has "materially failed to comply with the terms and conditions of a grant" after "reasonable notice to the grantee".[10] The notice preceeding the suspension shall:

> "[i]nclude the effective date of the suspension, the reasons for the suspension, and the corrective measures necessary for reinstatement of the grant . . ."[11]

No hearing rights are provided for a suspended grantee.

However, if BIA intends to cancel a grant, it must give written notice to a grantee, and allow the grantee sixty days in which to take corrective action prior to cancellation.[12] The grantee also is

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[5] 30 C.F.R. §§ 735.,21(c), 725.18(b), 886.18(b), and 890.23(b).

[6] 30 C.F.R. §§ 735.21(c), 725.18(c), 886.18(c), and 890.23(c).

[7] Interview with Charles McNulty, N. 4 *supra.*

[8] The Bureau of Indian Affairs administers grants principally for social service, education and self-determination projects for various Indian tribes. See, e.g., 25 C.F.R. Part 272; 25 C.F.R. Part 326; 25 C.F.R. Part 20.

[9] 25 C.F.R. § 276.1(b) (1980).

[10] 25 C.F.R. § 276.15(b) (1980).

[11] *Ibid.*

[12] 25 C.F.R. § 276.15(c) (1980).

entitled to a hearing which is to be conducted on "as informal a basis as possible."[13] To date, BIA never has held such a hearing, and no grantee has been cancelled on grounds of improper performance.[14]

Unlike the Office of Surface Mining and the Bureau of Indian Affairs, several DOI grant programs provide no dispute procedures whatsoever, allowing the Secretary of DOI or other appropriate official to suspend, reduce or terminate a grant without affording the grantee any notice or hearing rights.[15] For example, under the regulations governing the Youth Conservation Corp Programs, if a grantee "fails to comply with the grant award stipulations or conditions," the Secretary of DOI (together with the Secretary of Agriculture) may suspend or terminate the grant. Neither a hearing nor informal resolution is required prior to termination.[16]

In the absence of any specific regulatory language governing a grantee's rights, the only other means by which a grantee might obtain a hearing with respect to an adverse agency decision is by requesting the Director of the DOI Office of Hearings and Appeals to convene an ad hoc Appeals Board to hear the grantee's dispute.[17] In order to obtain review by that Office, the grantee must show that: (1) the particular regulations governing the grant program actually allow the grantee the right to appeal a DOI decision to the Department head; and (2) the disputed grant decision did not rest solely in the administrative or discretionary authority of a

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[13] 25 C.F.R. § 272.51 (1980).

[14] Interview with Dale Heale, Chief, Grants Officer, BIA, Department of the Interior, October 6, 1981 (Washington, D.C.).

[15] See "Grants to States for Establishing Youth Conservation Corp Programs," 43 C.F.R. § 26.5(t) (1980); "Administrative Procedures for Grants-In-Aid (Marine Mammal Protection Act of 1972)," 50 C.F.R. § 82.8(a) (1980); "Grants and Allocations for Recreation and Conservation Use of Abandoned Railroad Rights-of-Way" 36 C.F.R. § 1226.11 (1980); "Urban Park Recreation and Recovery Act of 1978," 36 C.F.R. § 1228.63 (1980).

[16] 43 C.F.R. § 26.5(1) (1980). With respect to some programs, DOI regulations do not even contemplate the possibility of grant termninations or other forms of disputes. See, e.g., "Conservation of Endangered and Threatened Species of Fish, Wildlife and Plants—Cooperation With the States," 50 C.F.R. Part 81 (1980); "Office of Water Resources Research," 18 C.F.R. Parts 501-508 (1980).

[17] 43 C.F.R. § 4.700 (1980).

DOI official.[18] If either of these prerequisities is missing, DOI's Office of Hearings and Appeals will not hear the appeal.

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[18] *Ibid.*

§ 54.11 Department of Justice

[1]—Overview of Grant Programs

[a]—Bureaucratic Responsibilities. At the Department of Justice (DOJ), it is not the grant dispute procedures which are in flux; it is the Department itself. The Department's major grant programs initially were authorized under the Omnibus Crime Control and Safe Streets Act of 1968 (Act).[1] The Law Enforcement Assistance Administration (LEAA) was established under the Act to administer those programs.

Since 1968, the Act has been amended several times. In 1974, with the enactment of the Juvenile Justice and Delinquency Prevention Act, an Office of Juvenile Justice and Delinquency Prevention (OJJDP) was created within LEAA. In 1979, the Justice System Improvement Act (JSIA) further reorganized LEAA to reflect changing programs and priorities. In 1980, OJJDP was removed from LEAA, and established as a separate grantmaking office within the JSIA structure. On April 15, 1982, LEAA was abolished.

Until 1979, all disputes arising under DOJ grant programs were handled by LEAA. However, this responsibility was shifted in 1979 to the Office of Justice Assistance, Research, and Statistics (OJARS), a staff support office serving the JSIA programs. OJARS is responsible for providing support to, and coordinating the activities of the National Institute of Justice, the Bureau of Justice Statistics, LEAA, and, since 1980, OJJDP.

Ironically, the bureaucratic shifts have not had major impact upon the nature or conduct of grant dispute procedures within the Department. The procedures have remained virtually the same; and, although their titles have changed, the personnel handling the disputes have remained largely the same.[2]

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[1] 42 U.S.C. § 3701 *et seq.*

[2] One notable exception is the current absence of Thomas J. Madden, former General Counsel and Assistant Administrator of LEAA, from 1968 to 1980. During his tenure, Madden not only designed and administered the LEAA dispute process, but also wrote extensively upon various aspects of grant appeals. See, e.g., Madden, "Providing an Adequate Remedy for Disappointed Contractors under Federal Grants-In-Aid to States and Units of Local Government," 34 Fed. Bar J.

Thus, despite the changes, the Department of Justice has had a fairly constant and consistent process. Before reviewing that process in detail, it may be helpful to consider the general nature of the Department's grant programs—past and present.

[b]—Past Programs. Prior to 1979, LEAA administered two major block grant programs under Parts B and C. Title I of the Act. Under Part B, LEAA provided funds to the States for the development of annual comprehensive law enforcement plans. Each plan was prepared by a State Planning Agency (SPA), which was responsible for submitting the application and administering the funds. When the comprehensive plan was approved by LEAA, the State was awarded an action block grant under Part C to carry out the planned projects and activities. Part C action grant funds were used, among other things, for the recruitment and training of law enforcement personnel, the improvement of courts and correction systems, the prevention and control of civil disorders and organized crime, and the improvement of police-community relations.

Parts C and E of Title I of the Act also authorized discretionary grants to State and local governments and non-profit organizations for the achievement of certain national goals and priorities. Other parts of the Act authorized grants for law enforcement education, research and development, and technical assistance programs.

The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP)[3] authorized formula grants to State and local governments and a special emphasis prevention and treatment grant program. Funds awarded under these programs generally were administered by State Planning Agencies.

As indicated above, the Justice System Improvement Act of 1979 amended the Omnibus Crime Control and Safe Streets Act to reorganize LEAA and to alter LEAA's granting authority. Part D of the Act, as amended, authorized formula grants to assist State and local governments in carrying out specific innovative programs of

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201 (1975); Madden, "Future Directions for Federal Assistance Programs: Lessons from Block Grants and Revenue Sharing," 36 Fed. Bar J. 107 (1977); Madden, "The Right to Receive Federal Grants and Assistance," 37 Fed. Bar J. 17 (1978).

[3] Pub. L. 93-415, 42 U.S.C. § 5601 *et seq.*

proven success. Part E authorized "National priority grants" to State and local governments to supplement formula grant assistance and to accomplish identified national goals. Part F authorized discretionary grants to State and local governments and non-profit organizations for support of programs which would improve the criminal justice system. Part G, among other things, authorized discretionary grants to institutions of higher education to support research and training programs for the improvement of criminal justice education.[4]

[c]—Current Programs. DOJ did not receive appropriations for support of the LEAA grant program in fiscal years 1981 and 1982, and, as noted earlier, LEAA as an entity was abolished on April 15, 1982. While some LEAA grant programs, such as Juvenile Justice, have been transferred and thus continue to survive, many of LEAA's grant programs are out of existence. The DOJ programs which still exist will use the LEAA grant appeals procedures as they were written when LEAA was abolished; no new regulations will be promulgated to govern appeals in the remaining grant programs.[5]

Thus, the description of LEAA's grant dispute procedures, discussed below, should be analyzed from two perspectives: first, as an explanation of how LEAA drafted and operated a detailed procedure for grant disputes; and second, as an explanation of an ongoing system for the remaining DOJ programs.

[2]—Department of Justice's Dispute Resolution Procedures

[a]—Statute. Prior to 1979, LEAA was required under the Act to provide "compliance" and "adjudicatory" hearings for disputes arising under the Act's block and categorical grant programs.[6] Compliance hearings were required before any withholding of funds based on a determination that the recipient had substan-

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[4] Other components of DOJ which are authorized to award grants are: (1) the National Institute of Justice, which is authorized to award grants for support of research, demonstrations and special projects concerning criminal and civil justice systems (42 U.S.C. § 3722(c), as amended); and (2) the Bureau of Justice Statistics, which is authorized to award grants to support the collection and analysis of justice statistics (42 U.S.C. § 3732(c), as amended).

[5] Interview with David I. Tevelin, Acting Deputy General Counsel, Office of Justice Assistance, Research and Statistics, March 16, 1982 (Washington, D.C.).

[6] 42 U.S.C. §§ 3757 and 3758(b).

tially failed to comply with the Act, implementing regulations, plans or applications for assistance. The Justice System Improvement Act of 1979 eliminated the requirement that LEAA (now OJARS) provide for compliance hearings, calling instead for "termination" hearings, which were designed to serve a substantially similar purpose.[7]

Unlike most other granting agencies, adjudicatory hearings were and continue to be available to DOJ applicants and grantees for the appeal of the following types of adverse funding determinations:

(1) rejection of an application;

(2) denial of any continuation grant or a portion thereof;

(3) reduction of a grant;

(4) granting of a lesser amount than the applicant believed to be appropriate.[8]

Notably absent from the list of types of disputes for which the appeals process is available is audit disallowances.[9]

[b]—Law Enforcement Assistance Administration Regulations. LEAA's regulations implemented and expanded upon the statutory procedures. Of chief note is that the regulations provided for investigation and informal resolution stages in order to avoid formal agency hearings.[10]

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[7] 42 U.S.C. § 3783 (1980).

[8] 42 U.S.C. § 3758(b).

[9] See text for discussion at Ns. 33-36 *infra.*

[10] The rationale for the informal procedure was the agency's perceived need to minimize the cost and delay which had become "increasingly important factors in the administrative review process." Lauer, "Informal Resolution of Appeals in the Law Enforcement Assistance Administration," Reference Materials, Federal Bar 147. As Lauer, a former LEAA Deputy General Counsel (currently the Acting Administrator, Office of Juvenile Justice and Delinquency Prevention), stated:

> "Use of an informal procedure . . . was keyed to the concept that agency personnel not involved in the original dispute take a look at the complainant's position. It has been our experience at LEAA that this is usually all that the complaining parties want. They don't want technical or costly briefs. They don't want to show how someone has erred. They are usually upset because they have put a great deal of work into a grant application, or people's jobs depend on the outcome of the dispute, or they believe in their positions as a correct position." *Id.* at 148-149.

The regulations—like the statute—identified and described two separate types of proceedings: Compliance (now termination) proceedings, where a recipient is charged with violating its grant terms and conditions; and adjudicatory proceedings, where an applicant or recipient appeals adverse funding decisions.

Each of these types of proceedings is discussed below. It should be noted, however, that the same informal investigatory procedures and formal hearing procedures are used both for compliance and adjudicatory-type disputes. The labels "compliance" and "adjudicatory" are used simply to distinguish the types of adverse determinations which may be appealed pursuant to these procedures.

[*i*]—*Compliance Proceedings.* A compliance proceeding almost always begins upon LEAA's (now AJARS) own initiative, if it decided that there has been a substantial failure to comply with the Act, regulations, plan or application.[11] It was also possible for a subgrantee or subgrant applicant to request initiation of a compliance proceeding by alleging an abuse of a State planning agency's approved hearing and appeal procedures, although such an action has never led to a hearing.[12]

The proceeding begins with an investigation.[13] Such investigation generally is conducted by an attorney in the Office of General Counsel (OGC).[14] Under the regulations, the investigation "should include, where appropriate, a review of the pertinent practices and policies under which the possible noncompliance occurred, and other factors relevant to a determination as to whether the recipient

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[11] 28 C.F.R. § 18.32.

A simple technical error, omission or delay would not suffice; a "substantial" failure of compliance requires a finding of such misfeasance or non-feasance as to impair the essential purpose of the Act, regulation, plan or application. Lauer, N. 10 *supra,* at 150, 155 N. 10.

[12] Letter from David Tevelin, Acting General Counsel, OJARS, March 12, 1982. The alleged abuse has to be significant and have a material effect to overcome a bias against DOJ review, and must amount to arbitrary and capricious action. Lauer, N. 10 *supra,* at 150, citing N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974 (9th Cir. 1967).

[13] 28 C.F.R. § 18.31(a).

[14] Interview with Thomas J. Madden, former General Counsel and Assistant Administrator, LEAA, July 1, 1980 (Washington, D.C.).

has failed to comply."[15] Although few generalizations regarding these matters may be made, the OGC attorney typically conducts an onsite investigation, including interviews with the grantee and an extensive examination of all relevant policies and practices. Input from the grantee is encouraged.

If an investigation indicated the recipient's compliance, the person conducting the investigation would so inform the recipient.[16] If an investigation indicated the recipient's failure to comply, an informal resolution of the matter would be sought.[17] If the matter could not be resolved informally, the parties would proceed to a hearing, as discussed below in Section 3.

[*ii*]—*Adjudicatory Proceedings.* Upon any of the adverse funding determinations specified in the statute,[18] an applicant or recipient may request an adjudicatory hearing.[19] Before embarking upon such hearing, LEAA (or OJARS) could investigate the matter, and seek an informal resolution.[20] Such investigations—like compliance investigations—generally are conducted by attorneys in the Office of General Counsel and typically include onsite evaluations with input from the affected grantees.[21] If a matter is not resolved informally, the parties may proceed to hearing.

[*iii*]—*Hearings.* As shown above, if an appeal is not resolved informally, a compliance or adjudicatory hearing is held.[22]

The regulations are comprehensive and detailed. For example, they specify the form and timing of pleadings and motions; provide exceptions to the technical rules of evidence; permit discovery, including the taking of depositions and the serving of interrogatories; specify rules concerning the availability of subpoenas; and require

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[15] 28 C.F.R. § 18.31(a).

[16] *Id.* at (b)(2).

[17] *Id.* at (b)(1).

[18] I.e., rejection of an application; denial of a continuation grant or a portion thereof; reduction of any portion of a grant; and the granting of a lesser amount than anticipated. 42 U.S.C. § 3758(b).

[19] 42 U.S.C. § 3758(b).

[20] 28 C.F.R. § 18.31(c).

[21] Interview with David Tevelin, Acting Deputy General Counsel, OJARS, January 27, 1981, and April 28, 1981 (Washington, D.C.).

[22] Regulations governing such hearings appeared in 28 C.F.R. §§ 18.41 through 18.73.

the hearing, decision and any administrative review to be conducted—and the record maintained—in accordance with the Administrative Procedure Act.

The regulations vest plenary powers in the hearing examiner, a role performed either by DOJ officials or, in the discretion of the agency, Administrative Law Judges (ALJs) based in other Federal agencies.[23] Any "duly qualified" hearing examiner or any duly authorized member of LEAA (this function is now performed by each grantmaking agency in DOJ) may hold the hearing.[24] Once a request for an adjudicative or compliance hearing is received the applicable agency head designates a hearing examiner, and the parties are notified of that designation. A hearing examiner may disqualify himself or may be disqualified upon a motion by any party alleging valid grounds for removal (determined by the hearing examiner or OJARS).

The hearing examiner is authorized to conduct prehearing conferences,[25] and to preside over the hearings. In addition, the hearing examiner is required to expedite every case. In furtherance of this mandate, the hearing examiner is specifically authorized to hold parties in contempt of his jurisdiction.[26]

At the close of the reception of evidence, the hearing examiner is required to submit to the agency head and to serve on all parties, proposed findings of fact, conclusions of law, and rulings or orders, together with reasons and briefs in support thereof.[27]

After providing the parties 30 days to respond to the hearing examiner's findings and recommendations, the agency head must make the final decision in the appeal. In reaching that decision, the Administrator may accept, modify or reject the hearing examiner's

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[23] Madden interview, N. 14 *supra.*

[24] 28 C.F.R. § 18.52.

[25] See College of William and Mary, Docket No. 1-2-54 (resolved at prehearing conference, January 9, 1978).

[26] 28 C.F.R. § 18.62(f).

[27] 28 C.F.R. § 18.56.

At any time prior to submission of recommendations to the Administrator, the hearing examiner may reopen the proceedings. After submission, the hearing examiner's jurisdiction is terminated. 28 C.F.R. § 18.73.

proposed recommendations and findings of fact.[28] The agency head also may remand a proceeding to the hearing examiner for further proceedings.[29]

Applicants or grantees who are dissatisfied with the Administrator's decision after an adjudicatory hearing, may, within 30 days, request a rehearing. A rehearing is provided only if the applicant or grantee has new information sufficient to require the conduct of further proceedings or has shown some defect in the conduct of the initial hearing causing substantial unfairness.[30]

The Administrator's final decision may be appealed to the United States Court of Appeals.[31] The Administrator's findings of fact are conclusive if supported by "substantial evidence on the record considered as a whole." However, for good cause shown, the Court of Appeals may remand the case to the Department to take additional evidence. The Court has jurisdiction to affirm, modify or set aside the Department's final decision.

[3]—Nature of Disputes

[a]—Historical Breakdown. LEAA promulgated regulations on grant appeals procedures in February 1973. However, appeals were not brought in significant numbers until four years later. Table 4, which provides a historical breakdown of appeals by the filing year, shows a clear upswing of filings in 1977-1978, with a gradual decline thereafter. Table 5 provides a breakdown in monetary terms of the appeals, by year of filing, and shows the same peak and decline. DOJ reports that it has three appeals pending concerning juvenile justice and delinquency prevention grants, two appeals of discretionary grant denials in other programs, and one appeal alleging a state appeals process deviated from the process set forth in its plan.[32]

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[28] 28 C.F.R. § 18.57.

[29] 28 C.F.R. § 18.73.

[30] 28 C.F.R. § 18.34.

[31] 42 U.S.C. § 3785.

[32] Interview with David Tevelin, March 10, 1982 (Washington, D.C.). DOJ expected to have a sharp increase in appeals in fiscal year 1980 when funding for many grant programs ceased. However, these expectations were not fulfilled.

[b]—Types of Adverse Determinations and Dollar Amounts Involved. As stated in § 54.11[2] *supra,* DOJ's appeal process is available to resolve the following types of disputes:

(1) terminations (compliance issue);

(2) denial of an intitial application;

(3) denial of a continuation grant (non-renewal);

(4) reduction of a grant; and

(5) award of a lesser amount than applicants believed to be appropriate.

Only the first three types of determinations consistently have been the subject of DOJ appeals.

Separating termination actions initiated by DOJ from situations in which subgrantees, contractors or competitive applicants requested DOJ to initiate compliance proceedings, the breakdown is as follows:

Type of Determination	Written Decision	Closed w/o Determination	Total
1. Denial of Application	9	34	43
2. Termination by DOJ	4	4	8
3. Non-renewal	4	9	13
4. Compliance	3	19	22
Total # of Cases	20	66[33]	86

Table 6 provides a breakdown of monetary amounts involved in the different determination categories. That Table demonstrates that the stakes are by far the highest in the application denial category. The reader should note, however, that there are 18 cases in

[33] One case is not included here. In National Conference of SPA, Docket No. 1-2-59 (withdrawn, May 2, 1977), LEAA denied additional funds to cover a cost of living increase for grantee employees.

which dollar amounts were unascertainable. Of these, 8 involved application denials; 6 involved compliance issues; 2 involved nonrenewals; 1 involved a partial termination; and 1 involved the denial of increased funding.

