



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Approved by Committee on Adjudication on 4/27/11

Committee on Adjudication
Minutes
March 30, 2011

Members Attending

Judge John Vittone (ret.)
(Chair)

Edward Kelly

Nadine Mancini

Fred W. Alvarez
Bruce Burkley (on behalf
of Ivan K. Fong)

Judge Robert Lesnick

Judge Daniel Solomon
Elaine Kaplan

Susan Tsui Grundmann
Judge Thomas W. Snook (by
phone)

Judge Robert A. Giannasi (on
behalf of Judge Robert Schiff)

ACUS Staff Attending

Jonathan R. Siegel
Director of Research & Policy

Funmi E. Olorunnipa
Staff Counsel

Frank Massaro
Legal Intern

Invited Guests Attending

Lee Becker
Dorilyn Ames
(Board of Veteran Appeals)

Douglas Kelly (by phone)
Mark Tate (by phone)
(Booz Allen Hamilton)

Judge Debra Bice (by phone)
Judge Robert Wright (by
phone)
Natalie Lu (by phone)
Reginald Jackson (by phone)
(Social Security
Administration's Office of
Disability Administration
and Review)

Members of the Public
Attending

Nina Olson
(Internal Revenue Service's
National Taxpayer Advocate)



INTRODUCTION AND REMARKS BY IN-HOUSE RESEARCHER

The meeting commenced at 9:00 am in the Conference Room of the Administrative Conference (“the Conference”). Judge Vittone began by briefly introducing the purpose of the meeting which was to consider the Conference’s in-house report on Agency Use of Video Hearings (“the report”). Mr. Siegel then provided a brief introduction and addressed some administrative matters. He explained that the purpose of the committee process is to formulate a recommendation for the full Conference at the plenary.

Ms. Olorunnipa then introduced herself as the Conference staff member who served as the in-house researcher for the report and the drafter of the report. Ms. Olorunnipa described the process by which she conducted research for the report. Ms. Olorunnipa then noted that she thought it would be best to hear about video hearings from individuals at agencies conducting video hearings and that the Committee would hear from some individuals from the Department of Veteran Affairs’ Board of Veteran Appeals (“BVA”), the Social Security Administration’s Office of Disability Adjudication and Review (“ODAR”) and the Department of Justice’s Executive Office of Immigration Review (“EOIR”), who were invited to attend the meeting and would be speaking later.

Ms. Olorunnipa then opened the floor for Committee members in attendance to ask questions regarding the report. Judge Giannasi asked for the holding in *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002), a Fourth Circuit decision which stated concerns about the use of video hearings in the immigration context and which was referenced in the report. Ms. Olorunnipa stated that the Fourth Circuit upheld the administrative agency’s decision notwithstanding their concerns about the use of video hearings. Mr. Edward Kelly then asked whether the report looked into why a lot of agencies do not currently use video teleconferencing (“VTC”) to conduct hearings. Ms. Olorunnipa stated that while some agencies have provisions allowing for the use of VTC in their statutes, those agencies had not used video hearings widely and had not performed a cost-benefit analysis to determine whether it would be in an agency’s best interest to implement a wider use of VTC. Judge Vittone asked how VTC affected costs at agencies using it. Ms. Olorunnipa responded by noting that the technology is less expensive than it was many years ago so costs of VTC use have gone down. Mr. Becker stated that he could attest to the reduction in costs of VTC technology and noted that the operating costs of video hearings are much cheaper now than they used to be. Mr. Becker also noted that BVA used to spend \$2 million dollars a year on the network it used for video hearings and now the agency is basically spending nothing because it uses the same server and technology that it already has. Mr. Becker also noted that at BVA, it is easier now to hold the hearings via VTC. Mr. Becker also stated



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that the use of video hearings at BVA saves time and money by allowing judges to conduct hearings remotely and by freeing up more time for judges to make decisions.

