REPORT TO THE CONGRESS

Design And Administration Of The Adverse Action And Appeal Systems Need To Be Improved

B-179810

Civil Service Commission

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

FEB. 5, 1974

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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To the President of the Senate and the
Speaker of the House of Representatives

Our review has shown that the design and administration of the adverse action and appeal systems of the Civil Service Commission need to be improved.

We made our review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

We are sending copies of this report to the Director, Office of Management and Budget, and to the Chairman, Civil Service Commission.

Elmer B. Staats

Comptroller General
of the United States

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D I G E S T

WHY THE REVIEW WAS MADE

Because congressional committees and others are concerned about the equity of the adverse action and appeal systems, GAO reviewed the Civil Service Commission's administration of the systems.

Background

Adverse actions provide Federal managers with a means of maintaining an efficient and effective work force. An employee's right of appeal enables him to seek redress of actions believed to be arbitrary or capricious.

A proper balance between the interest of the Federal Government as an employer and the rights of Federal employees is essential to an effective operating program.

Adverse actions involve removals, suspensions for more than 30 days, furloughs without pay for 30 days or less, and reductions in rank or pay. The employee can challenge such an action on the ground that the agency acted arbitrarily or unjustly or that it did not follow required procedures.

The three levels of administrative review available for appeal are (1) agency appellate systems, (2) Commission regional appellate offices, and (3) the Commission's Board of Appeals and Review.

FINDINGS AND CONCLUSIONS

The propriety of and need for agency appeal systems are questionable because of problems associated with:

--The inexperienced and inadequately trained agency hearing officers. (See pp. 8 to 10.)

--The excessive time required to process appeals at agency level. (See pp. 10 to 12.)

--The duplicate effort involved in permitting employees hearings by both the agencies and the Commission. (See pp. 13 to 14.)

Employees are concerned that the adverse action and appeal systems are unduly management oriented. Personnel managers are concerned that the systems inhibit their abilities to keep a quality work force. (See pp. 29, 30, and 31.)

GAO's review, as well as prior studies, identified the following factors creating these viewpoints.

--Most employees were not granted hearings until after penalties were imposed. (See pp. 16 to 21.)

--Neither the Commission's regional appellate offices nor the Board of Appeals and Review had the authority to mitigate agency penalties. (See pp. 22 to 26.)

--Hearings were closed to the public. (See pp. 27 to 29.)

--The systems were designed in such a way that managers and supervisors often were reluctant to take justifiable adverse actions. (See pp. 29 to 31.)

According to the concerned parties, the issue of the timing of the hearing is the most sensitive and controversial issue in the adverse action and appeal systems. The systems should maintain a balance of fairness between management and employees. GAO has carefully considered the evidence and focused on the advantages and disadvantages of the alternatives of the timing of the hearing issue. Opinions of many concerned parties are divided and GAO is not in a position to resolve the controversy.

The Supreme Court will address the constitutional issue as to whether predicision hearings on adverse actions are constitutionally required. (See p. 18.)

The Commission appelate offices did not have authority to generally mitigate penalties. In a recent proposal, however, the Commission planned to grant its offices limited mitigation authority and to gain a reasonable amount of experience operating under this broadened authority. In view of this, GAO is deferring a formal recommendation on this matter. (See pp. 22 to 26.)

As the personnel agency of the executive branch, the Commission establishes personnel policy and regulations and assists agency management in implementing them.

As administrator of the adverse action and appeal systems, the Commission tries to protect Federal employees from arbitrary and unjust agency actions.

The lack of a separate and distinct organization within the Commission for each of these activities creates doubt as to its objectivity and independence in administering the appeal system. (See pp. 32 to 39.)

The Commission's objectivity and impartiality can be established and employee trust in the appeal system can be increased through a restructuring of the Commission's appellate organization. Such restructuring should be designed to centralize administration of the appeal program and to separate personnel management activities from adjudication of appeals, which would avoid the appearance of conflict that these dual functions create.

RECOMMENDATIONS

To avoid using inexperienced or inadequately trained hearing officers and to prevent delays and duplicate effort involved in processing appeals, the Commission should act on its proposal to eliminate agency appeal systems as soon as practicable. (See p. 15.)

GAO recommends that administration of the appeal program be centralized under the Board of Appeals and Review and that:

--Regional appeals examiners and the Appeals Examining Office report directly to the Board.

--Regional examiners and the Appeals Examining Office be empowered to make decisions independently of the regional directors and the Executive Director.

--The Bureau of Personnel Management Evaluation no longer coordinate the Commission's first level of appeal.

--The Board, and not the Bureau of Policies and Standards, establish the Commission's appellate policy.

--The administrative relationships between the Board and the Executive and Deputy Executive Directors be limited to matters of minor administrative support.

--The Board be responsible solely to the Commissioners. (See p. 38.)

AGENCY ACTIONS AND UNRESOLVED ISSUES

The Commission stated that the proposed changes to the adverse action and appeal systems, announced in March 1973, attest to its agreement with GAO's overall evaluation that the design and administration of these systems need to be improved.

The Commission, like GAO, proposes eliminating agency appeal systems and allowing the employees the right to one hearing and one appeal before the Commission. The Commission proposes also giving employees the option of using negotiated procedures.

GAO believes that, when unions and management negotiate alternatives for settling adverse actions, employees should have the option of using such procedures.

GAO concurs with the Commission's recently adopted policy of having the adverse action hearing open to the public at the appellant's request.

The Commission is against the preaction hearing primarily because it feels that requiring management to hold a hearing as a precondition to discipline is an unreasonable limitation on the authority needed to maintain organizational effectiveness and discipline. (See p. 19.) In a recent report, the Administration Conference of the United States adopted a recommendation favoring a preaction hearing in certain cases terminating an employee's pay. The Conference report also discussed many of the arguments for a preaction hearing. (See app. I for report excerpts.)

The Commission recognizes the need for revising its appellate structure and has proposed realigning its organization to increase the independence of the appellate function. Although the Commission has not detailed all of its planned changes, GAO did note that it had included establishment of a new centralized appeal authority to which regional appeal offices and the Appeals Examining Office would report.

MATTERS FOR CONSIDERATION BY THE CONGRESS

This report attempts to focus attention on the controversial issue concerning the timing of the hearing. (See p. 16.)

In order to carry out certain Commission-proposed changes, legislation would be required. (See p. 59.)

Legislation would also be necessary to authorize the use of negotiated procedures to settle adverse actions. (See p. 15.)

CHAPTER 1

INTRODUCTION

Adverse actions involve removals, suspensions for more than 30 days, furloughs without pay for 30 days or less, and reductions in rank or pay. We reviewed the systems by which management imposes and Federal employees appeal such actions, because these systems can impact on all Federal employees and because congressional committees, labor unions, the courts, and the general public are increasingly concerned with the systems' equity. We wanted to know whether the systems were fair to both management and employees and whether they were being operated efficiently.

The Lloyd-La Follette Act of 1912, the Veterans Preference Act of 1944, and Executive Orders 10987 and 10988 issued by President John F. Kennedy in 1962 made major contributions to the existing adverse action and appeal systems. (See app. II.)

The acts generally require a Federal agency, when initiating an adverse action, to give the employee:

--Written notice of the proposed adverse action 30 days before it becomes effective and of his right to reply both orally and in writing.

--Access to material supporting the proposed action.

--Reasonable time to reply.

--Written notice of its decision.

In addition, the employee has a right to a formal trial-type hearing before a trained hearing officer.

The employee can challenge an adverse action on the ground that the agency acted arbitrarily or unjustly or did not follow required procedures. The three levels of administrative review available are (1) agency appeal systems, (2) Civil Service Commission regional appellate offices, and (3) the Commission's Board of Appeals and Review. How an adverse action is imposed and appealed is detailed in appendix II.

Some information on the types of appealable actions taken, incidence of adverse actions, and a profile of people who appeal is shown in appendix III. A recent study identified problems relating to the sufficiency and reliability of statistical information generated by the Commission concerning the adverse action and appeal systems. The Commission, in response to that study, stated that it was designing and installing an improved management information system for the appellate function.

The total agency costs associated with the adverse action and appeal systems are unknown; however, in fiscal year 1972 the Commission's total costs to operate its appellate systems were about $1 million.

Before we made our review, Messrs. Leo Pellerzi,[1] James A. Washington, Jr., Egon Guttman, Robert Vaughn and Ralph Nader, and Richard A. Merrill made separate studies of the adverse action and appeal systems. (See app. VI.) They identified problems with the existing systems and offered many suggestions for their improvement, which included:

--Eliminating agency appeal systems.

--Providing for one hearing and one appeal.

--Using Commission employees to hold the hearing.

--Holding the hearing before, rather than after, penalty is imposed.

--Holding an open hearing.

--Granting each Commission appellate officer authority to mitigate the penalty.

--Reorganizing the Commission to more effectively administer the appellate function.

This report confirms that many of these issues associated with adverse action and appeal systems and identified as early

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[1]At the time of his study, Mr. Pellerzi was the General Counsel for the Commission.

as 1967 by Mr. Pellerzi still exist. Further, it discusses proposals being considered by the Commission to correct most of the identified problems. Although the Commission made substantive changes to the adverse action and appeal systems in September 1970, the above issues still needed to be resolved. However, on March 30, 1973, the Commission completed its study and issued Bulletin 752-5 addressing these issues. This bulletin enumerated a number of significant proposed revisions to the systems (see app. V) and requested comments and recommendations from agencies, labor unions, veterans' organizations, and other interested groups.

We agree with the Commission proposals to (1) eliminate agency appeal systems, (2) allow the affected employee one appeal and one hearing before the Commission, (3) permit the hearing to be open to the public at the request of the employee, (4) provide for using negotiated procedures, including binding arbitration, as an optional method to settle the adverse action when union and management agreements so provide, and (5) restructure the Commission's organization which administers the appellate function.