One type of determination—audit disallowances—which commonly is disputed through the appeals mechanisms of some large Federal granting agencies is not subject to DOJ's appeal procedure.[34] Thomas J. Madden, former General Counsel and Assistant Administrator of LEAA, explained this phenomenon by stating that, at least in the past, audits of LEAA grantees generally were resolved informally by agency officials.[35] Moreover, according to Madden, program officials frequently waived disallowances. This waiver practice has been criticized by the General Accounting Office (GAO), which maintains that LEAA has waived too many disallowances and did not audit enough of its assistance programs.[36] LEAA officials believe these findings to be unrealistic. However, the future impact of the GAO findings is as yet unclear.[37]

[c]—Types of Grantees and Grant Programs Involved. A breakdown of LEAA appeals (resolved formally, informally, or closed for other reasons), indicate that appeals have involved both the block and discretionary grant programs. As indicated above,

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[34] Neither the Omnibus Crime Control and Safe Streets Act of 1968, as amended, nor its implementing regulations, explicitly authorize appeals of such determinations. For a discussion of such appeals in other agencies, see, e.g., §§ 54.07 and 54.08 *supra.*

[35] Madden interview, N. 14 *supra.*

[36] Report to the Congress by the Comptroller General of the United States, "Improved Grant Auditing and Resolution of Findings Could Save the LEAA Millions," FGMSD 80-21 (February 19, 1980); Report to the Congress by the Comptroller General of the United States, "More Effective Action is Needed on Auditors' Findings — Millions Can Be Collected or Saved," FGMSD 79-3 (October 25, 1978).

[37] As an example, Madden cited the Institute for Court Management, a nonprofit organization, and part of the University of Denver, which received major funding from the Ford Foundation and a $5 million grant from LEAA. GAO criticized LEAA for allowing the Institute to reconstruct its costs upon audit. Madden indicated that the criticism was unrealistic because: (1) the Institute actually had used all of its LEAA funds for grant related purposes; (2) the Institute had no way to pay back the disallowances; and (3) the Institute ran a good program and provided needed services, which would have been ended abruptly if the disallowances had not been waived. Madden interview, N. 14 *supra.*

States are eligible to participate as grantees in all DOJ grant programs. Units of local government may participate in all of these programs either as subrecipients (block grant programs) or as direct recipients (discretionary grant programs). Nonprofit organizations and institutions of higher education may apply to participate in certain DOJ discretionary and block grant programs.

Given their broad eligibility, it is hardly surprising that States and units of local government have brought the majority of appeals to DOJ. Local governments are the complainants in almost every compliance case. Appeals brought by non-profit organizations and institutions of higher education generally involve denials of discretionary grant applications or non-renewal of discretionary grants.

The various types of appeals have involved determinations arising under virtually all of the Department's grant programs: Parts B and C (planning and action) block grants, LEEP (education) grants, Correctional Institution training (Part E) grants, Arson Control grants, Family Violence grants, Probation program grants, Work Release Study grants, Juvenile Delinquency program grants, Victim Services program grants and Narcotics program grants. None of the programs appear to predominate in the appeals.

[4]—Outcome of Disputes

[a]—Litigated Appeals. The outcomes of litigated DOJ appeals is overwhelmingly in favor of the Department. As shown in Table 3, fifteen (15) out of 20 cases which culminated in written decisions resulted in decisions unfavorable to the grantee or disappointed applicant; 44 of 65 appeals closed without written decisions were resolved against the grantee or applicant.

Several of the determinations in favor of the Department were made by the Administrator of LEAA, reversing hearing examiners' recommendations. In two appeals, the hearing examiners recommended against termination; nonetheless, the Administrator terminated the grants.[38] In another case involving the denial of a grant, the hearing examiner recommended that the application be reviewed again; the Administrator refused to reconsider it.[39]

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[38] Neighborhood Together, Docket No. 1-2-86 (May, 1980); MAC, Docket No. 1-2-79 (Sept. 29, 1979).

[39] Mass. Dept. of Corrections, Docket No. 1-2-38 (June, 1978).

The Administrator has adopted hearing examiners' recommendations, for the most part in cases favorable to DOJ.[40]

Final decisions of DOJ have been appealed to the United States Court of Appeals in two instances. The first, *Massachusetts Department of Corrections v. LEAA,*[41] involved LEAA's denial of a discretionary corrections training grant. LEAA conducted an informal investigation and, thereafter, provided an adjudicatory hearing. The Administrator rejected the hearing examiner's recommendations (which were favorable to the applicant), finding substantial evidence to support the rejection of the application (on the ground that the proposal was not innovative, an established criterion for selection), and concluding that certain procedural defects were not prejudicial. The Court upheld the Administrator.

The second case in which a disappointed applicant appealed LEAA's final decision was *Champaign County, Illinois v. LEAA.*[42] In this case, the County sought construction funds under Part E of Title I of the Act (pre-1979 amendments). LEAA found that the County had failed to meet statutory requirements that it provide matching funds, and denied discretionary funding which had been "earmarked" administratively for the County. The County argued that LEAA had not acted on its application in a timely fashion, and that, in fact, the grant had been awarded to it.

The United States Court of Appeals affirmed LEAA's decision, concluding that LEAA was not required to award the grant despite its untimely denial, and finding no evidence of a duly executed grant agreement. The court found substantial evidence in support of LEAA's decision and held LEAA's decision to be conclusive.

[b]—Closed Appeals. At least 27 appeals were withdrawn after an investigation was conducted and DOJ reached a decision adverse to the appellant.

On occasion, disappointed applicants have succeeded in getting DOJ to re-review their applications prior to a formal hearing.

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[40] See, e.g., Mags Landing, Docket No. 1-2-94 (June 4, 1980); Illinois Dept. of Corrections, Docket No. 1-2-69 (July 10, 1979); Champaign County, Illinois, Docket No. 1-2-49 (Dec. 20, 1978); Ga. Dept. of Offender Rehabilitation, Docket No. 1-2-47 (December 17, 1978).

[41] 605 F.2d 21 (1st Cir. 1979).

[42] 611 F.2d 1200 (7th Cir. 1979).

However, upon reconsideration, DOJ frequently has rejected these applications again.[43] In one case, DOJ awarded the grant upon reconsideration of the application.[44]

In several cases in which noncompliance was the subject of complaint by a third party, DOJ closed the case if, after investigation, it concluded that the grantee was not guilty of substantial noncompliance. In other compliance cases, DOJ sought to effectuate a compromise between the parties, e.g., where a subgrantee sought increased funding.[45] Most of the other cases were closed because DOJ determined that the appellant had no right to a hearing (discussed below), or because the appellant did not pursue its appeal in a timely fashion.[46]

[c]—Specific Issues: Department of Justice's Interpretation of Its Authority to Hear Appeals. DOJ has held that its appeals process was not available in a variety of circumstances, summarized below.

(1) An employee of a grantee may not appeal his termination to LEAA.[47]

(2) A request for rulemaking proceedings is not a compliance for adjudicative matter subject to LEAA's appeal process.[48]

(3) A prospective applicant has no right to a "preapplication" hearing.[49] Similarly, an applicant has no right to a hearing

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[43] See Connecticut Dept. of Adult Probation, (Feb. 13, 1979); Seattle City College, Docket No. 1-2-90 (closed, Feb. 23, 1979); Dare Inc., Docket No. 1-2-33 (closed, Jan. 6, 1978).

[44] Colorado District Attorney's Council, Docket No. 1-2-64 (closed, Dec. 1978).

[45] Santa Clara Public Defenders, Docket No. 1-2-80 (closed, Oct. 19, 1979); Show-Me Missouri, Docket No. 1-2-58 (closed, Feb. 1978).

See discussion, § 54.11[2][b][i] *supra.*

[46] See Table 7 for breakdown of case closings.

[47] Alabama Employment Loss Appeal, Docket No. 1-2-60 (Oct. 10, 1975).

[48] Denver Police Department, Docket No. 1-2-19 (resolution date unknown).

[49] Salt Lake City Police Dept., Docket No. 1-2-91 (withdrawn, Dec. 17, 1979); New Mexico Bar Exam., Docket No. 1-2-61 (withdrawn, Nov. 17, 1975).

where no formal application has been submitted and rejected.[50]

(4) A compliance hearing is not available where the complainant did not exhaust state procedures first.[51]

(5) LEAA refused to provide an appeal where the disappointed applicant's letter was inadequate to notify LEAA of its intent to appeal the denial of a grant.[52]

(6) Where LEAA agreed to reconsider an application (initially disapproved), the underlying appeal of the disapproval was held to be moot.[53]

[5]—Observations

[a]—The Effect of the Procedure on the Outcome of Appeals. As shown above, the vast majority of DOJ's appeals have been decided against the appellant. The Department has at least a couple of explanations for this occurrence. First, Department officials note that attorneys in the OJARS Office of General Counsel (formerly the LEAA Office of General Counsel) traditionally have been involved at every stage of DOJ grant awards and administration. With respect to the award process, attorneys generally review grant award criteria and guidelines, application assessments, and determination letters advising applicants of the funding action taken on their applications and the reasons therefor. On compliance matters, attorneys generally are involved in all decisionmaking and correspondence leading up to the initiation of the compliance action. This involvement, according to the Office of the General Counsel, serves to protect the Department, and enables it to make relatively few mistakes.[54]

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[50] Baltimore High Impact, Docket No. 1-2-70 (dismissed, June 2, 1978).

[51] Milwaukee County, Docket No. 1-2-20 (Dec. 1, 1975).

[52] Alaska Juvenile Justice Info. System, Docket No. 1-2-45 (withdrawn, Aug. 10, 1977).

[53] Colorado District Attorney's Council, Docket No. 1-2-64 (Dec. 1978).

[54] Madden interview, N. 14 *supra;* Tevelin interview, N. 21 *supra.* When asked why the program staff allowed such extensive involvement of the Office of General Counsel in program administration, Madden commented that the nature of the programs—i.e., law enforcement assistance activities—was the key factor. Unlike social service or other grant programs, lawyers and the legal process are integral

A second explanation cited for the relatively low number of determinations adverse to the Department is the rigorous investigation and informal resolution undertaken by the Office of General Counsel. According to Madden, former LEAA General Counsel, this process weeds out cases adverse to the Department: If an investigating attorney believes that the Department will loose an appeal, (s)he makes sure that the case is resolved informally.

[b]—The Effect of the Procedure on the Number of Hearings. As shown above, DOJ's informal procedure apparently has obviated the need for adjudicatory and compliance hearings in at least 27 cases (roughly a third of all cases brought). The reasons for this occurrence may be based upon the same "weeding out" considerations discussed above. Or, they may be based upon the fact that the investigation and informal review process are conducted by an attorney in the Office of the General Counsel, and findings made by such an attorney bear the appearances of agency imprimatur. Upon such findings, grantees and applicants may consider their chances of winning an administrative appeal as almost nil.

[c]—The Effect of the Procedure on Case Duration. As established under the Act and regulations, DOJ's dispute process ensures a right to a hearing under certain circumstances. In light of such right, it has been suggested that the Department's elaborate investigations and informal review process may be counterproductive: It takes time and money, but—at the appellant's option—may not resolve the case.[55] The Department's response to this concern is two-fold. First, it points to the substantial number of cases which are resolved or dropped through the informal process. Second, it notes that, in any event, its appeal process is not as protracted as those of many other agencies.[56] The data bear this out. The vast majority of DOJ appeals are resolved within one to one and one-half years,[57] a far shorter period than other agencies surveyed.[58]

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parts of DOJ grants. Program officials expect to deal with lawyers (or are lawyers themselves), and, therefore, have no objection to General Counsel involvement.

[55] See 28 C.F.R. § 18.31(d).

[56] Madden interview, N. 14 *supra.*

[57] See Tables 1 and 2 *infra.*

[58] See, e.g., discussion regarding Environmental Protection Agency, wherein it was shown that the majority of appeals took from one to three or more years.

Table 1
LEAA GRANTS APPEALS
DURATION

Duration	Cases with Written Decisions	Cases Closed	Total
Less than 1 Month	3	3	6
1-3 Months	0	15	15
4-6 Months	4	18	22
7-12 Months	9	12	21
1+ Year-18 Months	5	8	13
19 Months-2 Years	1	0	1
2+ Years	1	0	1
Unascertainable	1	11	12
Total	24	67	91

Table 2
LEAA Grants Appeals
Duration* of Appeal by Date of Filing
* (Notice of Appeal through Resolution)
Written Decisions

Duration	1974	1975	1976	1977	1978	1979	1980	Total
Less than 1 month	1	1				1		
1-3								
4-6				3	1			
7-12					5	4		
1 year-18 months				2	2	1		
19 months-2 years			1					
2 + years				1				

Closed Without Written Decisions

Duration	1973	1974	1975	1976	1977	1978	1979	1980	Total
Less than 1 month				1		1	1		
1-3	1	1	3	2	4	2	3		
4-6	1	1	1	2	5	4	2	2	
7-12	1	1	1	1	3	4	2		
1 year-18 months		1			4	3			
19 months-2 years									
2+ years									

Unascertainable: 1-2-111, 1-2-104, 1-2-100, 1-2-55, 1-2-50, 1-2-46, 1-2-42, 1-2-41, 1-2-39, 1-2-19, 1-2-4, Hamilton Township

Table 3
LEAA Grants Appeals
Outcomes of Decisions

	Written Decisions			
	Favorable to grantee or Applicant	Against Grantee or Applicant	Against Complainant	Total
Result	2	16	3	21
Dollar Amount	$697,000	$5,279,441	1,170,000	7,146,441

	Favorable to Grantee	Against Grantee	Against Complainant (compliance)	Part for, Part Against	Total
Result	3	44	11	7	65*
Dollar Amount	$776,200	7,605,870	1,372,000	2,176,422	$11,930,492

Unascertainable results: 1-2-46, 1-2-4
Unascertainable $ Amount: 1-2-102, 1-2-91, 1-2-78, 1-2-73, 1-2-60, 1-2-59, 1-2-50, 1-2-42, 1-2-40, 1-2-39, 1-2-30, 1-2-24, 1-2-19, 1-2-5, 1-2-3, Hamilton Township

Table 4
LEAA Grant Appeals
Historical Breakdown

Appeals Filed In	Written Decisions	Closed Without Hearing and Written Decision	Total
1973	0	4	4
1974	1	2	3
1975	1	7	8
1976	1	6	7
1977	6	20	26
1978	8	15	23
1979	6	9	15
1980	0	4	4
Total	23	67	90

Unascertainable: Hamilton Township

Table 5

LEAA Grants Appeals

Dollar Amounts by Years of Filing

Written decisions

Year	$ Amount
1974	$400,000
1975	550,000
1976	1,500,000
1977	1,068,250
1978	970,000
1979	2,653,191
1980	0

Unascertainable amount: 1-2-94, 1-2-49, Connecticut Dept. of Adult Probation

Closed Without Written Decision

Year	$ Amount
1973	182,000
1974	480,300
1975	820,000
1976	957,500
1977	4,823,720
1978	1,502,355
1979	2,602,700
1980	800,000

Unascertainable amount: 1-2-102, 1-2-91, 1-2-78, 1-2-73, 1-2-60, 1-2-59, 1-2-50, 1-2-42, 1-2-40, 1-2-39, 1-2-30, 1-2-24, 1-2-5, 1-2-3, Hamilton Township

Table 6

LEAA Grants Appeals
Dollar Amount per Type of Determination

	Type of Determination	Written Decision	Closed Without Written Decision	Total
I.	Denial of Grant Award			
	- Appeal dropped after LEAA completed a negative adjudicative investigation	-	4,155,020	4,155,020
	- Rejected application as too late or incomplete	-	261,300	261,300
	- Grant denied in general	4,318,241	5,367,100	9,685,341
	Subtotal	4,318,241	9,783,420	14,101,661
II.	Termination of Grant before original expiration date	656,700	472,500	1,129,200
III.	Renewal of Grant	1,001,500	1,152,100	2,153,600
IV.	Compliance Matter - - competitive grantee or sub-grantee alleges some violation disqualifies a party, etc.	1,170,000	3,027,720	4,197,720

Unascertainable Dollar Amounts: 1-2-94, 1-2-49, Connecticut Dept. of Adult Probation; 1-2-102, 1-2-91, 1-2-78, 1-2-73, 1-2-60, 1-2-59, 1-2-50, 1-2-42, 1-2-40, 1-2-39, 1-2-30, 1-2-24, 1-2-24, 1-2-19, 1-2-5, 1-2-3, Hamilton Township

Table 7

LEAA Grants Appeals
Reasons for Case Closings

Appeal withdrawn by Grantee (reason unknown)	8
Appeal not pursued by Grantee -Closed for failure to prosecute	8
Appeal not pursued by Grantee after LEAA conducted an "adjudicative investigation," the negative results of which were mailed to Grantee	27
Appeal withdrawn-grantee got funds elsewhere	1
Compliance Issue-compromise	6
No non-compliance problems found; case closed	6
Non-compliance-grantee conceded	1
No hearing or appeal rights	6
Agency agreed to reconsider application (in most cases, denied the second time around)	4

§ 54.12 Department of Labor

[1]—Introduction

The Department of Labor (DOL) administers grant programs designed to improve working conditions, to increase job opportunities, and to protect the welfare of the American worker. The largest of the Department's grant programs are those authorized by the Comprehensive Employment and Training Act of 1973.[1] Under CETA, the Secretary of Labor awards grants to States, units of local goverment, Indian tribal entities, and nonprofit organizations. In Fiscal Year 1981, CETA grants totalled approximately $2.8 billion.[2]

The CETA Act and regulations established an elaborate multitiered complaint and appeal procedure. Complaints regarding program administration generally must be filed first at the recipient level, appealed to DOL regional officials, and, if necessary, brought to a hearing before the DOL Office of Administrative Law Judges (ALJs) in Washington, D.C. Decisions of ALJs generally may be appealed to the Secretary of Labor. Between 1976 (the first year in which the CETA dispute procedure became operational) and December 31,1980, eight hundred and twenty-one (821) CETA appeals were filed with the Office of Administrative Law Judges, with two hundred and seventy-three of these appeals involving disputes brought directly by recipients of or applicants for CETA funds. The remainder of the 821 appeals were filed by job trainees who were denied participation in CETA programs by CETA recipients.

DOL's second largest grant program is that connected with federally-funded Unemployment Insurance (UI) services. Under the program, DOL provides financial assistance to States for the administration of State-supported UI programs. Payments to a State

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[1] As amended, 29 U.S.C. § 801, *et seq.* (CETA). DOL's other grant programs include Unemployment Insurance programs, governed by rules contained in 20 C.F.R. Part 601; Occupational Health and Safety Grants for Implementing State-Approved Plans, 29 C.F.R. Part 1951; Development and Planning Grants for Occupational Safety and Health, 29 C.F.R. Part 1950; Mine Health and Safety Grants, 30 C.F.R. Part 46; and Senior Community Service Employment Programs, 29 C.F.R. Part 89. For a discussion of these programs, see text *infra.*

[2] Executive Office of the President, Office of Management and Budget, Catalog of Federal Domestic Assistance, 521-544 (15th ed. 1981).

may be withheld under certain conditions.[3] For example, State payments may be withheld if the Secretary finds violations in the State program "after reasonable notice and opportunity for hearing."[4] Such a hearing will not be held until "every reasonable effort" has been made to resolve the situation by conference and discussion.[5] The regulations give no description of the type of hearing which will be held, or any rules of procedure which will govern, other than to say that the State will receive a notice of the time and place of the hearing, and the procedure which will be followed,[6] and that the State is to be "given an opportunity to present all relevant evidence, written or oral," with the Secretary making the decision based on the hearing record.

While most of the DOL's other grant programs have some procedures for resolution of grant disputes, such procedures are not nearly as elaborate as those provided for under CETA, and are used rarely. For example, under the Mine Health and Safety Grant program,[7] a grant may be revoked or terminated at any time by the Assistant Secretary, if the affected State is given written notice and an opprtunity for a hearing.[8] No further hearing procedures are specified. Decisions reached under these procedures are final unless appealed within 30 days to the U.S. Court of Appeals for the District of Columbia Circuit.[9] Similarly, for termination disputes arising under Development and Planning Grants for Occupational Safety and Health (OSHA),[10] a State grantee must be afforded "reasonable notice and opportunity for a hearing" before the Department may terminate its grant.[11] Disputes arising under OSHA grants which go toward implementing approved State plans,[12] are governed by those procedures which govern disputes under con-

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[3] See 20 C.F.R. § 601.5.

[4] 20 C.F.R. § 601.5(a).

[5] 20 C.F.R. § 601.5(b).

[6] 20 C.F.R.§ 601.5(d).

