



Judicial Profile

by Jason Schlosberg

Hon. J. E. Sullivan Administrative Law Judge, U.S. Department of Transportation

By just looking at Judge J. E. Sullivan, you get the feeling that she does not belong in Washington, D.C. She exudes a peaceful, independent spirit, reminiscent of her original home within the Pacific Northwest. Her speech pattern—deliberate, paced and thoughtful—contrasts with her adopted city's relative manic energy. But, beneath her gentle veneer bubble, passionate feelings about judicial independence, particularly in the administrative courts.

In a variety of ways, the Office of Hearings at the U.S. Department of Transportation reflects the larger world of administrative law judge (ALJ) offices across the nation. Often called the “hidden judiciary,” ALJs often toil in the shadows of the executive branch agencies for which they preside. At the DOT, ALJs hear a variety of cases and draft decisions concerning certain operating administrations, such as the Federal Aviation Administration (FAA) and the Federal Motor Carrier Safety Administration (FMCSA).

However, the media rarely reports on—and I suspect that even the majority of employees at the department are unaware of—such cases. By design, the Office of Hearings is isolated from the politics of agency decision making. Organizationally, it sits as an office under the assistant secretary for administration, removed from the influence of those upon which it makes decisions. The office is even physically remote, located a couple of blocks down M Street Southeast from headquarters, with a view of South Capitol Street. “We are very insulated from the agencies that litigate before us,” says Judge Sullivan. “The first time I usually see an agency’s attorneys is when they appear before me in court.”

Previously, after serving as a criminal defense trial law-



yer and as a deputy prosecuting attorney, Judge Sullivan served for 19 years in Washington state, first on a state trial court of general jurisdiction and later as an industrial insurance appeals judge. In 2008, she became an ALJ with the Social Security Administration, which houses the vast majority of the country's 1,400 ALJs. By contrast, the Department's Office of Hearings employs three ALJs. While

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the chief ALJ, Judge Ronnie A. Yoder, presides over most cases heard in Washington, D.C., and their colleague, Judge Richard Goodwin, is responsible for cases mostly heard west of the Mississippi, Judge Sullivan's docket concerns cases closer to, but outside of, the capital. Having joined the office in 2011, Judge Sullivan is its most recent hire.

"I love the work here," she says. She believes it includes a wonderful variety of different procedural and substantive issues among the department's many operating administrations, more commonly known internally as "modes." Judge Sullivan speculates that 90 percent of her docket comprises of aviation safety cases, the vast majority of which arise from the FAA and involve anything from passenger behavior to aircraft airworthiness. They recently received a case involving the transport of a World War II B-17 bomber aircraft.

The remaining cases primarily concern enforcement of motor carrier regulations. The office has seen a sudden surge in out-of-service orders being issued by FMCSA and contested before an ALJ. FMCSA issues such orders when it believes a business practice reaches the level of an imminent hazard to public safety. The respondent business has to immediately shut down, including stopping all en route trucks and finding replacement drivers from other companies, and has a right to emergency hearing within 10 days. While the office may receive one such case every eight to 10 years, it has seen at least six in the past four years. One particular case involved a person using his father's name to develop a shell company and avoid enforcement of an earlier out-of-service order against his former company resulting from a fatality. The respondent, however, continued to use the same truck with the same business name and DOT identification number on its side.

In addition to having its own substantive safety regulations, each mode has its own procedural rules for hearings before ALJs. "Procedural rules are important," Judge Sullivan states. "They allow us to offer each other and the people we serve a way of dispute resolution that is civilized, peaceful, and nonviolent. We are privileged with the task and responsibility of providing to our people this kind, sophisticated dispute resolution process that is unique [and] for future generations to use and improve upon." She looks at the rules of procedure and evidence as tools for lawyers to provide the best possible panoply of options for his or her client. Judge Sullivan sees the varying procedural rules among modes as a result of each agency determining the very best tools for those within its unique enforcement process.

For instance, she notes that under the FAA's procedural rules, hearsay is admissible and it is the trier of fact's responsibility to weigh the evidence. But how does this work when reviewing a motion for summary judgment? Judge Sullivan has a very active pretrial motion practice of which many take advantage. She asks, "How do you address hearsay in a summary judgment proceeding when the court is not allowed to weigh evidence? It must only determine material facts and whether such material facts as provided by the evidence raise a genuine issue. When you have those

types of gaps, you have to look to guidance. I think that all of the tools can be utilized in harmony with each other and obviously there can be some differences on how or when the tools can be used. I have no problem using the tools that are before me."

