

**ASSOCIATION OF ADMINISTRATIVE LAW JUDGES**  
**Henry Reuss Federal Plaza, Suite 300**  
**310 W. Wisconsin Avenue**  
**Milwaukee, WI 53203**  
**(414) 297-3141, ext. 3009**

Subject: Docket No. 2004S-0270

On March 21, 2004, SSA and DHHS submitted a document entitled *Plan For The Transfer of the Responsibility For Medicare Appeals* (hereafter, the Plan) to Congress and the Comptroller General of the United States (the Government Accounting Office) delineating the manner in which the transfer will take place. The Plan anticipates that the adjudication of over 80,000 Medicare appeals to be initially will be resolved by Administrative Law Judges beginning on July 1, 2005. In addition, the Plan calls for the Judges to be located at DHHS Regional Offices, and specifies that they will be functionally and organizational separate from the Centers for Medicare and Medicaid Services (CMS). DHHS will solicit Applications for Administrative Law Judge positions this winter and will begin hiring judges and support staff next year. Judges will be hired from three sources: 1) the existing OPM Register; 2) Re-employed Annuitants from the Senior ALJ Program; and 3) sitting Administrative Law Judges. Upon receipt of the Plan, the Government Accounting Office (GAO) will have six months to evaluate the Plan and submit a report to Congress.

In a Notice dated June 24, 2004, DHHS entered an item in the Federal Register soliciting public comments to the Plan. Permit me to provide my comments on behalf of the Association of Administrative Law Judges.

Under the current adjudicatory scheme, the administrative law judges of the Office of Hearings and Appeals (OHA) of the Social Security Administration are charged with the privilege of hearing and deciding Medicare cases arising under Title XVIII of the Social Security Act. OHA currently has 139 field hearing offices and approximately 250 additional remote sites at which it currently adjudicates approximately 75,000 Medicare appeals per year. While we have many concerns with the feasibility of the Plan to provide the necessary adjudication services to the beneficiaries and providers, our main concern involves access to administrative law judges so that these hearings can be held in a timely fashion without unnecessary inconvenience and expense to the litigants and their representatives.

In Part IX of the Plan, entitled **GEOGRAPHIC DISTRIBUTION**, the Plan is silent on the manner in which judges will be distributed throughout the country. The Plan seems to hint at locating the majority of the judges in a "central hearing support office in the Baltimore/Washington area" and a "presence" in the regional offices. We believe that such a procedure is inconsistent with the language and spirit of Section 931 of the Act

that mandates a geographical distribution of judges "... throughout the United States to ensure timely access to such judges". While it is unlikely that DHHS will be able to offer hearing location opportunities in the same number of sites as currently being offered by OHA (*i.e.*, nearly 400 hearing locations), we feel that the intent of Congress is to require a physical presence located throughout the United States so that beneficiaries and providers alike can have ready access to judges so as to adjudicate their disputes. We believe that no fewer than 50 hearing offices should be created to adjudicate these matters so as to provide timely access to the judges charged in resolving these disputes.

We are also concerned with the language of Part VII of the Plan entitled **ACCESS TO ADMINISTRATIVE LAW JUDGES**. In that Part, DHHS is once again advocating the use of telephone hearings to resolve a large number of these cases. Such a plan was conceived and later harshly rejected by the Congress in the early 1990's when it was then referred to as the "dial-a-judge" program. We believe that telephone hearings are inconsistent with the intent of the Administrative Procedure Act and the intent of Congress when it mandates "access to judges" in any adjudicatory scheme developed by DHHS. The Plan should call for face-to-face hearings using a traditional trial court model.

The law which establishes the transfer of the function for hearing Medicare cases from SSA to DHHS provides for "[t]he appropriateness of establishing performance standards for administrative law judges with respect to timelines for decisions in cases under title XVIII of the Social Security Act" and cautions to take into account the requirements of the independence of such judges. The requirement for performance standards for administrative law judges is contrary to existing law that has been established under the Administrative Procedure Act. 5 U.S.C. sec. 4301(2)(D) exempts administrative law judges from the definition of "employee" in context of performance appraisals. 5 CFR sec. 930.211 provides that "an agency shall not rate the performance of an administrative law judge". The United States Supreme Court, in the case of *Butz v. Economou*, 438 U.S. 478 (1978), stated that prior to the Administrative Procedure Act there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they ... were often subordinate to executive officials within the agency. The holding in this case was affirmed by the Court in the case of *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). The law is clear that any performance standard which places the administrative law judge under the control of executive officials in the agency goes to the heart of independent decision making which is the very core of the Administrative Procedure Act. Independent decision making, by administrative law judges, has been provided by the Congress for the protection of the American people and not the judge. Any attempt to erode this independence of decision making denies constitutional due process to the American people and denies them of a protection provided by our constitution.

Finally, we have grave doubts that such an ambitious Plan can be effectuated by October 1, 2005. When fully implemented, DHHS will house the second largest group of administrative law judges and support staff in the United States, and will adjudicate around approximately 100,000 cases per year. We have not seen any significant progress

in the creation of such a Corps of Judges and support staff, and we fear that thousands of beneficiaries and providers will be forced to wait for an unreasonable period of time until DHHS' adjudication process is fully operational. Contingency plans should be identified for a continuing relationship with OHA should the Plan fail to meet the timelines identified in the Plan. The bench, the bar, and public need to be protected from needless delays in case adjudication that may arise from the failure of DHHS to achieve the announced ambitious goals.

If I can provide any further explanation of our concerns, please feel free to contact me.

Sincerely,

Ronald G. Bernoski  
President