[7] 30 C.F.R. §§ 46.10 and 46.11.

[8] 30 C.F.R. § 56.11.

[9] 30 C.F.R. § 46.11(c).

[10] 29 C.F.R. § 1950.

[11] 29 C.F.R. § 1950.12.

[12] 29 C.F.R. Part 1951.

tracts, including the Federal Contract Disputes Act.[13] No dispute procedures are provided with respect to the Senior Community Service Employment Program.[14]

In comparison with these procedures, the statutory and regulatory mandates governing CETA disputes are elaborate and frequently used. Because of their predominance within DOL, this chapter concentrates on the CETA appeal process and appeals brought before the Office of Administrative Law Judges.

[2]—Organizational Structure

As indicated above, the Comprehensive Employment and Training Act of 1973, as amended, establishes a multitiered grant dispute appeal process. Before describing that process, it may be helpful to identify the various parts of the Department which become involved in CETA appeals.

The Department's Employment and Training Administration, (ETA) is responsible for administering CETA programs. ETA is headed by an Assistant Secretary for Employment and Training, who reports directly to the Secretary. Within ETA, there is an Office of Comprehensive Employment Development, which is primarily responsible for grants to States and local governments, and other entities eligible to become "prime sponsors" of programs authorized under Title II of the Act. Most of the personnel in this Office are lodged in regional offices, and report to a Regional Administrator for Employment and Training. While national policies and procedures may be established in Washington, day-to-day program decisions are left to the discretion of regional staff.

A separate Office of National Programs within ETA is responsible for CETA programs targeted for Indians, migrant and seasonal farmworkers, and other groups designated in Title III of the Act. These programs are to be administered from Washington, and virtually all of the Office's staff are lodged there. Individual "Government Authorized Representatives" are assigned to each grantee.

The Office of Cost Determination, under the Assistant Secretary for Administration and Management, is responsible for establishing cost standards, indirect cost rates, and other fiscal determinations

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[13] See 29 C.F.R. § 1951.45.

[14] 29 C.F.R. § 89.83.

for CETA grantees, subgrantees, and other recipients of CETA funds.

The Office of Inspector General is responsible for the audit of CETA funds. The field work and report drafting for such audits may be performed by staff within the Office of Inspector General, or, through contract, by private accounting firms.

If a dispute arises from a CETA audit—or any other aspect of a CETA program—two other offices of the Department may be involved. The Office of the Solicitor—the top-ranking law officer in the Department—represents ETA officials involved in disputes. Unlike other Federal agencies (such as the Department of Health and Human Services[15]), this legal representation is automatic, and occurs in virtually every dispute that reaches the Office of Administrative Law Judges. Members of the Office of the Solicitor are lodged both in regional and national offices. The division of responsibility for legal representation division of program responsibility, i.e., when regional ETA officials are involved in a dispute, they generally are represented by Regional counsel; when Washington-based Office of National Programs officials are involved in a dispute, they may be represented by Washington-based counsel or regional counsel in the regions in which the grantees are located.

As will be discussed more fully in the following sections of this chapter, DOL's Office of Administrative Law Judges becomes involved in CETA disputes when efforts at informal resolution are to no avail. This Office is wholly independent from ETA and the other offices discussed above. All Administrative Law Judges within the Office are based in Washington.[16]

[3]—The CETA Appeal Process

[a]—Early Stages of Review. The Comprehensive Employment and Training Act of 1973, as amended, establishes an elaborate procedure for complaints and sanctions brought under the Act. Regulations promulgated under *Code of Federal Regulations,*[17] expand upon these procedures.

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[15] See § 54.08 *supra.*

[16] As indicated in the following sections, *infra,* Administrative Law Judges may hold hearings or other proceedings in locations outside of Washington.

[17] Volume 20, § 676.81 *et seq.*

[b]—Recipient or Subrecipient Procedures. The first stage of the CETA dispute process occurs at the recipient level.[18] Each recipient of CETA funds must establish and maintain a grievance procedure for handling complaints about the program arising from the program's sub-recipients or participants.[19] These procedures must provide, at a minimum, for hearings within 30 days after the filing of a grievance. Such hearings must be conducted "expeditiously," and decisions are not to be made more than 60 days after the filing of a grievance. With the exception of grievances alleging fraud or criminal activity (which may be filed at any time), a grievance must be filed with the recipient within one year of the alleged occurrence.

The recipient's resolution procedure for grievances must provide, at a minimum, for:

(1) An opportunity to file a complaint. All complaints must be in writing.

(2) An opportunity for informal resolution of complaints.

(3) Written notification of an opportunity for a hearing when an informal resolution has not been accomplished. The notice shall state the procedures for requesting a hearing and shall describe the hearing process.

(4) Opportunity to amend complaints prior to a hearing.

(5) Opportunity for a hearing within 30 days of filing the complaint. A final written decision to the complainant which shall be made within 60 days of the filing of the complaint and shall include: the reasons for the decision; a statement

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[18] CETA regulations define "recipient" to mean

"State or local government, a Federally recognized Indian tribal government, a public or private institution of higher education, a public or private hospital, an Indian or Native American entity other than a Federally recognized Indian tribal government, or other quasi-public or private for profit or nonprofit organization which receives CETA financial assistance directly from DOL, through a grant to perform substantive work under the Act (employment, training, supportive services, etc.)."

20 C.F.R. § 675.4. A "subrecipient" is defined under the regulations to mean

"Any person, organization or other entity which receives financial assistance under CETA through a recipient to carry out substantive work (e.g., employment, training, supportive services)."

[19] See § 106(a)(1) of the Act, 29 U.S.C. § 816(a)(1).

that the procedures delineated in this section have been completed; and notice of the right to file a complaint with the Grant Officer.[20]

If a hearing is requested, the recipient should provide the complainant at least the following:

(1) Written notice of the date, time and place of the hearing, the manner in which it will be conducted, and the issues to be decided.

(2) Opportunity to withdraw the request for hearing in writing before the hearing.

(3) Opportunity to request rescheduling of the hearing for good cause.

(4) Opportunity to be represented by an attorney or other representative of the complainant's choice.

(5) Opportunity to bring witnesses and documentary evidence.

(6) Opportunity to have records or documents relevant to the issues produced by their custodian.

(7) Opportunity to question any witnesses or parties.

(8) The right to an impartial hearing officer.

(9) A written decision from the hearing officer to the complainant(s) and any other interested parties within 60 days of the filing of the complaint, unless this period is extended with the written consent of all of the parties for good cause.

If the complaint filed with the recipient is filed by an employee of the recipient, the recipient may use the procedures described above *or* procedures which provide, at a minimum, for:

(1) Notice, upon enrollment into employment or training, of the scope and availability of such procedures.

(2) Notice, at the time the complaint is filed, of the procedures under which the complaint is being processed.

(3) Written notification of the disposition of the complaint, and the reasons therefore, which shall be issued within 60 days of the filing of the complaint, unless the grievance

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[20] 29 C.F.R. § 676.83(b).

procedure or the collective bargaining agreement specifically provides other limits.

(4) Written notification of the right to file a complaint with the Grant Officer of the decision issued.[21]

Whatever process appies, the complainant must exhaust the recipient level grievance procedure before taking his appeal to the next level: the Grant Officer.[22] The exhaustion requirement does not apply where the recipient has not acted in compliance with or within the time frames specified by law, or if an emergency situation exists.[23]

[c]—Investigation of Complaints by Secretary

"Whenever the Secretary receives a complaint from any interested person or organization (which has exhausted the prime sponsor's grievance system) which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review, or otherwise) that a recipient of [CETA] financial assistance is failing to comply with the requirements of this chapter, the regulations under this chapter, or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint."[24]

Pursuant to this mandate, DOL regulations establish detailed procedures for the filing, investigation, and determination of complaints arising under CETA programs. For example, the regulations require that *complaints* be filed no later than 30 days from the date of receipt of a written decision emanating from the recipient's grievance procedure as described above.[25] A complaint once filed

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[21] 20 C.F.R. § 676.84(b).

[22] 20 C.F.R. § 676.85(a).

[23] 20 C.F.R. § 676.85(b).

[24] § 106(b) of CETA, 29 U.S.C. § 816(b).

[25] 20 C.F.R. § 676.86(b). Pursuant to regulation, complaints must contain:

(1) The full name, telephone number (if any), and address of the person making the complaint;

may be withdrawn only with the consent of the Grant Officer.[26]

The regulations establish specific deadlines for the handling and investigation of complaints. Thus, the regulations provide generally that investigations should be completed within 60 days after the filing of a complaint, "or such additional time not to exceed 30 days as the Grant Officer may allow." Final audit reports received by the Grant Officer are to be transmitted to the recipient for a comment period not to exceed 30 days.[27]

[d]—Initial and Final Determination. After the conclusion of an investigation or the comment period for audits, the Grant Officer must make an initial determination of the matter in controversy, including the allowability of questioned costs or activities. This Initial Determination must be sent to the grantee, must be in writing, and must state with specificity the basis of the Initial Determination.[28]

Upon receipt of an Initial Determination, the recipient may seek an opportunity to resolve informally those matters contained in the Initial Determination. If the matters cannot be resolved informally, the Grant Officer must issue a *Final Determination.* Said Determination must be issued not later than *120 days* after the filing of the original complaint with the Grant Officer or the Grant Officer's receipt of a final audit report. Final Determinations must list any sanctions or corrective action required of the recipient, and advise

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(2) The full name and address of the respondent (the recipient, or subrecipient or person against whom the complaint is made);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged violation;

(4) Where known, the provisions of the Act, regulations, grant or other agreements under the Act believed to have been violated;

(5) A statement disclosing whether proceedings involving the subject of the complaint have been commenced or concluded before any federal, state or local authority, and, if so, the date of such commencement or conclusion and the name and address of the authority;

(6) A copy of the final decision of the recipient or subrecipient.

20 C.F.R. § 676.86(b)(1)-(6).

[26] 20 C.F.R. § 676.86(b)(7).

[27] 20 C.F.R. § 676.86(d).

[28] See 20 C.F.R. § 676.88(b).

the parties of their opportunity to request a hearing pursuant to the appeal procedures described below.

[e]—The Hearing Process: Procedures and Case Law. Under the CETA statute, the Secretary of Labor must give "due notice and opportunity for a hearing" to recipients charged with failing to comply with CETA requirements. DOL regulations elaborate upon the type of notice and type of hearing required.

[*i*]—*Prehearing Procedures.* Once the Grant Officer has made a "final determination" adverse to a party,[29] the party has 10 days within which to request a hearing before a DOL Administrative Law Judge,[30] Once a hearing has been requested, the case is assigned to an Administrative Law Judge, who assumes control of the case in much the same way as does a state or federal trial court judge. The Grant Officer who made the adverse decision becomes a party to the proceedings, being represented by counsel from the Department of Labor.[31]

Upon the filing of a request for hearing, the Chief Administrative Law Judge issues a *Notification of Receipt of Request for Hearing and Prehearing Order.* That Notification requires the Grant Officer to prepare and submit, by a specified date, an Administrative File of the appeal; said File to contain all pertinent rulings and data. At the same time, all parties to the appeal are required to file a *Notice of Intent to Participate* in the hearing.

The Chief Judge's prehearing instructions to the parties also typically require that upon receipt of the Administrative File, the parties shall begin discussions to consider all or part of the appeal, the stipulation of facts, the admissibility of documents, the possibility of submitting the case for disposition on a stipulated record, and such other matters as may aid in the disposition of the case.

Finally, the instructions typically require each party to file a prehearing statement by a specified date. Such statements generally are to include:

(1) a simple statement of the issues to be decided and the relief or remedy sought;

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[29] 20 C.F.R. § 676.88.

[30] 29 C.F.R. § 676.88(f).

[31] 29 C.F.R. § 676.88(g).

(2) the name and address of each witness the party expects to call and a summary of the testimony each witness is expected to furnish;

(3) a list of all the documents that party expects to use as evidence with a copy of each document when possible;

(4) an estimate of the number of days required for hearing.

Discovery in CETA cases has been handled in much the same manner as is prescribed under the Federal Rules of Civil Procedure, with the major exception being that the party seeking discovery must first request the permission of the presiding Administrative Law Judge.[32] Such permission generally is granted routinely.[33]

Copies of all documents submitted in the proceeding are to be filed in the Office of Administrative Law Judges and served upon all parties.

[*ii*]—*Hearing Procedures.* In deciding what type of process is to be given to appellants, neither the CETA Act or regulations state explicitly whether a hearing must be held in accordance with the Administrative Procedures Act.[34] However, the regulations implicitly are structured so as to meet the requirements of section 554, including their use of Administrative Law Judges,[35] the inclusion of compulsory process,[36] and the requirement that the ALJ's decision be in writing and based solely on the record.[37] In addition, the procedures governing the entire hearing process, including discovery, if not governed by CETA, the A.P.A. or the regulations of DOL, are to be "guided to the extent practicable by any pertinent provisions of the Federal Rules of Civil Procedure."[38]

To date, there has been no formal opinion which deals with the question of whether these hearing procedures are *required,* pursuant to the language of the CETA statute, to be conducted pursuant to Section 554. However, with the passage of the Equal Access to

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[32] 20 C.F.R. § 676.89(e).

[33] See e.g., In the Matter of Rural America, Case Nos. 82-CETA/A-2; 82-CETA/A-160.

[34] 5 U.S.C. § 554.

[35] 20 C.F.R. § 676.89.

[36] 20 C.F.R. § 676.90(a).

[37] 20 C.F.R. § 676.90(c).

[38] 20 C.F.R. § 676.89(a).

Justice Act, which allows award of attorneys' fees against the Government in Section 554 administrative proceedings, the issue may arise in the near future.

The actual hearing in which the CETA grantee is challenging the decision of the grant officer "shall be held at a time and place ordered by the Administrative Law Judge upon reasonable notice to the parties."[39] In practice, the grantee is given the option of holding the hearing in the area of the country in which it is located. For hearings held outside of Washington, either the regional branch of the Office of ALJ's will hold the hearing, or an ALJ from the national office will travel to the locale of the grantee.

Because most grant disputes under CETA revolve around factual issues, such as the eligibility of a particular CETA participant, oral hearings are routinely held by the ALJ. No date is set as an outer time limit by which the hearing must be held. Although "technical rules of evidence shall not apply" to these CETA disputes, the ALJ shall establish rules "designed to assure production of the most credible evidence." Cross examination is allowed. A transcript must be made of this hearing.[40]

The allocation of the burden of proof in CETA hearings has been recently addressed in a decision by the U.S. Court of Appeals for the First Circuit, in *State of Maine v. U.S. Department of Labor.*[41] In this case, the State of Maine, a CETA grantee, had certain CETA costs disallowed by the Department of Labor. The State of Maine appealed to an ALJ, who interpreted the burden of proof,[42] to rest with "the party requesting the hearing," which in every case would be the grantee. Maine contended that DOL's proof of the proposed disallowed costs was insufficient to meet its burden of "going forward" by presenting a *prima facie* case. The ALJ dismissed this argument, and Maine appealed to the First Circuit.

In its decision the First Circuit stated that the burden of producing a *prima facie* case rested with DOL. The *prima facie* burden will be met if the evidence which DOL presents is "sufficient to en-

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[39] 20 C.F.R. § 676.90.

[40] 20 C.F.R. § 676.90(c).

[41] 669 F.2d 827 (1st Cir. 1982).

[42] 20 C.F.R. § 676.90(b).

able a reasonable person to draw from it the inference sought to be established."[43] Once this happens, the burden shifts from the Department to the grantee to prove its compliance with the CETA Act and the regulations.[44] Based on *State of Maine,* the burden of proof rests squarely on the grantee, as long as it is apparent that the Department has some colorable evidence on which it is basing its claim against the grantee.

Apart from this case, the issue of burden of proof has come up twice in CETA grant appeals, once in the context of an audit disallowance, and once in the context of an emergency suspension. In the audit disallowance appeal, *The City of Camden, New Jersey and Mark Del Grande,*[45] the judge ruled that the party requesting the hearing must affirmatively disprove the existence of the facts as alleged by the Department of Labor.

In contrast, in emergency grant suspensions, where DOL can immediately suspend grant payments without any informal conference with the Grant Officer,[46] the Department carries the burden of proof regarding the propriety and necessity of the action. *Associated City-County Economic Development Corporation of Hidalgo County, Texas v. DOL.*[47] The action is considered so extreme that the normal standard of the presumption of validity is not followed.

[*iii*]—*Post-Hearing Procedures.* After an oral hearing has been completed, parties may file post-hearing briefs, including proposed findings of facts and conclusions of law.[48] No date is required by which an ALJ must make a decision on the dispute; measured from the date of filing until the date of decision is issued, grant appeals have averaged one year. In fact, as the number of CETA grant disputes has increased dramatically beginning in 1979, the duration of an average grant appeal has become more than one year.

Of those grant cases decided between 1976 and the end of 1980 by written decision from an ALJ, 5% were handed down in less

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[43] 669 F.2d at 830.

[44] *Ibid.*

[45] Case No. 79-CETA-102.

[46] 20 C.F.R. § 676.88(j).

[47] Case No. 79-CETA-114.

[48] 20 C.F.R. § 676.91(a).

than 3 months from the date of filing, 5% were handed down in less than 6 months but more than three months, 40% were handed down in less than one year but more than 6 months, 32% were decided in less than 1 1/2 years but more than 1 year, and 35% of the written decisions took more than one and one-half years to be decided. Of those cases which were closed by the ALJ *without* issuing a written decision, 56% of cases were disposed of in less than 6 months, 24% were disposed of in less than one year but more than 6 months, and 21% of non-written decisions took over one year to decide.

The regulations require that the ALJ make written findings in issuing a decision.[49] Since 1976, 42 grant cases have been closed with written findings by the ALJ, while 75 cases were closed by the ALJ without written findings ever being made. 42 of the cases in which an ALJ hearing was requested were settled before a written decision became necessary, 10 cases were withdrawn by the grantee, 11 cases were dismissed, and 4 cases were remanded back to a Grant Officer by the ALJ.

In reaching a decision, the regulations give the ALJ "the full authority of the Secretary in ordering relief . . . orders for relief may provide for suspension or termination of the grantee or refusal to grant or continue federal financial assistance in whole or in part. . ."[50] ALJ's have used this grant of authority both to uphold the Department in its suspension of a grantee as proper under the Act,[51] and to reverse the Department when it attempted to suspend a grantee for an insufficient reason.[52] The regulations provide that the decision of the ALJ shall become the final decision of DOL unless the Secretary modifies or vacates it within thirty days after it is rendered.[53] On very infrequent occasions, the Secretary has used

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[49] 20 C.F.R. § 676.90(c).

[50] 20 C.F.R. § 676.91(c).

[51] See, e.g., In the Matter of Associated City-County Economic Development Corporation of Hidalgo County, Texas, 78-CETA-114 (August, 1978); In the Matter of Greater California Educational Project, Inc., 78-CETA-106 (Dec. 1977).

[52] See, e.g., In the Matter of the City of East St. Louis, Illinois, 78-CETA-110 (Oct. 1978).

[53] 20 C.F.R. § 676.91(f).

this power to alter decisions of the ALJ.[54] On other occasions, the Secretary has simply affirmed the decision of the ALJ.[55] Judicial review of DOL's final decision is specifically directed under CETA to the U.S. Court of Appeals in the circuit in which the grantee transacts business.[56]

[4]—Grant Appeals Brought Under CETA

[a]—Type of Appeals. As is evident from the language of the enabling legislation and the regulations, a wide range of grant disputes are potentially eligible for adjudication. In the last 5 years, grantees have taken advantage of this broad grant of jurisdiction by appealing an array of adverse decisions.[57]

For example, of the 42 CETA grant cases in which written opinions have been issued by ALJ's, 11 of these cases have involved appeals by grantees of *pre-award* decisions by DOL (DOL either decided not to fund the grantee originally, or refused to renew a CETA grant to the grantee). In pre-award grant disputes, disappointed CETA grant applicants have raised a variety of issues on appeal, ranging from questioning the Department of Labor's adherence to its own regulations, to challenging the eligibility of the successful competing applicant. The issues that arose in the pre-award appeals which culminated in written decision can be summarized as follows:

Disappointed applicants alleged that:

(1) Successful competitor applicant violated antisupplantation regulation.[58]

(2) Successful competitor applicant was a successor to an orga-

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[54] See, e.g., In the Matter of San Diego Regional Employment and Training Consortium, 78-CETA-102 (1978).

