

## RECOMMENDATION NO. 17

### RECRUITMENT AND SELECTION OF HEARING EXAMINERS; CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND HEARING EXAMINERS; CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

#### RECOMMENDATION

##### A. RECRUITMENT AND SELECTION OF HEARING EXAMINERS

1. The Civil Service Commission should enlarge the base of recruitment and the number of qualified candidates available for appointment to hearing examiner positions by recognizing trial experience as one basis for qualification.

2. The Civil Service Commission should depart experimentally from the selective certification system as now practiced in the appointment of hearing examiners. Instead, it should develop a system under which the number of candidates qualified for hearing examiner positions is enlarged through the use of a general register for all agencies, with additional credit for specific relevant professional experience or selective certification for those agencies which demonstrate to the Civil Service Commission's satisfaction a current need for personnel possessing a specific background. The purpose of this experiment should be to permit meaningful comparative evaluation with the system now in effect. A report should be made to the Administrative Conference after 3 years of experience.

To aid the Civil Service Commission in effectuating the objective of this part of the recommendation, the Chairman of the Administrative Conference should appoint special committees from time to time to evaluate the standards of specific relevant professional experience proposed to the Civil Service Commission by any agency as being required for its work. Present selective certification agreements should continue until new standards have been adopted by the Civil Service Commission.

3. The Civil Service Commission should study and, if practicable, should institute an experimental intern program to supplement the direct appointment of hearing examiners from the register. Without finally deciding the issue, the Conference urges the Commission to consider anew whether successful interns should automatically be placed in hearing examiner positions.

4. The Veterans Preference Act should be amended to permit the selection of examiners for each vacancy from the top 10 available persons then appearing on the register, determined on the basis of examination and ranking without reference to veterans preference.

#### B. CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND EXAMINERS

1. Agencies employing attorneys and hearing examiners should encourage their participation in programs of continuing legal education. Budgets should include adequate funds for personnel so that attorneys and examiners may be released for reasonable periods of time to accomplish added training. Agencies should take all suitable steps to assure wide knowledge of training opportunities.

2. Agencies should also explore ways in which they can support the professional training activities of the Federal Trial Examiners Conference, bar associations, foundations, the Civil Service Commission, law schools, the individual agencies with parallel legal interests, and other institutions offering appropriate training for attorneys and examiners.

3. The feasibility of short-term exchange assignments of experienced attorneys in higher grades among agencies should be considered, in order to enhance the insight and effectiveness of government lawyers by exposing them to varied aspects of legal problems with which they may deal.

#### C. CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

1. A center should be established in the Washington area for the continuing legal education of Government lawyers, hearing examiners, and private attorneys practicing before Government agencies. The center should also promote coordinated programs within the Government and with specialized segments of the organized bar; stimulate and engage in the preparation of manuals, research materials, and other publications in support of such continuing legal education; and provide a mechanism for the exchange of information concerning professional problems of Government attorneys. The center, under the direction of lawyers, should be oriented toward applied legal problems. The Civil Service Commission should make available to it the benefit of the Commission's experience in establishing and operating Federal

Executive institutes and centers. The Federal Administrative Justice Center proposed by the American Bar Association in a resolution adopted by the American Bar Association's House of Delegates in January 1969, as an example, would serve the purpose of the present recommendation.

2. The establishment of the Center should not diminish each agency's present responsibility to provide continuing legal education for its own lawyers through "in-house" training programs, but the Center should support and assist all agencies in maintaining these programs at a high level of effectiveness.

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## VIEWS OF THE COUNCIL ON THE RECOMMENDATION OF THE COMMITTEE ON PERSONNEL

At its meeting on September 29, 1969, the Council of the Administrative Conference took the following action concerning proposed recommendations 1 through 4 of the Committee on Personnel concerning a change in the title for Hearing Examiners.

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

2. Since in its view an acceptable title has not yet been proposed, the Council does not express an opinion on proposed Recommendation 1.

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

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

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\* The proposed recommendations 1 through 4 failed of adoption. Matters referred to in the attached Committee report as Recommendations 5 through 14, and which were adopted, are incorporated as subparagraphs of Recommendation No. 17.

# REPORT OF THE COMMITTEE ON PERSONNEL IN SUPPORT OF RECOMMENDATION NO. 17

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## INTRODUCTION

The Committee on Personnel has prepared recommendations for the Conference in four areas:

- (1) a change of title for section 11 Hearing Examiners;
- (2) changes in the examination and appointment procedures for Hearing Examiners;
- (3) continuing legal education of Hearing Examiners and Government attorneys; and
- (4) establishment of a center for continuing legal education.

These topics are not novel. The first three years have been subjected to extensive debate for a number of years and have been the subject of a variety of proposals, some of them running back to 1962 and the recommendations of President Kennedy's Administrative Conference, others to Hoover Commission recommendations, others to parallels in the Report of the Attorney General's Committee on Administrative Procedure in 1941, and beyond. The third topic raises proposals which have been tried in various forms in several departments and agencies and are offered to strengthen the potential value of these programs and to encourage their greater use throughout the Government. The idea of a center for continuing legal education of lawyers involved in the administrative process, which is embodied in the fourth proposal, has been the subject of extended study by the American Bar Association. The Committee recommendations are compatible with the detailed proposal of that organization.

With respect to all of these matters the Committee informed itself through five days of public hearings in April 1969, supplementary statements and exhibits, a survey of departments and agencies in June 1969 which invited responses to specific pro-

posals, and numerous individual contacts with interested lawyers in and outside of Government.

The third and fourth sets of proposals, although subject to some debate as to specific details, were broadly supported and minimally controversial. The first and second sets, however, are very controversial. The bulk of the Committee's time and this report are devoted to these two topics.

#### A. CHANGE OF TITLE OF HEARING EXAMINERS

##### *Recommendation 1*

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

##### *Recommendation 2*

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

##### *Recommendation 3*

That the Civil Service Commission effect this change of title.

##### *Recommendation 4*

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

##### *Why Change the Title of Hearing Examiners?*

The Committee was persuaded that support for a change of title to something more clearly reflecting the important position and function of these quasi-judicial officers was overwhelming. Testimony heard in the public hearings and received in written form was almost exclusively in favor of such a change. There was no comparable agreement upon a substitute.

The present title of Hearing Examiner is not readily understood by laymen. It does not suggest to lawyers not familiar with the agencies the significance given the findings and decisions of the presiding officer. It has been confused with and compromised by the extensive use of the title Examiner for a wide variety of inferior and clerical officers throughout the Federal and state Governments. Particularly in hearings such as those conducted

by the National Labor Relations Board, where the credibility of witnesses and the full cooperation and respect of counsel and witnesses may be critical to the orderly and reliable conduct of the hearings, the title Hearing Examiner does not adequately suggest the serious character of the hearings. Attempts by agencies to individually dignify their hearings and to remedy this deficiency, by steps such as referring to hearing officers as Trial Examiners and referring to them in terms of the traditional courtesies and deferences of the courtroom, have not proven sufficient. Agencies, such as the Social Security Administration's Bureau of Hearings and Appeals, which deal directly with individual members of the public, report that parties do not feel the assurance and confidence they should from the appellate character of their hearing because they tend to regard the Hearing Examiner as merely another bureaucrat in their extended dispute with the agency. Attorneys who lack familiarity with the regulatory agencies also are confused and do not appreciate the independence of the Hearing Examiner. Further, since the title is ambiguous, Hearing Examiners often find it difficult to obtain the cooperation of Federal and state officials without lengthy explanations, as when obtaining the use of state courtrooms. And since the title is neither descriptive of function nor appropriate to the status of the office, it is suggested, potential applicants for Hearing Examiner appointments are not attracted to the office. A more appropriate title would, presumably, have a beneficial effect upon the morale, recruitment and retention of the entire corps of Examiners.

