

BACKGROUND REPORT FOR RECOMMENDATION 86-7

AGENCY TIME LIMITS AS A TOOL FOR REDUCING REGULATORY DELAY

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Report to the Administrative Conference of the United States

## AGENCY TIME LIMITS AS A TOOL FOR

## REDUCING REGULATORY DELAY

The problem of delay in federal agency decisionmaking has become a major source of complaint, receiving considerable congressional and academic attention in recent years. The Senate Governmental Affairs Committee's 1977 six-part study on federal regulation devoted one volume to the topic,<sup>1</sup> and, along with several "regulatory reform" bills, would have required all agencies to establish time limits for certain actions and report on their progress in enforcing them. Hundreds of proceedings already operate under statutory time limits, and agencies have paid millions to consultants for purposes of reducing delay. The Administrative Conference of the United States, charged with advising agencies and Congress on ways to improve the administrative process, has spoken to the problem several times, as have the American Bar Association and numerous others.<sup>2</sup> While myriad aspects of the problem have been examined, and all manner of "solutions" tried or proposed, relatively little attention has been given to examining in detail agencies' successful actions against delay,<sup>3</sup> or to considering if these cases hold lessons for other agencies plagued by slow decisionmaking.

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- 1/ Delay in the Regulatory Process, 95th Congress, 1st Session (1977). Delay problems have been studied also in particular agencies, like the Federal Energy Regulatory Commission ("FERC") and the Federal Trade Commission. E.g. Report of the ABA Task Force Studying the Federal Trade Commission (1969); General Accounting Office, Additional Management Improvements Are Needed to Speed Case Processing At the Federal Energy Regulatory Commission (July 15, 1980); see also, Bermann, Administrative Delay and Its Control, Law in the U.S. for the 1980's 473 (1982).
- 2/ Administrative Conference Recommendations 82-2 (Resolving Disputes under Federal Grants); 78-3 (Time Limits on Agency Action); 78-1 (Reduction of Delay in Ratemaking Cases); 78-2 (Procedures for Determining Social Security Disability Claims); 73-3 (Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation). 1 C.F.R. §305 (1983). These are discussed below, as are the recommendations of the Committee, ABA committees, GAO and others. See also Ogden, Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedure, Procedural Reform and Legislative Oversight, 4 Dayton L. Rev. 71 (1979), for a more detailed summary of some of these groups' views.
- 3/ There have been a few such inquiries, like Thomas Morgan's "Toward a Revised Strategy of Ratemaking," 1978 Reports and Recommendations of the Administrative Conference 23 (1980) ("ACUS"), 78 U. Illinois L.F. 21 (1978), and sections of the Senate Committee on Governmental Affairs report, supra note 1 at 133-140.

## I. BACKGROUND THOUGHTS ON DELAY

Delay, which is simply an agency's failure to initiate or conclude action on a timely basis,<sup>3a</sup> harms regulated entities because it is expensive, heightens their uncertainty, costs business opportunities, discourages innovation, renders data for decision stale, and is wasteful. Its deleterious impact on agency morale and on the public at large, while less measurable, is significant. Countering these manifold burdens, of course, are factors like the need for accurate decisionmaking and effective use of agency resources. This paper is premised on the view that well-informed agency officials, who in most instances are charged with weighing these considerations and deploying agency resources accordingly, are the ones who ultimately are most apt to make inroads on delay. Based on a review of several successful agencies' experiences, we seek to help agency officials to undertake certain recommended internal measures to ameliorate the problem, including use of self-imposed time limits at all agency levels.

Other potential sources of improvement — Congress and the courts — are not located where they can deal effectively with delay. The numerous legislated deadlines for agency licensing, rulemaking and adjudication have had quite limited success, to the point where the Administrative Conference of the United States has recommended that Congress ordinarily not use them.<sup>4</sup> Statutory deadlines fail to address many fundamental causes of delay, often are rigid or unrealistic, and tend to undermine an agencies' ability to establish priorities and control the course of its proceedings. They may foreclose the use of procedural techniques valuable to enhancing participation and obtaining information.<sup>5</sup> Courts have had difficulty when faced with enforcing these time limits, since Congress often fails to specify their legal effect. In cases where courts have imposed their own deadlines, the remedy has suffered from many of the same troubles.<sup>6</sup>

Slow decisionmaking cannot simply be legislated away or handled via any other single approach. Giving an agency new personnel sometimes may be merited when caseloads rise dramatically, but is usually impractical or undesirable. At its most elemental, ameliorating delay requires imbuing agency officials and employees with skills and habits that place more emphasis on timely decisionmaking. As the Senate Governmental Affairs Committee recognized, agency personnel — particularly higher level officials — must examine regularly their own agency's difficulties, and take steps that will, over time, allow the agency to do its business efficiently. Agencies may, for example, promulgate general rules that decide in advance certain issues or categories of

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3a/ Bermann, supra note 1 at 474.

4/ Professor Edward Tomlinson's Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing a Clearance Function and to Rulemaking, 1978 Reports and Recommendations of the Administrative Conference 119 (1978), amply demonstrates the difficulties with these limits.

5/ See Administrative Conference Recommendation 78-3, Time Limits on Agency Action, 1 C.F.R. §305.78-3 (1983).

6/ See, Tomlinson, Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing a Clearance Function and to Rulemaking, supra note 4; Ogden, Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedure, Procedural Reform, and Legislative Oversight, 4 Dayton L. Rev. 71 (1979); Judicial Control of Administrative Delay, 3 Dayton 345 (1978).

cases likely to recur.<sup>7</sup> Officials may streamline procedures by delegating authority to make decisions, removing or consolidating layers of review, or eliminating other steps in the process. They may hire management specialists and seek to improve their planning and oversight, or implement settlement policies to encourage parties to compromise. In addition to these changes, the Senate Governmental Affairs Committee and others have suggested appointing agency heads who are sensitive about delay problems, developing streamlined procedures for some cases, and creating an APA requirement that agencies set their own time limits for general classes of proceedings.<sup>8</sup>

Given that the reasons for delay range from growing caseloads with increasingly sophisticated litigants to complex cases requiring hard decisions, from statutorily-imposed procedures to stalling and occasionally even sloth, none of these remedies is likely to succeed alone. Even taken together, they may not work smoothly at first and will succeed only if agency managers oversee their use conscientiously.

Virtually all of those who have examined the problem agree that potentially one of the most effective tools to ensure that officials and employees recognize timeliness' importance has been an internal system of monitored time guidelines. Compared to solutions involving generic rulemaking, reorganization and settlement policies, agency use of time limits is far less inextricably bound up with hard questions of law, policy and even politics. And while hardly a panacea for every cause of delay, time limits can work to inculcate awareness of the importance of time, alert managers to bottlenecks as they occur, and help keep routine items moving. For these reasons agency successes in reducing delay with time limits should be more readily replicated by others than approaches to reducing delay that are more agency-specific and substantive. As opposed to statutory or court-imposed deadlines, agency-level limits are flexible, can be more readily tailored to suit different kinds of proceedings, and are less likely to provoke judicial intervention. The Administrative Conference of the United States, even while opposing legislatively imposed deadlines, has called on agencies to develop internal time limits for all of their rulemakings and adjudications.<sup>9</sup> This recommendation was seconded by the ABA's Committee on Law and the Economy in 1979, which went even further and called for requirements that agencies establish and enforce deadlines.<sup>10</sup>

While time limits have been widely prescribed, practical advice on implementing them (and other techniques to reduce delay) has been hard to come by. The Governmental Affairs Committee Report, in examining the roles of agency management and planning in reducing delay, contains an instructive look at agency case handling procedures.<sup>11</sup> Like GAO's report on case processing at FERC, it identifies key areas for

- 7/ Several sources have recommended use of rules, including the Senate Governmental Affairs Committee, GAO, and the Administrative Conference. Supra, notes 1 and 2.
- 8/ Delay in the Regulatory Process xvii-xxii (1977).
- 9/ See Conference Recommendations 78-3 (Agencies should impose their own time limits on rulemakings and adjudications); 82-2 (There should be internal deadlines for resolving disputes under grant programs), 1 C.F.R. §305 (1983).
- 10/ Federal Regulation: Roads to Reform 101,103 (1979); See also, GAO report, supra note 1.
- 11/ Delay in the Regulatory Process 133-140 (1977).

improvement. Conference Recommendation 73-3, which drew on a study by Professor Jerry Mashaw, stated,

Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) the development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

The Conference called on agencies to implement statistical reporting systems that will indicate the accuracy, timeliness and fairness of claims processing and identify "the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance".<sup>12</sup> But aside from such general advice, there has been little systematic examination of how specific agencies can, or should, use case monitoring systems, generic rulemaking, streamlined hearings, or other procedures.