[55] See, e.g., In the Matter of Greater California Educational Project, Inc., 78-CETA-106 (April, 1978); In the Matter of City of East St. Louis, Illinois, 78-CETA-110 (September, 1978).

[56] 29 U.S.C. § 817.

[57] As noted earlier, throughout this chapter, references are made to CETA "grant cases." This designation refers only to CETA appeals in which the disputes were between the grantee and DOL, or the grantee and actual or potential subrecipients, and does not include individual participant appeals.

[58] Warwick Area Migrant Committee, Inc. v. Program Funding, Inc., Case No. 78-CETA-105 (1978).

nization that was deemed seriously deficient, therefore making the grantee ineligible.[59]

(3) Successful competitor applicant had not yet committed funds and was therefore an ineligible prime sponsor.[60]

(4) DOL determination that applicant was not "a unit of local government" and therefore ineligible for prime sponsorship was incorrect.[61]

(5) Grant Officer did not act in accordance with CETA regulations when he denied 4 applicants' grantee status.[62]

Appeals raising post-award issues have made up the remainder of the cases. Of the post-award appeals brought by grantees, a vast majority concerned the issue of audit disallowances; these arise when DOL is alleging that a grantee has spent a certain sum of grant funds—supposedly to provide job training for eligible participants—on an unallowable activity. In these grant disputes, DOL now is attempting to recoup these supposedly misspent grant funds.

Of these post-award audit disallowance cases, many revolve around the question of whether the grantee was providing CETA stipends to participants who were ineligible for assistance under the regulations governing participant eligibility in a particular CETA program.[63] In these cases, DOL alleged that the documents in the possession of the grantee demonstrated that the particular participant was not eligible; often, tens of thousands of dollars were involved in the dispute. Closely related to these cases were those matters in which DOL claimed that the eligibility forms maintained by the grantees were so inadequate that the question of the eligibility

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[59] State of Nebraska, Case No. 80-CETA-51 (November 12, 1980).

[60] Florida Farmworkers Council, Case No. 80-CETA-23 (November 10, 1980).

[61] Center Township Trustee of Marion County Indiana, Case No. 79-CETA-195 (November 12, 1980).

[62] Migrant Action Program and Colonias Del Campesinos Unidos, Inc., Case Nos. 79-CETA-209, 80-CETA-60, 62, 63 (December 12, 1980).

[63] See, e.g., City Richmond, Case No. 79-CETA-111; Delaware County Board of Commissioners, Case No. 79-CETA-152; Madison County Board of Commissioners, Case No. 79-CETA-153; City of Gary, Indiana v. Department of Labor, Case No. 79-CETA-164; City of Durham, N.C., Case No. 80-BCA/CETA/6.

of the participants could not be determined. In these cases, DOL also desired to disallow the money spent on these participants.[64]

Another sizable portion of audit disallowance cases resulting in written decisions arose from DOL's claim that a grantee had awarded jobs to certain participants because of nepotism coming from within the grantee organization;[65] or due to political patronage; motives within a state or local government.[66] In each of these cases, the outcome depended on the proof which could be offered by the grantee pertaining to each particular participant being challenged by DOL.

The remaining group of post-award disputes revolved around the suspension, termination or debarment of a grantee receiving CETA funds. In these cases, the Department was seeking to suspend, terminate or debar because of its belief that the grantee was in some manner grossly mismanaging CETA grant funds, such as using the money for prohibited political purposes[67] or improperly commingling federal grant funds with nonfederal monies to subsidize a nonfederal project.[68]

Both cases which have been decided with and without written decisions, and those cases which are still pending have been catalogued by the type of dispute at issue. Of the 75 cases which have been closed by ALJ's *without* written decisions, 6 involved pre-award disputes, with the remainder involving appeals of adverse post-award decisions may be DOL. Of the 148 cases still pending, 6 concern pre-award issues in dispute, while 142 concern post-award disagreements.

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[64] See, e.g., City of Richmond, Case No. 79-CETA-111; Delaware County Board of Commissiones, Case No. 79-CETA-152; Mississippi County, Arkansas, Case No. 79-CETA-207.

[65] See, e.g., City of Camden, New Jersey and Mark Del Grande, Case No. 79-CETA-102; Orange County, New York, Case No. 79-CETA-104; City of Richmond, Case No. 79-CETA-111; City of Warren, Michigan, Case No. 80-CETA-82.

[66] See e.g., City of Camden, New Jersey and Mark Del Grande, Case No. 79-CETA-102.

[67] See City of East St. Louis, Illinois, 78-CETA-110 (June 1978).

[68] See Associated City-County Economic Development Corporation of Hidago County, Texas, 78-CETA-114 (August 1978).

While the statute and regulations give to grantees a broad jurisdictional grant in terms of the *type* of DOL decisions on which they can seek ALJ review, it appears that ALJ's have interpreted narrowly their power to review final DOL decisions. ALJ's have overturned DOL decisions which were based on ambiguous CETA regulations. For instance, in the case of *Michael J. Campi v. County of Santa Clara,*[69] the ALJ held that a CETA regulation which is so ambiguous in its meaning that reasonable persons could differ as to its interpretation cannot be enforced, in that it violates the essentials of due process. However, ALJs have refused consistently to rule on the validity of duly promulgated, specific CETA regulations.[70] In these cases, ALJs held that they have no authority to review the statutory or constitutional basis of DOL regulations, so long as these regulations were issued properly.

Given the repetitiveness in the type of grant disputes which arise under CETA, the precedential value of previously-decided cases becomes significant. Despite this, the accessibility of a current litigant to past ALJ decisions under CETA is extremely limited. The cases are collected chronologically in loose-leaf binders in the Office of Administrative Law Judge's library in Washington.

[b]—Volume of Appeals. The number of grantees using the grant appeals process under CETA has grown dramatically in the last two years. In the three-year period beginning in 1976 when the formal dispute procedures were inititated by DOL until the end of 1978, a total of twenty-five grantees had filed appeals with the chief ALJ's office. However, in 1979 alone the number of grant appeals jumped to fifty-two, and in 1980, the appeals figure reached 196. Appeals of audit disallowances accounted for much of this increase.

The number of written decisions being issued by ALJ's has not kept pace with this increase in appeals; the volume of written decisions has increased very little since 1979. However, there has been a sharp increase in the number of cases being closed without written decisions.[71] In 1979, only 24 cases were closed without written

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[69] Case No. 80-CETA-28 (September 1980).

[70] See Greater California Educational Project, Inc. and U.S. Department of Labor, Case No. 78-CETA-106 (Dec. 23, 1977); Transperience Center v. South Florida CETA Consortium, Case No. 79-CETA-108 (July 5, 1979).

[71] Cases closed without written decision are those in which there is settlement, withdrawal, dismissal or remand of the appeal.

decisions; by 1980, this number had almost doubled, to 43.

A large percentage of the grant appeals filed prior to December 31, 1980, still were pending as of that date. Of the 240 appeals which had been filed in 1979 and 1980, 148 or 62% had not been resolved by the end of 1980.

[c]—Types of Grantees Who Appeal. Of the grantees who have decided to use the CETA dispute procedure to appeal DOL decisions, approximately 50% have been local government agencies, acting as prime sponsors. The remainder of grant appeals were brought by State governments (9%), non-profit organizations (23%), and "consortiums" (grantees who act as coordinative bodies to pass through funding to sub-grantees) (8%). Not only have units of local government brought the greatest number of grant appeals, but they also have put the greatest amount of grant funds at issue: Of the approximately $15.7 million of disputed grant funds which were the subject of appeals since 1976, two-thirds of those funds have been concentrated in cases brought by local government grantees. This breakdown of the types of grantees bringing appeals and the percentage of cases each brought remains almost unchanged when one examines the breakdown of cases where grantees have received written decisions to those cases closed without written decisions of those still pending.[72]

In terms of the *types* of cases brought by the various grantees, the numerical breakdown loses some of its consistency. For example, in pre-award disputes (either non-selection of a grant applicant or non-renewal of an earlier grant), non-profit organizations have brought 70% of the appeals (compared to 23% of all appeals which were brought by non-profits), while local governments have brought 65% of all appeals challenging audit disallowances (compared to 51% of all appeals). This differentiation probably is based opon the fact that non-profit organizations frequently are subgrantees under CETA, for whom State and Local governments, serving as prime grantees, are responsible in the audit context.

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[72] For example, of all the cases closed by *written decision* of the ALJ, 53% have been cases where the grantee is a local govrnment agency; of all the cases closed without written decision, 48% were cases where the grantee was a local government, and for pending cases, tis figure was 52%.

[d]—Outcome of Grant Appeals. Of the 42 grant appeals in which written decisions have been issued, 33% have been decided in favor of the grantees, 50% have been decided in favor of DOL, and 17% have been decisions in which the outcome was a split between DOL and the grantee. For audit disallowances, which make up the majority of all grant appeals, of the $2.5 million which has been in dispute, grantees have retained $968,568 of those disputed funds.

§ 54.13 Legal Services Corporation

[1]—Introduction

The Legal Services Corporation (LSC) is a private, nonprofit organization, located in Washington, D.C. LSC was established by Congress in 1974 to provide legal assistance to the poor in civil matters.[1] It began operations in October 1975. While LSC is the successor to the former Office of Economic Opportunity poverty law program, it is not a Federal Agency.[2]

LSC is governed by an eleven-member Board of Directors, appointed by the President of the United States, with the advice and consent of the Senate. The membership on the Board generally is designed to be representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public.[3] No more than six members of the Board may be of the same political party. The Board selects one of the voting members to serve as Chairman.

The Board appoints an attorney to serve as the President of LSC. The President of LSC serves as a nonvoting *ex officio* member of the Board, and is authorized to award grants of behalf of LSC.[4]

LSC is authorized to award grants for the purpose of providing legal assistance to eligible clients,[5] for research related to eligible client representation, for training and technical assistance, and for information (clearinghouse) activities.[6] LSC also may support demonstration projects which provide alternative and supplemental methods of delivering legal services to eligible clients, including judicare, vouchers for legal services, prepaid legal insurance and contracts with law firms.[7]

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[1] Section 2 of Pub. L. 93-355 (42 U.S.C. 2996b) as amended.

[2] 42 U.S.C. § 2990d(e)(1).

[3] 42 U.S.C. § 2996c.

[4] 42 U.S.C. 2996d(a) and 2996f(e).

[5] "Eligible client" is defined to mean "any person financially unable to afford legal assistance." 42 U.S.C. 2996a(3).

[6] 42 U.S.C. 2996e(a)(1)(A) and 2996e(a)(3).

[7] 42 U.S.C. 2996f(g).

Eligible grant recipients are: (1) individuals, partnerships, firms, corporations, nonprofit organizations; and (2) States and units of local government (if the appropriate agency applies and the Board determines that the services could not be provided adequately through nongovernmental arrangements.[8]

[2]—Legal Services Corporation's Grant Appeals Procedures

[a]—Statute. LSC is required by statute to prescribe procedures to insure that: (1) financial assistance will not be suspended unless the grantee has been given "reasonable notice and opportunity to show cause why such action should not be taken;"[9] and (2) financial assistance will not be terminated, an application for refunding denied, or a suspension continued for more than 30 days, unless the grantee has been afforded "reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner."[10] The statute further provides that the hearing must be held *prior* to any final decision by LSC to terminate, suspend or deny renewal funding.[11]

[b]—Regulations

[*i*]—*Purpose and Scope of Applicability.* LSC has implemented the statutory notice and hearing requirements.[12] The stated purpose of these regulations is to afford recipients:

> "[T]he opportunity for a timely, full, and fair hearing that will promote informed deliberation by the Corporation [LSC] when there is reason to believe a grant or contract should be terminated[13] or refunding denied,[14] [while seeking] to avoid unneces-

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[8] 42 U.S.C. 2996e(a)(1)(A).

[9] In the context of LSC programs, a "grantee" who is entitled to these statutory protections must be a "recipient," as defined in 42 U.S.C. 2996e(a)(1). In practical terms, grantees providing legal assistance are covered by the procedures, while grantees providing non-legal support services do not appear to have the statutory protections.

[10] 42 U.S.C. 2996j(1) and (2).

[11] *Ibid.*

[12] See 45 C.F.R. Part 1606.

[13] "Termination" is defined in 45 C.F.R. § 1606.2(a) to mean a decision that financial assistance to a recipient will be permanently terminated in whole or in part prior to expiration of the recipient's current grant or contract.

[14] "Denial of refunding" is defined in 45 C.F.R. § 1606.2(b) to mean a decision that, after expiration of a current grant or contract, a recipient: (1) will not be pro-

sary disruption in the delivery of legal assistance to eligible clients."[15]

Grants may be terminated or refunding denied where the recipient has failed substantially to comply with applicable law, regulations, guidelines or conditions of the grant, or where the recipient has failed substantially to use its resource "to provide economical and effective legal assistance of high quality as measured by generally accepted professional standards . . ."[16] In accordance with the statute, notice and an opportunity to correct deficiencies must be afforded recipients *prior* to such action, except under unusual circumstances.[17]

[*ii*]—*Stages of Review*

[*A*]—*Preliminary Determination.* When LSC has reason to believe that a grant should be terminated or refunding denied, it provides the recipient with a preliminary determination. Under LSC regulations, the preliminary determination must state the grounds for the proposed action and identify any specific facts or documents relied upon as justification for the action. In addition, the preliminary determination must advise the recipient that: (1) the recipient may make, within 10 days, a written request for a hearing or informal conference (after which a hearing may be requested); and (2) the recipient has a right to receive interim funding (pending a final decision in the appeal), and may request closeout

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vided with financial assistance; (2) will have its annual level of financial support reduced to an extent that is not required either by a change of law or by a reduction in the Corporation's charter that is apportioned among all recipients of the same class in proportion to their current level of funding, and is either more than 10 percent or more than $20,000 below the recipient's annual level of financial assistance under its current grant or contract; or (3) will be provided with financial assistance subject to a new condition or restriction that is not generally applicable to all recipients of the same class, and that would significantly reduce the ability of a recipient to maintain the quality and quantity of its current legal assistance to eligible clients.

[15] 45 C.F.R. § 1606.1.

[16] 45 C.F.R. § 1606.3 and 1606.4.

[17] 45 C.F.R. § 1606.3(b) and (c); 1606.18.

funding in instances of proposed terminations.[18] If the recipient advises LSC that is does not wish to appeal, or if it fails to request review within 10 days, the preliminary determination becomes final.[19]

[*B*]—*Informal Conference.* "Promptly" after receipt of a timely request for appeal by the aggrieved recipient, the LSC employee who made the preliminary determination must conduct an informal conference if such a conference is requested by the recipient.[20] This conference provides the forum for exchanging views, narrowing issues, and exploring settlement possibilities. At the conclusion of the conference, the LSC employee may modify, withdraw or affirm the preliminary determination. Thereafter, the recipient has 5 days within which to make a written request for a hearing.

[*C*]—*Initiation of Formal Proceedings.* Within 10 days after receiving a request for a hearing, LSC must notify the recipient in writing of the names of the presiding officer (LSC's equivalent to the term "hearing examiner" as used in the statute) and the attorney who will represent LSC, as well as the date, place and time of the pre-hearing conference or hearing.[21]

The presiding officer is appointed by the President of LSC, and must be:

> "[A] person who is familiar with legal services and supportive of the purposes of the Act, who is independent, and who is not an employee of [LSC]."[22]

The recipient may object to the particular presiding officer appointed by LSC if the recipient believes that the presiding officer does not meet the criteria.[23] The regulations require the recipient to

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[18] 45 C.F.R. § 1606.5(b) and (c).

The regulations state that LSC must provide a recipient with interim funding in an amount necessary to maintain its current level of legal assistance activities, pending a final decision in the appeal. 45 C.F.R. § 1606.18. The regulations also state, however, that if LSC misses a deadline in connection with the appeal, the recipient is not entitled to continuation or renewed funding. *Id.*

[19] 45 C.F.R. § 1606.5(d).

[20] 45 C.F.R. § 1606.

[21] 45 C.F.R. § 1606.7.

[22] 45 C.F.R. § 1606.8(a).

[23] *Ibid.*

raise any such objection within 5 days of receiving notice of the presiding officer's name by filing a notice with LSC stating the facts supporting the objection. If a prehearing conference has not been previously requested by the recipient, the recipient must now request one for purposes of raising the objection. LSC then must hold a prehearing conference at which LSC and the recipient may examine the qualifications of the presiding officer. Within 5 days after the conference, the recipient must notify LSC of any additional facts supporting its objection. The President of LSC must, within 10 days after the conference, either sustain the objection and appoint a new hearing officer or override the objection.[24]

[*D*]—*Prehearing Conference.* The presiding officer may order a prehearing conference, and must do so if a conference is requested by LSC or the recipient. The regulations specify various matters to be considered at prehearing conferences, including proposals to define and narrow the issues, stipulations of fact, possibilities of settlement, and indications of the identity, number and order of presentation of exhibits and witnesses.[25]

[*E*]—*Hearing.* The hearing must be held as soon as possible, normally within 45 days after LSC has sent notice to the recipient identifying the presiding officer and LSC attorney. The regulations require that, if practical, the hearing should be held at a place convenient to the recipient and the community it serves.[26]

The regulations further provide that the hearing must be "full and fair," and must be open to the public unless the presiding officer determines otherwise "for good cause and in the interests of justice."[27] In conducting the hearing, the presiding officer must "avoid delay, maintain order and insure that a record sufficient for full disclosure of the facts and issues is made."[28] The presiding officer may allow third parties to participate in the hearing of their intervention "will not broaden the issues unduly or cause delay," and

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[24] 45 C.F.R. § 1606.8(b), (c) and (d).

[25] 45 C.F.R. § 1606.9.

[26] 45 C.F.R. § 1606.10(a).

[27] 45 C.F.R. § 1606.10(b).

[28] *Ibid.*

if their participation would "aid in proper determination of the issues."[29]

The regulations contain detailed provisions concerning the types of evidence which may be presented at the hearing, but state that the technical rules of evidence do not apply.[30] In addition, the regulations assign burdens of proof. LSC has the burden of proving, "by a preponderance of the evidence", the existence of any disputed fact relied upon as justification for termination or denial of refunding.[31] On all other issues, LSC must establish a "substantial basis" for termination actions or denials of refunding.[32]

Within 10 days after the hearing, each party may submit post-hearing briefs. The presiding officer may require such briefs and also may direct or permit oral argument.[33]

[*F*]—*Recommended Decision.* As soon as practical after the hearing (normally within 20 days), the presiding officer must issue a written recommended decision, containing findings of fact based on the hearing record, and stating reasons for the decision.[34]

[*G*]—*Final Decision.* The recommended decision becomes final within 10 days of issuance unless one or both parties request review by the President of LSC.[35] If review is requested within the 10-day period, the President of LSC must, as soon as practical (normally within 30 days), adopt, modify or reverse the recommended decision, or direct further consideration of the matter. A decision by the President of LSC to modify or to reverse the presiding officer's recommendation must be based on evidence in the hearing record and must contain a statement of reasons. The President's decision becomes final upon receipt by the recipient.[36]

[*H*]—*Reimbursement.* The regulations further provide that, to the extent a recipient prevails in an appeal, it is entitled to reimbursement by LSC for "reasonable and actual" expenses of bring-

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[29] 45 C.F.R. § 1606.10(c).

[30] 45 C.F.R. § 1606.10(d)–(h).

[31] 45 C.F.R. § 1606.11(a).

[32] 45 C.F.R. § 1606.11(b).

[33] 45 C.F.R. § 1606.12.

[34] 45 C.F.R. § 1606.13.

[35] 45 C.F.R. § 1606.14(a).

[36] 45 C.F.R. § 1606.14(c) and (d).

ing the appeal.[37] In this regard, it is important to note that the regulations specifically provide that LSC and the recipient have the right to representation by counsel, although limits are set on permissible attorney's fees. Unless LSC provides prior written approval, the fee paid to outside counsel may not exceed the hourly equivalent of the rate of level V of the executive schedule established by the Government.[38]

[c]—Interpretations of, and Challenges to, Legal Services Corporation Regulatory Procedures. Various aspects of LSC's appeals procedures have been scrutinized by the courts in ruling upon challenges brought by defunded applicants or recipients.