#### *What Should the Title Be?*

Although the need for a title change is almost consensual, the choice of the title to be substituted has produced a great deal of controversy. The title proposal receiving the strongest support has been "Administrative Trial Judge." It has been sponsored by the Federal Trial Examiners Conference and by the Administrative Law Section of the American Bar Association, has been the subject of legislation introduced by Senator John G. Tower of Texas, is apparently unanimously supported by the Hearing Examiners themselves, was the overwhelmingly favored proposal at the April public hearings of the Committee on Personnel, and has won the support or general acceptance of a number of agencies and departments, including the Federal Power Commission, the National Labor Relations Board, the Federal Maritime Commission, the Bureau of Hearings and Appeals of the Social Se-

curity Administration, the Department of Housing and Urban Development, the Small Business Administration, the Post Office Department, the Department of the Army, and the Federal Communications Commission.

Although some criticism of the term "trial" as non-descriptive of the function of Examiners in several agencies was received, the bulk of opposition was to the term "judge." It has been suggested that "judge" misdescribes the function of the Examiner and the hearing; that it will create confusion with members of the Federal Judiciary; that it suggests an independence of agency policy and of agency fact finding and decision powers that is quite inconsistent with the statutory objectives of the Congress; that it will induce unnecessary, undesirable and counterproductive judicialization in the hearing process; that it is not needed and is inappropriately honorific for the office of Hearing Examiner; that it would be incongruous with the reviewing functions of agency review boards and of the Boards and Commissions themselves; that it would suggest that the Examiner's decision has the status of a judicial determination; that to apply it across the board to all Section 11 Examiners would not recognize the considerable range in grade from GS-13 to GS-16 of Examiners, nor in the responsibilities and public significance of their respective functions; that the change is too drastic and that nothing indicates that the adoption of "judge" would accomplish the benefits claimed for it by the proponents; and that it may, especially when coupled with the word "trial," suggest an excessively adversarial character and mislead counsel and interfere with the efficient conduct of the proceedings. Agencies opposed to the use of "judge" in the title, or critical thereof, included the Atomic Energy Commission, the Civil Aeronautics Board, the Department of Commerce (including the Office of Foreign Direct Investments, the General Counsel, and the Maritime Administration), the Federal Trade Commission, the Interstate Commerce Commission, the Department of Health, Education and Welfare, the Department of Justice, the Department of Labor and the Department of the Treasury. The reader is reminded that these agencies, as well as those favoring "judge" above, have radically varying degrees of interest in the Examiner program and in the use of Examiners. A tally of proponents and opponents has no validity, but the scope of support and opposition has, and the agencies and departments are reported for that very limited purpose. A decision must be made upon the impact of the title change upon agency function, keeping in mind that some agencies are

closer to the process than others and any decision in this regard will have a greater impact on them. Unfortunately, these do not divide decisively in one direction or the other.

It is tempting to think that there must be some compromise title upon which most interested parties can agree. There does not appear to be one. Numerous suggestions have been offered, including:

|                              |                              |
|------------------------------|------------------------------|
| Adjudge                      | Examiner                     |
| Adminijudge                  | Federal Trial Examiner       |
| Administrative Chancellor    | Hearing Officer              |
| Administrative Judge         | Judicial Officer             |
| Administrative Law Officer   | Presiding Officer            |
| Administrative Trial Judge   | United States Trial Examiner |
| Administrative Trial Officer | United States Trial Officer  |

One of the reasons that compromises seem so unpromising is that the Examiners themselves and the agencies most strongly supporting them feel that the term "judge" is a critical element in any significant strengthening of the title, and that they further feel that a title change without the word "judge" will preclude further consideration of the matter for a number of years.

The Committee on Personnel proposes the title *Administrative Chancellor*, believing that it indicates to the unfamiliar layman or attorney the essentially formal character of the proceeding, the independence and high status of the hearing officer, the dignity and deference to be extended the office, and the necessary distinctions to be made between administrative rulemaking and adjudication on the one hand and Federal judicial proceedings on the other. The Committee feels that this title is as appropriate as any offered it to describe the varied functions of the full range of examiners appointed under Section 11, and that it will be as acceptable to as broad a base of agencies utilizing Examiners as any title suggested to the Committee.

*Must the Title be Uniform as to All Agencies?*

With the agencies divided, it has been suggested that each agency be left to determine for itself whether a change in title is needed and what title is most appropriate for its hearing officers. Arguing against this is the assumption that the uniform selection process, the sameness of status under Section 11 of the Administrative Procedure Act and the similarities of function would make such variations incongruous. Nevertheless, it is clear that some agencies feel a strong need for the change to "judge"



and the question was carefully weighed before the general principle of the advantages of uniformity was adopted.

It has been suggested to the Committee that there is considerable variation in the functions of examiners. The far less formal hearings deciding claimants' rights by Social Security examiners are quite different from the complex economic proceeding of rate making at the Federal Power Commission and both differ significantly from the credibility determinations and fact finding responsibilities of the National Labor Relations Board examiner. All three differ in turn from the fitness determinations of an examiner for the Federal Communications Commission in a licensing renewal case. All of these differ from each other and from the work of examiners in other agencies but all share in broad general functions such as making evidentiary rulings, controlling the development of testimony, dealing with counsel, making initial determinations of law and fact, etc.

It has also been suggested to the Committee as noted above, since examiners range in grade from GS-13 to GS-16, that a single title as honorific as "judge" would bestow inappropriate formality and dignity upon proceedings that benefit from their informal character.

The differences in duties, role and rank outlined above were weighed against the advantages of uniformity before the Committee chose to make the title choice uniform.

Under the present law the agencies may adopt any title they choose for internal administration, public convenience, law enforcement and similar purposes. This conclusion is based upon an advisory letter sent the Federal Trial Examiner's Conference by the General Counsel of the U.S. Civil Service Commission on Feb. 5, 1969, which indicated that a uniform title established by the Civil Service Commission was necessary for purposes of personnel administration, and for budgetary and fiscal matters, but that agencies individually might characterize their examiners as they chose for the other purposes noted. In neither case would legislation be needed to accomplish the change.

In its June 16, 1969, survey inviting agency comment upon tentative proposals, the distinction made by the General Counsel of the U.S. Civil Service Commission was brought to the attention of agencies and departments. This was done to determine how important the uniformity principle was thought to be, and whether agencies might prefer to have individual initiative in the matter of the title change.

The following agencies indicated a preference for a uniform

solution: Federal Maritime Commission, Federal Trade Commission, and Small Business Administration.

The following agencies supported the permissible change by individual agencies: Federal Power Commission and Housing and Urban Development.

The reasons given in opposition were (1) that a risk of confusion would be created by variations in the styling of examiners, and (2) that the variations would be a source of rivalry in status between agencies and would create pressure on the agencies not using the most desired title to adopt it, especially if that title were to include "judge." The virtues of uniformity were not explained beyond this. A limited variation was proposed by the consultant. This would be to adopt a common title for all examiners for budgetary and examination purposes. This would be accomplished by the Civil Service Commission. Then, agencies employing those in grade GS-16 would be permitted to experiment with "Administrative Trial Judge" or other titles and would thereby obtain a valuable experiential basis for evaluating, broadening or abandoning the reform. Part of the survey response of the I.C.C. was especially relevant to this proposal:

We would also like to point out that there is a great difference in the work of hearing examiners in different agencies. Also, the necessary degree of legal and administrative knowledge and training is so varying in different agencies that we do not believe a "broad brush" grant of the title of Judge should be so generally applied, indicating equal Judge status, to all the hundreds of hearing examiners who would be included. We have heard no sound rebuttal of this point. It appears, therefore, that the major, and perhaps the only, reason for asking for the change of title to Judge, for *all* hearing examiners, regardless of the great range of difference in the size, importance, and type of cases and procedures handled within the full list of agencies affected, is to gain the broadest possible support—a strength in numbers, united front approach, so to speak.

Additionally, the ICC does not believe the ICC Commissioners should be asked to take a position regarding the titles of staff personnel of other governmental units; nor should members of other such units be asked to vote on title designations for the ICC staff.