Beyond each mode's own procedural rules, each ALJ has the authority to administer each proceeding and to render an independent decision. To conduct hearings on behalf of their respective agencies, ALJs have been statutorily provided with the power to, *inter alia*, "regulate the course of the hearing."¹ ALJs have utilized that broad delegation of power to support their judicial activities not otherwise explicitly provided for in the Administrative Procedure Act (APA) or in agency rules.² For instance, the First Circuit has held that the ALJ's power to regulate the course of a hearing commits the decision whether to allow cross-examination to the ALJ's discretion.³

The U.S. Supreme Court has also recognized the need for ALJ independence in procedural and substantive decision making. For instance, in *Butz v. Economou*, ALJs were afforded decisional independence because of their judicial roles and despite the fact that they are agency employees. While the *Butz* court limited its discussion to the issue of decisional independence, it did so under the assumption that such independence is necessary to afford proper due process and to maintain the integrity of the process.⁴

Unsurprisingly, Judge Sullivan takes the notion of ALJ independence very seriously. She credits Chief Judge Yoder with insulating her from the administrative and financial decisions imposed by the department onto the Office of Hearings. She also believes that the department has maintained a commitment to support the judicial process. This was not the case, however, when she presided over cases at the SSA. According to Judge Sullivan, "Instead of engaging in responsible stewardship and management of a meaningful federal adjudication program, SSA management has substituted a factory-type 'production' process. This mistaken approach has allowed SSA management to present Congress and the American public with some impressive 'production' statistics. But these statistics have been achieved by causing incalculable damage to a meaningful adjudication system." Judge Sullivan contends that such an environment provides for too many poorly considered and rushed decisions concerning disability benefits.

By no means has Judge Sullivan enjoyed her stay at the department while forgetting the pressures that threaten the independence of her ALJ colleagues elsewhere. She has testified in an individual capacity before the Subcommittee on Energy Policy, Healthcare and Entitlements to the House of Representative's Committee on Oversight and Government Reform. At this congressional hearing, she criticized SSA's mistaken emphasis on "production goals" within the adjudication offices, citing an SSA document that defines "full productivity" for an ALJ with less than a year on the job to include scheduling and hearing a minimum of 50 cases per month. Management and mentors systematically "encourage" meeting these goals. In real-

ity, says Judge Sullivan, meaningful adjudication (i.e., the totality of a judge's work) takes time and involves complex work processes that do not fit well within such an environment. The decision-maker must have the time and resources necessary to become fully informed about the issues and the parties' positions. In one particular case, under the SSA's system, Judge Sullivan was only able to review 35 pages of a 2,000-page medical records involving at least 10 different types of medical components. "When you remove from the court the time and/or resources that allow it to be educated and informed, you remove from the public its right to fair, impartial, and educated justice."

Judge Sullivan also appears to link such pressure to a larger criticism against the judicial system, claiming that recent years have seen unprecedented and troubling attacks on administrative and Article III court judges. "It is not an easy job to maintain a place of safety that all parties perceive to be fair and even handed," says Judge Sullivan. "There are going to be times that a decision-maker will make a decision that someone will disagree with. To attack people for doing their job or to attack the process, or to try to control it, is an attack against the citizen's right to a fair and just tribunal. It is a back-door attack, but it is still an attack." Judge Sullivan believes that each citizen has an obligation to uphold the confidence of the bench, which should be held apart from the strifes of public disagreement regarding other things. "The dispute resolution and court system should be, and is, the crown jewel of our country," she says. ☺

Endnotes

¹5 U.S.C. § 556(c)(5).

²*See, e.g., Moore v. Dept. of State*, 15 M.S.P.R. 488, 490 (June 16, 1983).

³*Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 880 (1st Cir. 1978) (citing 5 U.S.C. § 556(c)(5), (c)(7), and (d), and Attorney General's Manual on the Administrative Procedure Act 78 (1947)).

⁴*Butz v. Economou*, 438 U.S. 478, 511-12 (1978) ("Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."). Any concern that ALJs may abuse such contempt powers is without merit. ALJs are decisionally independent from their respective agencies and can only be removed for good cause. *See Butz v. Economou*, 438 U.S. 478, 514 (1978). Further, the Supreme Court already recognizes that administrative adjudications contain many of the same safeguards available in the federal judicial process, and therefore, "the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women." *See Butz v. Economou*, 438 U.S. 478, 512-14 (1978).