We believe, however, there is an alternative to the Commission proposal concerning the amount of authority Commission appellate review levels should have to mitigate penalties. Also, the Administrative Conference of the United States suggested an alternative concerning the timing of the hearing when it recently recommended a preaction hearing in certain cases terminating an employee's pay.

In April 1973 we held formal briefings with the Commission and the staff of the Subcommittee on Manpower and Civil Service, House Committee on Post Office and Civil Service, on the results of our review.

Because of congressional interest, the potential impact of these systems on the Federal work force, and the corrective action planned to improve the systems' overall effectiveness, we plan to follow up and report on the implementation of the proposed changes.

CHAPTER 2

AGENCY APPEAL SYSTEMS

The propriety of and need for agency appeal systems are questionable because of the duplicate effort involved in permitting hearings both at the agency level and at the Commission. Statistics show that agency appeal systems are the most time consuming. In addition, agency hearing officers are not given adequate training and are denied the benefit of experience in agencies having few appeals.

In briefing Commission officials, we proposed that they consider eliminating agency appeal systems. The Commission's study supported the same proposal. If this proposal is carried out, Executive Order 10987 will have to be revised as it required most agencies to establish appeal systems.

AGENCY HEARING OFFICERS

Employees, management, and unions seriously doubt the quality and impartiality of hearing officers because most agencies have ad hoc, rather than permanent, hearing officers.

Among the opinions expressed to us were:

--Management often selected as hearing officers the employees it could spare, not the most qualified, and their assignments depended on agencies' willingness or ability to free them from their full-time jobs. This was unfair not only to the appellant, because he was kept waiting for his hearing, but also to the hearing officer, because he had a full-time job.

--Employees believed that agency hearing officers were management oriented because (1) they were selected from management and (2) if they decided a case against management they might encounter career advancement difficulties, or at least they believed they would.

--Vagueness of Commission requirements for qualifications of agency hearing officers resulted in selection of other than the most qualified persons.[1]

Agency hearing officers are not adequately trained. At the agencies we visited, they held, on the average, four hearings a year--which gave them little opportunity to acquire experience. Although the Commission conducted a 3-day training course, the Commission's Director of Employee Relations Training considered the training to be marginal and said that most students, after completing the course, had an insecure grasp of the subject.

Students attending the Commission training course were generally satisfied with the competence of the instructors; however, they believed the course did not prepare them to effectively hold hearings. An agency official who attended the course questioned the maturity of many of the students and believed it "rather frightening" that some of them might sit in judgment on others. One student considered himself a "3-day wonder," and another thought that agencies should have professional hearing officers.

Agency training ranged from a 4-day course plus a 1-day refresher session every 4 months at one installation to a 10-day course plus an occasional refresher session at another.

The U.S. Army Civilian Appellate Review Agency uses a structured appeal system employing 26 full-time hearing officers. It previously used an ad hoc system of 1,500 employees as needed to handle the workload. The Review Agency Director stated that a 1-week training course was not sufficient; hearing officers needed on-the-job training and at least a full year's experience to be qualified.

Agency responses to the Commission questionnaire used in its recent study also expressed reservations on the use of agency employees as hearing examiners. For example:

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[1]The principal Commission requirements for agency hearing officers are (1) employment at grade GS-12 or above, (2) completion of Commission-prescribed training, and (3) 4 years' experience in administrative, professional, or technical work or current or former employment as an arbitrator or hearing examiner.

"* * * it is almost impossible to find a completely impartial agency employee to serve as an examiner." (General Services Administration)

"The use of agency employees as examiners creates a doubt as to the impartiality of the system. With both the management representative (prosecutor) and the appeals examiner (judge) being agency employees, the appellant is left with the impression that the requisite impartiality of the hearing is lacking." (Treasury Department)

"* * * it would seem that the employees involved, and management as well, would have some concern about the quality of hearings that are conducted by persons with little training and without previous experience or with experience that is noncurrent." (Department of Housing and Urban Development)

All prior studies suggested that hearings be held only by Commission employees. They emphasized that part-time agency hearing officers did not gain the necessary experience and, since they were part of the agency's organization, were not completely impartial.

TIME-CONSUMING APPEALS

The Commission, agencies, unions, and each of the prior studies have recognized the excessive time involved in processing appeals. Processing an appeal through one agency level and the two Commission levels takes, on the average, over 300 days. On the basis of fiscal year 1972 experience, the Commission has said that processing an appeal at the agency level takes, on the average, 170 days.

The following schedule shows that average processing times at installations we visited far exceeded the standards for first-level agency appeal.

Installation	Time period	Number of cases	Average processing time (days)	Standard (days)
Naval Air Rework Facility, Alameda	Fiscal year 1971	8	177	57
Sacramento Air Materiel Area	Fiscal year 1971	3	114	75
Boston Postal Service	Calendar year 1971	29	212	50
Internal Revenue Service, Mid-Atlantic Region	Fiscal year 1970	1	164	(a)

[a]No standard.

One of the agencies failed to set standards, contrary to the Federal Personnel Manual, and some agencies set standards that appeared unreasonable. For example, the Sacramento Air Materiel Area has a standard of 75 calendar days. However, if the agency does not reach a decision within 60 days after receiving the appeal, the employee may terminate the agency appeal by taking his case to the Commission.

In fiscal year 1971 the Commission's Boston, San Francisco, and Philadelphia regional offices processed appeals in an average 81, 91, and 122 calendar days, respectively. These processing times exceeded the 63-calendar-day standard.

In one region 161 cases were appealed to the Board of Appeals and Review, and it took the Board an average 103 calendar days to render a decision; Commission regulations prescribe 75 calendar days for this process. Commission officials told us that 103 days appeared to be too long and estimated the average at about 80 calendar days, considering the Board's entire workload.

If the above processing times at the three appeal levels are considered collectively, processing an appeal takes about 1 year. Since most agencies impose penalties before they give an employee a hearing, the employee, in cases of removal, may be off the rolls and in a nonpay status for that entire year.

Unions responding to the Commission's questionnaire expressed concern over the amount of time required to process an appeal. The National Federation of Federal Employees summarized the concern as follows:

> "One of the major concerns of employees facing adverse actions is the interminable delay and length of time in having appeals decided and final action rendered * * *. Most of the delay in adverse actions is at the agency level."

DUPLICATE EFFORT

Duplicate effort is another problem that has been recognized in every study of the adverse action and appeal systems. Currently, employees can be granted two trial-type hearings, one at the agency and another at the Commission. The Commission itself, in its fiscal year 1971 annual report, stated that the hearing at the first level of the Commission repeated, in many cases, the hearing conducted at the agency. Such a practice is inherently duplicative and costly and, as Professor Merrill concluded in his study for the Administrative Conference of the United States, "simply inefficient."

As shown below, most of the persons we interviewed believed that only one hearing was necessary.

	One hearing	Two hearings
Agency employees and supervisory officials	43	6
Union representatives	11	4
Employees (note a)	7	1
Commission representative	6	2
Total	67	13

[a]Adverse actions had been imposed against all employees interviewed.

The Commission found that the question of two hearings resulted in more agency responses than any other topic in its study; 28 of the 36 agencies responding spoke out unequivocally against such duplication. The Navy and the Federal Communications Commission said that holding two hearings was time consuming, costly, and repetitive. The Department of Justice noted that two hearings lead to "sandbagging" and to withholding evidence at the first-level hearing. Seven Federal agencies suggested that, if a second hearing must be held, only new evidence or substantial matters not considered at the first hearing be allowed. In this way a substantial saving of time and money would be realized. Further, 21 of the 36 agencies believed that there were too many levels of appeal. Our interviews disclosed that most individuals favored eliminating agency appeals, as follows:

	Yes	No
Agency employees and supervisory officials	26	18
Union representatives	13	1
Employees (note a)	12	2
Commission representatives	5	1
Total	56	22

[a]See p. 13.

OTHER STUDIES

The studies of Messrs. Washington, Guttman, Vaughn-Nader, and Merrill all concluded that the existing systems were not being administered and operated economically and efficiently and suggested eliminating the agency appeal systems. In September 1968 Mr. Washington, in a memorandum to the Chairman of the Board of Appeals and Review, summarized the operational and administrative problems as follows:

> "Functionally, the agency appeals system probably serves only one major purpose; it syphons off cases which otherwise would enter the stream of the Commission's appellate system. However, posed against this purpose, are the disadvantages in terms of cost, duplication and time, the possibilities of inexperienced personnel being used to administer the system and the resulting potentials for injustice."

COMMISSION POSITION

The Commission, in Bulletin 752-5, identified proposed changes to the adverse action and appeal systems and requested the heads of agencies and independent establishments to reply by April 16, 1973. Included among the proposed changes was eliminating agency appeal systems. The Commission stated that, after carefully considering points of view from the many different sources and from extensive study and analysis, it believed that such elimination was necessary to expedite the appeal process.

The proposed change will require modification to Executive Order 10987 which requires each agency to establish an appellate system. If the order is modified, agency adverse action and appeal systems will be eliminated. The Commission pointed out that a possible exception being considered was using negotiated procedures, including binding arbitration, as an option to appealing to the Commission to settle adverse actions. Adoption of this proposal would require new legislation to permit an adversely affected employee to request review by his agency under the procedures negotiated between agency management and the union. If the employee appeals through the negotiated procedures, he would forfeit any right to appeal to the Commission.

CONCLUSIONS

In our briefing with the Commission and the Subcommittee on Manpower and Civil Service, we did not discuss the use of negotiated procedures to settle adverse actions. Instead, we focused on operating problems of the current adverse action and appeal systems.

We visited various private companies which used negotiated procedures and whose officials expressed general satisfaction with the process. We also obtained the views of union officials who stated that negotiated procedures should be available as an option to settle adverse actions. We agree with the unions' views and the Commission's proposal for using negotiated procedures.

We recognize that the Commission's implementation of its proposals is tentative, since it plans to consider agencies' responses before making changes. However, we believed that the findings of the Commission and prior studies, as well as our findings, demonstrate the questionable need for agency adverse action appeal systems, and we support a change to eliminate them. Such a change would result in more qualified Commission employees' conducting the hearings and would avoid excessive delays and duplicate processing of appeals.