Seeking to begin filling this gap, we assess processes for combatting delay at four federal agencies (including some that have exhibited notable long-term success) in hopes of serving as a source of principles and information for others. We examine case monitoring techniques used by the Civil Aeronautics Board ("CAB"), the Office of the General Counsel at the National Labor Relations Board ("NLRB"), the Federal Trade Commission ("FTC"), and the Departmental Grant Appeals Board at the Department of Health and Human Services ("HHS") to expedite decisions in rulemaking proceedings, formal adjudications or informal proceedings. Some are simple methods that can be implemented if one agency official takes the time to formulate time guidelines and enforce them intelligently. Others are complex, involving comprehensive computer case tracking and reporting systems. Some operate mainly within higher echelons, like the FTC's policies for expediting Commission decisions; others cover all workers involved, from investigators to ALJs to top officials. Our observations suggest that agency-imposed time limits are not a cure-all, but, where systematically monitored and enforced, they have markedly increased efficiency and reduced delay.

## II. RECOMMENDATIONS TO AGENCIES

Promulgating time limits to aid in reducing delay, should be only a first step, the catalyst for additional related agency actions. It should not be considered an end in itself, but rather as a management device supported by other internal components that help cultivate time-conscious work habits. Otherwise, deadlines may serve as a temporary palliative to avert congressional action, or provide the public with the legal means to prevent agency action egregiously delayed, but they are not likely to cure the problem alone.

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<sup>12/</sup> Recommendation 73-3 (Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation), 1 C.F.R. §305.73-3, 3 ACUS 160 (1974).

As is revealed in the following analyses of the four federal agencies, innovations to reduce delay can sap precious resources such as time, human effort, and money. Without this allocation of resources, success is unlikely. Internal agency time limit systems require an initial investment of time to accumulate data and set limits for various kinds of cases. Once the limits are in place, an agency must make sure that they are monitored and enforced by the proper employees.

This study suggests that the implementation of time limits at the CAB and NLRB has worked quite well in the long run to lessen delay while the HHS Grant Appeals Board has reduced its backlog considerably. An added advantage to these agencies is that their case monitoring systems record rough evidence of their productivity. This can help agency managers evaluate some personnel, and can be a useful tool during the budget authorization process. Though hard evidence is scarce, many agency officials believe that these systems pay for themselves.<sup>13</sup>

#### Necessary Components for Reducing Delay

Each successful program had four constant factors. These were (1) a program of interim step-by-step time guidelines, (2) agency regulations complementing the informal internal timetables, (3) a monitoring system that pinpointed problem areas or cases, and (4) a management committed to expeditious processing. Agency variances in personnel and other resources, caseload, complexity of cases, applicable procedures, and missions are too great for one particular system to be effective for all, but these four components appear basic.<sup>14</sup>

First, a time-limit system that has step-by-step interim time targets, such as the "Pipeline" structure at the NLRB, appears to produce the best results. The idea is simple, but implementing it often can be a complicated process, and the agency should seek to involve decisional officials and other employees and persons with expertise to help in developing targets. The time limits, in the form of specific informal guidelines, should serve to move the case constantly through each step of the proceeding in a timely, predictable manner. They should be fixed in all cases for all decisional levels within the agency, from investigation to initial decision to final agency review. The guidelines should be flexible enough to encompass exceptional cases, though firm enough to ensure that any delays are reasonable and justified. This approach should force each employee or office involved in a case to set a time schedule, resulting in more efficient time allotment at each step. At the least, it should keep routine items moving and draw attention to delays.

An added advantage to fixed timetables for each stage is predictability. If deadlines are used, and if they are common knowledge, "... then as the deadline time approaches, people in the organization will know what others are probably doing and can make reasonably valid inferences about what they themselves should be doing..."<sup>15</sup>

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13/ Interviews with Joseph DeSio, Associate Director, Office of General Counsel, NLRB; John Settle, Chair, HHS Departmental Grant Appeals Board; Norbert Kaus, CAB.

14/ A somewhat similar prescription was set forth briefly by the ABA Committee studying the FTC in the late 1960's, supra note 1, which stated that continuing supervision should be exercised over agency proceedings, deadlines should be established, and some group should cause these deadlines to be met.

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Thus, when a case or decision is handled within a predictable duration, it is easier for an agency to organize its own internal work schedule to match the work flow.

Second, time limits actually promulgated as agency rules should be broad guidelines reflecting only the overall time targets for the main stages of the proceeding. They should not be rigid specifications for each minute interval. Formally announced time limits that are too detailed can inhibit the positive effect of rules because inflexible and hard to adjust to the needs of a complex case or changing caseload. Most agencies need the flexibility to fine-tune when problems occur without dealing with a lengthy rulemaking process.

Moreover, the public interest is best protected when the rules are not so binding that speed becomes more important than reason and fairness. Thus, each agency we reviewed treated its rules as general guidelines, not absolutes. When an unusual case entered the docket room, it could be tagged and treated according to its particular circumstances.

Third, no system is complete without a monitoring capacity to measure how the time objectives set by the agency are being met. At the CAB, the managers handle problems as they arise within each division, and the Chief of Minutes handles agency-wide problems. At HHS' Grant Appeals Board, the Chair double-checks each overage case. At the NLRB, regional directors maintain a surveillance of problem areas highlighted by monthly case reports to the Office of the General Counsel. Without this oversight, which alerts managers who can then make sure that there is a valid reason for delay, the rules have little meaning.

Each of these agencies has adopted a monitoring system that fits its own situation. While an overly rigid operation can be counter-productive and even inhibit thoughtful decision, a lax approach that permits repeated delays to occur without any penalty will have little impact. The CAB's struggle to find a balance can serve as one example of an appropriate solution to the problem. Briefly, the CAB's initial method of requiring that time extensions be granted by the Board itself was altered to enable middle managers, instead of the Board, to change target dates if a justifiable explanation were given. Now, the explanation is recorded in the case file, which is reviewed regularly. As a result, the system is more flexible and much less threatening to staff members, yet still discourages delay.

Finally, the commitment of those who are in charge of implementing time limits is crucial. Agencies have great difficulty instituting an effective caseload management system unless key agency officials are willing to accept long-term responsibility for enforcing time limits. Although this seems an obvious point, it is worth examining. At each successful agency the system was implemented by capable people committed to reducing delay and backlog. Their commitment may have been fostered by psychological motives or external incentives ranging from merit awards to productivity requirements stated explicitly in their Senior Executive Service or other agreements. Whatever the motivation, there must be one or more responsible employees willing, able and authorized to devote the time and energy needed to develop flexible, yet clear, objectives designed to achieve the overall target date; monitor cases consistently; and deal promptly and effectively with delays that do occur.

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15/ Francis D. Tuggle and Charles B. Saunders, "Control and Its Organizational Manifestations," 14 Review of Business and Economic Research, 1, 11, 12 (1979).

Agencies should consider using available tools to ensure that their officials — and especially key employees charged with reducing delay — are properly motivated. These tools might include employee job descriptions and, where available, periodic performance evaluations. NLRB regional directors and the Chair of HHS' Departmental Grant Appeals Board, for instance, have specific obligations written into their SES contracts concerning responsibility to reduce delay and ensure timely case handling. Timeliness considerations have been written into some adjudicative officers' job descriptions or merit pay criteria — an approach agencies should consider. If more senior executives and employees worked under such criteria many agencies would become far more committed to promptly resolving their cases. Another tack — imposing limits on high level agency officials — has been tried by the FTC, and may serve as an example for others in the agency.