[*i*]—*Scope of Procedures.* The statute and regulations do not recognize a right of appeal with respect to various types of disputes typically entertained by other agencies, such as application denials and audit disallowances. No program has ever formally challenged a decision to disallow costs.[39] However, the denial of an application did give rise to a lawsuit in at least one instance. A disappointed applicant claimed that LSC acted arbitrarily and capriciously in not giving "meaningful consideration" to its application.[40] The court disagreed, holding that LSC properly exercised its discretion. The court relied specifically on the fact that the LSC Act and regulations do not bestow any procedural protections with respect to the original selection of a grantee.[41]

[*ii*]—*Preliminary Determinations.* LSC proposed to deny refunding of Spokane County Legal Services, Inc. in order to transfer the funds to a Statewide legal assistance program. Spokane objected to the proposed transfer and requested a hearing. LSC did not view this decision as a termination or denial of refunding "for cause", subject to the appeals procedures, and accordingly, denied the recipient's request. Spokane sued in the Federal district court to enjoin the transfer,[42] arguing that the preliminary determination to

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[37] 45 C.F.R. § 1606.17.

[38] 45 C.F.R. § 1606.16.

[39] Interview with Michael Glomb, Assistant General Counsel, LSC, May 1, 1981 (Washington, D.C.).

[40] Legal Services Corp. v. Ehrlich, 457 F. Supp. 1058 (D. Md. 1978).

[41] 457 F. Supp. at 1063.

[42] Spokane County Legal Services, Inc. v. LSC, No. C-76-289 (E.D. Washington, July 21, 1980).

defund was defective insofar as LSC did not offer it a hearing. LSC thereafter agreed to conduct a hearing.

At the hearing, the presiding officer recommended partial refunding of Spokane, but agreed with LSC that the transfer of the remainder of the program was appropriate. The President of LSC upheld the presiding officer's decision.

LSC then moved to dismiss the lawsuit, arguing that any deficiencies in the preliminary determination were cured as a result of LSC's having conducted the hearing. At that point, Spokane amended its complaint, raising several other objections to the proceedings; accordingly, the case was not dismissed.

[*iii*]—*Independent Hearing Examiners.* One of the additional arguments raised by Spokane in the lawsuit was a claim of hearing examiner bias. The presiding officer was a special assistant to the President of LSC. The district court did not reach this issue because it dismissed the case for lack of jurisdiction; on appeal, however, the Court of Appeals for the Ninth Circuit did not address the issue, having concluded that the district court had jurisdiction of the case.

The Court of Appeals rejected Spokane's claim of hearing examiner bias, based on evidence that the presiding officer had not had prior involvement in the case. The court specifically stated that the existence of an employer-employee relationship between LSC and the hearing examiner did not render the proceedings unfair or violative of the recipient's due process rights. The court also noted that, in any event, the regulatory requirement for an *independent* examiner was not in effect when the hearing was conducted.[43]

A claim of hearing examiner bias also was rejected by the court in *National Paralegal Institute v. LSC.*[44] In that case, the examiner was a regional LSC director who had not participated in the underlying decision.

[*iv*]—*Regulatory Deadlines.* A denial of refunding was challenged in *Hartford Neighborhood Legal Service, Inc. v. LSC,*[45] in

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[43] Although it rejected the claim of hearing examiner bias, the Court of Appeals remanded the case to the district court for a determination as to whether LSC's proposed transfer had a rational basis.

[44] Civ. Act. No. 7-61260 (D.D.C. 1976) (unpublished).

[45] 466 F. Supp. 1148 (D. Conn. 1979).

part on the ground that the President of LSC had failed to render a final decision within 20 days of the presiding officer's recommended decision. The court rejected this argument, concluding that the final decision (which was rendered one and one-half months after the recommended decision) satisfied the general statutory requirement of "timeliness". In addition, the court noted that the recipient interim funding from LSC during this period, and, in fact, was funded for 30 days beyond the date of the final decision. Thus, the court found that no harm had come to the recipient as a result of the delay.

LSC has been quite strict in construing the regulatory deadlines which are imposed on recipients, despite its authority to waive deadlines.[46] For example, in *Berkeley Neighborhood Legal Services,*[47] the President of LSC refused to review the presiding officer's decision, because the recipient had allowed more than 10 days to elapse before requesting review (12 days had elapsed). The President of LSC similarly rejected a motion filed by San Juan Legal Services, Inc. in which the grantee requested 45 days within which to submit a memorandum of law concerning a presiding officer's recommended decision to terminate. The President of LSC found that the recipient had had ample opportunities at various earlier stages to brief the issues, and upheld the recommended decision.[48]

[3]—Specific Issues Involved in Legal Services Corporation Appeals

Since 1976, LSC has terminated or denied refunding in approximately 20 instances. In additional 6 instances, LSC threatened defunding actions, but was able to resolve the problems through technical assistance to, and corrective action on the part of, the recipient.[49]

The vast majority of defunding actions occurred in 1976, LSC's first full year of operation, and were based upon determinations

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[46] 45 C.F.R. § 1606.15.

[47] Docket No. 10 (March 9, 1980).

[48] San Juan Legal Services, Inc., Docket No. 8 (April 26, 1979).

The recipient unsuccessfully appealed to Federal district court and currently is appealing the case the First Circuit. San Juan Legal Services, Inc. v. LSC, Civ. No. 79-1134 (D. Puerto Rico 1980).

[49] *Ibid.* Interview with Glomb, N. 39 *supra.*

that the recipients had failed to deliver economical and effective legal services of high quality.[50] In a few other cases, LSC defunded individual programs in order to merge them with other programs, in the interests of administrative efficiency and improved service delivery. Failure to comply with board structure requirements also has resulted in threatened defunding actions on a recurring basis; however, recipients often have been able to correct this type of problem prior to any final adverse action by LSC. Each of these issues has been the subject of at least one formal appeal.[51]

[a]—Economical and Effective, High Quality Legal Assistance.[52] This "catch-all"requirement has served to justify several LSC defunding actions, including those formally appealed. The presiding officers consistently rely on this provision in recommending defunding actions.[53] However, the presiding officers usually rely as well on violations of other, more specific, requirements, such as the recipent's failure to adopt goals and priorities in allocating scarce resources[54] and defects in board structure[55]

On appeal to the Ninth Circuit, Spokane County Legal Services, Inc. argued that it was arbitrary and capricious for LSC to rely solely on this vague standard. The court rejected the argument in the abstract, but remanded the case to the district court for a determination as to whether there was reasonable factual support for the conclusion that the requirement was not met in the Spokane case.

[b]—Publication of Funding Criteria. LSC denied refunding to Hartford Neighborhood Legal Services, Inc. on the ground that

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[50] 45 C.F.R. § 1606.3(c).

[51] It appears from LSC's docket numbers that approximately 10 appeals have been pursued in accordance with the formal procedures. However, after contacting various LSC officials, we were able to obtain documentation (at times incomplete) of only 6 formal appeals.

[52] 45 C.F.R. § 1606.3(c).

[53] See, e.g. Berkeley Neighborhood Legal Services, Docket No. 10 (Mar. 9, 1980); Merced Legal Services Association (Jan. 17, 1979); San Juan Legal Services, Inc. Docket No. 8 (Apr. 26, 1979); Spokane County Legal Services, Inc. (Feb. 9, 1977).

This provision seems to encompass management deficiencies, failures to train attorneys or supervise them as well as inadequate levels of service delivery.

[54] 45 C.F.R. Part 1620; Berkeley, N. 54 *supra;* Merced, N. 54 *supra.*

[55] 45 C.F.R. Part 1607; Berkeley, N. 54 *supra;* Merced, N. 54 *supra.*

it had reduced significantly its level of services to migrants, and thus, was ineligible for continued funding under the particular program in which it formerly had participated. The term "migrant" and the required level of services was dealt with in what LSC characterized as an internal staff directive.

Although neither Hartford nor LSC raised the issue in the course of the appeal, the presiding officer recommended that Hartford be re-funded, because the directive had not been published in the Federal Register. The President of LSC overruled the recommendation, indicating that it was questionnable whether the hearing examiner was authorized to raise the issue *sua sponte*. In any event, the President concluded that refunding should be denied, since Hartford had actual notice of the criteria and publication was not required.[56]

Thereafter, Hartford appealed to Federal district court.[57] The court upheld LSC's decision to defund Hartford, but ordered LSC to publish the directive since it contained "funding criteria."[58] The court did not overturn the Hartford defunding decision because the recipient had actual notice of the underlying criteria and, accordingly, was not harmed by LSC's failure to publish them.

[4]—Outcomes

It appears that there is not even one instance of a completely successful appeal of an LSC defunding decision.[59] In the one case in which the presiding officer recommended refunding, *Hartford*, the President of LSC overruled that recommendation.

This astounding record may be explained partially by the fact that LSC is required to provide recipients with an opportunity to correct deficiencies, at least prior to suspension actions, and presiding officers consistently look for evidence that this requirement has been met. Also, LSC contends that this record of appeals is perfectly understandable, when one considers that defunding and de-

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[56] Hartford Neighborhood Legal Services, Inc., Dockert No. 7 (November 19, 1978).

[57] Hartford Neighborhood Legal Services, Inc. v. LSC, 466 F. Supp. 1148 (D. Conn. 1979).

[58] As previously noted, LSC is not a Federal agency and is not therefore, subject to the Administrative Procedure Act's rulemaking requirements. See Legal Services Corp. v. Ehrlich, 457 F. Supp. 1058, 1066 (D. Md. 1978).

[59] As stated earlier, Spokane was partially refunded.

nial of refunding are LSC's ultimate sanctions and ones which LSC taken very seriously. LSC further explains that:

> "The Corporation essentially has the obligation of insuring that civil legal services are available to eligible clients, and that such services are provided in the most economical and effective manner. 42 U.S.C. Sections 2996b(a), 2996f(a)(3). The Corporation has established a comprehensive system to monitor program performance and to identify the need for and to provide technical assistance. It is only after efforts to assist a program have failed and the program has demonstrated that it is unwilling or unable to comply with the Act and regulations or to provide high quality and effective legal services that a grant action is commenced. In most case, the record to support defunding is established simply by program's lack of response."[60]

In addition, LSC's appeals procedures encompass several levels of review. LSC, therefore, has several opportunities to reconsider its position and to settle the matter prior to the formal hearing stage if it believes a negotiated settlement is more desirable. A recent settlement agreement between LSC and Bayou LaFourche Legal Services, Inc. lends credence to this explanation of adverse formal appeal outcomes. The preliminary determination to deny refunding was rendered in November 1980. LSC agreed to fund the project until May 1981 in exchange for Bayou's promise to forego any legal rights to a hearing under the provisions described herein.[61]

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[60] Letter from Micheal Glomb, Assistant General Counsel, LSC, March 10, 1982.

[61] 45 C.F.R. Part 1606 and § 1011 of the LSC Act of 1974 (42 U.S.C. 2996j), as amended.

Glomb interview, N. 39 *supra.*

§ 54.14 National Endowments on the Arts and the Humanities

The National Foundation on the Arts and Humanities was established as an independent agency under the National Foundation on the Arts and Humanities Act of 1965.[1] The Foundation is comprised of the National Endowment for the Arts, the National Endowment for the Humanities, and the Federal Council on the Arts and the Humanities. Each Endowment also has its own Council which advises the Chairman on policies and procedures, and reviews and makes recommendations concerning applications for financial support.

[1]—National Endowment for the Arts

[a]—Grant Programs Administered by the Endowment. The National Endowment for the Arts awards and administers three types of grants: (1) block grants to State governments for the support and development of projects and productions in the arts;[2] (2) project grants to groups or individuals of "exceptional talent" engaged in or concerned with the arts, for the support of particular types of projects and productions;[3] and (3) project grants to public agencies and private non-profit organizations for providing continuing support, administrative and management capabilities, and increased cooperation, audience participation, and citizen involvement in Arts programs serving a community.[4]

[b]—Post-Award Disputes. Under the National Foundation on the Arts and Humanities Act, the Chairman of the National Endowment for the Arts is required to take corrective action whenever he finds that:

(1) a group is not complying substantially with the provisions of this section [i.e. grant requirements];

(2) a State agency is not complying substantially with the terms and conditions of its State plan approved under this section; or

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[1] 20 U.S.C. § 951 *et. seq.*

[2] 20 U.S.C. § 954(g)(1).

[3] *Id.* at § 954(c).

[4] *Id.* at § 954(l)(1).

(3) any funds granted to a group or State agency under this section have been diverted from the purposes for which they were allotted or paid.[5]

Such action, however, may be taken only "after reasonable notice and opportunity for hearing."[6]

At least during the past eight years, there has not been a single case in which the notice and hearing procedures mandated by the Act have been employed.[7] Nor has the Endowment implemented the Act's procedures by regulation.

Nonetheless, the Endowment reports that it has withheld funds from grantees in few cases (four or five a year) where the grantee has demonstrated poor fiscal or administrative management. These withdrawals either were not appealed, or were resolved informally.

[c]—Pre-Award Disputes

[*i*]—*Block Grants.* There are no formal procedures for pre-award disputes arising under the National Endowment's block grant program. Resolution of such disputes lies solely with informal processes of consultation and negotiation.

There have been at least three cases in which a block grant applicant has challenged a determination that its grant application was inadequate.[8] In each case, the applicant consulted with the Endowment, revised and resubmitted its grant application, and received subsequent approval and funding.[9]

[*ii*]—*Other Grants*

[*A*]—*The Process.* Until recently, the Endowment also had no formal procedures with respect to pre-award disputes arising from project grants. All requests for reconsideration of grant applications, and requests for reconsideration of funding recommendations made by peer review panels, were handled informally.

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[5] *Id.* at § 954[h].

[6] *Ibid.*

[7] Interview with Susan Liberman, Assistant to the General Counsel of the National Endowment for the Arts, April 28, 1981 (Washington, D.C.).

[8] *Ibid.*

[9] Interview with Anthony Turney, Director for State Programs, National Endowment for the Arts, April 28, 1981 (Washington, D.C.).

On May 7, 1980, the situation changed: The Endowment adopted a grant appeals procedure (Circular No. 1) which provided for reconsideration of rejected discretionary grant applications.[10] The procedure is patterned upon the National Science Foundation's appeals procedure. The stated purpose of the procedure is to guarantee "uniformity and fairness in the review of funding recommendations."[11] The policy underlying the procedure is expressed as follows:

> "Award of Endowment financial assistance is discretionary. Nonetheless a Project Director or Authorizing Official whose application has been declined may obtain an explanation of the declination from the responsible Project Director. If the Project Director or Authorizing Official is dissatisfied with this explanation and believes the application was handled unfairly or evaluated unreasonably, reconsideration of the declination may be obtained from the Deputy Chairman for Programs, who will consult with the Chairman prior to making a final determination.
>
> Reconsideration is not an adversary procedure and no formal hearing is provided. Also, the Endowment cannot assure applicants that reconsideration will result in the making of a grant award even if a discrepancy is established in connection with the initial evaluation."[12]

The reconsideration procedures are relatively uncomplicated. As indicated above, there are two stages of review: (1) explanation by the Program Director; and (2) reconsideration by the Deputy Chairman for Programs. Details regarding each of these stages are discussed below.

Stage 1. The applicant may request (by letter, telephone, or in person) an explanation of the funding action from the Program Director responsible for reviewing the grant application. The Program Director must provide such an explanation and, if requested, must furnish to the applicant the substance of the comments of the peer review panel. The Program Director must give the applicant an op-

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[10] 45 Fed. Sec. 30195.

[11] *Ibid.*

[12] *Ibid.*

portunity to present its arguments and then must take appropriate action.

No revisions to an application made after the declination of a grant award or grant funding may be considered in connection with reconsideration. However, a substantially revised application may be submitted as an entirely new application.

Stage 2. If dissatisfied with the Program Director's explanation, the applicant may request reconsideration of the matter by the Endowment's Deputy Chairman for Programs. The request must be in writing and ordinarily must be submitted to the Deputy Chairman within 30 days of the applicant's receipt of the Program Director's explanation. The request must state why the declination was unwarranted.

The Deputy Chairman for Programs, in consultation with the Chairman of the Endowment, must review the request in light of all relevant material. The focus of the review is: "[T]o determine whether the application was handled fairly and evaluated in a reasonable manner."[13] The Deputy Chairman may request additional information from the applicant, and may obtain additional peer reviews. The Deputy Chairman may conduct the reconsideration personally, or may designate another Endowment official who had no part in the initial evaluation to do so.

The Deputy Chairman for Programs must provide the applicant with a written summary of the results of the reconsideration within 30 days of receipt of the request, or must explain in writing why more time is needed, with an indication of when the results can be expected. If, after reconsideration, the declination is affirmed, that determination represents final agency action.

The Deputy Chairman may conduct preaward audits or surveys of an applicant organization as part of the reconsideration process. Finally, the Deputy Chairman must maintain a record of all requests for reconsideration, including the date of receipt, the name of the applicant organization, the application number, the date reconsideration results were furnished to the applicant, and the nature of the results.

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[13] 45 Fed. Reg. 30196.

[*B*]—*The Cases.* As of December 31, 1980, eleven (11) requests for reconsideration of applications had been filed with the Endowment for the Arts. The appeals were brought for various reasons. Three of the 11 appeals concerned funding at lower levels than requested; other appeals involved rejected grant applications. With respect to the former class of appeals, the Deputy Chairman indicated that the reduced levels of funding were the result of limited appropriations and did not represent a criticism of the applicants.

In every case, the Deputy Chairman for Programs denied the appeal, finding that there were no flaws in the peer review process. The standard of review applied in the cases was whether "violations of due process" occurred.

[2]—National Endowment for the Humanities

[a]—Grant Programs Administered by the Endowment. The National Endowment for the Humanities administers a variety of grant programs. With the advice of the National Council on the Humanities, the Chairman of the Endowment is authorized to award: (1) block grants to States to support and to develop programs in the humanities;[14] (2) grants to individuals or groups to support programs designed to strengthen this Nation's research and teaching potential in the humanities;[15] (3) grants to institutions or individuals for training and workshops in the humanities;[16] (4) grants to groups to foster education in, and public understanding and appreciation of, the humanities;[17] and (5) grants to public agencies and private nonprofit organizations for the purpose of enabling cultural organizations and institutions to increase their levels of support and audience and community participation, and to improve program management.[18]

[b]—Post-Award Disputes. The Endowment for the Humanities is subject to a statutory mandate which is identical to that imposed on the Endowment for the Arts, i.e., notice and hearing rights must be provided to a grantee prior to any suspension of

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[14] 20 U.S.C. § 956(f)(1).

[15] *Id.* at § 956(c)(2).

[16] *Id.* at § 956(c)(3).

[17] *Id.* at § 956(c)(5).

[18] *Id.* at § 956 (h)(1).

funds based on a finding of substantial noncompliance.[19] These procedures have never been used.[20] According to the General Counsel of the Endowment, because of the short-term nature of the Endowment's grants, compliance questions generally arise only when a project is being considered for renewal. As a result, the Endowment has not suspended any grantee or required a formal dispute procedure.

[c]—Pre-Award Disputes. The Endowment for the Humanities has not published a procedure with respect to requests for reconsideration of rejected grant applications. However, according to the General Counsel of the Endowment, upon request, the Endowment would follow a procedure substantially similar to that of the Endowment for the Arts.

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[19] *Id.* at § 956(f)7.

[20] Interview with Joseph Sherman, General Counsel of the Endowment for the Humanities, April 28, 1981, (Washington, D.C.).

§ 54.15 National Science Foundation

[1]—Introduction

The National Science Foundation (NSF) is an independent Federal agency which was established in 1950[1] to promote scientific progress in the United States NSF consists of the National Science Board (with 24 members), a Director and Deputy Director. Reporting to the Director are several staff offices, the Directorate for Administration (including a Division of Grants and Contracts), and 6 scientific/technological directorates.

To fulfill its mission, NSF administers eleven major assistance programs[2] (within which there are more than 100 sub-programs) with an annual appropriation of approximately $850 million. Assistance is awarded, typically in the form of grants, to support basic and applied scientific research, education, and information exchange in all scientific disciplines. For the most part, recipients of NSF grants are academic institutions and nonprofit organizations. Grants also are awarded to commercial firms, State and local governments and unaffiliated scientists.

NSF is almost unique among Federal grantor agencies in that it has developed procedures to resolve certain pre-award disputes, but has not adopted uniform appeal procedures for all post-award disputes.[3] In most agencies, the opposite is true.