RECOMMENDATION

We recommend that the Commission carry out its proposed plan to eliminate agency appeal systems as soon as practicable.

CHAPTER 3

ISSUES RELATING TO

THE ADVERSE ACTION AND APPEAL SYSTEMS

The adverse action and appeal systems should maintain a balance of fairness between management and employees. Throughout our study we found a general feeling among employees that current systems were unduly management oriented. On the other hand, personnel managers felt that the systems inhibited their ability to keep a high-quality work force.

Each of the four primary factors creating these viewpoints dealt with fairness.

--Most employees were not granted full evidentiary hearings until after penalties were imposed.

--Neither the Commission regional level nor the Board of Appeals and Review had authority to mitigate agency-imposed penalties.

--Hearings were closed to the public.

--The systems were designed in such a way that managers and supervisors often were reluctant to take justifiable adverse actions.

TIMING OF HEARING

There is disagreement among concerned parties over whether hearings should be conducted before a penalty is imposed (preaction hearing) or after a penalty is imposed (postaction hearing). The following discussion of the views expressed is an attempt to focus attention on this highly controversial issue.

Under the current system each employee is entitled to at least one trial-type hearing during the adverse action or the appeal. The employee usually does not have an opportunity to have his hearing at which he can testify before an impartial third person, cross-examine witnesses against him under oath, etc., until after the penalty has been imposed.

The prior studies questioned whether the employee should be given a hearing before or after imposition of the penalty, and each concluded that in most circumstances employees should be given a hearing before imposition of the penalty. Judge Washington stated that:

> "* * * an employee who is ready, willing and able to work without undue detriment to the Government should remain in active status until his case is finally determined."

Professor Guttman stated that:

> "Adoption of the union proposal that an employee be retained on the payroll until his appeals are determined is recommended. It would speed the determination of cases."

Professor Vaughn concluded that:

> "The Commission, except where an employee poses a significant physical threat to himself or fellow employees or the public, should provide for a hearing before adverse action is taken * * *."

The Administrative Conference of the United States (Professor Merrill) concluded that:

> "An employee against whom an adverse action is proposed should have an opportunity for a prompt evidentiary hearing before the action becomes effective."

Mr. Pellerzi's proposed system provided, in part, that if the appeal was filed promptly, the employee be retained on the rolls during the appeal unless removed or suspended for a crime or because of danger to himself or others.

Although the Supreme Court has never directly addressed the issue of whether due process requires the Government to afford a tenured civil servant a hearing before removal, recent district court decisions have differed. In August 1972, a district court judge in California held that due process did not require the Department of the Navy to grant a fire

chief at a naval air station a hearing before his removal.[1] In October 1972, however, a three judge district court in Chicago held that a field representative with the Office of Economic Opportunity was entitled, under due-process requirements, to a preaction hearings.[2] More recently, a three judge district court in Seattle, Washington, decided that a district director for the Equal Employment Opportunity Commission did not have to be granted a preaction hearing.[3] The Civil Service Commission has appealed the Kennedy case to the Supreme Court, and recently the Court agreed to review the decision.

Currently nine Federal agencies,[4] including the Department of Justice and the Commission, hold hearings before penalties are imposed. The Department of Justice, in replying to the Commission's request for opinions and information as part of its recently concluded study, stated:

> "* * * we believe a hearing before the decision which parallels present judicial processes, does more than any other factor in developing acceptance and confidence in the system * * *."

The Commission has a preaction hearing system in its internal personnel management system, but it believes that it is not desirable for all agencies to have similar systems.

We discussed with 66 persons the issue of whether hearings should be held before or after penalties have been imposed; their opinions were divided.

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[1] Carboneau v. Foxgrover, Cw. 72-318-T (S.D. Cal., Aug. 31, 1972)

[2] Kennedy v. Sanchez, 72C771 (N.D. Ill., Oct. 24, 1972)

[3] Shelton v. Equal Employment Opportunity Commission, Cw. 799-72C2 (Mar. 16, 1973)

[4] The other seven agencies are Department of Health, Education, and Welfare; Department of Housing and Urban Development; Department of the Interior; Civil Aeronautics Board; Federal Communications Commission; Panama Canal Company; and National Labor Relations Board.

	Before penalty	After penalty
Agency employees and supervisory officials	10	25
Union representatives	13	2
Employees (note a)	6	1
Commission representatives	3	6
Total	32	34

[a]See p. 13.

The more recurring reasons given by those favoring a preaction hearing were (1) it provided the employee with his day in court before being penalized, (2) it afforded the agency an opportunity to reconsider its proposed action after all evidence had been presented, and (3) it should prevent the employee from being unjustifiably punished and irreparably harmed.

The reasons most often given by those opposed to preaction hearings included: (1) the employee would tend to find reasons to postpone the hearings so as to continue working, (2) since supervisors would have to work with the employee until the hearing had been held, they would be inhibited from taking adverse actions and other employees would become skeptical of management's authority to discipline, and (3) the employee was given sufficient opportunity to be heard during the advance-notice period when he was afforded the right to make an oral and a written reply to the notice of proposed adverse action.

Commission proposal

According to Bulletin 752-5 the Commission does not plan to alter the existing systems to require that an employee be granted an evidentiary hearing before imposition of the penalty. The major reason for the Commission's having a postaction hearing system is that the Commission believes that requiring management to hold a hearing as a precondition to disciplining an employee would unreasonably limit the authority needed to maintain organizational effectiveness and discipline.

Commission officials explained that many of their personnel programs were aimed at urging managers and supervisors to make decisions promptly and use their authority properly. The officials stated that interjecting a third party into the adverse action process would contradict these programs and often would inhibit managers from taking justified adverse acitons. They pointed out that their proposed changes included a requirement that a management official other than the person initiating the action consider the employee's reply and concur in any decision adverse to the employee. They believe that this will insure judicious consideration of the adverse action while it is still in the proposal stage and at the same time will not inhihit management from making a fundamental decision because of red-tape which might be encountered if a preaction hearing were required.

Administrative Conferênce of the United States proposal

The Federal Register (vol. 38, No. 140, Part III, July 23, 1973) contained recommendations of the Administrative Conference of the United States and included the following, favoring a preaction hearing in certain cases terminating an employee's pay.

> "An employee against whom an adverse action is proposed should have an opportunity for a prompt evidentiary hearing before the action becomes effective. However, if the employing agency determines that retention of the employees in his current duty assignment will adversely affect the ability of his office or installation to perform its functions, the employing agency should be able pending its final decision (a) to reassign the employee (b) to place the employee on administrative leave with pay; and (c) if for a cause attributable to the employee the hearing is not commenced within 30 days after the agency notifies him of its readiness to proceed or has not resulted in a final agency decision within 60 days after such notification, to place the employee on leave without pay."

Professor Merrill, in his report supporting recommendations adopted by the Conference, acknowledged that during the 30-day notice period the employee threatened with adverse

action is entitled to remain on active duty unless the agency finds that his presence may result in damage to Government property or be detrimental to the interests of the agency. The report also discussed many of the arguments for preaction hearings. (See excerpts of the report, app. I.)

Conclusions

According to the concerned parties, the issue of the timing of the hearing is the most sensitive and controversial issue in the adverse action and appeal systems. The systems should maintain a balance of fairness between management and employees. We have carefully considered the evidence and focused on the advantages and disadvantages of the alternatives of the timing of the hearing issue. Opinions of many concerned parties are divided and we are not in a position to resolve the controversy.

The Supreme Court will address the constitutional issue as to whether predecision hearings on adverse action are constitutionally required. If the Court should rule that such hearings are required, the Commission has stated that it will amend its regulations to provide for them. However, should the Court decide preaction hearings are not required, it is still highly probable that many of the Federal agencies currently providing for preaction hearings would continue to do so. Thus, many of the arguments for and against preaction hearings would remain.

MITIGATION OF PENALTIES

The adverse action and appeal systems were designed to protect the employee from arbitrary and unjust actions. Too severe a penalty can be just as arbitrary and unjust as an entirely unwarranted action. Yet the Commission regional appellate offices and the Board of Appeals and Review do not have the authority to mitigate penalties. Instead, agency adverse actions are either sustained or reversed, a practice which can be unfair not only to the employee but also to management. Sustaining an agency action which has too severe a penalty attached may punish the employee too harshly; its reversal may completely exonerate an employee not deserving such good fortune.

The Chairman of the Board of Appeals and Review has indicated that the Commission's authority to mitigate penalties resides in the Commissioners. If requested to do so, the Commission may delegate this authority to the regional directors and/or the Board on an individual-case basis. There have been few such requests, however, and we were unable to ascertain the specific reasons for this. We did note, however, that the Commission's internal guidelines did not provide for appellate offices' requesting authority to mitigate penalties. The fact that there is no written policy may account for the limited number of requests.

Persons we interviewed, including management officials involved in initiating and processing adverse actions, overwhelmingly believed that Commission appeals examiners and the Board should be given authority to mitigate penalties.

	For	Against
Agency employees and supervisory officials	28	9
Union representatives	8	3
Commission representatives	6	3
Total	42	15

Those favoring mitigation authority stated that:

--The power to rescind seemed to imply the power to modify.

--It would help to offset the management-oriented agency appeal system.

--Arbitrators had this authority, so the Commission appellate offices should also have it.

--Management would rather have a penalty reduced than have an action reversed.

--Commission examiners were forced to sustain or reverse an action when neither course was appropriate.

--Since the penalty was a part of the action, Commission reviews should include it.

--The Commission could best establish uniform penalties.

Those against mitigation authority said that:

--Setting penalities was a management prerogative.

--The Commission was not aware of how much employee misconduct adversely affected agency operations and therefore was not in a position to establish the penalty.

--Such authority was not needed since, if the Commission reversed an action because the penalty was too harsh, the agency could reinstate the action and impose a lesser penalty.