### Implementation Problems

Two major problems faced most of the agencies that developed time limits. One was the immense amount of time and patience frequently required to create a successful system. The other was the need to overcome negative employee attitudes.

At each agency, and particularly at the CAB, some staff members resisted changes that altered existing work habits. After initial transition periods, ranging from less than six months at HHS to 18 months at the CAB, much of this resistance dwindled. Moreover, at the outset, each successful agency had to invest time and manpower resources to create appropriate formal and informal timetables. This process can be tedious and frustrating. First, it can entail gathering information from offices and bureaus within the agency pertaining to the nature of their various proceedings and the time and resources spent on case processing within each office. Next, the data must be analyzed to break down the patterns of common case proceedings and fix appropriately expeditious time frames for each interim step.

The amount of time invested and the procedures used to accumulate and compile the information varied. At the CAB two computer specialists needed eighteen months to collect data, and six additional months to analyze it. The process was lengthy because so much of the pertinent information was undocumented. In contrast, the NLRB's team of lawyers and managers used an existing time study of case handling within the Office of the General Counsel to set up a structure of interim case stages and applicable time goals in slightly less than a year. The HHS Grant Appeals Board's system simply calls for cases handled under an expedited procedure to be completed in three months, cases with no hearings needed in six months, and cases with hearings in nine months.

Obviously, the more diverse an agency's caseload the more difficult it will be to develop appropriate time frames at the outset. But, as evidenced by both the CAB and HHS Departmental Grant Appeals Board, after the initial overhaul fine-tuning the system as new cases enter it can be done rapidly and efficiently. At the CAB, for example, when an unusually complex work item enters the docket room, it is labelled a "special case" and a manager and responsible staff members meet briefly to establish an appropriate time schedule and step sequence. In this manner, conscientious agency management can employ time limits flexibility in a variety of cases.

Another important barrier affecting time-monitoring systems is the dollar investment required. This need not be a drawback, since agencies can choose from a wide range of approaches that vary according to the size, function and complexity of the system. A smaller agency may wish to keep costs at a minimum, and keep track of time limits manually. If so, the cost should not impede an agency's decision to establish time

limits. On the other hand, an agency with a substantial caseload may wish to develop a fully automated program that covers every proceeding, even though a computerized information tracking system is a significant investment. Agency costs will vary according to their size, organization and functions and the number and complexity of their proceedings.

The case studies herein suggest that a committed agency can invest a minimal amount of funds and still reduce delay; or it can do more and to create a fully automated system to help manage an unwieldy caseload. Initially, the NLRB's information system was monitored manually, and was quite effective. Now, the NLRB is switching to a computer system because it appears to be economically feasible. While a computerized time limit system has real benefits, as discussed in the report on the CAB, some agencies may not find it necessary. Fortunately, organizations need not decide between a costly system and none at all.

### III. AGENCY AUTHORITY TO IMPOSE LIMITS

Before examining specific agencies, it will be useful to consider briefly the legal context within which federal agencies operate, particularly the extent of their authority to impose decisional deadlines for various agency personnel.

There appear to be few legal impediments to placing timeliness or backlog considerations into high level officials' Senior Executive Service agreements. A few agencies, like HHS, already have done this in some cases. Even commissioners of regulatory agencies can be bound if deadlines are adopted officially. Most employees can be dismissed "for the efficiency of the service," which includes failure to meet performance standards and a variety of other situations. Since the APA mandates timely decisions, agencies surely can use promptness as a criterion for supervising and assessing their personnel. Unless a collective bargaining or other agreement provides otherwise, imposition of case handling standards appears allowable with most employees.

One group of employees, however, occupies a unique position within an agency; the relationship between many agencies and the administrative law judges ("ALJs") they employ has been a thorny one.<sup>16</sup> While some agencies routinely impose limits on all personnel, and incorporate ALJ decision time into these timeliness objectives, other agencies' assertions of authority to use decision quotas, time limits, or similar devices with ALJs has aroused considerable controversy. Emotions have been quite intense at the Social Security Administration, where the ALJs have twice sued to block efforts to regulate their productivity. In 1978, following the first challenge, SSA and its ALJs entered into a consent agreement prohibiting use of numerical quotas or goals. Imminent court decisions in litigation now pending over SSA's recent attempts to dismiss four ALJs for inadequate productivity may help settle the uncertainty in this area.<sup>17</sup>

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16/ See e.g., Professor Victor Rosenblum's report to the Administrative Conference, Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors, 6 Western N. E. L. Rev. 593 (1984); Scalia, The ALJ Fiasco, A Reprise, 47 U. Chi. L. Rev. 57 (1979).

17/ E.g., SSA v. Robert W. Goodman, Docket No. HQ 7521821001, MSPB. At present, an ALJ at the Merit Systems Protection Board has ruled in favor of SSA; his decision is being appealed to the Board. See Rosenblum, supra note 16, for a fuller discussion.

Until now, the courts have not had to face the question of an agency's right to discipline an ALJ for failure to produce. In Ramspeck v. Federal Trial Examiners' Conference,<sup>18</sup> the Supreme Court appeared to reject the notions that ALJs (then "trial examiners") were totally independent of their agencies or "very nearly the equivalent of judges" in tenure. It viewed ALJs' status as intended to prevent "devious practice" by an agency detrimental to an ALJ's integrity or impartiality. Upholding an MSPB decision against an ALJ, the U.S. District Court for the District of Columbia stated that an ALJ "is not immune from review for procedural misconduct, incompetence or other failings in the performance of his or her duties."<sup>19</sup> A Seventh Circuit decision has described ALJs as having a "qualified right of decisional independence."<sup>20</sup>

Questions as to the ALJ's role pose difficult problems for administrators. On the one hand, Congress, wishing to insulate them from some kinds of agency pressure as to decisions, has created a unique system for selecting ALJs, prohibited certain kinds of communications with ALJs, protected them from performance evaluations by their agencies, and provided several other safeguards. Unlike federal employees, who can be fired "for the efficiency of the service", ALJs can be disciplined only "for good cause,"<sup>21</sup> which appears to be a higher standard.<sup>22</sup> In addition, Congress has authorized ALJs to "regulate the course of [an agency] hearing";<sup>23</sup> it might be argued that agency attempts to impose time limits usurps this power.

On the other hand, the ALJs' special status does not render them immune to discipline or dismissal. Authoritative decisions have allowed judicial sanctions for a variety of derelictions,<sup>24</sup> and, if productivity standards cannot be enforced, an indolent ALJ might do nothing (or little) and remain immune to discipline. As Professor Rosenblum found, precedent exists for disciplining even court judges who fail to keep up with their work.<sup>25</sup> Also, if agencies cannot amend their productivity expectations to meet rising caseloads, especially when providing additional services (e.g., word processing, law clerks, technical advice, training seminars) to increase employee output, then the only alternatives to backlog would be to dismiss cases wholesale, have agency jurisdiction altered or hire additional ALJs and support personnel. None of these are

18/ 345 U.S. 128 (1953).

19/ Chocallo v. Prokop, No. 80-1053, slip op. at 3 (Oct. 10, 1980).

20/ D'Amico v. Schweiker, 698 F.2d 903 (1983).

21/ The full standard reads, "Any action may be taken against an administrative law judge appointed under section 3105 of this title by an agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. 7521(a).

22/ But see Rosenblum, supra note 16, which suggests that recent MSPB decisions may have confused the two standards.

23/ 5 U.S.C. § 556(c)(5).

24 See Rosenblum, supra note 16, at 639.

25/ Rosenblum, supra note 16.

attractive prospects.