[2]—Pre-Award Disputes

NSF officials estimate that the Foundation annually receives 25,000 proposals, of which roughly one-half (13,000) are approved for funding.[4] Accordingly, there is a potential for appeals of declinations (decisions to reject proposals) by one out of every two applicants. Given the breadth of scope of NSF's mission and the enormous variety of supportable projects, NSF may be susceptible

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[1] National Science Foundation Act of 1950, 42 U.S.C. §§ 1861–1865, as amended.

[2] See Federal Catalog of Domestic Assistance, § 47.001 *et seq.*

[3] The National Foundation on the Arts and Humanities appears to be the only other Federal grantmaking agency in this category.

[4] Interviews with Frank Naughten and William Cole, Division of Grants and Contracts, NSF, June 1980 and March 5, 1982.

to claims of arbitrary treatment in judging the scientific merit of one proposal vis-a-vis another.

NSF has tackled this problem by: (1) developing elaborate systems for generating and evaluating proposals; and (2) adopting a procedure which affords disappointed applicants at least two opportunities to obtain reconsideration of rejected proposals. These systems and procedures are discussed below.

[a]—Generating and Evaluating Proposals. NSF generates grant proposals through two basic mechanisms: program announcements and program solicitations. As described in Section 202 of the NSF Grants Policy Manual, program announcements include brochures, announcements, guidelines, published program plans and so forth. They are the primary vehicle for generating proposals. The announcements may cover an entire program or a single program element. They do not identify specific projects or due dates and are generally open-ended. Proposals generated by these announcements are considered unsolicited. They are reviewed in accordance with general evaluation criteria and compete with each other only in a general manner.

A program solicitation is used to generate proposals in targeted areas. The solicitation is more definitive than an announcement, generally describing particular projects for which proposals are sought and specifying due dates. Evaluation criteria are more specific and competition more focused. The solicitation usually applies for a limited period of time.

NSF officials evaluate all proposals (solicited and unsolicited) with the advice of scientists and others who are specialists in fields relevant to the proposal. These specialists are known as peer reviewers. Guidelines for selecting outside peer reviewers are set forth in an internal NSF Circular 132 ("Peer Review and Guidelines for the Selection of Projects"), and a list of reviewers is published annually.

Two basic models of peer review are used. The first model is "mail" review. Under this model, the appropriate NSF program director selects two to nine members of the scientific community with expertise relevant to the proposal, sends them the proposal and requests their judgment of the project's merit. The reviewers make specific comments or suggestions and give the proposal an

overall grade from poor to excellent. In selecting reviewers, the program director is required to strive for balanced viewpoints and to be conscious of potential scientific and personal biases. NSF may not select any reviewer who appears to have a conflict of interest.[5] The final responsibility for evaluating proposals always rests with the responsible NSF program director.

The second model of peer review relies on panel review. NSF selects individuals to serve on panels which convene two or three times a year to discuss all proposals received since the last meeting. In order to achieve a reasonable balance of viewpoints on the panels, NSF considers: individual qualifications, balance of specialty interests, user or "concerned public" representation, geographic distribution, institutional representation, minority and female representation and age distribution. As is the case with mail review, the panels produce recommendations; NSF program directors render the final decision.[6]

Generally, proposals are approved and funded in order of merit within subareas of science. Where proposals are of substantially equal merit, geographic distribution and general subject matter coverage of grants made in a program also are considered. "Merit"-related evaluation criteria, set forth in Secton 232 of the Grants Policy Manual, relate generally to competent performance of research, intrinsic scientific merit, utility or relevance, and long-term scientific potential.

As indicated above, once peer review is completed, the responsible NSF program officer makes the decision as to which proposals will be funded. The decision to decline or fund a proposal must be accompanied by a brief summary of the reasons for the action taken.

[b]—Reconsideration of Proposals Declined by NSF. January 27, 1976, NSF issued Important Notice No. 61 which established a uniform procedure for handling requests for reconsideration of re-

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[5] Reviewers also are asked to disqualify themselves if they see a potential for bias.

[6] The peer review system used by NSF has been scrutinized by GAO and the National Academy of Sciences. They found no support for charges of "cronyism" in selection of reviewers and bias in favor of funding proposals from larger universities (versus small institutions). Wide variations in the judgment of reviewers have been noted, but recommendations for improvement in the system are lacking.

jected proposals. This procedure, slightly modified since 1976,[7] is described in Section 235 of the *Grants Policy Manual.*

When a rejected applicant has reason to believe that the proposal did not receive a "fair and impartial initial evaluation," the procedures afford the applicant (through its principal investigator) an opportunity to obtain: (1) an explanation from the appropriate Program Director; (2) reconsideration by the Assistant Director of the appropriate Directorate; and (3) further reconsideration by the Deputy Director of NSF.[8] This process is also available to applicants whose proposals are returned because they are considered "inappropriate" for NSF funding.

NSF procedures specifically state that reconsideration is not an adversary process and that a formal review hearing will not be provided. Furthermore, NSF statements make clear that, even if error is established in connection with the initial evaluation, reconsideration will not necessarily result in the award of a grant. The various stages of review are discused below.

[*i*]—*Explanation by Program Director.* The principal investigator (PI) of an applicant institution may, by letter, telephone or in person, request an explanation of the reasons for the declination or return of the proposal. In addition, the PI may request verbatim copies of any peer review comments. The responsible Program Director must furnish the explanation and, if requested, the peer reviews (with names and others identifying data deleted). The PI must be given the opportunity to present his views, but may not revise the underlying proposal.[9] The Program Director then may take any further appropriate action, including the possible award of a grant.

[*ii*]—*Reconsideration by the Assistant Director.* If dissatisfied with the Program Director's action, the PI may make a written re-

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[7] Important Notice No. 61 was superseded by Important Notice No. 84, August 8, 1980.

[8] However, if the proposal was reviewed by the National Science Board, the rejected applicant is only entitled, upon request, to an explanation. Reconsideration is not offered. Proposals that involve $500,000 or more in any one year, involve a total commitment of $2 million or involve significant policy issues are reviewed by the National Science Board. See 42 U.S.C. § 1864(e).

[9] A substantially revised proposal, however, may be submitted as a new proposal.

quest for reconsideration by the Assistant Director of the responsible NSF Directorate. The request generally will be considered only if the PI first sought and obtained an explanation from the Program Director and if the request is made within 180 days of the declination or return of the proposal.

The Assistant Director reviews the request and the administrative record to determine whether the proposal was "fairly handled and reasonably evaluated." The Assistant Director may request additional information from the PI and/or additional peer reviews. The Assistant Director may review the matter personally or may designate another NSF official who had no part in the initial evaluation to do so.

The results of the reconsideration must be provided in writing to the PI within 30 days unless a written explanation of the need for more time is offered along with an expected decision date. If the Program Director's decision is upheld, the PI must be advised of the applicant institution's right to obtain further reconsideraton by the Deputy Director of NSF.

[*iii*]—*Further Reconsideration by the Deputy Director.* Within 180 days after the reconsideration decision, a request for further reconsideration may be made, but only by the applicant institution.[10] The request must be in writing, signed both by the chief executive officer of the institution and the PI. An explanation must be provided as to why the institution believes an error may have occurred in the initial evaluation or determination that a proposal was inappropriate for NSF funding, and why it is dissatisfied with the Assistant Director's reconsideration decision.

In further considering these matters, the Deputy Director has exactly the same scope of authority as the Assistant Director, i.e. he may review the request and administrative record to determine whether a proposal was "fairly handled and reasonably evaluated." The decision of the Deputy Director is the final agency decision.

In fiscal year 1981, NSF received 62 requests for reconsideration. Only two applicants succeeded in getting the declinations reversed

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[10] NSF is attempting to limit high level review to cases in which the applicant institution as a whole, not just the PI, registers dissatisfaction with the decision. Interview with Cole, N. 4 *supra.* Obviously, where the applicant is an unaffiliated individual, this requirement is inapplicable.

by the responsible Assistant Director. Six requests for reconsideration reached the Deputy Director; none resulted in reversal of the declinations.[11]

[3]—Post-Award Disputes

[a]—Suspension and Termination. Sections 660 through 665 of the Grants Policy Manual contain procedures for handling a grantee's request for review of suspension and termination orders. Before terminating a project for cause, NSF must issue a notice of intent to suspend or terminate. The grantee has 30 days to respond in writing, describing corrective action which has or will be taken. If no response is submitted or if NSF finds the response unsatisfactory, the grant may be suspended for a maximum of 90 days. If the deficiency remains uncorrected, the grants officer may issue a notice of termination containing a statement of reasons therefor.

A request for review of a termination notice may be made to the Assistant Director for Administration and must be made within 30 days after the date of the notice (*not* date of receipt). The request for review must contain a full statement of the grantee's position, along with pertinent facts and reasons. Pending resolution of the request, the notice of termination is stayed except that NSF may continue to withhold or defer payments under the grant.

The Assistant Director is required to appoint "promptly" a termination review committee of at least three persons. No committee member may be from the NSF program responsible for monitoring scientific aspects of the project, or from the responsible branch of the Division of Grants and Contracts.

Relevant documentation is furnished to the Committee by the grants officer. The Committee may, at its discretion, hold an informal conference with the parties. The Committee must prepare recommendations based on its review to the Assistant Director for Administration, who makes the final decision.

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[11] Interview with William Cole, N. 4 *supra.* NSF does not keep a central file to track reconsideration requests. While agency officials in the central office were aware of the requests, they were unable to provide any further breakdown of the nature of the requests or issues involved.

Since NSF has rarely terminated a grantee, it comes as no surprise that this procedure never has been invoked.[12] NSF officials could remember only one termination in the past three years; in that case, there were allegations of fraud. The matter was settled by transfer of the project to a new grantee. No appeal was filed.

[b]—Cost Disallowances and Indirect Cost Problems. The termination review committee procedure has been adapted for use on an *ad hoc* basis to handle a few disputes which have arisen in connection with cost disallowances and indirect cost problems. Although the availability of this procedure to handle such disputes is nowhere described in the Grant Policy Manual or other NSF publications, NSF officials state that they "try" to advise grantees orally or in the disallowance letter that review by the Director may be requested.[13]

In one case, an ad hoc committee was established to review the appeal of questioned costs for equipment which had not been specifically approved by NSF. The appeal was triggered by a letter from the grantee to the Director of NSF, who delegated responsibility for selecting a committee to the Assistant Director for Administration. The Committee consisted of the Assistant General Counsel, Audit Manager and the Director of the Division of Grants and Contracts.

The Committee requested the grantee to furnish additional documentation of the equipment purchases. A small portion of the disallowance was reversed upon findings that one questioned item of equipment had been purchased early on in the grant period and would have been approved. The rest of the disallowance, attributable to equipment purchased at the end of the grant period (found not to be necessary to the project), was upheld.

In another case, although the grantee vehemently opposed the cost disallowances and repeatedly requested an opportunity to appeal (in letters to the grants officer and the Director of the Office of Audit and Oversight), the committee review process was not of-

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[12] One explanation for the lack of termination actions is the statement of NSF officials that where problems arise, NSF generally allows current grants to run their course and simply denies refunding or future funding. Interview with Jerry Fregeau, Director, Office of Audit and Oversight, June 1980; interview with William Cole, N. 4 *supra.*

[13] Interview with Wiliam Cole, N. 4 *supra.*

fered. Rather, the grantee was advised that NSF has no audit resolution appeal process but was told that another audit could be requested or the grantee could submit additional documentation.[14]

One grantee tried to appeal NSF's ceiling on indirect costs, claiming that its total budget could absorb most of the excess administrative costs. NSF refused to permit an appeal, stating that the grantee had agreed to this ceiling when it accepted the grant. Thus, no unanticipated hardship could be found.

[4]—Observations

NSF officials appeared very comfortable with the absence of any uniform rule for post-award grant appeals. NSF officials offered several reasons for their position.[15] First, they pointed out that very few post-award disputes arise, and those that do typically are resolved through negotiation between the grantee, NSF program officials and the NSF grant officer. Such negotiation, according to NSF, generally is enhanced by the long-standing partnership relationship that NSF has with most of its grantees and the smallness of the NSF grantee community. Second, NSF officials expressed concern that implementation of formal procedures would jeopardize the partnership between NSF and its grantees, with the probable result that claims would be submitted that previously never would have been pressed. They added that the increase in claims would produce a workload that NSF is not geared to handle.

The small number of disputes cited by the officials may be caused, in large part, by the fact that NSF itself does not generally conduct audits of its grantees.[16] Most of its grantees receive funds from, and are audited by, other agencies, such as the Department of Health and Human Services (specifically, the National Institutes of Health) and the Department of Education. HHS is the cognizant agency for most NSF grantees and conducts audits of all of these

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[14] In one of its letters, the grantee registered disappointment at the absence of an appeals process, "particularly since we have always had a cordial working relationship with the NSF . . . we would hope that some appeal and review process could be devised for any future disagreements."

[15] Interview with Frank Naughten and William Cole, N. 4 *supra* and interview with Jesse Lasken, Assistant General Counsel, June 1980.

[16] In other agencies, audits frequently give rise to the greatest number of post-award disputes. See, e.g., chapters on the Department of Health and Human Services and the Department of Labor.

grantees' federally-funded activities. Unless the auditors question costs specifically with respect to the NSF grant, NSF takes no part in making disallowances and, thereafter, in resolving related disputes.

This lack of disputes, however, seems to beg the issue of the lack of uniform procedures. In one of the cases discussed above, a grantee obtained review by an independent party; in another case, a grantee was denied such review. Even though there were only two cases, the question seems to remain: Should grantees in similar situations be treated similarly?

And, regardless of the answer to that question, should grantees and other interested parties be advised on an equal basis of whatever appeal procedures do exist? Unlike most Federal grantor agencies, NSF has not waived the exemption from rulemaking requirements afforded to grant programs under the Administrative Procedure Act. Publication of important policies in the Federal Register with opportunities for notice and comment is thought to be unnecessary because the community with which NSF deals is highly concentrated (mostly academic institutions) and limited in number. Instead, these policies are issued in NSF's Grants Policy Manual (Rev. 1981) and a series of communiques known as Important Notices. The *Manual* and Notices are mailed directly to recipients at the time an NSF grant is awarded, as well as to persons who make a specific request for them. The *Manual* also is published by the Government Printing Office and made available to subscribers.

Notwithstanding this wide circulation, some interested parties may not be apprised of NSF procedures. Rejected applicants which previously have received NSF grants would have a copy of the Manual and therefore be aware of their rights to request reconsideration. However, new applicants whose proposals have not yet been recommended for an award by NSF would not have a copy of the Manual unless they had specifically requested it. NSF does, however, summarize the reconsideration process and specifically cites the relevant Important Notice and Manual procedures in its brochure, Grants for Scientific Research. This brochure is the basic guidance for prospective applicants, is widely distributed and made available, and is used by applicants in preparing and submitting

proposals to NSF. NSF declination letters themselves do not uniformly remind applicants of the availability of reconsideration.[17] In addition, as stated earlier, grantees are not, as a routine matter, advised in cost disallowance letters or elsewhere that they may request review of disallowances by an *ad hoc* committee within NSF.

This lack of uniform procedures—and uniform notice—is of concern.

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[17] Interview with Dr. Jerry Fregeau, Director, Office of Audit and Oversight, March 16, 1982, Washington, D.C.

§ 54.16 Public Health Service

[1]—Introduction

The Public Health Service (PHS) is an agency within the Department of Health and Human Services (HHS), which consists of the Office of the Assistant Secretary for Health and 6 major components: (1) the Health Services Administration; (2) the Health Resources Administration; (3) the Alcohol, Drug Abuse, and Mental Health Administration; (4) Center for Disease Control; (5) the National Institutes of Health; and (6) the Food and Drug Administration. These components administer hundreds of grant programs which support health research and the delivery of health services.

A variety of post-award disputes arising out of the administration of PHS grants are appealable both through an informal PHS grant appeals process and to the HHS Departmental Grant Appeals Board.[1] However, any pre-award disputes arising from PHS grantmaking generally may not be appealed administratively.[2] This section of this chapter describes how PHS approaches and handles such pre-award disputes.

[2]—Precautions Taken By PHS to Avoid Pre-Award Disputes

PHS officials estimate that they annually receive approximately 80,000 grant applications, of which approximately 40,000 are approved for funding.[3] Simple subtraction shows the potential each

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[1] See 42 C.F.R. Part 50, Subpart D, and 45 C.F.R. Part 16.

[2] There is one recent exception to this lack of pre-award appeals. In regulations published on August 31, 1981, the Departmental Grant Appeals Board asserted jurisdiction over appeals from denials of continuation grant applications, a form of application common at PHS. For discussion of this provision, see text at Ns. 18-19 *infra.*

[3] In addition, PHS receives roughly 20,000 requests to extend budgets and requests for administrative supplements. The majority of awards are of the noncompeting continuation variety, with competing extensions and new awards following in volume. Interview with Theodore Roumel, Chief, Grants Management Branch, PHS, January 21, 1981, Washington, D.C. and memorandum from the Director, Division of Grants and Contracts, PHS, to the Administrative Conference, dated March 17, 1982.

year for 40,000 appeals of denials of funding, and additional thousands of appeals of reductions in funding.[4]

Needless to say, PHS is concerned about the possibility of large numbers of pre-award grant disputes, whether they take the form of formal appeals or informal disgruntlement. Accordingly, the agency has done a great deal to establish fair and objective application review procedures, and to advise applicants and potential applicants of their rights. These efforts are described below.

[a]—General Information at Pre-Application Stage. Anyone who shows general interest in applying for a PHS grant is sent a booklet entitled *PHS Financial Assistance Process* (April 1, 1980). This booklet describes in very basic terms where to find sources of financial assistance, who is eligible to apply for PHS grants, how to apply, how applications are reviewed, what actions PHS may take on an application and how PHS notifies the applicant of such action. The booklet also describes general rights and responsibilities under PHS grants, and lists the specific circumstances in which a recipient may appeal a post-award adverse decision. Thus, the first piece of information which a potential applicant receives from PHS states that *recipients* have appeal rights, and implies that *applicants* do not.

[b]—Specific Policies and Procedures: The Grants Administration Manual. In its *Grants Administration Manual,* PHS has issued several detailed policies dealing with dissemination of information to potential grant applicants, objective review of grant applications, and notification to unsuccessful applicants. These policies attempt to ensure that applicants are fully informed of how their applications will be evaluated, thereby enhancing the agency's chances of avoiding misunderstandings.

[*i*]—*The Dissemination of Information.* PHS Chapter 1-55 of the *Grants Administration Manual* pertains to the dissemination of information to potential applicants for discretionary grants. Pursuant to this chapter, PHS staff is required to maximize competition for grant assistance by furnishing sufficient and timely information about each grant program to interested parties and by inviting public participation in the development of program regula-

[4] The likelihood of such reduction, of course, rises significantly in periods of funding cut-backs such as the present.

tions. Data which must be developed and/or disseminated includes: (1) the program statute; (2) implementing regulations; (3) generally applicable guidelines; (4) other statements of funding priorities and criteria;[5] (5) a statement regarding availability of funds; (6) program announcements; and (7) a description of application review procedures.

PHS staff must keep all such information up-to-date, and must publish notices of availability of funds at least annually. The information must be distributed sufficiently in advance of application deadlines to give interested parties adequate time to decide whether or not to apply. The information must be detailed enough to minimize the need for further consultation between PHS staff and potential applicants. PHS employees are not permitted to provide any information concerning priorities, criteria or other relevant matters to a particular party unless the information is available generally to all requestors. Finally, technical assistance in application preparation must be provided to all interested parties requesting such assistance.

[*ii*]—*The Review Process.* PHS Chapter 1-507 of the *Grants Administration Manual* contains policies ensuring objective review of all PHS discretionary grant applications. "Objective review" is defined in the *Manual* to mean:

> "[T]horough and consistent examination of all applicable applications by persons knowledgeable in the field of endeavor for which support is requested in order to provide advice to awarding officials based on an evaluation of the scientific or technical merit or other relevant aspects of the proposal."

PHS agency heads or regional health administrators are responsible for establishing a formal system of objective review for each grant program. The review system must describe the relationship between a review committee or individuals and the official with final awarding authority. At a minimum, the system must state the conditions under which the awarding official may make an award notwithstanding adverse recommendations from the reviewers. Regional offices and the central PHS office must coordinate develop-

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[5] PHS Chapter 1-57 of the *Grants Administration Manual* requires the development of certain minimum criteria.

ment of these review systems to ensure consistency among the regions.

