Recommendation 88-5

Agency Use of Settlement Judges

(Adopted June 10, 1988)

Many cases over which administrative law judges, administrative judges, and other agency hearing officers preside do not involve broad regulatory issues and are often appropriately resolved by settlement. Following in the footsteps of several innovative federal judges,[1] some administrative agencies have begun to provide additional mechanisms for resolving these cases. The Federal Energy Regulatory Commission and the Occupational Safety and Health Review Commission have used a "settlement judge"—not the presiding judge in the case—to work with parties to explore possibilities for consensual resolution. Other alternatives agencies have used include prehearing conferences and summary procedures,[2] and more recently, minitrials, mediation and binding and nonbinding arbitrations.[3]

Agency prehearing conferences have historically been utilized as a means for either settling an entire case or narrowing the issues. Today, some presiding judges are exceptionally effective at using these conferences to promote settlement without overstepping bounds of proprietary. Still, while the presiding judge may be the ideal person to suggest that the parties talk settlement in a reasonable manner, he or she often cannot help the parties' explorations in any comprehensive way without risking the appearance of impropriety. In broad classes of cases, a separate settlement judge, not so limited, can exercise greater settlement-inducing authority than the presiding judge.

The Conference does not intend to suggest that use of settlement judges is a dispute resolution method that is necessarily better or worse than adjudication, arbitration, minitrials,

[1] In addition to settlement conferences, courts have engaged in broad and growing use of other means for facilitating an early disposition of a case including arbitration, special masters, mediators, and the use of summary jury trials. Rule 16(c) of the Federal Rules of Civil Procedure was amended in 1983 to provide that settlement and "extrajudicial procedures" for resolving disputes are desirable and may be a subject at pretrial conferences, while subsection (f) of the rule provides for sanctions for failure to appear at, to be prepared for, and "to participate in good faith" at such conferences.

[2] *See* ACUS Recommendation 70-4(1) (urging presiding officers to hold prehearing conferences on own motion or at the request of the parties) and Recommendation 70-3 (summary decision).

[3] *See* ACUS Recommendation 86-3 (alternative means of dispute resolution) and Recommendation 87-11 (alternative means of dispute resolution in government contract disputes). In both recommendations, use of settlement judges is specifically recommended, 86-3(D), 87-11(d). *See also* Recommendation 72-4(D) (settlement of ratemaking cases).

mediation by staff personnel or nongovernment mediators, or settlement by the presiding judge; parties should retain maximum flexibility to use the best procedure for their case. The best solution of all is to settle *before* an action has been instituted, and agencies should also do far more to instill consensual methods of dispute resolution into investigatory, pre-enforcement, and other stages. The settlement judge technique, nonetheless, is a useful means of facilitating settlements that, in appropriate adjudications, may be of greater value.

The settlement judge can command a degree of deference similar to that of the presiding judge without the need to observe all of the commands that establish and maintain impartiality. A separate settlement judge, once appointed, can engage in ex parte and off-the-record conversations, frank assessments of the merits, and other techniques to aid settlement that the presiding judge is less free to use. The settlement judge is generally knowledgeable about the kind of case and the parties' interests, and is in a position to lend structure to the negotiations, control their pace, reduce the adversarial nature of the process, and help the parties to assess objectively both the strengths and weaknesses of the case and to find reasoned solutions. The settlement judge is familiar with how the presiding judge is likely to handle such cases, how much time and effort they take, how evidence is weighed, and what kind of a reception the legal and factual issues will be given in light of agency precedent and policy. The settlement judge, who carries a judge's power and authority, may greatly reduce the scope of parties' disagreements over likely outcomes. Parties also are less likely to be skeptical about the informal settlement judge process and more likely to view this device as a legitimate and potentially valuable means of reaching an enforceable, legally defensible settlement.

