Calendar No. 1193

94TH CONGRESS, 2d Session | SENATE | REPORT No. 94-1259

AGENCY SEPARATION OF FUNCTIONS

SEPTEMBER 17, 1976.—Ordered to be printed

Mr. KENNEDY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 798]

The Committee on the Judiciary, to which was referred the bill S. 798, as amended, to amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures, having considered the same, reports favorably thereon with amendments, and recommends that the bill as amended do pass.

S. 798 would amend the Administrative Procedure Act, 5 U.S.C. sections 551–559, to make generally applicable to all formal proceedings those safeguards relating to separation of litigating and adjudicative functions now contained in 5 U.S.C. section 554(d) and applicable only to certain categories of formal adjudication.

S. 798 is endorsed by the Administrative Conference of the United States and, with a qualification explained below, by the American Bar Association. The bill is also supported by the Department of Health, Education, and Welfare; the Department of the Interior; the Department of the Treasury; the Department of Agriculture; the Federal Communications Commission; the Federal Maritime Commission; and the Consumer Product Safety Commission. (*See*, Hearings before the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, on "Administrative Procedure Act Amendments of 1976," April 28 and May 3, 1976, 94th Congress, 2d session (hereafter referred to as "1976 Hearings").)

AMENDMENTS

1. On page 1, line 9, change "shall" to "may" and on line 11 after "title" change the period to a comma and add the following: "or the entire record may be certified to the agency for decision."

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Explanation.—The amendment is intended to give the agency the option, where the presiding officer becomes unavailable before rendering a decision, either to assign the case for decision (including such additional hearings as may be necessary) to another officer qualified to preside—*i.e.*, an administrative law judge or an agency member—or to have the record certified to the agency itself for decision. It should be noted that the purpose in adding language to the first sentence of section 554(d) is simply to specify who may decide the case in the event of unavailability of the presiding officer. (*See*, Davis, *Administrative Law Treatise*, section 11.19, p. 119.) The addition to section 554(d) is not intended to overturn the results in those cases which hold that where the presiding officer becomes unavailable in a case which turns on a determination of witness credibility, a new hearing must be held. (*See*, *Gamble-Skogmo, Inc.* v. *F.T.C.*, 211 F.2d 106 (8th Cir. 1954); *Van Teslaar* v. *Bender*, 365 F. Supp. 1007 (D. Md. 1973).)

2. On page 2, lines 8 and 10, change the "(g)" to "(f)".

Explanation.—This is a technical conforming amendment.

3. On page 2, lines 18 and 21, and on page 3, line 5, strike the word "prosecuting" and insert in lieu thereof the word "litigating".

Explanation.—The references to "prosecuting" functions have been changed to "litigating" functions. The term "prosecuting" functions suggests a criminal or quasi-criminal proceeding. Since the bill would extend separation-of-functions principles to rulemaking and initial licensing proceedings, the broader term is believed by the committee to be more appropriate. It should be interpreted *pari passu* with that extension, and not so broadly as to include all participation in court litigation arising out of agency proceedings. For example, a general counsel whose role in a case is limited to defending the agency's action in a judicial review proceeding would not thereby be disqualified from advising the agency after remand of the case or in a related case. (*See*, *Attorney General's Manual on the Administrative Procedure Act*, 58, n. 8 (1947) (hereafter referred to as "AG Manual".)

4. On page 2, line 26 and on page 3, lines 1 and 2, strike the words "in ratemaking and cognate proceedings and".

Explanation.—The term "cognate proceeding" does not presently appear in the Administrative Procedure Act. It would have been added in a revision of definitions proposed by the Administrative Conference of the United States and the American Bar Association, incorporated in S. 796. Since the committee has not acted on this proposal, the reference in this bill would be premature and confusing.

5. On page 3, after line 6, add the following: "(3) This subsection does not apply to the agency or any member of the body comprising the agency.". Strike the quotation marks and final period at the end of line 6.

Explanation.—The exception from separation-of-functions requirements for the agency itself and members of the body comprising the agency is brought forward from present section 554(d). (*See*, *F.T.C.* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968); *Withrow* v. *Larkin*, 421 U.S. 35, 51–52 (95 S. Ct. 1456, 1467 (1975).)