Our views with regard to these objections follow.

--The Commission has the power to set aside a penalty completely; granting it the power to mitigate a penalty would not further impinge upon management's prerogatives.

--If an agency documents its case in detail, as regulations require, the Commission will be aware of the effect of employee misconduct.

--An agency's reinstatement of a case after reversal adds to an already time-consuming process. We were unable to identify cases reinstated after reversal because of overly harsh penalties.

Under the appeal or grievance procedures employed by the United States Postal Service, Massachusetts, California, and four private companies, penalties can be mitigated at any step of the appeal process. (See app. IV.)

Other studies

The studies of Messrs. Washington, Guttman, Merrill, and Vaughn-Nader all advocated giving Commission appeals examiners and/or the Board of Appeals and Review authority to mitigate penalties.

> " * * * Most of the problems associated with penalty substitution, including delays occasioned by seeking case-by-case delegations, would be solved by giving the Board and the regional offices general authority to substitute or modify penalties. Moreover, with this authority, the Board may be able to bring about substantial uniformity in the imposition of penalties." (Judge Washington)

> " * * * It is recommended, therefore, that if we have appeals examiners with the background and training suggested that the power to vary the penalty be delegated to the appeals examiner where a trial-type hearing has been held by him." (Professor Guttman)

> " * * * The Commission should grant to the Bar [Board of Appeals and Review] the authority to reduce penalties in adverse action cases." (Professor Vaughn)

> " * * * The Commission's appellate authority should have authority to affirm, or to reverse, or to modify the employing agency's disciplinary action in any appeal." (Professor Merrill)

The Commission had opposed granting its appellate offices authority to reduce agency penalties. However, as a result of its recent study, the Commission now proposes to

grant limited authority to be used only when it is shown that the penalty imposed was not in accord with agency policy or practice in similar situations. As we understand this proposal, a penalty could be mitigated only when it was found that the employees of an agency were being penalized differently for like offenses.

The Commission believes that its proposed change is a highly significant broadening of authority and that it is both prudent and advisable to gain experience with this limited authority before giving unlimited authority to its appellate offices.

Conclusion

Although an overly severe penalty is as arbitrary and unjust as an unwarranted agency action, neither the Commission regional appeals examiners nor the Board of Appeals and Review currently addresses the question of suitability of penalties. Instead, they either sustain or reverse adverse actions. It is questionable whether (1) sustaining an action having too severe a penalty is fair to the employee and (2) reversing such an action and completely exonerating the employee is fair to management.

The Commission's recent proposal recognizes the problem and attempts to make the systems fairer to both employees and management. Our interviews with Commission appeals examiners and our review of case files indicate that, depending on circumstances, different penalties may be appropriate for similar offenses. We believe, as does Professor Guttman, that prior decisions, although they may serve as guides for adjudicating officers, should not necessarily be binding. Adjudicating officials, upon being apprised of the circumstances of a case, can best determine the propriety of the penalty imposed. As the National Federation of Federal Employees stated in its reply to the Commission's questionnaire:

> "The Appeals Examiner should be given the power to vary the agency penalty should he find such a recommendation is in consonance with his findings of fact. The present system hamstrings a just adjudication."

Although exercising such authority will undoubtedly result, at times, in judgments deemed inapproriate by one party, we believe that the Commission will vest the authority with persons having the requisite integrity, experience, and good judgment.

To make the appeal system more equitable, the Commission should consider broadening the authority of its appellate offices to generally mitigate penalties. Such authority should be guided, but not bound, by prior decisions. The Commission is developing a system for indexing and digesting significant or precedential decisions, which should be helpful. We recognize the Commission's position regarding the need to gain experience with limited mitigation authority before conferring general authority on its appellate offices. Therefore we are making no recommendation at this time. We intend to review this matter later.

OPEN OR CLOSED HEARINGS

Hearings have traditionally been closed to the public, primarily because of the Commission's expressed desire to protect the privacy of employees. However, if an employee is willing to forgo his privacy because he feels that an open hearing will better protect him from arbitrary and unjust actions, an open hearing should be permitted.

We asked 66 persons whether adverse action appeal hearings should be open to the public.

	Open	Closed	Option of employee
Agency employees	1	28	5
Union representatives	2	7	7
Employees (note a)	3	3	1
Commission representatives	-	5	4
Total	6	43	17

[a]See p. 13.

Although an overwhelming number of those responding said that hearings should be closed, about 25 percent volunteered that the employees should have the option of having the hearings open or closed.

The reasons most often advanced by those favoring closed hearings were:

--Closed hearings protect employee privacy.
--Open hearings would serve no useful purposes.
--Unions could use open hearings to publicize grievances.
--Open hearings could take on a circus atmosphere.

The validity of such reasons is questionable, because permitting employees the option of having open or closed hearings would not adversely affect their rights to privacy. It would also satisfy employees who believe that open hearings would afford them greater protection against arbitrary and unjust actions. Further, if unions wish to publicize a particular grievance they can do so--and have done so--even though the hearing is closed. We believe that open hearings

would not take on a circus atmosphere, because most adverse-action hearings would not attract crowds and because hearing officers would have the authority, and should have the ability, to control the hearings.

Information obtained in our review of the appeal systems used by various State and municipal governments was that in California, Delaware, Pennsylvania, and the city of Philadelphia, open hearings are mandatory; in Massachusetts an open hearing is held at the request of either party; in Virginia and West Virginia hearings are closed.

Other studies

Three of the prior studies attacked the practice of holding closed hearings.

> "Open hearings and public decision would allow the public, however one defines it, to judge for itself the fairness and efficiency of the appellate system." (Judge Washington)

> "The public is involved in these hearings because the public has an interest in effective administration and has a right to evaluate and judge the fairness of the appellate process." (Professor Vaughn)

> "Except in extremely rare cases, where an employing agency can establish good cause for keeping the hearing closed, an employee subject to adverse action should have the right to elect a hearing that is open to the public." (Professor Merrill)

Commission position

The Commission recently adopted the policy of having an adverse action hearing open to the public at the request of the employee. The hearing officer can, however, close all or part of a hearing to the public if he determines such action to be in the best public interest or in the best interest of the appellant, a witness, or the Government.

Conclusion

The option of having open or closed hearings should satisfy those employees who believe that open hearings will afford them greater protection against arbitrary and unjust actions and will protect their right to privacy. Although we believe that the Commission should clarify the terms "in the best public interest" and "in the best interest of the appellant, a witness, or the Government," this change should substantially increase employee faith and confidence in the adverse action and appeal systems.

MANAGEMENT RELUCTANCE TO TAKE ACTION

One of the most recurring complaints of agency employees was that managers and supervisors were reluctant to take adverse actions because the current adverse action and appeal systems tend to be overly protective of employees. We asked 53 persons the question, "Are supervisors reluctant to take adverse actions?" They answered:

	Yes	No
Agency employees and supervisory officials	35	6
Union representatives	4	-
Employees (note a)	3	-
Commission representatives	5	-
Total	47	6

[a]See p. 13.

Some of the more common reasons advanced for this reluctance were:

--The system was too time consuming; supervisors were required to spend extensive time disposing of a case.

--The system was procedurally cumbersome; too much paperwork was involved.

--Management feared that an action would be reversed on a minor technicality and that the whole procedure would have to be repeated.

--Supervisors were treated roughly by employee representatives at the hearing.

--Supervisors were not adequately trained to process an adverse action.

--Unpleasantness was involved in taking an adverse action against an employee.

Although the questionnaire used in the Commission's recent study did not specifically address management reluctance, 14 of 36 agencies commented that the adverse action and appeal systems inhibited supervisors from taking adverse actions. For example, the Office of the Secretary of Defense said:

> " * * * Management's lack of acceptance of the appeals process probably results from the difficulty encountered in building an adequate case against an employee and the continuing threat of reversal by the Civil Service Commission on grounds of procedural inadequacy. As a result * * * management is often prone to take action against only the most chronic offenders."

The Treasury Department said:

> "Unacceptance of the system on the part of managers stems partially from the cumbersome procedures required for processing adverse actions. Supervisors and line managers become frustrated in their efforts to separate undesirable, inefficient employees, and often do not initiate actions except in the most aggravated cases. The knowledge that an adverse action may take an excessively long time to be completed adds to this feeling of frustration."

The Securities and Exchange Commission said:

> "According to our supervisors the real problem with the present adverse actions system is that too few are taken against federal employees. They believe that agencies are reluctant to initiate adverse actions, in part, because such actions require the

expenditure of a great deal of time and effort by supervisors and other agency officials and interfere with the regular workload of all persons involved."

Conclusion

We believe that adoption of our recommendation (see ch. 2) for eliminating agency appeal systems will help overcome management's reluctance to take action because of the systems' being too time consuming and procedurally cumbersome. Further, the use of full-time Commission employees to hold hearings should provide more orderly and controlled hearings and should reduce the rough treatment about which supervisors complained. (See ch. 2.)

Management's apprehension about taking action for fear of reversal seems to be directly related to the training provided. It appears that this fear could be reduced by comprehensive training and refresher courses with mandatory attendance by management employees responsible for taking adverse actions. Such courses would make managers capable of preparing well-documented cases and would familiarize them with the procedures required to process cases.

CHAPTER 4

THE COMMISSION'S ADMINISTRATION OF THE EMPLOYEE APPEAL SYSTEM

Independent reviewers, as well as Federal agencies, have questioned the objectivity and independence of the Commission as administrator of the adverse action and appeal systems because it has a dual role. It not only administers the employee appeal system but, as the personnel agency of the executive branch, also establishes personnel regulations and assists agency management in implementing them. As Professors Vaughn and Guttman, respectively, stated in their reports:

> "The appeals system, both structurally and informally displays a management perspective which at the least can be expected to undermine the confidence of employees in the objectivity and impartiality of the system." (Underscoring supplied.)