Thus, the consultant's proposal was one of uniform title for Civil Service Commission purposes and of an "individual agency option" on selection of title for GS-16 Examiners as an experiment to determine the advantages of title changes. The proposal was rejected by the Committee, because it would permit the use of the title "judge" when this was thought inappropriate and because it would introduce the possibility of a variety of titles confusing to the bar and public, stimulating rivalry among agen-

cies in bidding for Examiner favor.

The use of various titles by individual agencies, or two titles among all agencies, would not appear to interfere with the use of a single title for examination and personnel purposes by the U.S. Civil Service Commission. The Commission did not respond to this item of the survey, but the General Counsel's letter noted above does not suggest that an agency by agency change would interfere with the Commission's responsibilities. Since the enactment of the Act, agencies have used various titles, e.g., Trial Examiners at the NLRB; Examiners of Inheritance in the Department of Interior; and, earlier, Referees in the Social Security Administration. The letter did question the feasibility of accomplishing a comprehensive change on an agency by agency basis.

The Committee adopted the recommendation that every department and agency effect the change of title, as it is presumed to be in the public interest that the same title be used throughout the Government. Although the law will still permit agencies to adopt individual titles for the limited purposes noted above, the thrust of the recommendation will be to prevent such experimentation by individual agencies. This fourth recommendation is thus separable from the first three and is designed solely to assure uniformity in the styling of examiners. It is not essential to the accomplishment of the title change, as such, but is the recommendation of the Committee as a policy matter.

*Will the Title Change Affect Examiner Subordination?*

Some agencies expressed concern lest the title change subtly affect the relationship of the Boards and Commissions or executive officers of departments and the subordinate examiners. This was clearly not the intention of those proposing the title change. In its June 16, 1969, survey, a Committee proposal dealt with this matter explicitly:

That this change should be accomplished in such manner that it will not affect the concept of examiner independence, the subordination of examiners to agency powers as provided in 5 U.S.C. 557(b), and the duty of examiners to comply with reasonable and proper directions of their respective departments or agencies in matters of administration.

After considering the responses and the law, it was the feeling of the Committee that this was very clearly the case and that neither the procedure proposed for accomplishing the change of title nor the change of title itself could modify these relationships. Hence, the Committee chose to drop this recommendation altogether.

*Are Future Title Changes Barred?*

The Committee repeatedly heard the argument from those favoring "judge" that the adoption of any substitute would effectively bar consideration of that title for a number of years. This is not the Committee's intention. The Committee, reacting to the clear division of opinion among agencies as to the suitability of the title "judge" chose what it regards as an equally honorific title, and one to which such strong adverse reaction was not received. It recognizes, however, that in practice the advantages claimed for a title change may not be realized and that experience with Administrative Chancellor may eventually lead to a renewal of the debate. The Committee notes this in simple candor. It does not seek to prejudice the consideration of any proposal based upon additional experience and reflection in the future.

*How Will Administrative Chancellor Be Received?*

In its survey of June 16, 1969, Administrative Chancellor was one of three titles offered agencies to replace the present title of Hearing Examiner.

It was criticized by three agencies as being susceptible of confusion with the officers of the Judicial branch and by one as misleading as to function, leading to confusion with religious or educational institutions or with courts of probate or equity. It was supported explicitly by only one, although several others indicated that it would be acceptable to them.

The debate as to title change has been so thoroughly polarized by the proposal of "judge" that it is difficult to predict with confidence the reception Administrative Chancellor will have. Its historical associations with the system of justice of English speaking peoples, its strong associations with high station, responsibilities and independence in all contexts, and its specific tie to the regulatory process through the addition of "administrative" would seem to make it an attractive replacement for Hearing Examiner.

**B. RECRUITMENT AND SELECTION OF EXAMINERS***Recommendation 5*

That the Civil Service Commission enlarge the base of recruitment and the number of qualified candidates available for appointment to hearing examiner positions through recognition of trial experience as one basis for qualification.

*Recommendation 6*

That the Civil Service Commission on an experimental basis amend the selective certification system as now practiced in the appointment of hearing examiners and provide in lieu thereof a system whereby the number of qualified candidates for appointment to hearing examiner positions would be enlarged through the use of a general register for departments and agencies generally, with the proviso for additional credit for specific relevant professional experience or selective certification for departments and agencies which justify a need on a current basis for such specific relevant professional experience to the Civil Service Commission in order to permit a meaningful comparative evaluation of the system currently in effect, a report to be made to the Administrative Conference after three years of experience.

*Recommendation 7*

That to effectuate the objectives of Recommendation 6 the chairman of the Administrative Conference appoint special committees from time to time to evaluate the standards of specific relevant professional experience proposed to the Civil Service Commission by any department or agency as justifying experience, the present selective certification agreements to serve until the new standards are adopted by the Civil Service Commission.

*Recommendation 8*

That an intern program on an experimental basis to supplement the direct appointment of examiners is recommended to the Civil Service Commission for immediate study and for adoption if practicable in the judgement of the Commission.

*Recommendation 9*

That the Veterans Preference Act be amended to permit the selection of examiners for each vacancy from the top ten available persons appearing on the register, preserving examination grades and ranking to facilitate selection and eliminating Veterans Preference Points (5 to 10).

*Why Consider the Selection Procedure?*

For a number of years an extensive debate has raged among those most interested in the examiner program as to whether the recruitment and selection procedures were producing the op-

timum quantity and quality of candidates and appointees. Numerous issues have been raised in this debate, such as whether sufficient publicity has been given nationwide to the number of positions, to the prerequisites of examiners and to the examination procedures; the impact upon potential attorney-applicants of the administrative law requirements; the reliance upon confidential inquiries of associates of applicants with inescapably varying subjective factors of scoring; the burdensome character and extent of materials and information required of the candidate for examination purposes; the allegedly partisan role of some members of the personal interview panels; and the difficulties associated with obtaining a reevaluation and reranking once the examination has been passed successfully. All of these questions, however, have lacked the degree of controversy attached to the two general questions of most far-reaching significance in the GS-16 examiner program :

- (1) Should expertise be a prerequisite to appointment as an examiner; and
- (2) What freedom should the agency have in selecting examiners.

Both questions relate to the potential costs or efficiencies of regulatory programs.

Under the present system, agencies assure the appointment of specialist attorneys already familiar with the substantive issues of the agency by obtaining from the Civil Service Commission a "selective certificate" whenever an Examiner vacancy occurs. The candidates on the "selective certificate" are taken in order from the general register, regardless of their place on that register, on the basis of their prior qualifying experience in the appropriate area of specialization. On the "selective certificate" they appear in the order in which they appeared on the general register, but when there are only a few candidates with the specialized experience they may move from near the bottom of the general register to the very top of the "selection certificate." A concrete illustration is provided later in this report.

Selective certificates are not provided agencies merely for the asking. An agency must first justify to the Civil Service Commission that its work is of such a specialized and technical character that a limiting experimental prerequisite is necessary for the effective conduct of its business. Such requirements are made public by the U.S. Civil Service Commission in the examination announcement. The following language and examples from Announcement No. 318 are provided to illustrate :

*Special Qualifications for Filling Certain Hearing Examiner Positions*

In filling Hearing Examiner positions in certain Federal regulatory bodies, prior consideration is given to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before these bodies. . . .

. . . Listed below are the special qualifications for the positions in these bodies.

In order to obtain prior consideration in filling a position in one of these bodies, an eligible applicant must have clearly established in his application and related papers, in the manner prescribed in the examination announcement, that he has acquired the special qualifications for that position within the 7 years immediately preceding the date of his application.

When it is found that the register does not contain the names of a sufficient number of eligibles possessing the special qualifications for consideration by an agency, certification will then be made in regular order from the register.

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FEDERAL POWER COMMISSION

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, involving causes arising in the field of public utilities law. These cases must have originated before governmental regulatory bodies at the Federal, State, or local level.