History of the Bill

Revision of the Administrative Procedure Act safeguards relating to separation of functions has been considered by the Congress for over a decade. Legislation introduced in the 88th Congress proposed amending the provisions on separation of functions (*see*, proposed amendments to section 1005(c) of title 5, United States Code in S. 1663 and S. 2335, 88th Congress), and subsequent bills to amend the Administrative Procedure Act have followed suit (*e.g.*, S. 518, 90th Cong., 1st sess.).

The American Bar Association, following a study lasting over 14 years, adopted a specific resolution in August 1970 that legislation be adopted "providing that agency employees engaged in investigative or prosecuting functions in an adjudicatory proceeding or formal rulemaking proceeding cannot ex parte participate in or advise in the decision of that proceeding by agency heads, review boards or hearing examiners." In June 1973 the Administrative Conference of the United States adopted a formal statement on the ABA resolution approving it in part but indicating that the Conference did not believe "that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. 554(d)."

On February 22, 1975, Senators Edward M. Kennedy and Charles McC. Mathias introduced S. 797 and S. 798, which reflected alternatively the ABA and Administrative Conference positions on this issue. The bills were referred to the Committee on the Judiciary and hearings were held on these and other proposals to amend the APA on April 28 and May 3, 1976. The subcommittee favorably reported S. 798, with amendments, to the full committee in July 1976.

On September 16, 1976, the Committee on the Judiciary met and ordered reported S. 798, as amended, without objection.

Purpose

The second and third sentences of section 554(d) of the Administrative Procedure Act contain three distinct provisions for protecting the independence of the decisional process in formal, on-the-record agency adjudication:

First, the presiding officer, ordinarily an administrative law judge, may not consult a person or party on a fact in issue except on notice to all parties.

Second, the presiding officer must not be responsible to, or subject to the supervision of agency officials engaged in the performance of investigative or prosecuting functions. Thus, as a practical matter, an agency's administrative law judges must be placed in an organizational unit separate from those to which investigative and prosecuting personnel are assigned under the supervision of the agency itself or of agency officers who exercise no investigative or prosecutive functions. (See, *AG Manual* 55–56.)

Third, no employee who has performed investigative or prosecuting functions in a case may participate or advise off-the-record in the agency decision in the same or a factually related case. He cannot, in

other words, participate first as an investigator or advocate and then turn around and act as decisionmaker or confidential adviser to the decisionmaker in the same case. This principle is not limited to the decision by the presiding officer, but is applicable at all decisonal levels within the agency.

Since section 554 is addressed only to formal adjudications, the three provisions described above are not applicable to formal rulemaking proceedings, nor are they applicable to certain categories of adjudication—initial license proceedings and proceedings to determine the validity of past rates—which are excepted from the coverage of section 554(d) because of their similarity to rulemaking in the relative significance of policy as against purely factual issues. (*See, AG Manual* 50–51.) It was the judgment of the drafters of the APA that to impose the requirements of section 554(d) on formal rulemaking and initial licensing would undesirably restrict the flexibility of such proceedings.

Experience, however, has belied these fears. In point of fact nearly all agencies in conducting formal proceedings not covered by section 554(d) nevertheless follow procedures consistent with the requirements of the subsection. The Congress has already enacted a provision to apply the ex parte prohibitions in the Administrative Procedure Act to formal rulemaking proceedings. (*See*, Public Law 94–409.) Further, both the American Bar Association and the Administrative Conference of the United States have proposed that the separation-of-functions requirements contained in section 554(d) be expanded in their application to cover all formal proceedings, both adjudication and rulemaking. S. 798 would accomplish this objective.

The committee had before it alternative bills dealing with separation of functions. S. 797, the bill proposed by the American Bar Association, would have extended without qualification to all formal proceedings the three provisions of section 554(d) described above. S. 798, the bill proposed by the Administrative Conference, would do the same, with a single qualification: The bar on participating or advising in the agency decision would not extend to agency officials who have not personally been involved in the case but who have general supervisory responsibility over employees who have participated in the case. For example, the general counsel of an agency would not be disqualified from advising the agency members with respect to a formal rulemaking proceeding simply because attorneys in the general counsel's office participated in the hearing.