> "A system has to be devised which will not condition those involved in the appeals process to determine a doubtful situation in favor of management rather than the employee, by reason of predilection and participation in the personnel management program." (Underscoring supplied.)

Agencies' doubts regarding the Commission's objectivity were shown in their responses to the questionnaire the Commission used in its recent study.

> " * * * The Commission's professional staff is regarded, whether righty or wrongly, as 'management' by employees of other agencies, and both stages of Commission appellate review are viewed as management-controlled adjudication." (National Labor Relations Board)

> "The lack of confidence in the current appellate system from the employee point of view appears to stem from a lack of belief that the Agency and the Civil Service Commission can maintain a fair and impartial role in the light of the Commission's close association with Agency management." (Office of the Secretary of Defense)

" * * * Some view the Commission, not as an impartial third party, but rather as an extension of the arm of management." (Department of Treasury)

The Commission has stated that it can adjudicate employee appeals objectively and impartially. We would agree, if the Commission's adjudicatory functions were separated from its personnel management functions to improve its image and to restore employee trust in the system.

PROBLEMS ASSOCIATED WITH THE COMMISSION'S DUAL ROLE

The Commission's organizational charts and functional statements show that no one department within the Commission is responsible for administering the appeal program. Instead, seven organizational elements, most of which are also involved with establishing, coordinating, and implementing personnel management policies and programs, play some role in the program. (See fig. 1, p. 34.)

Regional offices

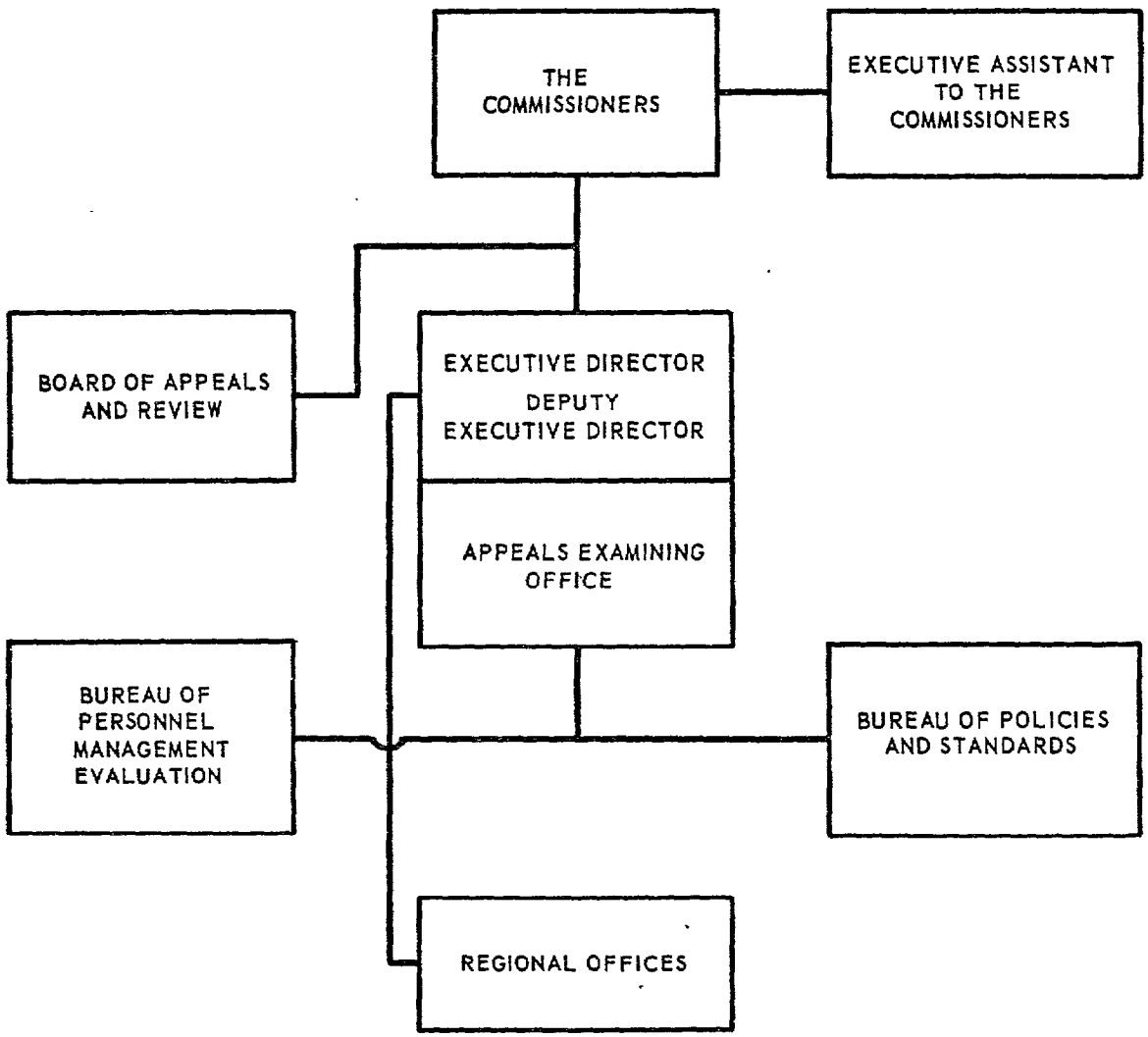
The dual role of regional directors involves their implementing the Commission's personnel policies in their regions and delegating adjudicatory authority to their respective regional appeals examiners. The extent of authority delegated to these examiners appears to vary. One regional director reviewed only reversals when agency management was overturned. Another regional director reviewed all decisions. A third regional director was told of reversals but reviewed only those the appeals examiner referred to him.

Bureau of Personnel Management Evaluation

The Bureau of Personnel Management Evaluation is responsible for coordinating and evaluating the regional appeal process. The Bureau primarily compiles and analyzes statistical data. Its nonappellate functions involve personnel management activities and include evaluating agency personnel management operations, determining compliance with statutory and regulatory provisions, and providing agency officials with assistance and guidance on personnel management matters.

Despite the Bureau's minimal involvement in the appeal program, its dual role detracts from the image of independence

ORGANIZATIONAL ELEMENTS INVOLVED IN THE COMMISSION'S APPELLATE FUNCTION



Source: Civil Service Commission

expected of an appellate function and could result in the Commission's being placed in a tenuous position. For example, our review at one installation disclosed that the Bureau, as a result of an evaluation, had downgraded a number of agency positions. The letter to the installation head directing the downgradings was signed by the Commission's regional director. The affected employees, because the action was initiated by the Commission, could not seek relief from their agency. Instead, they had to appeal directly to the Commission's regional office; they had to petition the Commission's first appellate level for redress of actions initiated and approved by some of the very individuals involved with this appeal level. The employees we interviewed questioned the objectivity and independence of the appeal system.

Board of Appeals and Review

The Board does not have dual functions. The Commission contends that, although the Board reports directly to the Commissioners, it is virtually autonomous. Its decisions, however, are subject to review by the Commissioners who, upon being petitioned, can reopen a case and reverse the Board's decision.

A Board decision which reverses an agency action does not direct the agency to remove all traces of the action from the employee's personnel file. We suggest that, if the Board's decision is reversal, it should include such direction in its written decision. It does not seem reasonable for an employee to bear the scars of an adverse action from which he has been exonerated. The current procedure for a reversal is to insert a reversal notice in the employee's record. Agencies do not, however, remove the initial notice detailing the action taken against the employee. This could adversely affect the employee's future opportunities for promotion and/or other employment.

Commissioners and Executive Assistant

After a decision by the Board, the agency or the employee can petition the Commissioners, in writing, to reopen the case. Petitions are reviewed by the Executive Assistant to the Commissioners on Appeals. For a case to be reopened, one of the following criteria must be met.

--New material evidence is available.

--The law has been erroneously interpreted or established policy has been misapplied.

--New or unsettled questions of policy of an exceptional nature are involved.

The majority of petitions to reopen cases are decided by the Executive Assistant and do not come to the attention of the Commissioners. During the 18-month period ended December 31, 1971, petitions were filed in 570 cases;[1] however, only 43, or 7 percent, were forwarded to the Commissioners. The remaining 527 petitions, or 93 percent, either had been decided by the Executive Assistant or were pending his review. The cost to review petitions during fiscal year 1972 was $30,000.

Bureau of Policies and Standards

The primary function of the Bureau of Policies and Standards is to develop Government-wide personnel policies. However, it also gives technical assistance to agencies comtemplating adverse actions. We believe that the Bureau should be allowed to assist agencies, if requested. However, we also believe that the Bureau's policy-setting ties with the appeal program should be severed and that policy should be set by the Board. This suggestion is consistent with our proposal for Commission restructuring aimed at centralizing the administration of the appeal program and making it independent.

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[1]About 428 cases, or 75 percent, involved adverse actions.

Executive and Deputy Executive Directors

The Executive and Deputy Executive Directors are the chief operating officials of the Commission. Their personnel functions include:

--Directing the planning and development of effective Government-wide personnel programs.

--Directing the Commission's line and staff activities in carrying out Government personnel programs.

--Interpreting and carrying out established personnel policies.

Their dual functions are evidenced by their delegations of adjudicatory authority to the Appeals Examining Office in Washington, D.C., and by the fact that regional directors, the Bureau of Personnel Management Evaluation, and the Bureau of Policies and Standards report to them. The Board of Appeals and Review also maintains administrative relationships with the Director.

OTHER STUDIES

Prior studies also have identified the problems involved with the Commission's serving as the personnel agency of the executive branch and as administrator of the appeal program.

> "* * * Perhaps all appeals examiners should be brought under the supervision and control of BAR [Board of Appeals and Review]. BAR is at the apex of the appellate process. It should be the overseer of the entire system. It is in the best position to assess and evaluate the work of the field appeals examiners." (Judge Washington.)

> "* * * Appeals Examiners and the Board of Appeals and Review have now come to regard themselves as an adjunct to the personnel management functions of the Civil Service Commission. Thus they feel a duty to assist in securing a decision which conforms closest with justice and fairness while assisting management in achieving its objectives * * *."