COMMENTS BY INVITED GUESTS FROM ODAR

Judge Vittone stated that the Committee would now hear from invited guests from ODAR. Judge Wright started by providing a general history and background of the use of video hearings at ODAR. Judge Bice then reiterated some of the comments made by Judge Wright and noted that as a result of video hearings, ODAR has brought down the number of cases in the agency's backlog and lowered the amount of time that a claimant has to wait before having a hearing. Judge Bice then asked if the Committee had any questions. Judge Vittone asked who is present at ODAR hearings and asked how long hearings last. Judge Bice noted that most hearings are one hour or less and that judges usually allow 45 minutes to an hour for each hearing. Judge Bice also noted that the judge, claimant, attorney, a reporter and possibly witnesses and experts are present at an ODAR hearing. Judge Vittone asked whether the hearings were public and Judge Bice responded by noting that the hearings are not public under the Privacy Act. Ms. Mancini asked whether the video of an ODAR hearing is preserved and Judge Bice noted that while it is not, an oral recording is made. Mr. Alvarez asked whether the hearings were adversarial in nature and Judge Bice noted that they were not because only the claimant might be represented by counsel at the hearing. Judge Giannasi asked whether a claimant could have an in-person hearing if they requested one and Judge Bice noted that the agency's regulations reflect a claimant's right to an in-person hearing when requested. Judge Bice also noted that when a hearing is scheduled, the agency can inform a claimant of its decision to have a hearing by video and the claimant can opt-out if they choose to do so. Judge Snook then stated that with regard to ALJ productivity, it is certainly fair to look at travel time, but field judges do not have additional staffing like judges at ODAR's National Hearing Center ("NHC") do. Mr. Burkley then asked what kind of security protocols ODAR had on its video hearing system and wanted to know how the agency maintains sensitive information that may be transmitted by video. Mr. Jackson responded by noting that when the agency conducts video hearings, it performs them within the SSA's main network and the same security precautions used generally by SSA are also used for video hearings.

Judge Lesnick then noted that with respect to his agency, the Federal Mine Safety Health and Review Commission ("FMSHRC"), a statute requires that hearings be held near a mine site and he suspects that in determining whether to use video hearings, agencies may face issues that may not be fully captured in a cost-benefit analysis. Mr. Siegel noted that the draft recommendation lists factors that agencies should think about and best practices that they should adopt if they decide to implement the use of video hearings. Mr. Siegel asked whether the invited guests from ODAR had a chance to review the factors and best practices in the draft recommendation and whether they agreed with those listed. Judge Bice noted that while she and



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her colleagues had not had time to look at the factors and best practices in-depth, they were in agreement with the factors and best practices listed overall. She also noted that she and her colleagues would like to take additional time to review the draft recommendation and provide comments.

COMMENTS BY INVITED GUESTS FROM BOOZ ALLEN HAMILTON

Judge Vittone then called upon Mr. Douglas Kelly, who presented a summary of the cost-benefit analysis of the use of VTC at ODAR which was done by Booz Allen Hamilton in 2009. Mr. Douglas Kelly then asked whether the Committee had any questions. Judge Lesnick asked what a remote VTC site would cost if it were developed today. Mr. Douglas Kelly noted that when conducting the cost-benefit analysis, Booz Allen was working only with those costs associated with updating an already existing VTC program and thus, the analysis did not reflect the costs of finding real estate and other capital costs. Judge Solomon then asked whether any quality assurance had been done to determine the validity of some decisions by ODAR. He also asked how the use of VTC affects the rate of appeals at ODAR. Judge Solomon noted that in his experience, there are other ancillary people present at hearings in a high percentage of ODAR cases and that this has led to problems with interpreters being available at those hearings. Mr. Douglas Kelly responded by noting that ODAR has tackled some of the issues raised by Judge Solomon so ODAR officials may be better suited to answer those questions because the Booz Allen study did not consider those issues. Ms. Olorunnipa noted that ODAR provided her with a 2009 quality assurance report which showed that there was no statistically significant difference between in-person hearings and video hearings. She also noted that with respect to the use of interpreters, the issue was not discussed in interviews with ODAR.