PHS policy states further that formally constituted review committees should be used in each program's review system, and describes the various types of committees which may be used depending on the type and size of the program. Possible types of committees include standing committees, ad hoc committees, field readers, etc. PHS policy also makes clear that persons with a potential bias or interest in the outcome of any grant application review be excluded from such review.

Each review system must provide for the collection and maintenance of full documentation on the selection and appointment of reviewers, the results of the review, and the awarding official's final decision. Deviations from established review systems for particular grant applications may be made only with the prior approval of the appropriate agency head or regional health administrator.

PHS officials believe that PHS has the most objective review process in the Federal Government.[6] Nonetheless, PHS' Office of Grants Management and six component agencies currently are reviewing all of the regional and headquarters' review systems to ensure their objectivity and effectiveness.[7]

[*iii*]—*The Ranking, Approval, and Funding of Applications and Notification to Applicants.* PHS Chapter 1-64 of the *Grants Administration Manual* establishes policies applicable to ranking, approval and funding of grant applications and notice to unsuccessful applicants. Once objective review is completed, the review committee(s) must consider all applications accepted for review, and rate each application in accordance with preannounced criteria. Thereafter, a designated program official must assign a numerical score based on relative merit to each application recommended for approval by the committee(s), and prepare a single ranking of all similar kinds of applications. The ranking must be sent to the chief program official who then must indicate which applications are to be approved, and must send the full list to the Grants Management Office for comment. The program head must give written reasons

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[6] Roumel interview, N. 3 *supra.*

[7] *Ibid.*

in support of the approval or disapproval of each application. This rationale must be maintained in special PHS files.

Individual, personalized written notice must be sent to each unsuccessful applicant within 30 days of the agency's decision. The notice must contain a full explanation of the reasons why the applicant was not approved or funded. If appropriate, constructive advice should be provided as to how the application may be improved. However, the applicant should be advised further that any amended application would be reviewed under the same objective review procedures that had been followed previously.

Although not required to do so by the PHS *Manual,* PHS generally invites unsuccessful applicants to meet with program officials to obtain a detailed explanation of the agency's reasons for disapproving their grant applications.[8] This invitation is extended in the hope of helping the applicant to correct deficiencies and to improve the applicant's chances upon reapplication.[9]

[*iv*]—*Additional Policies.* In addition to the general policies described above, PHS has issued policies specifically regarding the denial of continuation grant applications. PHS Chapter 1-85 of the *Grants Administration Manual* states that the agency is committed to fund the recipient for each year during the project period, subject to the availability of funds, satisfactory progress by the grantee, and a determination that continued funding is in the best interests of the Government. It must be noted, however, that the United States Court of Claims recently held that this provision did not result in a grantee's "entitlement" to continued funding.[10]

Individual PHS programs also have established highly specialized performance criteria by which to evaluate a grantee's perfor-

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[8] Roumel interview, N. 3 *supra.*

[9] *Ibid.* PHS officials state that, since they offer to discuss with applicants the reasons why their application did not receive a high priority score or was not otherwise recommended for funding, it would serve no purpose to permit appeals. They suggest that an appeals board could, at most, require the agency to re-review the proposal; however, applicants already have this recourse through meetings with staff.

[10] Missouri Health and Medical Organization, Inc. v. The United States, 641 F.2d 870 (Ct. Cl. 1981).

mance.[11] These criteria lessen the appearance of subjective decisionmaking, particularly with respect to the evaluation of applications for continuation grants.

[3]—The Nature of Pre-Award Disputes Which Have Arisen at PHS

Notwithstanding the precautions discussed above, there have been some pre-award grant disputes which have surfaced at PHS. Although the number of such disputes is small, they cover a broad range of issues.[12]

For example, NIH applicants have argued, sometimes successfully, that the wrong committee was selected to review their grant applications.[13] As a result, some applicants have obtained a second review by a review committee considered to be better qualified than the first.[14]

Other disputes have arisen regarding the eligibility of an organization to apply for grant funds. For example, under Title X of the Public Health Service Act, family planning grants may be awarded only to applicants which will offer a "broad range" of alternative family planning methods. In one case, Catholic organizations which only provided information concerning natural family planning methods were denied grants on the ground that they were not eligible "broad range" providers. The organizations applied for agency reconsideration. Since the question was essentially one of legal interpretation of the statutory requirement, the Public Health Division of the Office of General Counsel (OGC) was asked to render an opinion. OGC advised the agency that entities, such as the

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[11] For example, the Bureau of Community Health Services of the Health Services Administration has developed Bureau of Common Reporting Requirements (BCRR) which elicits from grantees certain information concerning productivity, as well as fiscal and managerial performance. The Bureau has developed certain minimum standards of performance as a result of analyzing the BCRR.

[12] PHS has provided only rough estimates of the number of pre-award disputes brought over the past fiscal year through a sample survey of five of the ten regional offices. There is no formal PHS system of recording instances in which appeals were requested but denied.

[13] Roumel interview, N. 3 *supra.*

[14] *Ibid.*

applicant, which offered only a single family planning method were ineligible for funding.[15]

Some PHS pre-award disputes have been reviewed by the courts. In one case, plaintiff argued that the denial of a grant application was due to the facts that plaintiff (a woman) would have been project director (sex discrimination), that she participated in feminist political activities, and that she provided testimony to the United States Senate regarding conflicts of interest of PHS reviewers. Accordingly, plaintiff claimed that her Constitutional (First Amendment) rights had been violated by the denial of the grant application. Because all requests for reconsideration had been denied by PHS, the plaintiff challenged the denial in court.[16]

The district court held that plaintiff lacked standing to contest denial of the grant application, because she was the designated project director, not the grant applicant itself. (The grant applicant was the medical center for which plaintiff worked.) Accordingly, the district court dismissed the case.

The court of appeals reversed the district court, and held that plaintiff was entitled to have the court review the merits of her constitutional arguments. However, in reaching this decision, the court of appeals went on to state that the medical merits of PHS decisions with respect to training grant applications might be committed to unreviewable agency discretion. This *caveat* was based on a case in which the Veterans Administration's denial of a research grant application was challenged.[17]

In *Kletschka,* the court noted the burden that review of the mass of technical data would place on a court in order for it to decide that one grant application was so superior that it was an abuse of agency discretion to reject it in favor of others. The court also noted the impracticability of reviewing the agency's judgment of the personal competence of applicants. Accordingly, the court refused to review the agency's decision.[18]

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[15] Interview with Joel Mangel, Acting Assistant General Counsel, Public Health Division, July 1980, Washington, D.C.

[16] Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975).

[17] Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969).

[18] Relying on *Kletschka,* the court in *Apter* also stated that review of agency

Another type of dispute which has surfaced occasionally has been challenges to the significant reduction of a grant from one year to the next. One grantee, Action for Boston Community Development, was unsuccessful in its attempts to force reversal of such a reduction through a lawsuit.[19]

Several PHS recipients have tried to appeal the denial of their continuation grant applications.[20] The PHS informal appeals committee and the Departmental Grant Appeals Board consistently have held that they lack jurisdiction to review such appeals.[21]

In one case,[22] the grantee/applicant successfully challenged the

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grant decisions would place a heavy burden of litigation and delay upon the agency and its grantees. 510 F.2d at 355, n. 6.

[19] Action for Boston Community Development, Inc. v. Montminy *et al.*, C.A. No. 79–600–F (D. Mass. 1979).

The bringing of this lawsuit ironically served to highlight another implication of PHS's lack of administrative procedures for pre-award grant disputes. Under the cost principles governing ABCD's Federal grants, grant funds may be used for the payment of reasonable attorneys' fees, but may not be used for the "prosecution of claims against the Government." (These cost principles were identical to those imposed by virtually all Federal grantor agencies and the uniform cost standards for nonprofit organizations issued by the Office of Management and Budget in OMB Circular A-122.) HHS has held that the pursuit of administrative appeals through the Departmental Grant Appeals Board does not constitute the "prosecution of a claim against the Government," and attorneys' fees attendant to such appeals, therefore, are allowable. See, Florida Farmworkers Council, Departmental Grant Appeals Board Docket No. 80-125 (July 30, 1981). ABCD, however, had its grant expenditures for attorneys' fees in the PHS litigation disallowed because the action was brought in Federal Court "against the Government," and not before an administrative appeals board within the Government. This disallowance obviously could have an extremely discouraging effect upon the bringing of legal challenges to PHS grant decisionmaking, particularly to individuals and nonprofit organizations which are the eligible recipients of many PHS grants.

[20] As stated earlier, under PHS policy, applicants for continued funding each year over a multi-year project period do not have to compete with other applicants for funds. Continuation grants may be withheld only if the recipient has not performed satisfactorily, if there are insufficient funds available, or if continued funding would not be in the best interest of the Government.

[21] See e.g. Rural Improvement Council, Inc., Departmental Grant Appeals Board Docket No. 76-15 (Rejection of Appeal, Oct. 6, 1976).

[22] Southern Mutual Help Association v. Califano, 574 F.2d 518 (D.C. Cir. 1977).

Grant Appeals Board's decision. In that case, the grantee/applicant argued that HEW had terminated its multi-year grant and that it was entitled to pre-termination notice and hearing before the Board. The court found that HEW's regulations and grant award documents did not adequately establish that continuation grants were annual (as opposed to multi-year) commitments and, accordingly, concluded that non-renewal was equivalent to termination. Since, under HEW's then current regulations, a grantee was entitled to pre-termination notice and hearing, the court ruled that such rights should be afforded to the grantee/applicant in this case.

In response to this decision, PHS amended its regulations and award documents to make clear that commitments are made to continuation grantees only for one year at a time. Subsequent attempts to administratively appeal denials of continuation grant applications have failed.[23]

It should be noted that, as indicated above, a significant change in HHS policy with respect to appeals of denials of continuation grant applications occurred on August 31, 1981. On that date, new regulations governing the Departmental Grant Appeals Board were issued.[24] The new regulations provide, *inter alia,* that the Board has jurisdiction over such appeals where the denial is for failure to comply with the terms of a previous award.[25] It should further be noted, however, that PHS informal appeals procedures have not yet been amended to provide for appeals of the denial of continuation grants.[26] Consequently, any appeal of this sort must be made directly to the Departmental Grant Appeals Board.

The Departmental change in policy with respect to appeals of denials of continuation grants may be attributable, in part, to an apparent acknowledgement that there is little difference between termination for cause and non-continuation because of unsatisfac-

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[23] See, e.g., Missouri Health and Medical Organization, Departmental Grant Appeals Board Docket No. 77-24 (June 21, 1978).

[24] 45 Fed. Reg. 43816.

[25] See Appendix A, Section C(a)(3) of the regulation.

[26] PHS currently is amending its regulations (42 C.F.R. Part 50, Subpart D) to provide for such appeals. PHS anticipates that the amendments will be in effect by October 1, 1983.

tory performance.[27] Indeed, the potential for abuse by HHS officials may be significant insofar as they might choose to wait until the end of a program year to deny refunding for a grant program instead of terminating it during a program year. In such manner, the agency would be able to avoid the legal and procedural burdens associated with defending termination appeals.

[4]—PHS' Position with Respect to Appeals of Pre-Award Decisions

PHS has been extremely reluctant to allow formal appeals of denials of applications and reductions in funding for several reasons. First and foremost is the fact that, as indicated above, PHS reviews roughly 80,000 applications for grants each year, of which approximately 40,000 are approved for funding.[28] The sheer number of potential pre-award disputes — and the resultant administrative burden — is staggering.

Furthermore, the nature of PHS grant applications bodes poorly for timely administrative appeals. With the passage of the Omnibus Budget Reconciliation Act of 1981, beginning in Fiscal Year 1983, over 97 percent of discretionary PHS project grants will be for research and training activities. Applications for grants to support these kinds of activities contain masses of highly technical data and analysis, and require particular knowledge or skills on the part of the reviewer. Given the complexity of HHS' current appeal procedures and the time it takes to resolve a formal appeal, these grant applications could clog the system and probably never would be resolved in a timely fashion.[29]

With respect to research and training programs, PHS officials believe that PHS has implemented a fully objective peer review system and has taken every possible precaution to prevent conflicts of

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[27] Both types of decisions may result in bankrupting the recipient and injuring its reputation in the community. All of these recipients want the opportunity to appeal, if only to clear their good name. Interview with Deputy Director, National Association of Community Health Centers, November 4, 1981, Washington, D.C.

[28] Interview with Roumel, N. 3 *supra.*

[29] See § 54.08 *supra.* The timeliness problem, of course, is of special concern in the pre-award context. The application under appeal might impact on other approved applications. Furthermore, if the appeal was taken at the end of the fiscal year, PHS might lose its ability to fund other applications due to the lapse of its authority to obligate funds when the fiscal year expires.

interest or bias in the selection of reviewers and to ensure that applications are reviewed by the appropriate peer review group. The peer review system is assessed continually through PHS-initiated studies as well as the General Accounting Office.[30] If, given this system, applicants still feel harmed by PHS' actions, they may appeal such actions to court.

It is not difficult to reconcile these concerns with the recent HHS decision to allow administrative appeals of denials of continuation grant applications "for cause." Continuation grant applicants do not have to compete with other applicants. Thus, if an appeal is filed, only the agency's decision with respect to that one grant application is at issue, not the relative merits of several competing applications. Although such an appeal would entail a delay in making funds available to other applicants, only the funds for one grant would be held up in appeal. Moreover, as indicated above, the potential harm to an applicant for a continuation grant is greater than with respect to applicants for new grants. If the denial of continuation funding is based upon an applicant's poor performance, and the PHS decision is allowed to stand unchallenged, the applicant may lose its good name in the community, as well as additional Federal and non-Federal funding.

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[30] See U.S. General Accounting Office, *Better Accountability Procedures Needed in NSF and NIH Research Grant Systems*, PAD-81-29, Washington, D.C., September 30, 1981.

§ 54.17 Smithsonian Institution

The Smithsonian Institution is not a Federal agency; rather it is an "independent trust establishment." Congress created the Smithsonian in 1846[1] to carry out the terms of the will of James Smithson of England, who bequeathed his estate to the United States for the purpose of establishing a cultural center.[2] Congress assigned responsibility for administering the Smithson trust to the Smithsonian Board of Regents, composed of the Chief Justice of the U.S. Supreme Court, the Vice President, three members of the Senate and three members of the House of Representatives and nine congressionally-appointed citizen members.

Among activities performed by the Smithsonian in fulfilling its mandate are three small programs of grants to individual scholars and museum institutions. One program, the National Museum Act[3] is financed directly by appropriated funds. Awards are made to museums, their professional organizations, and institutions of higher education to: (1) support the training of career employees in museum practices; (2) perform research on, and otherwise contribute to, the development of museum techniques, with emphasis on museum conservation; and (3) support the preparation and distribution of significant museum publications.[4] Appropriations for this program may not exceed $1 million per year. (In FY 1982 $711,000 was appropriated.) The Special Foreign Currency Program, which is part of the P.L. 480 program, uses exclusively "excess foreign currencies," and the Smithsonian's Basic Reasearch Program is financed almost entirely through income from the Smithsonian's trust funds.[5]

Because its grant programs are small, and complaints are few, Smithsonian officials indicate that there is no need to adopt formal

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[1] 20 U.S.C. § 41 *et seq.*

[2] The will stated: "[T]o found at Washington, [D.C.] under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men." United States Government Manual at 702 (1979–1980).

[3] 20 U.S.C. § 65a.

[4] 20 U.S.C. § 65a(a)(2), (3) and (4).

[5] Interview with Gretchen Ellsworth, Director, Office of Fellowships and Grants, June 29, 1981 (Washington, D.C.).

procedures to resolve grant disputes.[6] In the last five years, only one disagreement escalated to a level requiring review by the General Counsel's Office. This dispute, involving a discrepancy in a final accounting of a small sum, was settled quickly and informally.[7]

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[6] Indeed, it is doubtful that the Smithsonian, as a trust institution, has authority to issue rules. Interview with Marie Malaro, Assistant General Counsel, Smithsonian Institution, June 29, 1981 (Washington, D.C.).

[7] *Ibid.*

§ 54.18 Department of Transportation

The Department of Transportation (DOT) was created in 1966 to coordinate national transportation policy. Six divisions within DOT administer grant programs: The Urban Mass Transit Administration (UMTA); the Federal Aviation Administration; the Federal Highway Administration; the National Highway Traffic Safety Administration; the Federal Railroad Administration; and the Research and Special Programs Administration.[1]

DOT has no Departmentwide regulations or procedures to govern the resolution of grant-related disputes. However, DOT currently is in the process of developing Departmental procedures for the debarment of grantees.[2]

Like the Department of Housing and Urban Development, DOT has a Board of Contract Appeals which is authorized to hear all cases properly assigned to it by the Secretary.[3] While such authority generally is viewed as including grant-related cases, the Secretary never has assigned a grant-related case to the Board.[4]

Because DOT has no Departmental procedures, it is necessary to consider each of its operating divisions separately.

[1]—Federal Aviation Administration

The Federal Aviation Administration (FAA) administers three grant programs which fund planning, construction, and repair of the Nation's airports.[5] In fiscal year 1981, approximately $450 mil-

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[1] All of these divisions except UMTA are discussed in this section.

[2] Interview with Charles McLaughlin, Program Analyst, Division of Grants Management, Office of Assistant Secretary for Administration, U.S. Department of Transportation, October 21, 1981 (Washington, D.C.).

[3] 41 C.F.R. § 12–60.103(a)(3).

[4] Interview with Judge Emmanual Snyer, Chairman, Board of Contract Appeals, Department of Transportation, October 21, 1981 (Washington, D.C.).

[5] These programs are the Airport Development Aid Program, 14 C.F.R. Part 152, the Airport Planning Grant Program, 14 C.F.R. Part 152, and the State Standards Grant Program, for which no regulations have been issued. Interview with Paul Galis, Director, Office of Airport Planning and Programming, Federal Aviation Administration, U.S. Department of Transportation, October 21, 1981 (Washington, D.C.).

lion was expended on these programs.[6]

The FAA has established standards and procedures for the withholding, suspension, and termination of grant funds.[7] These regulations provide enormous discretion to the agency. They afford no opportunity for a hearing, or other formal appeal rights to the grantee.

Thus, for example, the FAA may withhold payments to a grantee "at any time during the grant period" if the FAA determines that the grantee has failed to comply with program objectives, grant award conditions, or Federal reporting requirements.[8] Grants may be suspended, and payments withheld, if the FAA decides that the grantee has failed "to comply with the conditions of the grant," so long as the FAA gives written notice of the action to the grantee.[9] Moreover, the FAA may terminate a grant "in whole or in part" for failure of the grantee to comply with grant conditions, so long as the grantee receives written notification of the termination. This notification must contain only the reasons for the termination and the effective date.[10]

In the case of grant terminations or suspensions, the grantee may request the FAA Administrator to reconsider the agency's suspension or termination.[11] However, the regulations neither guarantee this reconsideration, nor specify procedures to be followed in the event that a request for reconsideration is granted.

According to FAA officials, no grantees ever have been suspended or terminated from FAA's grant programs.[12] Funds have been withheld from grantees under the procedures outlined above. However, once the cause for withholding was corrected or resolved (informally), FAA restored the funds to the grantees.[13]

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[6] *Ibid.*

[7] 14 C.F.R. § 152.209(g); 14 C.F.R. § 152, Subpart F.

[8] 14 C.F.R. § 152.209(g)(1).

[9] 14 C.F.R. § 152.503(a).

[10] 14 C.F.R. § 152.505(a), (b).

[11] 14 C.F.R. § 152.509.

[12] Interview with Paul Galis, N. 5 *supra.*

[13] *Ibid.*

[2]—Federal Highway Administration

The Federal Highway Administration (FHWA) administers a grant program for highway research, planning, and construction.[14] The program is composed of grant authorizations for more than 120 types of highway-related projects, including the planning and construction of interstate and secondary highways, as well as carpool, vanpool and bicycle demonstration programs and various research projects.[15] All FHWA grantees are either State agencies or units of local government.

The FHWA has not established a formal procedure for the resolution of grant disputes. The only relevant regulation provides that the FHWA Administrator may withhold current payments or approval for future projects, or "take such other action that he deems appropriate under the circumstances" when a State has violated or failed to comply with Federal laws or FHWA regulations.[16] While the FHWA apparently has withheld grant funds "occasionally" during the pendancy of audit resolution, the agency reportedly has been able to settle all such matters informally. FWHA officials indicate that this informal approach to diapute resolution is proper because the agency is engaged in a "cooperative effort" with the States.[17]

[3]—Federal Railroad Administration and the Research and Special Programs Administration

The Federal Railroad Administration administers two small grant programs which provide funds for planning, rehabilitation, program operations and safety on the Nation's railroads.[18] The Re-

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[14] 23 C.F.R. Subchapters E–I.