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INTERSTATE COMMERCE COMMISSION

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory agencies at the Federal, State, or local level, in the field of surface transportation (including transportation by rail, motor carrier, or water), involving matters relating to rates, finance, operating authorities, and safety. In the absence of a sufficient number of eligible applicants with the foregoing experience, priority in certification will next be given to those with similar experience in the field of air transportation.

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NATIONAL LABOR RELATIONS BOARD

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal or State level, arising in the field of labor law and involving the enforcement of governmental policy encouraging collective bargaining and the right of free association in connection with employer-employee relations.

An applicant who has fully established his general eligibility under the terms of the examination announcement is permitted to submit evidence of his participation, within the 7 years immediately preceding the date of

his application, in the arbitration of labor disputes in connection with the provisions of a collective bargaining contract or statutory machinery, as partial or complete satisfaction of the special qualifications requirement set forth above.

### *What Has Been the Effect of Selective Certification?*

There is no question but that the effect of selective certificates has had the primary effect of providing the agencies with examiners with the necessary specialization. The secondary effect, however, has been to reduce, in the original instance, the field of potential appointees to GS-16 Examiner positions to a small population of specialized lawyers. Although private attorneys are members of this population, they have shown little interest in Examiner appointments. The secondary effect, then, has been to staff these specialized agencies predominantly with Government lawyers formerly on the staff of the appointing agency. This has been widely criticized as "cronyism," as promoting "inbreeding," and as unfair to the attorneys on the general register, many of whom scored substantially higher on the qualifying examination.

In the most general terms, the supporters of selective certification have argued as follows: (1) the cost of training in specialized areas of legal practice is substantial and should not have to be borne by the agencies when qualified personnel are available; (2) the delays resulting from having to train generalist lawyers in technical or specialized areas are significant, impose a requirement for redundancy of personnel when such professionals are in short supply, and lengthen the delays in case adjudication and disposition when examiner staffs are shorthanded; (3) selective certification assures the appointment of lawyers who will like the work of the agency, since generalist lawyers frequently find the specialized practice of the agencies much less to their liking than they had anticipated in the abstract; and (4) it facilitates the execution of the specialized tasks for which the agencies were created. The suggestion that selective certification has resulted in staleness and inbreeding has been explicitly denied.

Still, there is no question but that selective certification has often had the effect on the register of elevating for consideration individuals whose scores placed them far down on the general register of successful examinees. This, the critics argue, proves that selective certification by-passes the merit system and unjustly permits inferior attorneys to be appointed. This argument does not automatically follow, however. For one thing, the register itself is composed of mature professional men who may not



be so differentiated in skills and ability as the raw number comparisons would suggest. For another, the Veterans Preference Points may elevate a man from 83 to 93, but this does not suggest that he is professionally superior to someone on the register at 84 or 85 without Preference Points, or even at 80 or 81 without Preference Points, since a discrimination of two or three points on a highly subjective evaluation of professional men in mid-career may be a treacherously difficult and unreliable discrimination. Further, the weighting of points on the examination clearly prefers the older professional with more than minimum time in qualifying grades. This is not an irrational weighting, but it suggests that the younger ICC lawyer, for example, who goes on the register as soon as he is minimally qualified may not be a bad choice for the agency when compared with a generalist ten years his senior. The ICC may obtain, as an added benefit of selective certification, his additional ten years in office as an examiner.

Nevertheless, it is clear that selective certification provides agencies with previously experienced specialists *and* disrupts the merit ranking of the general register. Thus, in responding to the notice of the April hearings by the Committee on Personnel, the U.S. Civil Service Commission pointed out that a comparison of standings of individuals on the general register with their standings on a selective certificate provided one of the agencies employing GS-16 examiners in 1967 showed the following variations:

| <i>Standing on the General Register</i> | <i>Standing on the Selective Certificate</i> |
|---|--|
| 5th                                     | 1st  |
| 31st                                    | 6th  |
| 40th                                    | 7th  |
| 42nd                                    | 8th  |
| 51st                                    | 10th   |
| 60th                                    | 11th   |

But what does this mean? Does it mean that the requesting agency, if it picks up the 11th man on its selective certificate, has by-passed over fifty attorneys of superior professional qualifications? Apart from the subjective variations in testing and scoring, it does mean that. But we must ask, so what? The absolutely critical question is not whether there may be superior generalist attorneys available, but whether there is anyone else available who is superior in general professional qualifications and *who has the absolutely essential specialized knowledge*. If, as

this agency has said, it must have persons of specialized experience, then one not so specialized cannot perform the job the agency requires in a reasonable time and reliable way. No matter how superior he may be in other respects, he cannot perform the job the agency requires.

This leads us to two important conclusions: (1) the primary question is not the effect of selective certification on the register, but whether it is necessary to the agency; and (2) the impact upon the by-passed generalist is a secondary effect of selective certification.

Thus, a solution to the dilemma of selective certification, should superior attorneys be by-passed in favor of those with superior specialization and experience, must rationally be solved by determining whether selective certification can be justified. It cannot rationally be solved by adopting any scheme merely designed to put the superior generalist professional in a better competitive position with the specialist.

Statistics are often cited to show the evil impact of selective certification in terms of staff appointees as examiners. This by-passes the fundamental question, *was such specialized experience essential?* The need felt by the specialized agencies was succinctly put by the Office of the Judge Advocate General of the Department of the Army in responding to the June 16, 1969, survey:

With regard to proposal B (Examiner selection), we feel that the standards for the selection of examiners should not be reduced or relaxed in any respect. Nothing can frustrate the regulating scheme, that is, the orderly, expeditious, and just disposition of important matters and proceedings, like an examiner who is not well versed in trial practice and procedure, or one who lacks a sound knowledge of utility rate-making principles and practices, tariff structures, and utility rates and charges or one who lacks a judicial temperament. The current requirement for extensive administrative law experience and the manner of establishing this experience should be continued.

If it is essential, the high incidence of appointments of former staff members reflects only the very limited pool of such specialized experience that is available and the fact that the private bar possessing parallel experience is not attracted to the examiner positions. The Civil Service Commission has had enormous difficulty in attracting private attorneys with administrative law experience, much less specialized agency experience, to take the exam. And the agencies have repeatedly indicated their willingness and desire to take private attorneys with specialized experience when such men become available on the register.

Finally, it should be noted again that the private bar that is highly qualified and would readily meet the selective certification requirements has historically shown little interest in applying. It has been suggested that this is because: (1) examiner's pay, though quite respectable, is not competitive with the income of specialized private practitioners; (2) examiners lack the status and prestige that would attract such attorneys; (3) examiners lack independence of final judgment because of agency review of decisions; and (4) examiners must work for the Government and many of these attorneys cannot conceive of themselves as Government employees.

Thus, we must ask, does it matter that since 1964 that of 66 appointments to agencies utilizing GS-16 examiners and requiring specialized experience that 52 had been employed on the staffs of the agencies ultimately appointing them? Where else will the agencies get such experience? A partial answer to this lies in training programs, and in specialized recruitment programs, such as the experimental intern program recommended by the Committee on Personnel and discussed later in this report. But as to the critical question, is such specialized experience necessary, the Committee on Personnel proposes an inquiry directly into that issue.

#### *What Are the Agency Attitudes Toward Selective Certification?*

The responses tended to focus upon two problems, (1) how much specialized knowledge or expertise is needed to serve effectively as a hearing examiner, and (2) whether this specialized knowledge should be a prerequisite to appointment as an examiner. The very controversial question of whether selective certification should be permitted is an outgrowth of both of these, since the use of selective certification implies that expertise is a critical factor in examiner selection for agencies utilizing selective certification, and since it gives an absolute preference to applicants with such experience over those without it, no matter how superior the latter may be in general professional qualifications.

Considerable concern has been expressed, especially by representatives of the American Bar Association, about the disproportionate number of agency lawyers appointed as examiners in the agencies in which they have been serving. This, it is argued, leads to in-breeding and staleness in agency decision making.