COMMENTS BY INVITED GUESTS FROM BVA

Judge Vittone then called on Ms. Ames and Mr. Becker to present on BVA's use of video hearings. Ms. Ames began by providing some general background about BVA hearings and the use of video hearings at BVA. Ms. Ames then asked whether the Committee had any questions. Ms. Mancini asked how long hearings at BVA last and Judge Giannasi asked whether the hearings at BVA are adversarial in nature. Ms. Ames responded to these questions by stating that most BVA hearings last about an hour and BVA hearings are not adversarial in nature. Mr. Siegel asked why BVA was seeking the power to mandate video hearings and Ms. Ames responded that BVA is trying to do what it can to expedite the processing time for video hearings. Mr. Becker added that BVA has seen no statistical difference in the grant rates between in-person travel board hearings and video hearings.

Ms. Mancini asked whether video hearings were recorded and Ms. Ames responded by stating that hearings are not recorded by video but they are recorded by audio and placed into a



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Approved by Committee on Adjudication on 4/27/11 transcript. Mr. Becker noted that BVA has learned to leverage the infrastructure that it already has and that the agency recently moved from ISDN to IP, which strengthens BVA's network and makes it more flexible. Judge Solomon asked if BVA has electronic files and Mr. Becker responded by noting that the Veterans' Administration is looking into getting electronic files and is currently administering a paperless appeals project. Judge Solomon asked how BVA handle requests for records from other agencies and Ms. Ames responded by noting that BVA has a partnership project with the Department of Defense which creates a system to allow other agencies to access veterans' records.

COMMENTS REGARDING EOIR FROM COMMITTEE MEMBER EDWARD KELLY

Judge Vittone stated that the Committee would hear from Committee member Mr. Edward Kelly regarding the use of video hearings at EOIR. Mr. Edward Kelly began by providing general background and history on the use of video at EOIR. Mr. Edward Kelly then asked whether the Committee had any questions. Judge Vittone then asked who controls the camera during a video hearing at EOIR and Mr. Edward Kelly responded to inform him that the judge controls the camera. Judge Giannasi asked whether EOIR hearings are adversarial in nature and Mr. Edward Kelly responded by stating that the hearings are adversarial in nature and that the government has the burden of proof. Mr. Alvarez asked where the government attorney would be during a video hearing at EOIR and Mr. Edward Kelly responded by stating that the attorney would either be at a detention facility with the respondent or in the courtroom with the judge. Ms. Grundmann asked how EOIR handles visual or audio delays in the VTC technology used when such delays arise. Mr. Edward Kelly responded by stating that judges handle delays and do their best to notify administrative staff when technological issues arise. Mr. Siegel asked whether EOIR has done a study determining how similar grant rates are in video hearings and in-person hearings. Mr. Edward Kelly responded by stating that EOIR had not done any such studies because too many variables are in play that would make creating such a study extremely difficult to do. Mr. Siegel noted that if such a study was done at EOIR, some variables could be accounted for and that, for example, EOIR could compare detainee hearings done by video with those done in-person.

Ms. Mancini asked whether any feedback was received from people who used video hearings at the agencies. Mr. Edward Kelly noted that EOIR's court evaluation unit is currently conducting a study of the use of VTC in one immigration court in Texas. He noted that in the study, parties have the ability to complain about anything that they would like to and so far, the agency has not heard many complaints about the use of video hearings. Mr. Edward Kelly also noted that his understanding was that while immigration lawyers objected to the use of video hearings at the beginning, they have now recognized that since the use of VTC is in the agency's statute, it is here to stay. Mr. Kelly also noted that some lawyers are delighted because with the use of VTC, they do not have to travel to attend a hearing if they do not want to. Mr. Becker



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added that BVA does provide veterans with survey cards but that those cards ask generally about a veteran's hearing experience. He noted that the survey cards do not ask about what type of hearing the veteran had or any specific questions about video hearings.