* * * * *

"I would suggest the creation of a new career service within the Civil Service Commission: that of Legal and Appeals Officer. This Career should be separate from and not subject to the jurisdiction of the Executive Director and Regional Directors other than 'for administrative purposes.'" (Professor Guttman.)

Although the Vaughn report advocated establishing a new agency to administer the appeal function, it indicated that if the function were to remain with the Commission:

"The BAR should report directly to the Commissioners."

* * * * *

"* * * The appeals examiners in each region should be empowered to make independent decisions without the concurrence of the regional director and should report directly to the BAR and be administratively responsible to the BAR."

CONCLUSIONS

We believe that the Commission's image could be improved and that employee trust in the system could be increased through a complete restructuring of the Commission's appeal organization. Such restructuring should be designed to centralize administration of the appeal program and separate personnel management activities from adjudication of appeals, which would avoid the appearance of conflict that these dual functions create.

RECOMMENDATIONS

We recommend that administration of the appeal program be centralized under the Board of Appeals and Review and that:

--Regional appeals examiners and the Appeals Examining Office report directly to the Board.

--Regional examiners and the Appeals Examining Office be empowered to make decisions independently of the regional directors and Executive Director.

--The Bureau of Personnel Management Evaluation no longer coordinate the Commission's first level of appeal.

--The Board, and not the Bureau of Policies and Standards, establish the Commission's appellate policy.

--The administrative relationships between the Board and the Executive and Deputy Executive Directors be limited to matters of minor administrative support.

--The Board be responsible solely to the Commissioners.

The Commission recognizes the need for revising its appellate structure and has proposed its reorganization. Although the Commission has not detailed all of its planned changes, we did note that it had included establishment of a new centralized appeal authority to which regional appeals offices and the Appeals Examining Office would report.

CHAPTER 5

SCOPE OF REVIEW

We conducted interviews and examined records at the Commission, Washington, D.C.; at Commission regional offices in Boston, Philadelphia, and San Francisco; and at 17 Federal installations. At each of these activities, only a limited number of persons knew about the adverse action and appeal systems. We obtained information and/or opinions from these persons, including regional directors and appeals examiners, personnel officers, employee relations officers, agency hearing officers, operating supervisors who had taken adverse actions, union representatives, and employees who had been the subject of adverse actions. A list of the installations we visited and the union activities we contacted is included in appendix VI.

We reviewed the information and/or opinions which the Commission obtained in response to a questionnaire it sent to agencies and unions as part of its recent study. We also analyzed prior studies of the adverse action and appeal systems made by Messrs. Pellerzi, Washington, Guttman, Vaughn-Nader and Merrill. (See app. VI.)

We examined laws, executive orders, regulations, and policies relating to the adverse action and appeal systems; reviewed case files, reports, and other related documents; attended hearings at Commission regional offices and headquarters; attended and evaluated a Commission training course for agency hearing officers; and obtained information on systems used by six States, one municipality, and six private companies. (See app. IV.)

Our analysis of the five prior studies, together with data we obtained from the Commission resulting from its recent study and the information developed from our independent interviews and examinations, formed the basis for our suggesting modifications to the existing systems.

Excerpts From Report In Support of the Administrative Conference of the United States Recommendation 72-8

Procedures for Adverse Actions Against Federal Employees
Richard A. Merrill

The Administrative Conference of the United States favored a preaction hearing in certain cases terminating an employee's pay. The following excerpts from the above titled report discuss many of the arguments for preaction hearings.

p. 1056 "2. Timing of hearing. Most agencies do not make a hearing available to an employee until after the proposed adverse action has become effective.[63] Some nine agencies--including the Departments of HEW, HUD, and Justice, as well as the Civil Service Commission itself[64]--provide the hearing in advance, but their caseloads comprise only a small percentage of all contested adverse actions. The Department of the Navy shifted from a pre-action to a post-action hearing procedure in 1967, and the Veterans Administration followed suit in 1971. Both agencies have large caseloads.[65] Among the justifications offered for these changes and for the prevailing practices is the claim that providing a hearing in advance prolongs the process. However, neither Navy nor the VA has yet provided statistics comparing their experience before and after shifting to a post-action hearing.

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

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

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

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

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

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

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

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

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

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

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

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

p.1058 "This is not to suggest that employees who have received a letter of charges do not represent a problem for employing agencies. When the agency's charges relate to serious misconduct on the job or criminal activity threatening persons or property, an employee's continued presence on duty may indeed be disruptive. Furthermore, agencies have an interest in avoiding frivolous cases that are contested simply to postpone the effective date of disciplinary action.

p.1060 "The issue of the timing of the hearing is undeniably controversial. On balance, however, the case against providing a hearing in advance--which is manifestly fairer to the employee--does not withstand scrutiny. The asserted efficiency of the present practice has not yet been supported by evidence; agencies that postpone the hearing in 1970 disposed of cases less rapidly that those that afford a hearing in advance. This was partly because they held relatively fewer hearings, which tends to undermine the contention that fewer cases need be heard when the hearing is postponed. If other, more recent evidence revealed that fewer hearings were required under the post-action procedure, one would be concerned that such a system discouraged employees from contesting their removal even in meritorious cases.

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

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

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

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

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

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

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

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

ADVERSE ACTIONS AND APPEALS

The adverse action and appeal systems are intended to insure fairness to Federal civilian employees and management. Management's imposition of adverse actions provides a means of maintaining an efficient and effective work force; the employee's right to appeal permits redress of actions believed to have been arbitrary or capricious. Figure 2 on page 46 outlines the current appeal process.

DEVELOPMENT OF ADVERSE ACTION AND APPEAL SYSTEMS

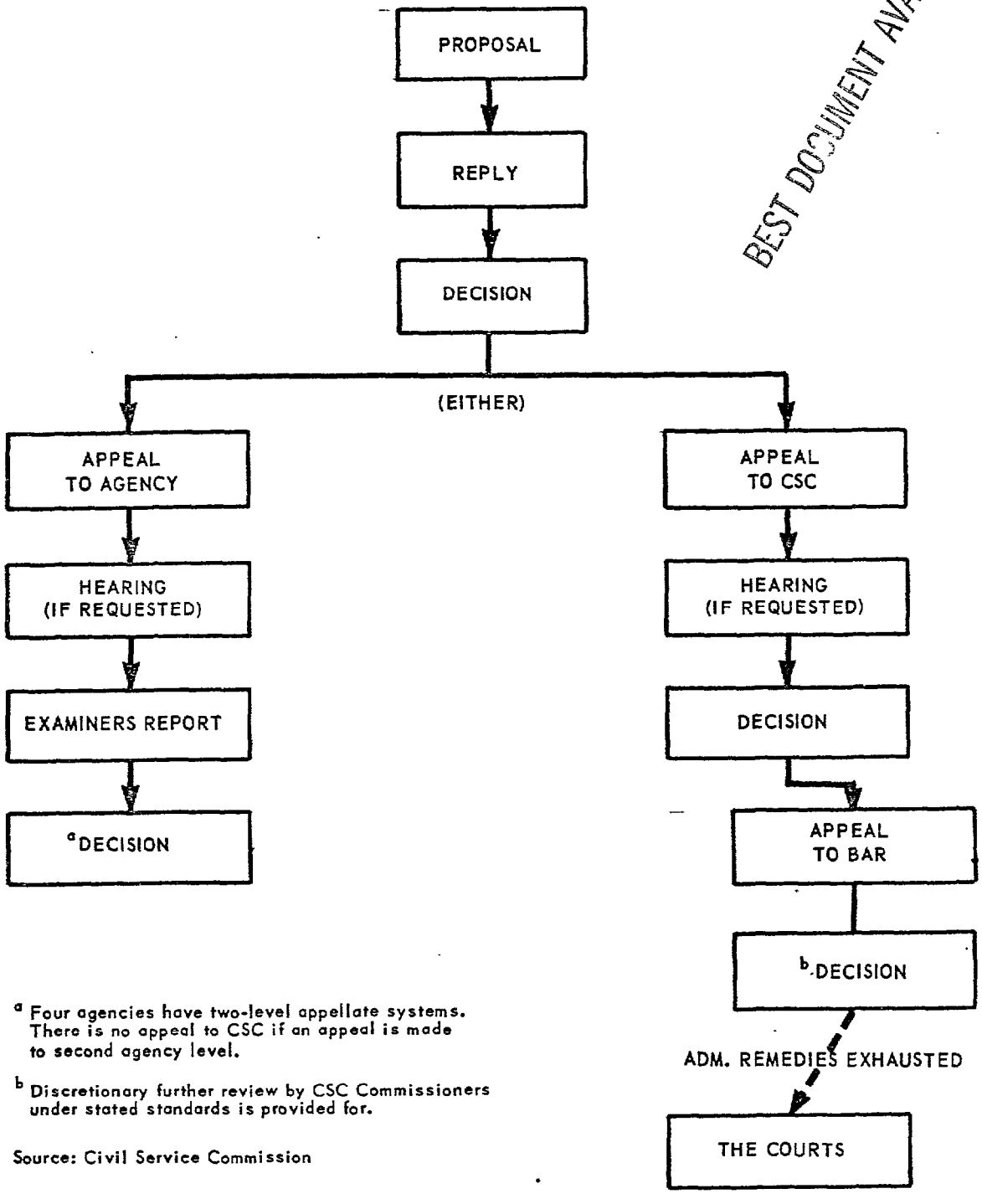
The first statutory protection against summary dismissals of Federal employees was the Lloyd-LaFollette Act of 1912. Although the act did not offer the employee administrative appeal rights, it did provide him with a legal basis for appealing arbitrary removal to the courts. It provided that an employee could be removed only for such cause as would promote the efficiency of the service; that the employee be give written notice of the reasons for the action; and that the employee have the opportunity to reply to charges, in writing, and submit supporting affidavits. The act did not provide for a trial or hearing, and therefore the employee had no opportunity to present or examine witnesses. Removal of the employee was entirely at the discretion of the appointing officer. Generally the Commission reviewed an action only when the employee could show that proper procedures had not been followed, that his removal had been for political or religious reasons, or that the penalty imposed was excessive.