The American Bar Association has strongly urged the abolition of selective certification, and supports, in lieu thereof, an intern program and on the job training where necessary to sat-

isfy agency specialization needs. This assumes that such expertise or specialized knowledge as the examiners require may be acquired on the job or in specialized training programs after their initial appointment, and that it can be acquired in a reasonable time.

Although the responses were not always specific or unequivocal, the following agencies tended to support the American Bar Association in its position: Health, Education and Welfare, Housing and Urban Development, and the Small Business Administration.

Agencies tending to support selective certification or other methods designed to assure specialized competence prior to appointments included: Atomic Energy Commission, Civil Aeronautics Board, Department of the Army, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission (although FPC would give up selective certification if the Veterans Preference Act were amended to permit a sufficiently broad selection from the general register—a proposal to be discussed below), Federal Trade Commission, Interstate Commerce Commission, Labor, Post Office and the National Labor Relations Board.

The Committee was told that the costs of training the new examiner and the consequential delays in processing cases would be enormous. The estimate of two years training before an examiner without prior specialization could be fully effective was given by several agencies. Whether that is a reasoned estimate or an approximation based upon their two-year specialization requirement for the examination, could not be determined without a detailed inquiry into the substantive work of each agency. The National Labor Relations Board estimates that four years of training would be required for its purposes.

It should be noted, however, that although the examination requirement for selective certification is only two years, the practical effect of that requirement is to provide the agencies with much more extensive experience. The typical applicant qualifying for selective certification actually has seven or eight years of specialized experience. Oddly, it may be that with a two-year qualification requirement the agencies have been obtaining the seven or eight years that they may really need. An investigation of their justifications might suggest to the Civil Service Commission that a more realistic prerequisite for any given agency might be seven or eight years, instead of two. This would have an additional advantage in that it would clearly indicate to those

on the general register that the needs of that agency are so specialized that it would be most unlikely that the agency would ever go to the general register, rather than waiting for additional specialists to qualify.

Some measure of how important to their own operations agencies regard the prerequisite specialization is reflected in agency tactics when they cannot obtain an acceptable candidate from the list provided. Often the agencies will then go to other departments or agencies and solicit the transfer of specific examiners with related skills or particularly attractive professional reputations, or they will simply wait until they can qualify some of their own attorneys through selective certification. Such tactics have been attacked as demonstrating the bad faith of the agencies, but they may more fairly be characterized as reflecting the great importance to the agency of an effective, reliable examiner corps. The agencies, with enormous amounts of business to conduct, have little incentive for the appointment of bad performers.

It is somewhat paradoxical, some agencies feel, that their use of specialization has been under such hostile attack by the American Bar Association in a period in American legal history when specialization in the private bar has become increasingly an inescapable and accepted fact.

The increasing emphasis by Federal courts in judicial review of agency action upon the need for broad agency evaluation of planning and promotional impacts of regulation will result in increased pressure upon the agencies to utilize examiners broadly sophisticated in the impacts of substantive regulation. An examiner can scarcely evaluate the significance of holdings upon the public interest and upon industry growth and development or upon competitive aspects of industry performance if he is not profoundly aware of the role of regulation, its scope and implications. This is especially critical in agencies in which there is little representation of the interest of the general public by staff counsel or by other governmental agencies. In such situations the examiner must make certain that the developing record contains the information critical to an informed agency decision, or delays and remands from the Federal courts may follow and disrupt the regulatory scheme. How is the examiner to know whether a reliable record is being developed if he is totally dependent upon the adversarial presentations of attorneys before him, especially when all interested parties and the interests of consumers and the general public may not be represented.

For effective regulation, it is not only important that the examiner be knowledgeable, but that he be sufficiently competent in the substantive problems of the agency to evaluate the performance and arguments of counsel. The role of the passive generalist judge is simply not analogous to many of the presiding and decision making problems faced by the examiner. Thus, there is a clear necessity for a careful substantive evaluation of agency needs for selective certification before it is abandoned. Neither should it be continued indefinitely without such impartial review as has been proposed by the Committee.

A further justification for selective certification is the very high number of examiners already eligible and soon to become eligible for retirement. This potential erosion of the examiner corps is relevant not only to the need for appointing men qualified to assume a full workload, but is also relevant to the need for establishing an effective intern or training program. If such training can be realistically coupled with examiner appointments, the short supply of already qualified attorneys may be considerably enlarged.

#### *What Solutions Were Considered for Selection Certification and Recruitment?*

Six major possibilities for examiner selection procedures were considered. Four of these may be fairly characterized as follows, moving from the procedure least emphasizing prior expertise to that most emphasizing prior expertise:

(a) The exclusive use of a general register with such specialized training as may be needed to qualify the attorney to be administered after appointment. This is essentially the position advocated by the American Bar Association.

(b) The appointment of lawyers seeking examiner positions to interim attorney positions to permit them to acquire experience in specialized areas prior to selection as examiners. This procedure received no support and was generally attacked as impracticable because of the difficulty of inducing mid-career attorneys to leave an established career for an interim appointment of uncertain future.

(c) The use of a general register for non-specialized agencies and individual special registers for each agency with a distinct expertise requirement that is able to justify the establishment of such a register to the U.S. Civil Service Commission. The advantage of this procedure is that it permits weight to be given to prior specialized experience but does not require that such ex-

perience be completely determinative, e.g., a lawyer with outstanding professional qualifications but no specialization would not be immediately and irretrievably ranked below lawyers with an inferior professional record who happened to have the required two years of specialization.

(d) The use of a general register with selective certification afforded agencies justifying their need for such restrictions. This is the present method and was given strong criticism and strong support.

Two other proposals were considered with these, for they are closely related in effect. The fifth proposal was similar to the procedure discussed under c. above, except that agencies with similar requirements would have been lumped together for examination purposes, e.g., transportation agencies, public utility agencies, labor law, etc. And a sixth represented an attempt to provide an alternative to selective certification or special registers by requiring of all examiners a general knowledge of contemporary economic regulation. This proposal received no significant support and was attacked as requiring too detailed a knowledge of economics and business regulation.

The suggestion of specialized examinations was generally favorably received by those supporting selective certification, with the caveat that performance on an examination should not be regarded as equivalent to experience and that some weighting between the two would be necessary. Obviously, those opposed to selective certification tended to be opposed to the specialized examination proposal as well.

The question as to the feasibility of specialized examinations or special registers must ultimately be a decision of the Civil Service Commission for it is inextricably bound up in the requirements of the examination process. The consultant's preliminary recommendation was that these be suggested to the Commission for study by its Advisory Committee, along with the question of whether or not the selective certification requirement should be lengthened. Both special examinations and lengthening the selective certification prerequisite have the effect of intensifying specialization and of further isolating the examiner appointments from the unspecialized bar. The special register proposal, in contrast, permitted a weight to be assigned specialized experience but did not entirely eliminate the outstanding generalist attorney. Thus, an agency attorney with seven years transport experience might have received seven points for such experience but be outranked by the superior generalist attorney whose over-

all score was higher though he lacked transport experience altogether. The Committee recommendation of permitting limited additional credit for specialized experience is essentially the proposal for specialized registers without special examinations. It is explained further below.

It might be noted that a similar effect to weighting expertise would be indirectly obtained should the Veterans Preference Act requirement of the "Rule of Three" be eliminated. This requirement ties the agency selection inescapably to the top of the register. If either the zone of consideration were enlarged to 15 persons, as suggested by the Federal Power Commission, or if an unranked register were offered the agencies, then the most talented candidates could be chosen, whether their merit lay in superior specialized experience or in overall superiority as generalist attorneys. The Committee-proposed enlargement to a "Rule of Ten" preserves aspects of the merit system and still enlarges agency discretion.

Another means by which a larger number of persons might be added to the generalist register would be through a redefinition of what constitutes "administrative law experience," e.g., by recognizing trial experience as a means of qualification. A limited broadening of that definition by the Civil Service Commission might enlarge considerably the number of persons qualifying for the general register. This would not change the problem as to the majority of GS-16 appointments, however, since the controlling factor in those cases is the selective certification requirement, a requirement less susceptible of liberal definition and the redefinition of which would defeat the very purposes for which the agencies have adopted it.