It should be pointed out that it is not entirely clear that section 554(d) regards such general supervisory responsibility as disqualifying in and of itself. The *AG's Manual* raised but did not answer the question. (*See, AG Manual* 57–58; *see also*, Davis, *Administrative Law Treatise* sec. 13.07; *R. A. Holman* v. *SEC*, 366 F.2d 446, 453 (2d Cir. 1966) cert. denied, 389 U.S. 991 (1967).) However, in those agencies which conduct adjudications subject to section 554(d), the problem does not arise because of strict organizational separation between prosecuting and advisory functions.

However, if the separation-of-functions requirements of section 554(d) are extended to all formal proceedings, the question of disqualification because of supervisory responsibility will create problems in at least one major agency, the Federal Power Commission. It is Commission practice to require every staff member who is specifically assigned to work in the investigation or trial of a case set for a hearing

to enter his appearance upon the record. Each such person must exclude himself from any Commission meeting involving that or a factually related case. However, the top staff members, the General Counsel, Assistant General Counsels, and Bureau chiefs, who might supervise those who are engaged in trying a case, usually attend Commission meetings at which the resolution of cases is discussed and are available to give legal advice to the Commission on request or on their own motion. Thus, these senior agency officials who may have had contact with the staff trying the case may later give legal or policy advice to the Commission.

The Commission vigorously opposes being required to sever either the advisory link between the Commissioners and the senior staff or the supervisory link between senior and trial staffs. Either separation would create both budgetary and personnel problems, since it would require separate advisory and supervisory staffs, and the Commission anticipates significant difficulty in recruiting additional staff with the legal and technical expertise required by the Commission's work. Furthermore, it must be recognized that even if a separate advisory staff were obtained, cutting off the Commission from the advice of its top officials with operating responsibilities would not be an unmixed blessing. (*See*, Federal Power Commission Report on S. 797 and S. 798 in 1976 Hearings.) Finally, apart from the particular needs of the Federal Power Commission, complete separation of supervisory and advisory responsibilities may create problems in those agencies which conduct formal rulemakings only occasionally and consequently have a need for some organizational flexibility. (*See*, Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," 2 ACUS 834 (1972).) For these reasons, and in reliance on the deliberate judgment of the Administrative Conference, the committee has decided to adopt the Conference rather than the bar association proposal.

Accordingly, S. 798 provides specifically that in proceedings not subject to section 554(d), that is, in those formal proceedings to which the separation-of-functions provisions are being extended by this bill, general organizational or supervisory responsibility for investigative or litigating functions will not disqualify an agency official from advising the agency on the disposition of a case if the official has not personally participated, including actual exercise of supervisory authority, in the investigation or litigation of the same or a factually related case. In specifying that these circumstances are not to be deemed a violation of the principle of separation of functions in cases not subject to section 554(d), it is not the intent of the committee to alter in any way the law applicable in cases subject to section 554(d).

Cost

The committee believes that there will be no additional cost imposed on any agency of the Federal Government by virtue of enactment of S. 798.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is

enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

5 U.S.C. 554

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

[(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

[(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

[(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

[An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recom-

mended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

[(A) in determining applications for initial licenses;

[(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

[(C) to the agency or a member or members of the body comprising the agency.]

(*d*) *The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency, in which case such decision may be made by an employee qualified to preside at hearings pursuant to section 556 of this title, or the entire record may be certified to the agency for decision.* This subsection does not apply—

(*A*) *in determining applications for initial licenses;*

(*B*) *to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or*

(*C*) *to the agency or a member or members of the body comprising the agency.*

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue, a declaratory order to terminate a controversy or remove uncertainty.

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§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued, except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(f) (1) Except to the extent required for the disposition of ex parte matters as authorized by law, the employee who presides at the reception of evidence may not—

(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(ii) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or litigating functions for an agency.

(2) An employee or agent engaged in the performance of investigative or litigating functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings or as authorized by section 557(b)(1), except that in cases not subject to section 554(d) of this title, an employee shall not be deemed to have engaged in the performance of investigative or litigating functions solely by virtue of his general organizational or supervisory responsibility for such functions.

(3) This subsection does not apply to the agency or any member of the body comprising the agency.

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