Although the Lloyd-LaFollette Act was a start in protecting employees from arbitrary personnel actions, there continued to be little interference with the appointing officer's removal power. This situation remained until 1944 when the Veterans Preference Act was passed. Although the substantive requirements of this act were the same as those of the Lloyd-LaFollette Act, considerably stronger procedural protections were provided to veterans. The act required that:

--The employee be given written notice, including reasons, 30 full days before his removal.

APPENDIX II

EXISTING ADVERSE ACTION APPEAL SYSTEM



[a] Four agencies have two-level appellate systems. There is no appeal to CSC if an appeal is made to second agency level.

[b] Discretionary further review by CSC Commissioners under stated standards is provided for.

Source: Civil Service Commission

--The employee have the right to reply orally and in writing.

--The employee have the right to appeal to the Commission on substantive, as well as procedural, grounds.

--An employee appealing to the Commission have the right to appear before the Commission either personally or through a designated representative under regulations prescribed by the Commission.

In 1947 the Commission's appellate authority was strengthened when the Veterans Preference Act was amended to make it mandatory that agencies carry out the Commission's recommendations on appeals of adverse actions.

After the Veterans Preference Act was passed, numerous studies and reports to the Congress were made on adverse actions and appeal rights of employees other than veterans and numerous pieces of legislation were introduced. However, no legislative or executive action was taken until January 17, 1962, when President John F. Kennedy issued Executive Order 10987[1] which called for each Federal agency to establish a system of appeal from adverse actions. This order granted each employee the right to a formal hearing at some stage of his appeal, the right to be represented by a person of his choice, and a reasonable amount of time to prepare his appeal. By Executive Order 10988,[2] issued January 17, 1962, the same appeal rights granted to veterans under the Veterans Preference Act were extended to nonveteran employees.

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[1]This Executive order did not apply to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Atomic Energy Commission, and the Tennessee Valley Authority.

[2]The provisions of this Executive order were incorporated in Executive Order 11491, issued October 29, 1969, which established a Government-wide policy for labor-management relations.

IMPOSITION OF AN ADVERSE ACTION

Any employee with a career or career-conditional appointment or a career-executive assignment who has completed his probationary period is entitled, with two exceptions, to at least 30 days' written notice before an adverse action takes effect. A written notice or a minimum notice period is not required in the case of a furlough without pay due to unforeseeable circumstances, such as an act of God or a sudden equipment breakdown. Further, an agency may give an employee less than 30 days' advance written notice when there is a reasonable cause to believe that the employee is guilty of a crime for which a sentence of imprisonment could be imposed.

An advance notice must make clear that it concerns a proposed action. It must also state in detail the reasons supporting the agency action and advise the employee of:

--His right to reply, both orally and in writing, and to submit affidavits supporting his reply.

--His right to review material relied on by the agency to support the action.

--Where he may review this material.

--The time he is permitted for replying.

--The person or office to which his reply should be forwarded.

--The fact that his reply will be considered in reaching a decision.

If the employee is on active duty, the notice should also tell him how much official time he will be allowed to review the material, to secure his affidavits, and prepare his reply.

The employee is entitled to submit his reply and accompanying affidavits to a person authorized to make or recommend a final decision. If, after considering the reply, the agency decides to proceed with the action, it must give the employee written notice of its decision, stating the effective date of the action and indicating specifically which of the reasons stated in the advance notice were sustained and

which were not. The notice of decision, which must be delivered to the employee at or before the time the action becomes effective, must also inform him of:

--His right to appeal to his agency, including where he should file his appeal.

--His right to appeal and the appropriate office of the Commission to which to appeal.

--The time limit for his appeal.

--Where he can get information on how to appeal.

--Any restrictions on the use of his appeal rights.

--His right to a hearing, if not previously stated.

During fiscal year 1972, 11,530 appealable adverse actions were taken against Federal employees. (See app. III.)

AGENCY APPEALS

Upon receiving an agency's notice of an adverse decision, an employee--within 15 days after the effective date of imposition of the penalty--can appeal to and request a hearing by either his agency or the Commission. If he elects to appeal initially to his agency, he may later appeal to the Commission. However, if he decides to appeal directly to the Commission, he is precluded from appealing to his agency. Every employee has a right to a formal, trial-type hearing before a trained hearing officer during the appeal process. Currently, nine agencies, including the Commission and the Department of Justice, hold the hearing before imposing the penalty. Most agencies, however, hold the hearing after the penalty has been imposed.

The agency hearing officer submits a written report of his findings and recommendations to the agency official authorized to decide the appeal. This official must hold a position above that of the person who initiated the adverse action. If this agency official decides to impose a less severe penalty than that recommended by the hearing officer, he may do so. If he considers the hearing officer's recommendation lenient, he must send the appeal file, with his reasons for nonacceptance, to a higher level in the agency for decision.

If the employee does not receive the agency's decision within 60 days after he initially filed his appeal, he may drop the agency appeal and appeal to the Commission. If the employee does receive the agency decision and is dissatisfied with it, he may appeal to the appropriate Commission regional office. During fiscal year 1972, 1,033 cases were decided at the first-level agency appeal.

The Army, Navy, Air Force, and Department of the Interior offer second-level agency appeals. If an employee elects to use this level, he forfeits his right of appeal to the Commission. Only 52 cases were decided at this level during fiscal year 1972.

COMMISSION REGIONAL OFFICE APPEAL

Direct appeal

In lieu of appealing to the agency, an employee can appeal directly to the appropriate Commission regional office to obtain a right to a hearing by a Commission appeals examiner. At this level, the Commission will either sustain or reverse the agency decision and will cite its reasons. Either the agency or the employee may appeal this decision to the Commission's Board of Appeals and Review within 15 days. During fiscal year 1972 Commission regional offices decided 1,242 direct appeals.

Appeal after first-level agency decision

An employee who chooses to appeal initially to the agency is entitled to appeal to the Commission regional office within 15 days after the agency's first-level appellate decision. If the employee does not want a hearing, he must notify the Commission, in writing. The Commission's appellate office can only sustain or reverse an agency decision; it does not have the authority to modify penalties. The agency or the employee may appeal this decision to the Board of Appeals and Review within 15 days. If the agency's action is reversed, the agency must report to the Commission within 7 days after receiving the decision as to whether it accepts the decision or intends to appeal to the Board of Appeals and Review. In fiscal year 1972 Commission regional offices decided 738 appeals after agency appellate decisions.

BOARD OF APPEALS AND REVIEW

The Board does not hold hearings or hear oral arguments. Instead, each case is adjudicated on the basis of a review of the entire case file, including the record developed by the Commission office having initial appellate jurisdiction and any information submitted, in writing, by either party. During fiscal year 1972, the Board decided 982 employee appeals and 140 agency appeals.

The Board's decision is final except that the Commissioners may, at their discretion, reopen a case upon a showing that new material evidence is available, that the law has been interpreted erroneously, that established policy has been applied incorrectly, or that new or unsettled questions of policy of an exceptional nature are involved.

TYPES OF APPEALABLE ACTIONS TAKEN (note a)

	Fiscal year 1972	
	Actions	Percent
Demotion	7,390	64
Removal	3,690	32
Furlough	170	1
Suspension	280	3
Total	11,530	100

[a]Does not include actions taken by United States Postal Service.

INCIDENCE OF ADVERSE ACTIONS PER 1,000 EMPLOYEES (note a)

	Fiscal year 1972
Demotion	2.7
Removal	1.4
Furlough	.1
Suspension	.1
Total	4.3

[a]Based on Federal work force of 2.7 million.

PROFILE OF PERSONS WHO APPEAL (note a)

Sex:	82 percent male
Average age:	45 years
Average length of Government service:	15 years

Grade:	Percent
GS-1 to GS-4	26.8
GS-5 to GS-8	28.8
GS-9 to GS-12	32.8
GS-13 to GS-15	11.6

[a]According to a Commission study.

OTHER APPEAL SYSTEMS

We reviewed various facets of the appeal systems of six States, one municipality, six private companies, and the United States Postal Service. (See app. VI.)

States and municipality

With one exception, the six States and the city of Philadelphia appeal systems offer an employee only one level of appeal from an adverse action. The exception was that an employee faced with removal had a second level of appeal to the Governor. An employee, with one exception, is entitled to only one hearing which is held after the penalty has been imposed. The exception provides not only for a postaction hearing but also for a mandatory preaction hearing by the agency head. State civil service or personnel commissions or attorneys appointed by the State commissions hold postaction hearings.

State representatives said that processing an appeal took about 90 days through one State's appeal system, about 60 days through another's, and 30 to 60 days through a third's. We did not ascertain the processing times for the other three States or for Philadelphia.

Private companies

Two companies we visited did not use formal appeal or grievance procedures. Both used elaborate systems of counselings and warnings before taking actions against employees. However, at one company the employee had one informal appeal to a level above his immediate supervisor.

The remaining four companies used formal grievance procedures contractually negotiated between company managements and unions. Some of the major features of these systems were:

--Binding arbitration was used.

--Before arbitration, the employee was afforded three to five levels of in-house review beginning with his immediate supervisor and usually ending with the labor or industrial relations department.

--No formal hearing was conducted until the case reached arbitration.

--The arbitrator was mutually selected by management and the union.

--The cost of arbitration (about $2,000) was borne equally by management and the union.

--A penalty could be negotiated at any step in the proceedings.

--Appeals were not allowed without union representation in two companies.

Data provided by two companies indicated that the in-house review procedures were completed, on the average, in 40 days, although the arbitration process took between 90 and 180 days.

Management employees do not have any appeal rights. However, two companies offer management employees in-house reviews but not arbitration.