It should be noted that the U.S. Civil Service Commission, the individual agencies and the American Bar Association and other professional organizations have all cooperated in an intensive program of promotion of the hearing examiner applications. Such recruitment cannot, however, have more than limited effect on the GS-16 appointments without the adoption of an intern program or some other training mechanism, unless the selective certification requirement is eliminated.

#### *What Does the Committee Recommend Relative to Recruitment and Selective Certification?*

The Committee proposes that the Civil Service Commission, if recommended after study, substitute for the present selective certification system the use of a general register with credit for



specialized experience to be given candidates whenever agencies considering them for appointment have justified to the Conference Committee and to the Commission a current need for such specific relevant professional experience. This would be supported by the review of such justifications by a special committee appointed by the Chairman of the Administrative Conference of the United States, whenever changes in such justifications are proposed, with the present selective certification procedure operating as that standard until new standards of specific relevant professional experience are approved by the Committee and adopted by the Civil Service Commission. The Civil Service Commission will immediately ask each agency utilizing selective certification to justify its reliance upon such standards and will then ask the Special Committee of the Administrative Conference to review such standards.

The Committee then would make a careful substantive analysis of the justification of the agency for selective appointments and would recommend to the Civil Service Commission at the earliest possible date one of three findings: (1) that the agency had not justified such specialized need as to avoid the general register; (2) that the agency had justified a need for specialization sufficient to give weight to the specific relevant professional experience of attorneys on the general register, such weight to be in the form of points for such experience and to have effect on their place on the general register for such agency or agencies only; and (3) that the agency has justified such a critical need for specialization in its appointees as to permit it to continue to use selective certification or to be given such weight in bonus points on the general register as to make such specialization determinative in normal cases.

The added effect to the present system of this proposal would be as follows, illustrating the point bonus system for specialized experience. Applicant X is placed on the general register with a score of 84. If the Federal Power Commission requested a certificate to fill a vacancy, since X has four years of utility experience, his score of 84 would be increased by points derived from that experience, say four points for illustrative purposes. For the purposes of the Federal Power Commission his grade would then be an 88 and if that placed him high enough on the general register, his name would be submitted to them. Suppose, further, that the Civil Aeronautics Board simultaneously asks for a certificate. For their purposes applicant X, lacking aviation law experience, stands wherever his 84 places him.

Such a system permits the superior generalist attorney to earn a higher score than the mediocre specialist. But it permits the agency to benefit at least slightly from the specialization of an attorney, if such specialization moves him above those attorneys without specialization but with somewhat superior general professional achievement and skills. The extent to which the agency would benefit from the applicant's prior specialization would depend upon the weight recommended for such prior specialization by the Special Committee and adopted by the Commission.

The system proposed by the Committee on Personnel would ultimately provide agencies with the best available talent. When specialization is critical, the system will provide specialists, if available. When prior specialization is central but not critical to agency performance, the system will provide the very superior generalist attorney or the specialist, depending upon which person earns the higher score on the specialty-weighted scoring procedure. And when specialization is not central to the agency's functions, the system will provide the highest scoring attorney without regard to specialization. Such a system would seem to permit a rational balancing of the advantages of generalist attorney talent and experience with the advantages of specialization. And it would provide for this balancing on an agency by agency basis. It does not impose upon any agency the needs or preferences of agencies engaged in substantially different regulatory tasks.

The significance of this proposal should not be misunderstood. Selective certification is regarded by several major regulatory agencies as absolutely critical to their appointment of effective examiners. For any given agency, this proposal may replace the present selective certification scheme, whereby specialization is an effective prerequisite to appointment from the register, with a bonus point system whereby applicants are merely given points for specialized experience. This would probably result in a bonus point formula, such as one point per year of specialized experience up to a maximum standard set by the Civil Service Commission. However, the proposal, as it stands, does not terminate the prerequisite effect of selective certification but makes such termination depend upon the findings of a special committee and the Civil Service Commission that such specialization in appointees is not critical to the work of the agency.

It should be noted, too, that the recommendations include one which requests the Civil Service Commission to permit the substitution of trial experience for administrative law experience in

order to qualify for appointment to the general register. There is no question but that this would increase enormously the numbers of lawyers from across the Nation who could qualify for appointment to the general register. Such a change, alone, would have little impact upon the GS-16 register, since such candidates would still lack the specialized experience required by the agencies hiring the vast predominance of GS-16 examiners. When coupled, however, with a change in selective certification the impact upon the GS-16 register might be extremely significant! It is conceivable that the successful recruitment of highly successful private trial attorneys might place large numbers of candidates near the top of the general register who would be almost totally unfamiliar with utility law, aviation law, transportation law, ratemaking, licensing procedures, or any other aspect of administrative law.

Although the proposed substitution of trial experience for administrative law experience has been a standing proposal of the American Bar Association for some time and has been generally discussed among practitioners and agencies, it was not a matter raised by the public notice for the April hearings of the Committee nor raised specifically in the June 16, 1969, survey of agencies. The Committee has received only quite limited comment on this proposal and almost none from those agencies most likely to be affected. The principal argument in favor of permitting trial experience to be substituted for administrative law experience is that trial attorneys are thoroughly familiar with the adversarial format, with the rules of evidence, with the problems affecting control of counsel and parties, with the development of testimony and control of cross-examination, with the making of objections, and with all other facets of the trial processes which parallel the administrative hearing.

#### *What Is the Effect of the Veterans Preference Act?*

The preference points awarded by the Veterans Preference Act of five points to all veterans and ten points to all disabled veterans distorts the merit system of examiner appointments. The requirement of that Act that selection be made from the top three available candidates on the register (or special certificate) narrowly constricts the choice of Chief Examiners and Boards and Commissions appointing examiners.

To illustrate the pernicious effect as to the rational ranking of candidates which these preference points inject into the system, the following testimony from Valentine B. Deale, Esq., a

private practitioner in Washington, D.C., and a member of the Advisory Committee on Hearing Examiners to the Civil Service Commission is offered:

. . . I am talking now about the GS-16 register alone, and I am talking about that register as of March 10, 1969, so this is current information.

There are 104 names on that register. Of this number, 15 have received ten preference points; 51 have received five preference points; and 38 are no-pointers. All the points they have (the no-pointers) are earned points.

Because of the age of the folks on this register, I would suggest that it is likely that the veteran points are based or derived from service in World War II or Korea.

At the bottom of the register there are just six who received the minimum passing grade of 80, but there are 18 five-point veterans with 85, and there are 6 ten-point veterans with 90.

Now on an earned point basis, these additional 24 belong at the bottom of the list, so that we really have—on an earned point basis—30 people on the list with 80, but now, thanks to the unearned point additions, the ten pointers who would be at the bottom of the list are actually on the current list with rank (positions) of 25th to 30th, and the five pointers who would be on the bottom of the list are ranked 65th to 85th.

Now, let's go to the top of the register. After a moment's reflection I am sure it doesn't come as any great surprise that the top five people on the register are ten pointers. Of the first 24 on the register, that is those with scores of 91 or above, and of those 24, 9 are ten pointers, 9 are five pointers and 6 earned their points all the way.

Now, on the basis of earned points, the first on the register would be 5 non-veterans, and, incidentally, this touches upon the subject we will be talking about a little bit later, 4 of these 5 have selective certification qualifications, and as the register now stands, that is the first 5 at the top of the register have certification registration.

I have this other point just for the edification of the fact that this business has other ramifications. On an earned point basis there is a spread of only 16 points, 80 to 96, and we are putting 104 people into that spread, and in that small spread, 15 are given a ten-point edge in a 16-point spread, and 51 are given a five-point edge.

Now we go to, it seems to me, a further imposition of an improper requirement on the register system. First is the allocation of points; and the second, as I say, is the grading requirement. And my proposition is that it is unrealistic, artificial, to grade candidates on a narrow arithmetical basis when the critical parts of the tests are composites of the subjective judgments.