Several other advantages may accrue. Initiating the settlement judge technique may be an excellent way for agencies to introduce the idea of settlement in proceedings in which it is not now frequently pursued but which the presence of other factors seems to make apt candidates. In such circumstances, an agency could make special efforts to make the technique available in the interest of breaking the adversarial mold, perhaps preceded by seminars or other devices to permit its presiding judges to study mediation, negotiation and other settlement-inducing techniques. In individual cases, use of a settlement judge might lead the parties to turn to mediation or other non-adjudicatory means of pursuing a settlement agreement. Presiding judges’ experiences as settlement judges, and possible enhanced expertise as mediators, should help them in resolving later cases.

Settlement judges are not a panacea, and their use must take into account caseloads, possible abuses in extreme cases, and likelihood of success. The very potency of the judicial

office means that it must be carefully employed to avoid abuse. Even so, the Conference sees great merit in the settlement judge technique and urges that it receive much wider consideration and application as a means of actually settling matters, or convincing the parties to undertake other consensual dispute resolution methods.

These recommendations suggest procedures for using the settlement judge as a final effort to obviate formal proceedings, as well as guidelines that seek to increase potential gains in efficiency while minimizing possible abuses that may result from a greater reliance on settlement in agencies' adjudicatory proceedings.

Recommendation

A. *Encouraging Use of Settlement Judges*

1. As part of efforts to encourage use of consensual means of dispute resolution, federal agencies that decide cases presided over by administrative law judges, administrative judges, or other hearing officers should encourage and facilitate settlement of adjudicatory proceedings by the voluntary use of settlement judges and other consensual methods.

2. Agency offices of administrative law judges, boards of contract appeals, and other hearing offices should adopt rules for appropriate use of settlement judges.

3. In urging regularized and amplified utilization of settlement judges, the Administrative Conference has no intention of discouraging reliance on other methods of dispute resolution without recourse to formal procedures. In many instances, cases of the types deemed suitable for reference to a settlement judge (paragraph B, below) can and should be settled at preliminary stages of disagreement. At times, moreover, early recourse to mediation or arbitration (where authorized) may be appropriate.[4] The Administrative Conference urges constant attention to settlement possibilities long before a controversy has reached the docket of a trial judge.

B. *Appropriate Cases*. In general, the agency use of settlement judges may be appropriate where one, and particularly more than one, of the following factors appear.

[4] *See* Recommendation 86-3 and 87-11, *id*.

1. Crowded dockets with relatively few cases being settled.

2. Presence of a large proportion of factual issues that are not of major precedential importance and do not raise broad policy or legal issues, particularly where the facts are undisputed and the primary issues concern the interpretation or characterization of such facts.

3. Remedies susceptible to gradation and, thus, to compromise. Examples are money claims, rates,[5] and degrees of restrictions or activity.

C. *Administrative Issues*

1. The chief judge should retain discretion in assigning settlement judges on the basis of the situations, issues, judges' aptitudes and personalities, and so forth. He should also remain free to refuse to appoint a settlement judge.

2. The agency head should ordinarily not suggest use of a settlement judge, since he is much less likely to know when a particular case is suitable for settlement and much more likely to desire a case to be settled to avoid having to decide it.

3. Given the workload of presiding judges and possible limited availability for appointment as a settlement judge, agencies should use, as an alternative source of settlement judges, currently retired ALJs who have notified the Office of Personnel Management that they would accept temporary appointment (pursuant to 5 U.S.C. 3323(b), enacted in 1984), retired administrative judges or hearing officers, or active hearing officers from another agency.

4. Agency presiding judges, and especially chief judges, should regularly review their dockets to identify cases where use of settlement judges may be useful, and consult regularly with experienced mediators to locate cases ripe for settlement.

5. Agencies should give attention to offering training in negotiation, mediation, and other consensual dispute resolution skills to administrative law judges, administrative judges, and other hearing officers. Training courses or seminars should be developed by agencies jointly or in cooperation with the Administrative Conference, Federal Mediation and Conciliation Service, Board of Contract Appeals Judges Association, American Bar Association, or other professional organizations. Agencies should also work with other interested groups to sponsor similar programs or outreach sessions for representatives who regularly appear in agency proceedings.

[5] *See* Recommendation 72-4, *supra*, note 3.