Postal Service

The Postal Service has two different appeal systems, one for supervisors and the other for nonsupervisory employees. Veterans, under both systems, have the option of using the procedure described below or of appealing directly to the Commission.

The grievance procedure for nonsupervisory employees, which includes binding arbitration, is negotiated between management and the union and is essentially the same as that described on pages 54 and 55 for four of the private companies.

A limited review of 10 cases involving nonsupervisory employees at the Boston Postal District showed that the in-house reviews were completed, on the average, in 27 days. Since no decisions had been made under arbitration at the time of our review, we were unable to determine the time to process a case through all levels of appeal.

Supervisors are offered two levels of in-house review. The first is the Assistant Postmaster General of the department or if there is no Assistant Postmaster General of the department, the department head. If requested, a hearing is held at this level. The second is the Postmaster General or his designee. No hearing is held at this level. Binding arbitration is not available to supervisors.

COMMISSION'S PROPOSED SYSTEM

Under the Commission's proposed system (see fig. 3, p. 58), an employee would continue to receive 30 days' advance notice of a proposed adverse action, would be permitted to review all material supporting the charge, and would have the right to make an oral and a written reply. The Commission proposes, however, to require that a management official, other than the person who initiated the action, consider the employee's reply. This official would be responsible for determining whether additional factfinding, investigation, personal discussions with the employee, or other steps were necessary.

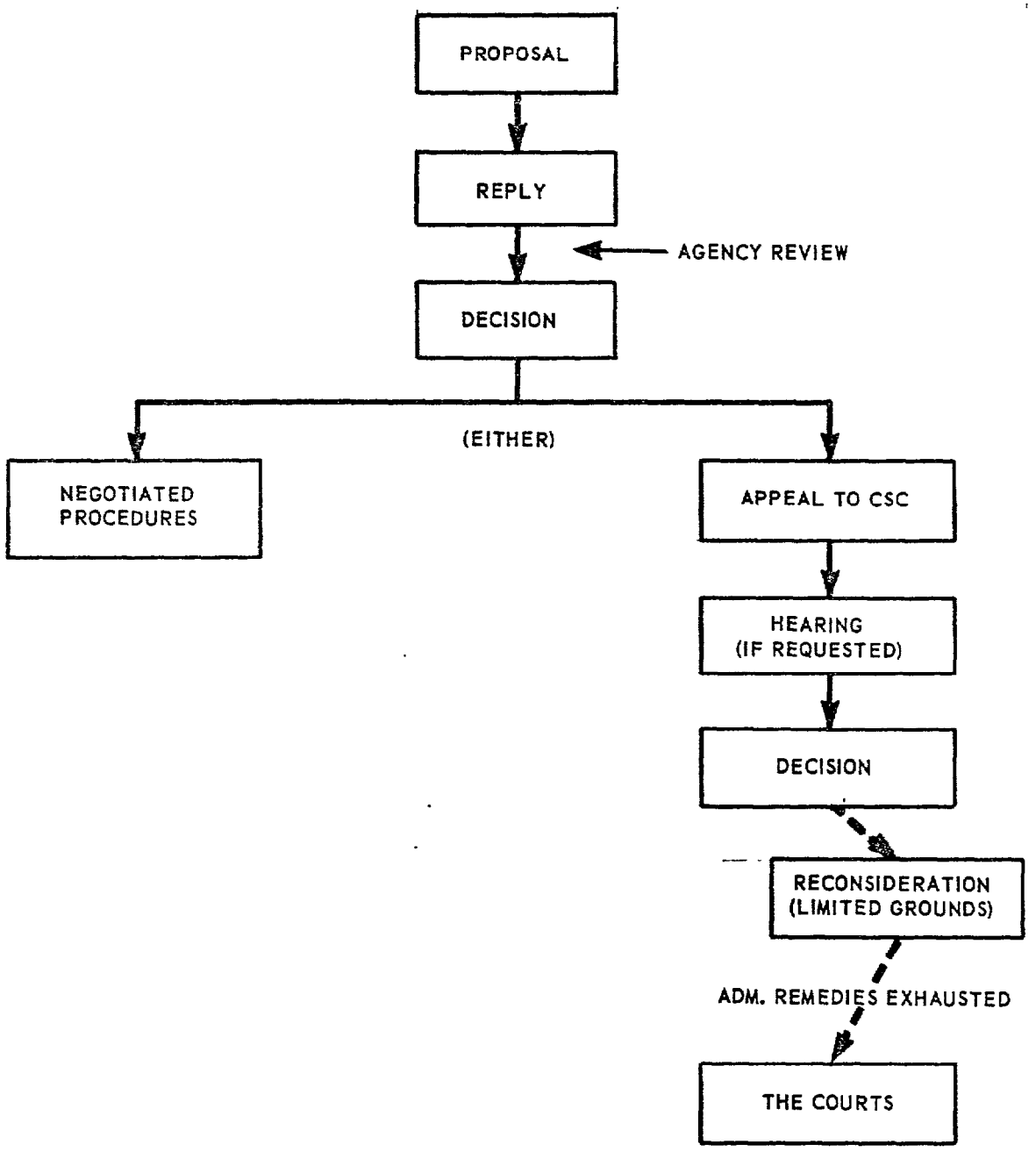
After considering the employee's reply, the agency would give its final decision, in writing, to the employee. Employees would then be permitted two mutually exclusive methods of appeal: through negotiated procedures or to the Commission. If the agency and a recognized union have negotiated procedures, including binding arbitration, to settle adverse actions, the employee may elect this method; however, if he does so, he cannot later appeal to the Commission. The Commission, however, retains the authority to review the arbitration award if it is contrary to law or regulation and on other reasonable grounds as may be provided for by Commission regulations.

Employees not using the negotiated procedures but wishing to appeal must do so directly to the Commission. Agencies will no longer have their own adverse action appellate systems. There will be one appeal to and one hearing at the Commission. The hearing will be held after the penalty is imposed and will be open to the public, if the employee so requests. However, the hearing officer can close all or part of the hearing to the public, if he determines such action to be in the best interest of the public, the appellant, a witness, or the Government.

Commission appellate offices will be authorized to mitigate agency penalties but only when the penalty imposed was contrary to agency policy or practice in similar situations.

The right to petition the Commissioners to reopen a case under the existing criteria remains, and, unless this petition is granted, the Commission's initial appellate decision will be final.

PROPOSED ADVERSE ACTION APPEAL SYSTEM



Source: Civil Service Commission.

Commission regional appellate offices and the Appeals Examining Office in Washington, D.C., will be organizationally attached to a restructured central appeals authority. Regional appellate offices will no longer report to the regional directors, nor will the Appeals Examining Office report to the Executive Director.

Other changes proposed by the Commission, which we believe would further improve the system, include:

--Furloughs for more than 30 days, currently treated as reductions in force, will be regarded as adverse actions. Furloughs for 30 days or less will be reviewable under grievance procedures.

--Significant decisions by Commission appellate offices will be published.

--Legislation will be proposed to clarify the meaning of "the efficiency of the service," the statutory standard for adverse actions, particularly as it relates to matters arising outside the employment setting.

--Legislation will be requested to extend to nonveterans the same adverse-action protections and appeal rights accorded to veterans.

--Legislation will be requested to define the categories of disciplinary and nondisciplinary adverse actions.

APPENDIX VI

ACTIVITIES REVIEWED AND PRIOR STUDIES

	Location
FEDERAL INSTALLATIONS:	
U.S. Navy Headquarters, Office of Civilian Manpower Management	Washington, D.C.
U.S. Navy Philadelphia regional office of Civilian Manpower Management	Philadelphia, Pa.
U.S. Navy San Francisco regional office of Civilian Manpower Management	San Francisco, Calif.
Naval Publications and Forms Center	Philadelphia, Pa.
Naval Air Rework Facility	Alameda, Calif.
U.S. Army Civilian Appellate Review Agency	Washington, D.C.
Frankford Arsenal	Philadelphia, Pa.
Sacramento Air Force Appellate Review Office	Sacramento, Calif.
Sacramento Air Materiel Area	McClellan Air Force Base, Calif.
Air Force Electronic Systems Division	L. G. Hanscom Field, Bedford, Mass.
Boston Postal District	Boston, Mass.
Veterans Administration Hospital	Bedford, Mass.
Internal Revenue Service, Mid-Atlantic Region	Phildelphia, Pa.
Internal Revenue Service, Philadelphia District	Philadelphia, Pa.
Internal Revenue Service, Philadelphia Payment Center	Philadelphia, Pa.
Social Security Administration, Payment Center	Philadelphia, Pa.
National Aeronautics and Space Administration Ames Research Center	Moffett Field, Calif.

UNIONS:

AFL-CIO Government Employees Council
National Association of Government Employees
American Federation of Government Employees
National Federation of Federal Employees
National Association of Internal Revenue Employees
National Association of Letter Carriers
American Postal Workers Union
International Association of Machinists and Aerospace Workers
American Federation of Technical Engineers

STATES:

California
Delaware
Massachusetts
Pennsylvania
Virginia
West Virginia

MUNICIPALITY:

Philadelphia

PRIVATE COMPANIES:

Bank of America
Sears, Roebuck & Co.
New England Telephone and Telegraph
Pacific Telephone and Telegraph
General Dynamics, Quincy Shipbuilding Division
Western Electric

Prior studies:

Report to William P. Berzak, Chairman, Board of Appeals and Review, prepared by James A. Washington, Jr. (1969).

"The Development and Exercise of Appellate Powers in Adverse Action Appeals," by Professor Egon Guttman (1970).

"The Spoiled System," by Professor Robert Vaughn for Ralph Nader's Public Interest Research Group (1972).

"Procedures for Effecting and Adjudicating Adverse Actions Against Federal Employees," by Professor Richard A. Merrill for the Administrative Conference of the United States (1972).

APPENDIX VI

"Improving the System for Adjudicating Appeals from Adverse Personnel Actions," a summary of the system advocated by Mr. Leo Pellerzi, former general counsel of the Commission (1967).