Refined distinctions simply cannot be made in terms of measuring realistically the candidates' qualifications for different jobs. The plain fact is that a person might be better qualified for one job than another.

Now in making that observation I suggest to you that there should be no trouble in (drawing a) line between a qualified person and an unqualified person, or between an outstanding person and a qualified person, or between a qualified and well-qualified person, but indeed we are fooling ourselves when we try to make distinctions among individuals with 81

and 82 or 94 and 95. And the whole matter, the distortion, becomes compounded when we add these gift additions of the veterans' preference to the score. The grading system indeed confuses the process by giving a pretext of certitude which just doesn't exist.

So it is sheer nonsense that the people who come out of this lottery, who happen to be at the top, are the best qualified for any agency who happens to need a hearing examiner at that time. So let me suggest that the underlying fact here is the derogation of judgment. We are talking about top people in an agency, and those top people are selected by the senior people of the agency, the commissioners, by the senior people . . . and those people, by the very nature of their positions have talent and that is why they are there. They have top talent.

And what we are doing is (saying to them) that you can't choose your top people, the super-grades that play a critical role in carrying out the responsibility of your agency, a responsibility which the general manager shoulders. The derogation of (their) judgment here is the whole thing.

We try to secure against their making their best judgments, you see, in terms of regulations and pretenses of arithmetical certitude.

This long quote from the testimony of Mr. Deale succinctly describes the impact of the bonus points in practical terms. It also points directly to the second aspect of the Veterans Preference Act which seems counterproductive in terms of the regulatory agencies, the Rule of Three. The Act presently requires the Civil Service Commission to certify to the agencies for consideration individuals ranked at the top of the register. The agencies must choose from the top three available candidates. This is a very severe limitation and leads to selective certification, waiting strategies in which agencies postpone appointments until individuals they do not want are appointed to other agencies, pirating of examiners from other agencies to avoid having to go to the general or selectively certified register, and strong attacks upon the examination process itself, with its inescapable rankings and scoring of highly subjective qualifications.

In the Committee's June survey, agencies were offered several possible modifications of the Veterans Preference Act: (1) selection by agencies from all candidates passing the examination, but with grades reported to facilitate Examiner selection; (2) enlargement of the Rule of Three to a Rule of Fifteen to broaden the discretion allowed agencies and Chief Examiners; and (3) a pass/fail register without grades or ranking, permitting agencies and Chief Examiners to choose anyone on the register.

The first proposal would have given agencies the complete register from which to choose. The grades to be reported to the agency merely for information.

The second proposal would give the agencies a list of names and the agency would be free to choose anyone from the top ten available.

The third proposal, like the first, would have given the agencies a free choice from the entire register, but no grades or scores would be reported.

Five agencies reported support of (1), seven of (2), and four of (3). Explicit opposition to these was voiced in several instances, but opposition tended to take the form of a suggestion that Congress cannot be persuaded to amend the Veterans Preference Act to exempt one class of positions from the competitive service. While this may be true, the responsibility of the U.S. Administrative Conference and the Personnel Committee is not to eliminate needed proposals simply because they are unlikely to prove immediately acceptable to Congress. If a modification in the Veterans Preference Act would strengthen the administrative process, it is the duty of the Conference to so advise the Congress and the Executive Branch.

Some agencies opposed modification of the Veterans Preference Act. These were: Federal Maritime Commission, Commissioner MacIntyre of the Federal Trade Commission (the other members would support such a modification only if there is evidence that the Act has prevented the most qualified personnel from achieving examiner status), and Health, Education and Welfare. Justice opposed the pass/fail proposal.

The consultant's preliminary recommendation was that the Conference enlarge the zone of consideration to the top 15 persons as suggested by the Chief Examiner of the Federal Power Commission, Mr. Joseph Zwerdling, at the April, 1969, hearings of the Committee. As the Federal Power Commission has indicated its willingness to abandon selective certification if offered this larger range of candidates, such a modification might solve the very difficult issue of selective certification and simultaneously permit the individual agencies to weigh the relative utilities of expertise and superior generalist professional qualifications. The enlargement of the zone of consideration without completely abandoning a merit priority system has the advantage, as the Federal Power Commission suggested, of being a less radical modification of the Veterans Preference Act. Further, it has an advantage suggested by the Small Business Administration of preserving a significant portion of the merit priority system since the choice from the top 15 would limit the agency selection to the top ten to fifteen percent of the register.

*What the Committee Recommends as to the Veterans Preference Act*

The Committee felt that a modest change, enlarging the zone of consideration from three to ten persons, would give the agencies much greater discretion in their choice of examiners. It would reduce the need for reliance upon selective certification and would constitute an expression of confidence in the top career and political appointees of the various agencies and departments. It would enlarge the managerial choice where the managerial responsibilities for the effective conduct of agency business lie.

The Committee also recommends dropping the Veterans Preference Points in regard to the selection of examiners. The Committee felt that such supplementary points had no relevance to the appointment of senior professionals and were beyond the scope of advantages and compensation essential to an effective system of veteran benefits. The Committee noted that such points were inconsistent with the employment of a merit ranking system for the appointment of examiners, if the priorities of the system are construed in terms of making the most capable candidate available to the agency.

*Can Examiners Be Trained Subsequent to Appointment?*

In an attempt to find some middle ground between the prerequisite specialization of selective certification and the use of the general register, the Committee proposed to the agencies several approaches that involved training of attorneys in administrative specialties prior to their appointment as examiners. These proposals met a variety of criticisms, the most frequently encountered of which was that it would be impossible to persuade high quality attorneys to leave the security of their practice or employment to take a training position with only the possibility of subsequent appointment as an examiner.

In the course of their comments upon this proposal, numerous agencies drew parallels between the Committee's suggestion and the Intern program that had been proposed in recent years by the Civil Service Commission. The Committee then considered the Intern proposal and decided that the Conference should recommend its trial on an experimental basis.

This plan would apply the same stringent standards of the present Hearing Examiner examination except that candidates could be appointed to fill gaps in experience or professional skills

that now tend to disqualify them from appointment as hearing examiners. The candidate would be appointed as Hearing Examiner Intern. The internships would be conducted approximately as described in this 1967 draft announcement of the Civil Service Commission:

A detailed professional development program will be planned and managed by the Civil Service Commission for each hearing examiner intern in the light of his prior education, experience and ability. The successful completion of 2 years internship should provide the intern with the full qualifications required by the competitive standards for a hearing examiner. The Civil Service Commission will periodically review the progress and development of each intern and prior to the end of internship determine his eligibility for appointment as a hearing examiner in the light of the hearing examiner qualifications standards. The Commission's review will consider the intern's record and performance, including evaluations of the intern's work by supervisors and others to assure that he meets the full competitive standards for hearing examiner. On the basis of the entire record and a final interview with the intern by a specially designated panel consisting of three people, a final rating will be assigned and such rating will be transferred to the hearing examiner examination for consideration for appointment to such position.

Those found not to be satisfactory during the internship will be separated from the intern position. If the Commission's panel, upon completion of the internship, determines that the intern is not eligible in all respects for appointment as a hearing examiner, the intern will be rated ineligible for such appointment and separated from the intern position. The intern so separated may be considered for reassignment or transfer to other positions in the Federal Service for which he is eligible.

The intern may be continued in his intern position until an appointment can be made, but not to exceed one year. Thereafter, if not appointed, the intern's eligibility may be continued so long as he occupies a position the duties of which are such as to preserve his competence for a hearing examiner position.

(U.S. Civil Service Commission, "DRAFT ANNOUNCEMENT OF AN EXAMINATION FOR POSITION OF HEARING EXAMINER INTERN GS-14")

It might seem improper for the Committee to adopt such a plan in *specific detail* without a full examination of it and an opportunity for all interested agencies to comment upon it prior to a recommendation to the Administrative Conference. Nevertheless, the plan has already had considerable discussion throughout Government agencies, and professional groups such as the American Bar Association have commented upon it specifically in their responses to this Committee.