In addition to this program, FHWA administers the Highway Educational Fund, 23 C.F.R. Part 260, which in fiscal year 1981 dispersed about $500,000 in grants to individuals in State governments to allow them to return to school. The fund has no grant dispute procedures.

[15] Interview with Harvey Wood, Chief, Federal-State Finances, State Financial Management Branch, Federal Highway Administration, U.S. Department of Transportation, October 21, 1981 (Washington, D.C.).

[16] 23 C.F.R. § 1.36.

[17] Interview with Harvey Wood, N. 15 *supra.*

[18] These two grant programs are: Grants-in-Aid for Railroad Safety, 49 C.F.R. § 212 et seq., and Local Rail Service Assistance, 49 C.F.R. Parts 255 and 266. In fiscal year 1981, these two programs expended $86 million in grant funds. Inter-

search and Special Programs Administration administers a single grant program, which awards monies to States to develop and maintain a Statewide inspection program for gas pipelines.[19] Neither Administration has established any formal grant dispute resolution procedure. Both Administrations report that any potential disagreements with grantees have been resolved through informal discussions.[20]

[4]—National Highway Traffic Safety Administration

The National Highway Traffic Safety Administration (NHTSA) administers one grant program: the State and Community Highway Safety Program.[21] In fiscal year 1981, approximately $190 million of Federal funds was awarded under this program. All of the program's recipients are State agencies.[22]

NHTSA has no formal dispute resolution procedures. Any disputes which may arise (which generally involve disagreements over whether project is worthy of funding) are settled informally within NTSA.[23]

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view with Walter Rochey, Director, Office of State Assistance Programs, Federal Railroad Administration, U.S. Department of Transportation, October 21, 1981 (Washington, D.C.).

[19] The Gas Pipeline Safety Grant Program, 49 C.F.R. Parts 191–192, awarded $3.5 million in grants to State agencies in fiscal year 1981. Interview with David Donaldson, Transportation Specialist, Materials Transportation Bureau, Research and Special Programs Administration, U.S. Department of Transportation, October 22, 1981 (Washington, D.C.).

[20] Interview with Walter Rockey, N. 18 *supra;* Interview with David Donaldson, N. 19 *supra.*

[21] 23 C.F.R. Part 1204 *et seq.*

[22] Executive Office of the President, Office of Management and Budget, 1981 Catalog of Federal Domestic Assistance, 576 (15th ed. 1981).

[23] Interview with John Womack, Assistant Chief Counsel, National Highway Safety Administration, U.S. Department of Transportation, October 22, 1981 (Washington, D.C.). NHTSA does have formal procedures which it must follow, as required under 23 U.S.C. § 402, for sanctions against a State when the Governor of a State refuses to develop or implement a highway safety program (under which the State then could receive grant funds). See 23 C.F.R. Part 1206. Under these procedures, the sanctions, which include a reduction in highway construction funds given out by the Federal Highway Administration, may not be imposed until a hearing is conducted in front of a three-member DOT review board. See 23 C.F.R. § 1206.10–§ 1206.12.

§ 54.19 Other Agencies

[1]—Introduction

The foregoing sections of this chapter have been devoted to Federal agencies which are heavily involved in grants administration, and grant dispute resolution. This section discusses those agencies which have had less exposure to the "slumbering giant" of grant law.[1]

[2]—Department of Defense

The Army Installations Bureau, Department of Defense (DOD), administers two grant programs for supporting construction of military training facilities and armories.[2] States are the only eligible recipients.[3] The states are aware that there are limited appropriations for these programs, and they maintain close liaisons with the Bureau.[4]

Although there have been several instances of noncompliance which have resulted in the termination or reduction of armory grants (e.g., failure to provide the required land site or failure to meet Federal share requirements), DOD does not have a formal dispute resolution procedure.

[3]—Department of Treasury

[a]—General Revenue Sharing Program. The Department of Treasury administers a Revenue-Sharing program under the authority of the State and Local Fiscal Assistance Act of 1972, as amended.[5] Funds are awarded under the Act to State and local government units and are considered to be entitlements. The Act, and regulations promulgated thereunder, mandate post-award dispute procedures with respect to noncompliance determinations.[6]

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[1] Southern Mutual Help Association v. Califano, 574 F.2d 518, 522 (D.C. Cir. 1977); See also, ACIR *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law,* M-122, Washington, D.C. (December 1980).

[2] These grants are authorized under 10 U.S.C. §§ 2233 *et seq.*

[3] *Id.* at § 2233.

[4] Interview with staff of Installations Division, National Guard Bureau, Department of Army, Jan. 27, 1981 (Washington, D.C.).

[5] 31 U.S.C. § 1221 *et seq.*

[6] 31 U.S.C. § 1243(b); 31 C.F.R. § 51.200 *et seq.*

These procedures are fairly specific, and culminate in a hearing before an administrative law judge.

The most common type of complaint arising in the program are citizens' complaints regarding the improper use of grant funds, and challenges to the agency's calculation of grantee allotments.[7] Virtually all complaints other than those involving allegations of civil rights violations have been resolved informally.[8]

[b]—Internal Revenue Service. The Internal Revenue Service (IRS) administers a small grant program to support tax counseling for the elderly. IRS estimates that only a half dozen non-profit organizations annually receive these grants.[9] Because it is a small and relatively new program, the IRS has not yet developed any formal grant dispute resolution procedures.

No disputes have arisen thus far. IRS officials indicate that if such disputes were to occur, the matter would be referred to the Office of General Counsel.[10]

[4]—Federal Emergency Management Agency

Federal Emergency Management Agency (FEMA) administers a variety of grant programs including programs of emergency management assistance and State disaster preparedness. The agency does not have formal grant dispute resolution procedures, but intends to develop them.[11]

In 1979, apparently the only dispute arising under FEMA grants occurred. A grantee (Holy Cross Hospital) protested the low amount of a grant for reconstruction of its facility after a disaster. The grant was awarded initially by the Department of Housing and Urban Development's Federal Disaster Assistance Administration (FDAA), and the appeal was initiated there. When FDAA's functions were transferred to FEMA (effective April 1, 1979), FEMA

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[7] Interview with Richard Isen, Acting Chief Counsel, Office of Revenue Sharing, Jan. 26, 1981 (Washington, D.C.).

[8] *Ibid.*

[9] Interview with Edward Lacke, Program Analyst and Grants Project Coordinator, IRS, Jan. 27, 1981 (Washington, D.C.).

[10] *Ibid.*

[11] Interview with Donald Young, Deputy General Counsel, January 23, 1981 (Washington, D.C.).

took jurisdiction of the dispute. Upon review, the director approved the award of supplemental funding to the grantee.

While no specific procedures were followed in the Holy Cross appeal, FEMA officials now indicate that future disputes probably will be handled as follows: Complaints first will be directed to the FEMA Associate Director responsible for the particular grant program at issue; if resolution of the complaint at that level is not possible, the matter will be appealed to the FEMA Director. The grantee will be required to file a written brief, and the agency staff will prepare a position paper and suggested decision, all of which will be evaluated by the Director. The Director then will send a decision letter to the grantee.[12]

[5]—General Services Administration

General Services Administration (GSA) administers a program of one-year grants to support the development of historical publications and archival records.[13] Disputes which have arisen in connection with these grants involve grantee non-compliance and failure of grantees to complete projects.[14] These problems have been resolved informally. GSA does not have formal dispute resolution procedures.

In three instances, GSA has denied refunding of projects, having received negative recommendations from a State advisory review board because of poor performance by a grantee, or because of budget cuts (which permitted funding only of top-priority projects). The grantees did not object to the non-renewals, and in two cases, the projects were continued with support from other sources.

[6]—Nuclear Regulatory Commission

[a]—Enhanced Technology Grants. The Nuclear Regulatory Commission (NRC) currently administers two small grant pro-

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[12] *Ibid.*

[13] Information in this section obtained in interview with Frank Burke, Executive Director, National Historical Publications and Records Commission, Jan. 26, 1981 (Washington, D.C.).

[14] The program does not perform audits, but may request the agency to perform them. The program does receive audit reports from other agencies which include assessments of its grant projects.

grams to support conferences and research in the area of "Enhanced Technology." These programs are just getting underway. No grants have been awarded; no disputes have arisen.[15]

Nonetheless, NRC's General Provisions for Enhanced Technology grants provide the following dispute resolution clause:

"*Dispute Review Procedure*

"a. Any request for review of a notice of termination or other adverse decision should be addressed to the Grants Officer. It must be postmarked no later than 30 days after the postmarked date of such notice.

"b. The request for review must contain a full statement of the grantee's position and the pertinent facts and reasons in support of such position.

"c. The Grants Officer will promptly acknowledge receipt of the request for review and shall forward it to the Director, Office of Administration, who shall appoint a review committee consisting of a minimum of three persons.

"d. Pending resolution of the request for review, the NRC may withhold or defer payments under the grant during the review proceedings.

"e. The termination review committee will request the Grants Officer who issued the notice of termination to provide copies of all relevant background materials and documents.[16] It may, at its discretion, invite representatives of the grantee and the NRC program office to discuss pertinent issues and to submit such additional information as it deems appropriate. The chairman of the review committe will insure that all review activities or proceedings are adequately documented.

"f. Based on its review, the committee will prepare its recommendations to the Director, Office of Administration, who will advise the parties concerned of his decision."

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[15] Interview with Ronald Thompson, Acting Chief, Special Projects Branch, Jan. 25, 1981 (Washington, D.C.).

[16] The composition of such review committee would be determined on an *ad hoc* basis. To date, there have been no disputes which have required the use of this procedure.

[b]—Grants to States. In FY 1980, NRC also administered a small program of grants to States. There were no formal dispute procedures applicable to that program, and no disputes arose.[17] The future of the program is uncertain.

[7]—Office of Personnel Management

The Office of Personnel Management (OPM) administers a program of intergovernmental personnel grants to assist State and local governments by strengthening their staffs through improved personnel administration, training and development.[18] The grant program is relatively small, with maximum appropriations of $20 million per year.

The statute requires the provision of reasonable notice and an opportunity for a hearing to State or local governments prior to the withholding of grant payments.[19] This requirement has been implemented in OPM's regulations.[20] The regulations specify detailed requirements concerning the notice, time and place of hearings, right to counsel, hearing procedures, admissible evidence, waiver of hearing rights, contents of the administrative record, the initial decision of the hearing officer, and the final decision of the agency. The regulations also provide that, upon the completion of corrective action, a grantee may request that OPM funding be restored. If such request is not granted, the grantee may seek a further hearing of its complaint.

These procedures have not yet been invoked.[21] On the one occasion that OPM terminated a grantee, the grantee conceded the correctness of OPM's action and repaid the funds in question.[22]

[8]—Regional Commissions

There are nine regional commissions, all of which are authorized under Title V of the Public Works and Economic Development Act

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[17] *Ibid.*

[18] 42 U.S.C. § 4763.

[19] 42 U.S.C. § 4767.

[20] 5 C.F.R. § 900.204.

[21] Interview with Cathy Hohman, Grants Manager, Office of Intergovernmental Grant Programs, Jan. 23, 1981 (Washington, D.C.).

[22] Allegations of fraud against the grantee were involved in the action.

of 1965.[23] The nine regional commissions are: (1) Appalachian Regional Commission; (2) Coastal Plains Regional Commission; (3) Four Corners Regional Commission; (4) Old West Regional Commission; (5) Ozarks Regional Commission; (6) Upper Great Lakes Regional Commission; (7) New England Regional Commission; (8) Pacific Northwest Regional Commission; and (9) Southwest Border Regional Commission.

Each of the Commissions is a combined Federal-State agency, and is comprised of a Federal co-chairman, and the governors of the States in the region. (The Appalachian Regional Commission also has a presidential appointee as a member).

[a]—Direct Grants. A small percentage of Regional Commission funds is awarded by way of technical assistance grants to State and political subdivisions, and private organizations to support research, development and demonstration projects directed at solving economic, environmental and health problems in each region.

Several of the commissions have adopted for these grants a dispute clause similar to that used in government procurement contracts. The clause is included in the grant award document or application kit.[24] Basically, the clause provides for review of post-award disputes by the Federal co-chairman, executive director or project coordinator. Thereafter, grantees have 30 days to request the Commission to review the matter. The grantees may offer written materials and request a hearing. The Commission's decision is final as to any question of fact unless the decision is arbitrary, or based upon fraudulent or insubstantial evidence. The decision is not final as to questions of law. The grantee must continue to perform pending the final decision unless funds are withheld. The Commissions which do not have such written procedures reportedly would follow the same procedure should a dispute arise.[25]

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[23] 42 U.S.C. § 3181 *et seq.*

[24] The Commissions which have written dispute resolution procedures are: (1) Appalachian Regional Commission; (2) Coastal Plains Regional Commission; (3) Four Corners Regional Commission; (4) Old West Regional Commission; (5) Ozarks Regional Commission (grant instrument states that grantee has the right to negotiate a dispute, but no procedures are specified); and (6) Upper Great Lakes Regional Commission.

[25] Interviews with Charles Tretter, New England Regional Commission; Ar-

None of the commissions has had to use these procedures, having resolved all disputes informally. Examples of disputes which have arisen concern: Davis-Bacon Act requirements (use of prevailing wage rate in the region); suspension for nonperformance (resulting in the withholding of funds); and interest/citizen's groups' opposition to projects chosen for funding.[26]

[b]—Supplemental Grants. The Commissions award grants to supplement aid from Federal agencies for the economic and environmental development of regions. The task of grants administration is turned over to the Federal agency (e.g., the Department of Housing and Urban Development, the Department of Health and Human Services, the Department of Transportation) which generally is responsible for the particular type of grant being awarded, i.e., a highway development project grant would be administered by the Department of Transportation. The Federal agency then administers the grant in accordance with its own authorizing statute and regulations, and any disputes arising under the grant would be handled in accordance with the Federal agency's procedures.

A Regional Commission may get involved in these procedures, but only if necessary to protect its interest in furthering the economic development of its region or if Commission mismanagement is at issue. Generally, the Commissions simply try to keep apprised of the situation.

[9]—Small Business Administration

The Small Business Administration (SBA) administers Small Business Development Center grants and Office of Advocacy grants. Both types of grants are discretionary in nature, and are authorized, respectively, under the Small Business Development Center Act of 1980,[27] and the Small Business Investment Act of 1958,

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thur Johnson, Pacific Northwest Regional Commission; and William Butler, Southwest Border Regional Commission (January 26, 1981).

[26] It is interesting to note that the Upper Great Lakes Regional Commission automatically withholds 10 % of technical assistance grant funds until a grantee's audit is reviewed and approved by the Commission. No disputes have resulted from this process.

[27] 15 U.S.C. § 648.

as amended.[28]

The SBA has begun only recently to use the grant instrument (as a result of the Federal Grant and Cooperative Agreement Act).[29] Consequently, SBA has not published in regulations any formal dispute procedures. However, a dispute clause is included in each notice of grant award.

The dispute clause provides for review of post-award disputes by the grants management officer (GMO). The GMO's decision must be in writing and is final unless the recipient appeals in writing within 30 days of its receipt of the decision. The matter then is reviewed by the SBA Administrator who must afford the recipient an opportunity to be heard, to be present, to offer evidence and testimony, to cross-examine SBA witnesses and to examine documentation or exhibits offered in evidence by SBA or admitted to the appeal record. SBA has the same rights. The appeal must be determined on the appeal record. The Administrator's decision is final and conclusive as to any question of fact unless arbitrary, fraudulent or not supported by substantial evidence. The decision is not final with respect to questions of law. This procedure has never been invoked, because to date, SBA has not terminated or suspended any grant.

There is no procedure for handling pre-award disputes.

[10]—Veterans Administration

The Veterans Administration (VA) administers several grant programs, including medical school assistance and health manpower training,[30] State nursing home construction,[31] State cemetery,[32] and exchange of medical information programs.[33] With the

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[28] 15 U.S.C. § 634.

[29] Information in this section obtained in interview with A. T. Judd, Chief, Grants Section, Office of External Awards, Jan. 27, 1981 (Washington, D.C.).

[30] Veterans Administration Medical Assistance and Manpower Training Act of 1972, as amended, 38 U.S.C. Chapter 82.

[31] State Nursing Facilities for Furnishing Domiciliary, Nursing Home, and Hospital Care, 38 U.S.C. Domiciliary, Nursing Home, and Hospital Care, 38 U.S.C. §§ 5031–5037.

[32] Veterans Housing Benefits Act of 1978, 38 U.S.C. § 1008.

[33] Veterans Hospitalization and Medical Sources Modernization Amendments of 1966, 38 U.S.C. § 5055.

exception of the State nursing home construction program (entitlements program), the programs are discretionary in nature.

The VA has no central coordination or administration of its grant programs. Nor is there a single person or branch of the agency's Office of General Counsel (OGC) responsible for grant-related matters.[34]

Although some of the VA programs have published procedures for handling grant disputes, these procedures have not been invoked by grantees. Disputes have been resolved informally in every instance. Disputes arising from audit disallowances generally have been resolved in the grantee's favor, expecially where the grantee has offered documentation of costs incurred.

The Medical School Assistance and Health Manpower Training Grant Program has regulations which provide for notice and hearing prior to termination or recapture of funds.[35] The program has a policy handbook which states that these procedures also may be invoked with respect to any post-award dispute. Disappointed applicants are contacted routinely by VA program officials for purposes of discussing reasons for disapproval.[36]

The State Nursing Home Construction Program has no formal dispute procedures. There have been only a few disputes concerning initial eligibility (including one involving the State of New York, which was resolved against the grantee), funding levels, and one instance of termination (the State of Washington). All of these disputes were handled through informal meetings between the VA and the grantee, and an exchange of letters with OGC.[37]

The State Cemetery Grant Program has published procedures providing for hearings with respect to disapproval of applica-

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[34] An example of the lack of coordination cited by a VA official was that OGC approved a notice of grant award for one grant program but disapproved the identical form for another. Interview with Harold Graber, Director, State Cemetery Grants Program, January 23, 1981 (Washington, D.C.).

[35] 38 C.F.R. §§ 17.413–17.415.

[36] Interview with Chester DeLong, Coordinator, Program Review and Liaison, Office of Academic Affairs, Jan. 23, 1981 (Washington, D.C.).

[37] Interview with Rita Frampton, State Home Program Coordinator, Jan. 23, 1981 (Washington, D.C.).

tions,[38] and full Administrative Procedure Act protections with respect to alleged civil rights violations resulting in termination, suspension or non-renewal.[39] If an applicant invokes the former procedures (none has as yet), the hearing could be handled by any program official other than the original decision-maker, OGC staff, or a combination of both. It should be noted that this program does not award continuation grants; all of the grants are awarded only for one year at a time.[40]

The Exchange of Medical Information Grant Program has a handbook which states that general VA dispute regulations[41] are to be followed in any post-award disputes arising under the program. The procedures have never been used.[42]

[11]—Water Resources Council

The Water Resources Council (WRC) is composed of the heads of several major agencies, including EPA, Interior, Agriculture, and the Army. The Council has a permanent staff which is headed by a Director who has lead responsibility for administering grants and recommending fund allocations.[43]

WRC awards comprehensive water and related land resources planning grants.[44] Grants are awarded only to the States and none of the States has ever been denied a grant, nor has any grant been terminated or suspended. The only disputes which have surfaced relate to reductions in funding and audit disputes. All such disputes have been resolved through informal negotiations between WRC staff and the State. The Office of General Counsel has not been directly involved in dispute resolution.

WRC has no formal dispute resolution procedures. WRC officials indicated that if a dispute could not be resolved informally,

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[38] 38 C.F.R. § 39.4.

[39] 38 C.F.R. §§ 18.9–18.10.

[40] Interview with Harold Graber, N. 34 *supra.*

[41] 38 C.F.R. § 17.285.

[42] Interview with Robert Shamaskin, Special Assistant to AD&C for Academic Affairs, Jan. 23, 1981 (Washington, D.C.).

[43] 18 C.F.R. Part 701.

[44] Under authority of 42 U.S.C. § 1962(c).

the Director probably would review the matter and, if necessary, the Council might consider the issue.[45]

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[45] Interview with Denzel Fisher, Acting Director of the State Programs Division, January 26, 1981, (Washington, D.C.).