Courts that have faced the ALJ question have had to consider how Congress, in providing ALJs with the aforementioned protections, intended to limit agencies' supervisory influence over the work of ALJs. Pressure of any sort relating to factual findings would be improper. The less the supervision, or communication, have to do with the facts or outcome of a particular case, presumably the less suspect it would become. Communications to ALJs of substantive agency policy intended to obviate an issue in future cases seems quite appropriate, as the Seventh Circuit recognized in D'Amico v. Schweiker.<sup>26</sup>

Promulgation of time limits is, in one sense, the most general kind of policy statement imaginable. It applies to all cases, potentially all employees, and thus would seem an unobjectionable statement of agency goals and procedures. Moreover, promptness is one of several goals to which agencies should aspire and presumably they should have considerable discretion in deciding how to reach it (assuming that the resultant procedure is not so summary as to deny due process). The mere fact that some employees, even ALJs, sometimes would like more time for decision than the agency wishes to afford should not itself be a disabling factor. On the other hand, a deadline can affect an ALJ's handling of particular cases. A deadline arguably could even influence the substance of a decision, by preventing relevant factual inquiry, discovery, or hearings, or by forcing issuance of a decision before the ALJ has considered all the evidence. Whether such influence, combined with potential agency discipline, contravenes the "qualified right of decisional independence" is not an easy question.

Of course, legal precedents become crucial only when an agency seeks to dismiss or discipline an employee for failure to perform. An agency decision to promulgate time limits and monitor all employees' compliance for informational and oversight purposes, would seem secure from legal objection. Also, agencies can avail themselves of other means of averting confrontation, such as ALJ participation in developing time frames<sup>27</sup> and regular discussion of potential problems between Chief ALJs and program and management personnel.<sup>28</sup> In that case, agencies' use of case monitoring and time limits should not provoke the kind of resistance that could be crippling.

#### IV. NATIONAL LABOR RELATIONS BOARD

The NLRB's case management and information system has been a model of performance amongst federal agencies. Implemented in 1959, this system was devised by lawyers and managers who studied the agency's delay and related performance problems. After an extensive time study was completed, the Office of the General Counsel established overall time goals that were promulgated in 1960 as part of the agency's Rules of Practice. Internally, the agency formed interim time targets for specific stages of the case process. Finally, the Office developed an information system that permitted managers to measure and compare productivity, caseload and case type for each of the NLRB's 33 regional offices.

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<sup>26/</sup> 698 F.2d 903 (1983).

<sup>27/</sup> See Administrative Conference Recommendation 73-3, supra note 12; Rosenblum, supra note 16.

<sup>28/</sup> See GAO report on FERC, supra note 1.

External criticism, more than statutory time limits, constituted the impetus behind the NLRB's self-imposed guidelines. The few time limits imposed on the agency by the National Labor Relations Act of 1935 (NLRA) did not deal with case processing.<sup>29</sup> Shortly before the NLRB acted, Senator John F. Kennedy berated the agency's case processing speed and stated that "justice delayed is justice denied."<sup>30</sup> Faced with congressional pressure and internal backlog, the NLRB decided to create a thorough time goal system that was applicable agency-wide.

#### Agency Structure and Duties

The NLRB is an independent agency whose functions are divided between a five-member Board and its General Counsel. It has 33 regional offices which are responsible for investigative and prosecutorial functions. The agency employs approximately 3,000 people. Two-thirds are employed in the regional offices, 350 work with the Board and 600 are assigned to the Washington Office of the General Counsel. The NLRB handles approximately 55,000 cases per year, and its caseload has been increasing steadily.

The NLRB has two primary statutory missions. One is the conducting of secret ballot elections among employees in appropriate collective bargaining units to determine whether or not the employees desire to be represented by a labor organization. The other is preventing and remedying of unfair labor practices of employers and labor organization or the agents of either. In addition, the Board also hears jurisdictional disputes.

The General Counsel exercises general supervision over the bulk of attorneys employed by the Board (other than Administrative Law Judges, legal assistants to Board members, the Executive Secretary and the Solicitor, and a few others) and over the offices and employees in the regional offices. Also, the General Counsel has final authority with respect to the investigation of charges and issuance and prosecution of complaints before the Board.

The General Counsel's staff is separated into several divisions. The Division of Operations-Management has full responsibility for supervising all field operations as well as monitoring and directing case flow through the various Washington offices. It is headed by an Associate General Counsel who has six Assistant General Counsels reporting to him.

All cases originate in the regional offices through the filing of unfair labor practice complaints or the filing of representation petitions, and most are resolved at the regional level without any formal participation by the Board. Specifically, approximately 90 percent of the 55,000 unfair labor practice and representation cases coming before the National Labor Relations Board annually are resolved informally by the agency's 33 regional offices. The regional offices operate under the general supervision of a regional director, who is assisted by a regional attorney, and a staff of field attorneys, examiners and clericals. They investigate petitions and charges of unfair labor practices, prosecute unfair labor practice cases and process jurisdictional dispute cases.

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29/ As amended in 1947 by the Labor Management Relations Act (Taft-Hartly Act) and in 1959 by the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act).

30/ "Twenty Years of Productivity," 2 Performance 1 (1981).

The regional office's investigation of an unfair labor practice complaint usually will be completed within 30 days. The regional director then decides whether the evidence is sufficient to substantiate the charge. If so, the Regional Director may seek a settlement or may issue a formal complaint and a notice of hearing. The case is tried before an ALJ, normally in the geographic location where the conduct in question occurred.

After the hearing is concluded and briefs are submitted, the ALJ prepares a decision stating findings of fact, conclusions of law and a recommended order. If exceptions are filed, the case will be reviewed by the Board, usually acting through a three-member panel.

Besides their role in processing unfair labor practice cases, the regional offices also play an important part in the processing of representation cases. These cases begin with the filing of a petition with a regional office by a union, an employer, or an employee, and proceed with a regional office investigation. In cases where the parties do not sign an agreement consenting to hold a representation election, a hearing may be conducted to determine whether an election should be held. The Board may review a decision if substantial questions of law or policy are raised or if there is a clear error by the regional director on a substantial factual issue.

The NLRB's "Pipeline" System

The time limits scheme that the NLRB established in response to congressional criticism took considerable time to develop, but is not particularly complicated. In fact, a key to meeting the agency's self-imposed goals is found in the system's simple structure.<sup>31</sup> The NLRB's "Pipeline" system sets up objectives for each step in handling the predecisional stages of every unfair labor practice case that the agency handles. The goals are as follows:

- Step 1. Charge is filed . . . . . Day 1
- Step 2. Commence Investigation . . . . . 7 days from charge
- Step 3. Complete Investigation and  
Determination . . . . . 30 days from charge
- Step 4. Issue Complaint . . . . . 45 days from charge
- Step 5. Case Hearing . . . . . 90 days from charge

These timetables were established in 1959 and still apply in 1983. The cases involving representation petitions are processed according to similar time guidelines.

These guidelines can signal problem areas as they arise and permit the origins of time lags to be traced. Once the root of the delay is found, the problem can usually be alleviated before the problem is compounded. Otherwise, backlogs may ensue, leading to further difficulties caused by handling current cases concurrently with older ones.

The complementary monitoring system is nearly as simple as the timetable; basically, it is based on management by exception. The system is impersonal and concentrates on overall office results. Individual employees are monitored by their team supervisor. The supervisor reports to the Assistant Director, who is responsible to the Regional Director. The process continues in a hierarchical fashion until it reaches the

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31/ Interview with Mr. Joseph DeSio, Associate General Counsel, NLRB.

apex of the information and monitoring system, the Office of the General Counsel.

The case management system is well disciplined. Each Regional Office is required to submit a Regional Case Dispositions Report by the tired working day of each month. The report includes information on a region's intake and investigations counts, pre-complaint situations, methods of disposition, complaints issued, and other comprehensive statistics (See Appendix A).

The Office of the General Counsel aids in the monitoring process by rapidly compiling and distributing the data derived from each office to prepare comparative charts. Each region can measure its performance against all other regions, and the Office of the General Counsel can spot backlogs. Once a problem is spotted, discussions are held with affected regional directors and their offices to determine the extent, cause and possible solutions for lag in performance level.

The system also has built-in mechanisms to insure adequate flexibility. First, a case may be delayed because of external factors, such as the unavailability of witnesses. Instead of judging solely on the numerical statistics, a regional director will determine the reasons for a delay before acting to expedite the handling of a case. Secondly, the Regional Office statistics are based on median measurements as opposed to averages. Thus, according to NLRB officials, it reflects a more accurate assessment of the time it takes a typical case to move through the system.<sup>32</sup>

While applied comprehensively, time limits at the NLRB are not specific requirements, but serve as broad goals. The case handling system is effective also because it is reinforced by additional strategems that strengthen internal discipline and promote healthy competition, such as Senior Executive Service contracts, incentive programs, personnel evaluations, promotions, and recognition awards. These encourage agency workers to give priority to timeliness whenever possible.