Thus, it would seem proper for the Committee to put before the Conference the suggestion that the Civil Service Commission



adopt experimentally a Hearing Examiner Intern Program. The Intern Plan raises questions similar to the questions raised by the Committee's "Administrative Law Specialist" proposal and the Intern Plan meets the objections of impracticality raised against that proposal.

It might be noted that the American Bar Association has urged the establishment of an intern program if it contained certain safeguards, such as the elimination of applicability of selective certification, placement of the retention decision in the Civil Service Commission and not in the employing agency, training for appointment to all agencies and not for a particular agency, use of the program as a supplement to the examination system and adoption of such a program on an experimental basis. These provisos obviously raise some of the conflicts discussed above under selective certification and illustrate why the Committee cannot adopt an unequivocal endorsement of the intern plan as it now stands. Nevertheless, the plan offers a solution to the need for specialization and/or administrative law experience. It received at least limited endorsement in the survey responses from: Atomic Energy Commission, Civil Service Commission, Federal Trade Commission, Health, Education and Welfare, and Interstate Commerce Commission.

#### *What the Committee Recommends as to an Intern Program*

The Committee recommends that the Conference endorse the establishment of an experimental intern program for hearing examiners. Such a program would be a supplementary source of examiner candidates. It would be established in conjunction with agencies utilizing examiners and would reflect their individual needs. Such questions as whether the interns would be available for appointment to all agencies or might be more specifically assigned to agencies undertaking their training would have to be settled by the Civil Service Commission. The Conference is not being asked to endorse the program in detail, but merely to encourage the initiation of such a supplementary program.

### C. CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND EXAMINERS

#### *Recommendation 10*

That departments and agencies employing attorneys and examiners encourage their participation in programs of continuing legal education and budget for sufficient personnel

so that attorneys and examiners may be released for reasonable periods of time to accomplish such training.

*Recommendation 11*

That departments and agencies explore ways by which they can support the professional training activities of the Federal Trial Examiners Conference, bar associations, foundations, the Civil Service Commission, law schools, the individual departments and agencies with parallel legal interests, and other institutions offering appropriate training for attorneys and examiners.

*Recommendation 12*

That departments and agencies review their procedures to make certain that training opportunities appropriate to attorneys are well publicized and that the application procedures for such programs are equally well publicized.

*Recommendation 13*

That departments and agencies investigate the possibilities for short-term exchange assignments to other departments or agencies of experienced attorneys of higher grades whose insight and professional effectiveness would be enhanced by exposure to other aspects of the legal problems to which they are assigned.

This topic and the two remaining ones were not significantly controversial, but each addresses an important aspect of attorney development in Government service.

The four recommendations now adopted by the Committee on Personnel are those that were circulated for agency response and comment in the June 16, 1969, survey of agencies.

The proposals in this item, with two exceptions, were greeted generally with overwhelming support by the agencies. The two exceptions were these recommendations: (1) that redundancy in staffs should be budgeted to permit the release of attorneys for training, and (2) that short-term exchange assignments to other departments should be investigated.

Numerous agencies noted the impracticality of expecting such a redundancy of personnel to be approved in budgets. The tenor of the reactions was not that such a proposal was unnecessary or would not be useful, but that it was not feasible for the foreseeable future. Strong support for the principle was given by some agencies.

The suggestion that attorneys be exchanged between agencies was greeted with mixed interest and scepticism. Exchanges were contemplated in the proposal between agencies sharing similar problems, e.g., attorneys in Justice and the Federal Trade Commission with overlapping interests in antitrust matters. The greater the specialization and exclusive jurisdiction of the agency, the less likely such exchanges would prove useful. Some agencies have considered this possibility in the past, but shortages of personnel have made it impractical.

An important aspect of effective training, especially in the Washington, D.C., area, is in the efficient communication to attorneys and their agencies of training opportunities. The Interstate Commerce Commission, in its response to the proposal that agencies seek ways to support and participate in programs of all agencies and institutions when related to the work of the agency, suggested the need for a central clearing house, perhaps through the proposed center for continuing legal education.

It might be noted that in the preparation for the April hearings the Committee offered many detailed proposals as to improving effective agency training but that the response of most agencies and departments was that general recommendations by the Conference would be more helpful than proposals so particularized that their applicability from agency to agency would weaken support for and conformance to the recommendation.

#### D. CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

##### *Recommendation 14*

That a center be established in the Washington area to provide a facility for the continuing legal education of lawyers in Government service, hearing examiners and private attorneys practicing before Government departments and agencies, to promote coordinated programs within the Government and with specialized segments of the organized bar, to stimulate and engage in the preparation of manuals, research materials, and other publications in support of such continuing legal education, and to provide a mechanism for the exchange of information as to professional problems of Government attorneys in the various departments and agencies. The Federal Administrative Justice Center proposed by the ABA (resolution adopted by ABA's House of Delegates in January 1969), as an example, will meet these objectives.

This proposal is the result of numerous suggestions received by the Committee late in 1968 as it attempted to frame preliminary recommendations for its second set of hearings. The need that such a center would satisfy is widely recognized and has been the subject of considerable commendable work and promotion by John T. Miller, Jr., Chairman of the Hearing Examiners Committee of the Administrative Law Section of the American Bar Association. His work has resulted in the endorsement by the American Bar Association of the establishment of a Federal Administrative Justice Center. Legislation has been prepared detailing such a center and that legislation illustrates the type of institution that the Committee feels would satisfy this need.\*

In circulating its proposals the Committee had reduced its recommendations to four items by the June survey. The first stated generally the need for such a center. The second offered possibilities for its placement; in the Civil Service Commission, subordinate to the Administrative Conference, or as an independent agency. The third indicated that the center should be concerned primarily with applied legal problems. The fourth indicated that the center was not to displace present or future training programs of individual departments and agencies.

Agency responses to these proposals, while not unanimous, were overwhelmingly favorable. Proposal (4) received specific endorsement by a number of agencies already engaged in extensive or highly specialized training. Proposal (3) was criticized by some agencies as unnecessarily restricting the staff of the center, it being suggested that such policies should be left to the administrators of the center. Still, the thrust of (3) toward applied legal problems was generally accepted.

The only aspect of the proposal that divided the agencies in significant numbers was (2) dealing with the location of the center. It should be pointed out that if the agency is established in the Civil Service Commission or other existing agency of the Government, the Government Employees Training Act would permit the establishment of such a center without additional legislation.

Five agencies explicitly recommended or accepted the establishment of such a center in the Civil Service Commission. Five agencies explicitly recommended or accepted the establishment

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\*The Committee has reproduced copies of the Administrative Law Section's report for the American Bar Association detailing its proposed center for continuing legal education. The Committee will provide any interested person a copy of this report upon request.

of such a center subordinate to the Administrative Conference of the U.S. Eight agencies explicitly recommended or accepted the establishment of such a center as an independent agency. The Atomic Energy Commission suggested that it be established independent of the Government to facilitate its use by the private bar and to avoid the traditional restraints on Government agencies. The Civil Service Commission pointed out that it has accumulated experience in developing career educational centers somewhat analogous to the proposed legal center, such as the Federal Executive Institute in Charlottesville, Va., and the two Executive Seminar Centers, at Kings Point, N.Y., and Berkeley, Calif., respectively. The Small Business Administration suggested that it might be established in the Department of Justice, with its placement reconsidered for possible relocation in the Civil Service Commission if lawyers are brought under the competitive service system.

The consultant's recommendation was that the center be established subordinate to the Civil Service Commission, with an expectation that this decision be reexamined once it is established and operating to determine whether it should be relocated. The Commission has the greatest amount of experience in organizing such facilities and would offer the immediate advantage of avoiding the necessity of additional legislation.

The Committee decided to leave for the Conference the option of supporting the ABA proposed legislation, creating an independent center, or creating a center under the auspices of either the Conference or the Civil Service Commission.