D. *Procedures*. Agency regulations or guidelines implementing the use of settlement judges should consider the following:

1. *Suggesting use of a settlement judge*. (a) The suggestion that a settlement judge be consulted may be made to the agency's chief judge by any party or by the presiding judge (although the agency head's invocation of the technique should be restrained (see C.2, above)). Because it will usually be difficult to predict at what points in the prehearing process settlement will be possible, the presiding judge and the parties should be free to request appointment of a settlement judge at any time. Any party or the presiding judge may veto such a suggestion.

(b) The chief judge should seek to ensure that all parties who appear *pro se* consent knowingly and voluntarily before he decides to invoke the aid of a settlement judge.

2. *Appointment*. (a) When appointing a settlement judge, the chief judge should issue an order specifying the length of time for such negotiations and confining the scope of any settlement negotiations to specified issues.

(b) When a settlement judge is appointed, the presiding judge may suspend discovery or other proceedings during the time the matter is assigned to the settlement judge.

(c) If settlement negotiations are terminated, the chief judge may subsequently appoint a settlement judge in the same proceeding to conduct further negotiations.

(d) To ensure that proceedings are not unnecessarily interrupted, agency regulations or guidelines should provide that any decision concerning the appointment of a settlement judge or termination of settlement negotiations is not subject to review or rehearing.

3. *Conduct of negotiations*. (a) The regulations should afford the settlement judge broad authority to:

(1) Confer with the parties on the subject of whole or partial settlement,

(2) Suggest privately to a party's representative what concessions be considered by the party,

(3) Assess privately with each representative the reasonableness of the party's case or settlement position,

(4) Facilitate communications between the parties,

(5) Mediate,

(6) Seek resolution of as many issues in the case as is feasible, and

(7) Recommend use of minitrials, mediation, factfinding, or other consensual resolution means, and, if the parties genuinely wish some method of presenting evidence in a settlement context or having the dispute mediated, the settlement judge should be free to refer them to a separate minitrial or mediation process.

(b) To increase the likelihood of settlement, the regulations should:

(1) Provide that the settlement judge may recommend that the representative who is expected to try the case be present at a settlement conference and that the parties, or their agents having full settlement authority, be present.

(2) Set forth specific guidelines for conducting settlement conferences (including by telephone) where appropriate.

(3) Exhort all parties and their representatives to be candid with the settlement judge so he may properly guide settlement discussions.

(4) Provide the settlement judge with flexibility to impose any additional requirements proper to expedite resolution of the case.

(c) The settlement judge should, within days after appointment, meet or talk with the parties together and (usually) separately to determine what obstructs settlement. Proceedings before a settlement judge should not ordinarily be lengthy or elaborate.

4. *Confidentiality*. (a) To encourage the candor often necessary to achieve a settlement, the regulations should provide that no evidence of statements or conduct by parties, counsel or settlement judge in the settlement proceedings shall be admissible in any subsequent hearing, except by stipulation of the parties. The regulations should further provide that documents disclosed in a settlement process may not be used in litigation unless obtained by appropriate discovery or subpoena. Agencies should provide sanctions against any violators.

(b) The regulations should prohibit the settlement judge from discussing the merits of the case with the presiding judge or any other person[6] and preclude the settlement judge from being called as a witness in any hearing of the case.

5. *Settlement and reports*. (a) At the conclusion of the settlement procedures, either the parties should tell the presiding judge they have settled, or the settlement judge should advise the trial judge, without elaboration, that settlement has not been reached. The report should not attribute any view to any party or assess any positions taken. The agency's regulations should describe the method by which the presiding judge is advised that settlement has not been reached.

(b) To protect against unnecessary delay, the settlement judge's first report should be made within a specified period after appointment. The agency head or chief judge should be authorized to order additional reports at any time.

(c) In reporting, the settlement judge may recommend the termination or continuation of settlement negotiations.

(d) A settlement arrived at with the help of a settlement judge should be treated like any other settlement.

Citations:

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[6] This should not prevent judges within the same office from engaging in discussions of settlement or mediation techniques that may aid the settlement judge in resolving particular cases and assist in a judge's professional development.