#### Results of the "Pipeline" System

Since timeliness figures are compiled, tabulated and recorded, the quantitative results of the case management system are easy to assess. Tthe median age of cases pending under preliminary investigation prior to the establishment of time limits was 52.5 days in 1958 as compared to 20 days in 1978, a decline of 62%. Before the implementation of the monitoring system, Regional Offices averaged 116 days to process a case from the filing of charges to the issuance of complaints. Now the process is accomplished within a median range of 44-45 days. Significantly, these reductions occurred as the NLRB total case intake tripled. Within two years after the implementation of the case management system, the backlog was virtually eliminated.<sup>33</sup>

The system produced additional, less tangible benefits. First, it appears to have helped the NLRB during the budget process. Because the agency has numerical evidence as to performance and productivity, it has had relative success maintaining an adequate budget during an era of budget-cutting. Secondly, the system can be useful to monitor

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<sup>32/</sup> Interview with Joseph DeSio, *id.*

<sup>33/</sup> DeSio, J. and Higgins, John, "The Management and Control of Case Handling, Office of the General Counsel, NLRB", The Bureaucrat, Vol. 2, Number 4, Winter 1974, p. 394.

personnel performance, though timeliness is not, of course, the only measure of performance. Thirdly, the system seems to create incentives by providing goals that even the busiest offices strive to fulfill. Statistics have shown that most regional offices, regardless of size or caseload, will consistently process their cases within the system's time guidelines.

#### V. CIVIL AERONAUTICS BOARD

In order to reduce its sizeable backlog, the Civil Aeronautics Board was forced to streamline its administrative processes. In 1976 two separate, but related improvements were undertaken by the agency -- the implementation of a computer tracking system and development of a manually operated time limit program. The Work Item Tracking System (WITS) initially instituted and overseen by the Board members and their immediate managerial staff, maintained a tight surveillance over work item deadlines and bureau adherence to them. The initial time limits system, overseen by the Managing Director's office, permitted the Board to monitor the course of petitions for rulemaking. This 120-day target period was divided up into component steps, each step having an individual time deadline. When a routine petition was processed through all of its various stages, the sum of the steps would be no greater than 120 days.

The WITS system has changed and expanded gradually, to take in other kinds of cases, and it now has an impact on all CAB bureaus that deal with docketed information. Its flexible case profile system places each incoming case under a time schedule that is broken down into stages. As a case moves through various bureaus and offices, a specific employee at each is responsible for it and must justify any request to change a specified time target. The new deadline, and the reason, are logged into the computer. This makes it difficult to blame others for delay. The CAB helps to enforce the time limits by maintaining accurate, up-to-date status reports on all cases that are monitored regularly. The comprehensive computer system keeps track of all areas of case-handling. It keeps a case from "falling through the cracks" and can serve as an objective method for motivating promptness via reports that remind employees of deadlines. The managers play an important role in communicating with responsible employees and applying pressure where needed.

The many work items that are monitored range from fare exemptions to domestic route applications. The time limit program helps to reduce duplicative steps, and signals problem areas as they occur. However, the quantitative impact of fixed deadlines at the CAB is difficult to measure for two major reasons. First, the agency entered its "sunset" era in 1978 just as the system was expanded and improved. Hence, both caseload and resources to handle it decreased as WITS utilization increased. Secondly, caseload and time statistics were not comprehensively recorded prior to 1976, so (with the exception of the cases affected by 120-day statutory deadlines) no accurate comparisons can be made to determine reductions in case-processing time. In statutory deadline cases, a congressional study on federal regulation documented improvements. One year after the standardized deadlines and complementary managerial programs went into effect, an item's average case age dropped from 10 months to 5 months, and all petitions received during that period, with one exception that required a 30-day extension, were processed within the 120-day deadline.<sup>34</sup>

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<sup>34/</sup> Committee on Governmental Affairs, United States Senate, Delay in the Regulatory Process 136 (1977).

### Structure and Duties

The Civil Aeronautics Board is an independent regulatory agency responsible for the economic regulation of domestic and international air transportation.<sup>35</sup> Among other things, the CAB has been charged with licensing domestic and overseas airline operations, regulating passenger cargo rates and air carrier practices, awarding financial subsidies to eligible air carriers to encourage otherwise unprofitable air service, approving or disapproving mergers, and prescribing uniform systems of accounting for carries. Under the Deregulation Act of 1978, many of these powers have been greatly reduced and the CAB will cease to exist shortly.

The Board consists of five members appointed by the President. The Managing Director, under the Chairman's direction, oversees the Board's workload. The CAB is fairly small (and diminishing) agency, now with approximately 450 employees. The staff has considerable authority to act on a wide variety of regulatory matters under delegations of authority from the Board. Even in matters finally decided by the Board itself, the staff plays an important role in scheduling the work flow, processing applications and other requests, conducting investigations, recommending action, and drafting agency regulations and decisions. Most cases are decided on the basis of written submissions by the parties without formal evidentiary hearings.

As mentioned above, the CAB is subject to several statutory time limits. License applications must be dismissed, set for evidentiary hearing, or processed by nonhearing means within 90 days. Applications set for hearing have an additional 240 days to decision. Under section 1010 of the Federal Aviation Act<sup>36</sup>, the CAB must approve or deny within 180 days applications for interlocking relationships, mergers, or exemptions. Except for merger cases, this period is extended to a year if the Board sets the matter for an evidentiary hearing. The Board's own regulations require it to issue a notice of rulemaking, or dismiss a request for rulemaking received from the public, within 150 days after receipt. Thus, both agency-promulgated and statutory time limits are integral to the CAB's operation.

### Background of the WITS System

WITS is a computer-based, agency-wide management information system. It was established with the following objectives in mind: (a) facilitate the setting and meeting of overall target dates for individual work items; (b) signal delays as they occur; (c) keep routine items moving; (d) provide a mechanism for top management to interpose alternative priorities; and (e) build a central perpetual inventory of work in the CAB's processing pipelines. Ideally, the goal is to expedite regulatory activities without interfering with the quality of fairness of the agency's proceedings. In retrospect, the CAB feels that present system has met those objectives.

The program was implemented in 1975 under the direction of Chairman John E. Robson, who thought that computer system would improve the CAB's capability to act and react in the "timely manner" required by the Administrative Procedure Act.<sup>37</sup> With the

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<sup>35/</sup> Its statutory responsibilities are set out in the Federal Aviation Act of 1958, as amended, 49 U.S.V. §1301, et. seq. Those responsibilities were substantially modified by the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705.

<sup>36/</sup> 49 U.S.C. 1940.  
(cont'd)

aid of two data processing specialists, information was gathered from each office within the CAB's bureaus concerning 1,500 work items in 40 categories of administrative proceedings. Their information-gathering stage culminated after 18 months. In addition, it took six months to program and "flow-chart" the data and develop appropriate guidelines.

Revisions have been made over the past six years. The most significant changes have been the addition of a simplified computer language, a language that utilizes conversational English as opposed to computer jargon, and the involvement of middle managers in the monitoring procedures.

### Developing Profiles and Internal Target Dates

#### 1. Profiles

For each type of item that the CAB handles, it has devised a "profile," which is like a flow chart outlining its course as it is processed by each of the CAB's various departments in the most expeditious sequence, and specifying the amount of time each step is allotted. It is similar to the NLRB's pipeline structure, though somewhat more complex. Some profiles contain over 60 steps, such as a domestic route application. If a work item requires a decisionmaking step, the profile report will have the options listed, as well as the set of procedures that would follow each option. For example, in the profile of a fare exemption, after the third step the profile direction indicates possible choices to be made in the proceeding. The directions state that if a problem exists after a legal review then the work item should be sent to a staff member who can "recommend action", but if no problem exists then the item's review and pursuant recommended actions should be considered.

Systematically, the profile provides directives, a reliable sequence of events, and an expeditious timetable, and it designates the employee responsible for each stage of the casehandling process.

#### 2. Procedures

Profiles are designed by the Management Systems Information manager with assistance of affected personnel. Together, they informally work out the sequence of steps, and the time allotted to each step. Profiles are revised as problems arise within each bureau. A suggested revision is discussed between the staffer and a Management Systems Officer. Afterwards, the revision is sent to all other offices for approval.

The use of profiles has extended to each type of work item that flows in and out of the CAB. As a document, request or complaint enters the CAB, it is docketed and then logged into the computer which categorizes the work item under a specific profile number. At this point, however, two additional options are available: (1) it may be deemed a "special" case that cannot proceed through the agency at normal speed, or (2) if the Board designates it a "priority" item, then target dates are altered accordingly. This procedure is a necessary step to ensure that each case is treated with individual attention and with the utmost efficiency where possible. This built-in flexibility helps to subordinate the "process" to a secondary level and maintain purpose and fairness as the

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37/ Speech by Rubin A. Caldwell on "The Work Item Tracking System: A Mechanism for Improving Federal Productivity," at The Ninth Annual SMB Conference, 1977.

top priorities.

#### Problems with Implementation of Time Limits

The two major difficulties that arose within the CAB as the WITS system was implemented were general resistance to change and defensive attitudes concerning the tight surveillance of worker activity.

The first problem will occur within most agencies. The CAB dealt with the resistance by stimulating participation at the managerial level. Once the managers understood the system's benefits, they participated in the WITS system to aid them in their administrative duties. Other staff members learned to use it, also, through the educational program offered by the agency's computer specialists and the assistance of the interested management.

However, middle management did not become actively involved in combatting delay through computer tracking until the second problem, an overly rigid oversight system, was addressed. The CAB discovered that too much "coercion" can cause unfavorable attitudes that can harm worker productivity and diminish cooperation with managers who wish to enforce firm time limits.

The WITS system began as a top-level management program. Target dates set on a prioritized proceeding could not be altered by anyone except the Board's Managing Director. He had to approve all time extensions and then his staff of computer operators had to log the alterations into the computer.

In contrast, after 1977 the rigid system became less formalized and more accessible, and hence, more accepted. Middle managers were trained to use the WITS system and manage the time limits within each bureau. The CAB's Bureau division managers were authorized to change target dates and approve other schedule alterations and required to log explanations for time extensions into the computer. The division manager's daily cases status report lists all reasons for time changes on the computer printout, as well as the number of times a case's schedule has been revised. Because the record of the delay is hard data that is accessible, visible, and updated regularly, it is easier to enforce than less well-documented time limits. The program, while less regimented than the original WITS system, appears more effective.

Currently, the established time limits are overseen agency-wide by one person, the Chief of Minutes, who monitors the system<sup>38</sup> develops reports, indicates areas that need revision, and highlights serious delay. He is responsible for contacting each office to determine the reasons for the backlog and helping solve managerial problems by working out more viable guidelines, streamlining proceedings or admonishing poorly run offices. The system is no longer "policed" by the Managing Director's office.

The CAB's experience shows the utility of developing a computer language that can be learned quickly and used by staff members. At its inception, the WITS system was not a program that a lay person could operate. It was a system designed by computer specialists for computer specialists,\* so that later, when the WITS system spread to the mid-management level, most people had difficulty learning the computer language and operating its complex programs. The CAB overcame much of its language barrier problems with the development of a complementary query system that is based in a language similar to conversational English. Once it was implemented, time limit changes and

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38/ Interview with Norbert Kaus, July 1982.

monitoring became a simpler, more accessible process. As a result, in 1983 90 percent of all department management personnel used the WITS system in their daily routines.

### Qualitative Advantages

Reliable data on the impact of the WITS system is hard to obtain because manpower and caseload have been diminishing steadily as a result of airline deregulation. Nonetheless, the following advantages are evident.

1. It reduces duplication of effort. As a profile is designed, managers and staff members in affected bureaus develop an organized format of steps that are charted from start to finish. In creating the 120-day statutory time limit profile, the normal number of process stages — formerly 20 to 25 — was reduced to about fifteen. What managers discovered once they plotted a work item's course was that many procedures were needlessly duplicated in a bureau. For example, a manager formerly had to approve a work item after each staff member processed it, instead of one time at the end of its departmental circulation. In another instance, prior to establishment of the system, different bureaus sent one case to the Board three times. Under its present time schedule the duplicative steps are omitted, thus saving days of paper shuffling.

2. WITS reduces time spent on monitoring deadlines. This is because of two factors: the reduction in backlog and the designation of a responsible party for each stage of the process. Because workers can concentrate more heavily on work that is "on the track" and flowing, rather than pending, the tendency for delay is lessened. Workers no longer have to contend with cases that are a year old. Instead, they can deal solely with incoming work items that proceed along a predictable track. Furthermore, the designation of a specific person responsible for a work item enables supervisors to survey case progression without wasting time searching for the person handling the case. For instance, when inquiries arise about a particular rule or other case's status, the computer can display within seconds who has it and in what stage it is pending.

3. Items do not get lost as often. Within any agency where substantial paperwork is transferred from office of office, papers often get misplaced or "stored". Under the time frames within the WITS system and the monitoring of delayed proceedings, the computer stores up-to-date information about case location and status.

4. It exposes problem areas. A Division Manager can spot delayed proceedings daily as he reviews his General Case Manager's Report (GCMR). If a bottleneck begins to form within one bureau, the manager can note it as it occurs and act more quickly.

5. Statistics and inquiry responses are compiled quickly. Because the centralized WITS system also serves as a data bank, computations can be made and statistics compiled within a matter of seconds. General inquiries about past cases or present cases and their due dates can also be answered quickly.

6. It saves employee time. Time that was previously spent determining where the file on a case was located, or when an item would be completed, can now be directed towards more important matters. Docketing time is also reduced. Overall, it can make the agency more responsive, and can reduce manpower requirements, particularly in clerical areas. The WITS system enabled the CAB to reduce the number of workers in its docket room substantially.

7. It can substantiate productivity and help avert statutory deadlines. In 1978, as part of the Airline Deregulations Act, Congress was considering implementing statutory

deadlines. With the information readily available under WITS, the CAB was able to provide a comparison of its projected time limits to the congressional time limits. Because the agency had a tracking system and self-imposed limits, the CAB was able to avert overly rigid statutory time limits.

#### Conclusion

The CAB has developed techniques that can be adopted by other agencies suffering from delay. The usefulness of its organizational techniques is apparent. Convincing agencies of the benefits of a computerized system will depend on agency size, caseload and case type. Advantages exist, but they are not as important as developing a system to monitor time limits conscientiously.

VI. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
GRANT APPEALS BOARD

HHS' Departmental Grant Appeals Board hears appeals by grant and cooperative agreement recipients seeking to dispute decisions of the Social Security Administration, Health Care Financing Administration and other component agencies of HHS. Approximately three years ago, HHS' Departmental Grant Appeals Board had a large backlog with each case taking, on the average, 368 days to complete. Recent statistics show a current average case age of 159 days. Much of the reduction in processing time and backlog (which has almost been eradicated) can be attributed directly to the introduction of time limits, promulgated and informal, combined with related managerial techniques.<sup>39</sup>

Organization and Duties

Commencing in the 1970s, federal agencies charged with the responsibility of administering federal grant programs increasingly have used grant appeals boards established by regulation to decide many kinds of disputes between the granting agencies and their grantees. The first of these appeal boards--and one that has served as a prototype -- was established by the Department of Health, Education and Welfare in 1973. The recently revised regulation governing the Board accords states, local governments and other HHS (formerly HEW) grantees under designated programs the right to appeal certain types of final decisions of an HHS constituent agency on a dispute arising under an existing grant. These cases may involve, for example, disagreements arising out of an auditing procedure that determines that a state or local grant recipient must repay some grant money. The grantee may contest the initial agency decision by appealing to the Departmental Grant Appeals Board. The Board, upon the basis of written submittals by the grantee and the granting agency, and often supplementary evidentiary hearings, renders a legally based, written decision resolving the dispute.

The Board consists of four members, aided by a legal and clerical staff. Each case is resolved by informal adjudication or by a mediation process recently implemented for some cases.<sup>39a</sup> The former is much like a APA adjudication, but usually involves less discovery and is decided by a presiding officer who is not an administrative law judge. The mediation process involves a Board staff attorney in a more active settlement role and usually takes slightly less time. At present, the Board is handling between 225 and 250 cases, of diverse size and complexity, involving disputes over amounts ranging from a few thousand to several million dollars.

Time Limits System

In 1981, the Board had no time limits in its regulations, nor was it subject to any statutory time limits. As part of their new Board Chair's Senior Executive Service contract, however, he agreed with the Department to reduce the backlog in his office.<sup>40</sup>

39/ Interviews with Norval D. (John) Settle, Chair, HHS Departmental Grant Appeals Board, July and August 1983.

39a./ See, Barrett, Use of Mediation Procedures in Connection with More Formal Adjudication of Grant Disputes (1982); Steinberg, Procedures for Resolving Disputes Under Federal Grant Programs, 1982 ACUS 137 (Vol 1.) (1984).

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As a by-product of his contractual obligation several "goals" were published as part of the Board's procedural regulations in the Federal Register of August 31, 1981.<sup>41</sup> Section 16.23, "How Long an Appeal Takes", established "general goals" for its consideration of cases. Its goals included time frames that apply to each step of agency proceedings. First, for regular review based on a written record under §16.8 (preparation of an appeal file and written argument) a six months time frame was set. After the review of an appeal file the Board may opt to schedule a conference to clarify issues and questions. Again, the deadline is six months; for cases which require a hearing, a hearing must be held and decision written within nine months. And thirdly, a case can be processed in an "expedited fashion"—those cases involving \$25,000 or less and containing no complicated or unusual circumstances—within three months. The expedited process involves a streamlined document exchange and issue formation process, and generally relies on a telephone conference involving all parties.<sup>42</sup>

The Board's stipulations are goals rather than requirements, which is consistent with its intent to allow flexibility and permit considerations of sound decisionmaking to take precedence over speed. These self-imposed time limits are subject to periodic review and revision.

It must be noted that implementation of the rules has been complemented by internal time limits that are adapted to each case as it is assigned, and additional managerial methods. The Board has two supervisors and two teams of lawyers who aid the Board members and mediate cases. Each supervisor, a GS-15 level employee, coordinates the activities of 7 or 8 attorneys. As cases are filed with the Board, one employee receives and categorizes them. Next, he discusses the case allocation with each supervisor to determine attorney assignments. Once determined, the supervisor, the attorney and a Board member sit down at an informal "negotiating" session to establish an appropriate timetable for the case, based on its complexity and the attorney's workload. This process is implemented for all cases, whether they are to be handled through adjudication or mediation.

Enforcement techniques vary with each employee. Once target dates are set, personnel generally tend to adjust priorities accordingly. Problems that do arise are handled by (1) actively discouraging delay, (2) posting a list of particularly overdue cases in visible sites, and (3) channeling cases which can be diverted from the traditional process through streamlined steps to promote more expeditious case handling.

Employees and parties are generally discouraged from asking for time extensions. When the employee asks for an extension, for example, he might be informed that it will be granted this time, but not the next. In other cases, compromises may occur, with a request for 40 days being negotiated so that a 25-day extension is granted instead.

Charting overage cases, a form of peer pressure, is used only when cases are noted

<sup>40/</sup> This is reflected in the Chair's performance plan.

<sup>41/</sup> 45 CFR Parts 16 and 74; 46 Fed. Reg. 43,816, Aug. 31, 1981.

<sup>42/</sup> Another pertinent revision to the Grant Appeals Board Rules is found in subsection 16.7. It states that "within 10 days after receiving the notice of appeal, the Board will send an acknowledgment, enclose a copy of procedural steps an appellant must take, and advise him of the next steps. The Board will also send a copy of the notice of appeal, its attachments, and the Board's acknowledgment to the respondent."

as particularly overdue, regardless of the reason. The chart of overage cases contains a list of fixed, negotiated deadlines established with the responsible attorney in one column, and the number of days the case is overage in the next. The chair compiles and posts a master copy of the month's overage case chart in his office, and distributes copies of the chart to each supervisor and attorney. This pressure, which stems from a concern for image and credibility, appears to be an effective tool to use with self-motivated employees.

The third techniques seeks to save time by directing cases through informal proceedings where possible. The informal proceedings utilize an ombudsman-type format to save several months of case handling time. By eliminating some steps, such as orders to show cause and other niceties, hours of preparatory time may be saved. This permits attention to be diverted to the complex cases that can require large amounts of attorney time.

The Board's chair has no future plans to implement additional target dates or rules, and feels that the Board is too small to implement a computer tracking system. However, he receives comments and suggestions on the effectiveness of the time limits through staff meetings. After two years of the time monitoring system, it was concluded that too much policing hampered employee motivation and the pressure of certain deadlines was eased by granting extensions more liberally and allowing more room for employee discretion on complex cases. The balance point between "too much" and "too little" is elusive and constantly fluctuating, but is one to which supervisors must remain constantly sensitive.

#### Advantages of Time Limits

Time limits have helped to organize case proceedings and reduce backlog. The reduction in backlog frees more time for staff to engage in front-end activities, particularly mediation which often leaves both parties with a more equitable result. Also, deadlines foster more efficient handling of cases since both parties have a better retention of case facts and are more productive when the case is "fresh" in their minds. Many common procedural problems associated with delays are avoided, such as locating witnesses or documents, educating new Board or party personnel, or rescheduling hearing dates.

#### Implementation Problems

The largest obstacle at the Board was one overcoming old habits and adapting to the self-imposed regulations. It took a period of several months to implement the system completely with full participation. Also, there have been occasional complaints from parties or outside agencies that felt the Board was moving proceedings too quickly. The Board's published rules attempt to meet this problem by providing that any case with complex circumstances will be allowed sufficient time to ensure a fair and equitable treatment of the case. The Board's goals advocate that the timeliness of case handling should not override the fairness of a trial, and that time limits be formulated with this in mind. Flexibility in enforcement of the rules appears to reflect this goal.

Today, delay at the Board, while not insignificant, can be attributed primarily to external factors, as opposed to managerial ones. To illustrate, the two leading causes of delay in 1981-82 were (1) delays requested by the parties and (2) disagreements between board members on what the outcomes of various appeals should be.

Conclusion

The Board has found time limits an effective way to free resources, streamline processes and monitor every item. Setting a time schedule with each lawyer as the case enters the office places each case into a time frame that guides the speed and direction of the cases. Also, use of backlog reduction as a performance measure in SES contracts, as in Mr. Settle's, may prove generally useful to stimulate agency managers to take steps to reduce delay. The Board's relatively simple monitoring techniques seem pertinent to many agencies.

## VII. FEDERAL TRADE COMMISSION

The FTC has received considerable criticism over the years for the time required to complete its investigations and adjudications. For example, an ABA Commission to study the FTC noted in 1969, "Problems of delay have vexed the FTC ever since it was established . . .".<sup>43</sup> More recently, the Commission's cumbersome trade regulation rulemaking procedures have aroused similar complaints (among others). While the FTC has taken steps to ameliorate delays, statistics developed by the Administrative Conference show that in recent years it has taken between two and four years to complete FTC adjudications and five years to conclude a rulemaking proceeding.<sup>44</sup>

From time to time, FTC officials have attempted a variety of improvement strategies, from continuous hearings to deadlines for ALJ decisions. Nonetheless, many cases have proven virtually intractable, because of lengthy discovery and hearings, complicated issues, or delay at the Commission level. Last year, the FTC began a new approach, streamlining the Commission's decisionmaking processes in several areas, particularly those relating to Commission level review of initial decisions and voting and assignment procedures. While these reforms'efficacy has not yet been proven over the long haul, they merit consideration as an example of commitment at an agency's highest echelons to combatting delay.

Structure of the Agency

The Federal Trade Commission is an independent agency, comprised of five members (including a chairman) appointed by the President and confirmed by the Senate. It is charged with protecting the public from deceptive advertising and unfair trade practices and preventing unfair methods of competition. The FTC has about 1200 employees working at its Washington, D.C. headquarters and ten regional offices.

The FTC is authorized to undertake adjudications and rulemakings in carrying out its duties. Ordinarily, the initial step in an FTC proceeding is investigation of an alleged violation; during investigation, the FTC has considerable authority to compel production of documents, take oral testimony, or hold hearings. If a staff investigation reveals a violation, and a majority of Commission members agree to issue a complaint, an adjudicatory proceeding before an administrative law judge is held to decide whether violations of the law have occurred and if a cease-and-desist order should be issued. The ALJ's initial decision can be appealed to the Commission and then to a federal Court of

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43/ See note 1.

44/ Administrative Conference of the U.S., Federal Administrative Law Judge Proceedings: Statistical Report for 1976-78, 159-63 (1980). Boyer, Report on the Trade Regulation Rulemaking Procedure of the FTC, 1980 ACUS 33, 1979 ACUS 41.

Appeals. Adjudication typically involves one or more prehearing conferences, considerable discovery, evidentiary hearings, and Commission review.

The FTC also conducts, from time to time, proceedings to develop substantive rules defining unfair conduct and prescribing preventive safeguards. These rulemaking proceedings, usually directed at industry-wide practices that are alleged to unfairly exploit consumers, entail procedures that by statute are considerably more complex than those prescribed by the APA. They require informal oral hearings before a "presiding officer," complete with cross-examination. After the hearing, the FTC's rulemaking staff prepares a report analyzing the record and recommending a final rule. Then, the presiding officer recommends a decision and, after additional input from the public and other parts of the FTC, the Commission decides whether to issue a rule regulating the conduct in question.

#### Commission Reforms to Reduce Delay

In September 1983, the Commission met and adopted a series of new deliberative procedures based on recommendations developed by Chairman James C. Miller.<sup>45</sup> The major changes affected decisionmaking at the commissioners' level. Several involved voting, where commissioners previously had almost unlimited time to cast votes on many matters before them; the new procedures subject them to time limits for matters decided by written circulations.

While many important FTC decisions are made at formal Commission meetings, most matters before its members are decided as motions circulated in writing. Timely processing of written circulations has at times troubled the FTC, with action sometimes being delayed by a dissenting commissioner's failure to vote. To ensure prompt effectiveness of FTC decisions, the new procedure gives commissioners 14 days to vote from the time a majority of his or her sitting colleagues has recorded votes on one side of a motion. A commissioner may wish to circulate a "topping motion" amending or substituting for the original motion; if he or she does so, and if the new motion obtains two affirmative votes, the limitation is tolled until the motion is resolved. A similar process with shorter time limits governs "walk-around" circulations, which are used in matters requiring prompt resolution.

Deadlines will also be used to expedite appeals to the Commission from ALJs' initial decisions. The Commission agreed to set, immediately following oral agreement of an appeal, a target date for issuance of its decision and to set internal target dates for preparing an opinion. To expedite appeals handling, the Commission also agreed to make greater use of its Office of General Counsel and Bureau of Economics in opinion drafting and to amend its rules of practice to require the parties to file an index of their exhibits and witnesses.<sup>46</sup> The Secretary is responsible for preparing a weekly list of all outstanding adjudications that have been circulated by the commissioners.

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<sup>45/</sup> The FTC's revisions are described in Miller, "Chairman Takes Steps to Improve Efficiency at FTC," Legal Times, October 31, 1983, 13. The discussion herein is drawn largely from that article, and from Chairman Miller's October 1983 memorandum to the Council of Independent Regulatory Agencies.

<sup>46/</sup> 48 Fed. Reg. \_\_\_\_\_ (1983) (to be codified at 16. C.F.R. §3.46).

In addition, the FTC modified its rotational system of assigning new matters to its members to permit a commissioner with a heavy workload to be passed over for a reasonable period. It also placed a deadline on commissioners' processing of assignments, requiring them to circulate all assignments, either with a motion or on an informational basis, within 30 days after receipt. The Secretary of the Commission is now responsible for distributing to members a weekly list of all pending assignments.

The commissioners approved delegations of authority in deciding petitions to quash compulsory process and in closing investigations. Below the Commission level, the Secretary distributes to the members a monthly report listing target deadlines that the Commission has established for staff handling of matters. In addition, the commissioners plan to meet with the FTC's ALJs to discuss ways to expedite the trial of adjudicatory proceedings.

### Conclusion

As the Senate Governmental Affairs Committee recognized, the self-discipline of agency members in establishing and adhering to deadlines is essential, since it can set an example for others in the agency.<sup>47</sup> While the FTC's initiatives are too new for their full impact to be gauged, if adhered to they should serve at least to speed Commission processing of its business and possibly to strengthen the hands of agency managers interested in improving the FTC's deliberative process at all levels.

## VIII. CONCLUSION

Delay in federal agencies occurs for many reasons, but as this study suggests, a variety of options are available to agencies wishing to develop time guidelines and case monitoring systems as one response. Given the nature of bureaucracies, which abide by rules and standardized working procedures and can become very resistant to structural changes that require the substitution of new work habits and expectations, the difficulty in implementing a time limits scheme should not be underestimated. Introducing a time limit program will require commitment far beyond the mere promulgation of a set of rules. To have any effectiveness, it demands the commitment and participation of all those involved, as well as the creation of optimal conditions for such a change.

These techniques cannot be implemented without the realization that a structural change requires a commitment of time, planning and personnel. An agency that implements time limits should allocate the resources necessary to ensure that such commitments can be kept. It should take pains in developing time limits. Once guidelines has been issued, then the internal explanation, instruction, monitoring and feedback must begin.

A cooperative environment must be fostered. Two agencies noted that their time limit systems had been too harsh at one point during the implementation process to yield satisfying results. The Chair at HHS' Departmental Grant Appeals Board found that staff members felt unnecessarily pressured because they were supervised too closely. CAB workers felt that the initial system was too inflexible as well. Some decisional officials may feel their "independence" threatened. At the extreme, reactions to a system that polices staff members can range from fear to resentment because it may signal that supervisors do not trust employees. At both HHS and the CAB, some workers initially

thought that the deadline systems pushed rather than reminded them of time restrictions, and that they focused on apparent problem areas without considering situational factors that delayed work items. Adjustments at both agencies proved helpful.

Agencies can lessen the resistance and promote cooperation by using several techniques. Employees participating in decisionmaking will be less resistant if they see time limits being enforced at all levels in the process. Feedback channels must be available, since employees frequently can determine fallible planning more quickly than those who devise it. Moreover, feedback channels indicate that agency officials welcomes employee suggestions and complaints because s/he trusts his/her judgment.

Additionally, employees will more likely accept changing procedures if they can participate in their development.<sup>48</sup> Very simply, this means that if the management announces a change (such as time limits and case monitoring) without first discussing the problem with or giving any forewarning to affected staff members, then they will probably encounter greater resistance. A fear of the unfamiliar can thwart change, particularly when the change involves the introduction of new technology. ". . . (B)efore we exchange one set of fears for familiarity, the residual fears can lead to immobility." But, if the staff members are familiarized with the agency's concerns at the start of the process, then they are unlikely to have as much fear and discomfort. Furthermore, if employees participate in a goal's establishment then they can understand it more fully. Thus, uncertainty is minimized at the outset of each case proceedings. The participation also promotes a sense of employee involvement and control that can lead to more cooperation and satisfaction.

Time limits and monitoring can be implemented for most agency adjudicatory and rulemaking proceedings. Several agencies have used time frames with success, each one doing so differently. The important point to note is the results. At each agency that implemented a system, the benefits from reducing delay appeared to outweigh the system's resource demands, decisional effects, and other drawbacks. These agencies' experiences can serve as lessons to others, and as the heads of more federal agencies decide to experiment with time target programs, those that follow can learn even more from their predecessors' experience.

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<sup>48/</sup> This point has been recognized by the Administrative Conference in Recommendation 78-2, which called for consultation with ALJs and other affected interests to develop standards for expeditious disposition of Social Security appeals, and Professor Rosenblum in his draft report, which calls for involvement of ALJs in developing productivity standards, supra note 16.