DISCUSSION OF THE DRAFT RECOMMENDATION

Judge Vittone then stated that it was time to proceed to the discussion of the draft recommendation. Discussion of the draft recommendation began with comments being made and questions being asked by various Committee members. Mr. Burkley asked whether the draft recommendation could be expanded beyond just hearings to include other adjudicatory proceedings. Judge Snook noted that the Committee should be careful about issuing a recommendation which could give the appearance that the government favoring law firms with a lot of money who could set up their own VTC equipment in order to appear at hearings by video from their offices. Mr. Becker stated that BVA treads carefully regarding this issue because the agency needs to ensure the integrity of the government's network. Ms. Ames added that BVA's regulations require that hearings be conducted in a Veterans' Administration facility and that at BVA a private attorney's office could not be used as a hearing facility. Ms. Ames added that if the Committee is worried about the improper use of video hearings by private attorneys, they could encourage agencies to specifically put in their regulations how they want video hearings to be conducted.

Ms. Mancini asked what process was used to create regulations at BVA. In response, Ms. Ames noted that after the law approving the use of video hearings was passed in 1994, the agency amended its regulations. Judge Lesnick then said that he was generally opposed to the use of video hearings by agencies. He said that it would be difficult to imagine conducting a complex administrative hearing by video and that he does not think that there is a substitute for the ability to cross-examine witnesses in-person. Judge Giannasi stated that the National Labor Relations Board has not spoken on the issue of the use of video hearings and that the agency would probably go on a case-by-case basis. He noted that the agency would likely not conduct an entire hearing by video but that there may be circumstances where parts of hearings can utilize VTC technology. Judge Giannasi noted that he thought each agency will handle the use of VTC differently. Judge Vittone noted that the recommendations are general in nature and need to be considered by each individual agency. He stated that an agency with few hearings might not find the use of video hearings to be feasible and that such an agency may find that there are other options such as conference calls. Ms. Grundmann then noted that subsection 3(a) of the draft recommendation is directly contrary to Merit Systems Protection Board case law. Mr. Edward Kelly noted that in a detainee setting, the respondent has no choice as to whether his hearing will be by video or in-person and accordingly, EOIR cannot offer video hearings on a volunteer basis in detainee situations. Mr. Siegel noted that the Committee should keep in mind that the Conference's recommendations are not mandatory, but that agencies do care about



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complying with the Conference's recommendations. Judge Giannasi stated that some account should be taken of the agencies that have parties who may object to the use of video hearings. Mr. Siegel pointed out that the draft recommendation states that agencies should consider the items listed as best practices.

Judge Vittone stated that the Conference's staff could work on revisions to subsection 3(a) of the draft recommendation and incorporate other suggestions given by the Committee and then circulate a revised draft recommendation to the Committee. Judge Snook stated that he could assure the Committee that if agencies were allowed to mandate video hearings, there would be very few in-person hearings in the social security context. Judge Snook also noted that he was opposed to having agencies mandate video hearings. Judge Vittone noted that he did not think anyone was pushing to have agencies mandate video hearings. Mr. Becker then noted that "high volume case load" could mean many things and wanted to know whether the Committee wanted to give agencies a clear understanding of what the term "high volume case load" meant. Judge Giannasi noted that he thought subsection 3(d) of the draft recommendation was broad enough to cover this. Mr. Burkley noted that he thought subsection 2 of the draft recommendation was more direct and wanted to know whether the Committee thought it should include references to obtaining secured services for VTC technology and use. Mr. Siegel asked whether the term "high volume case load" should be deleted from the recommendation. Ms. Grundmann noted that maybe the term "high volume case load" should be defined more clearly in the draft recommendation. Mr. Siegel suggested that perhaps the volume of cases could be one of the factors under subsection 2 of the draft recommendation. Ms. Olorunnipa stated that the Centers for Medicare and Medicaid are looking into implementing video hearings, not because the agency has a high volume of cases, but, because of the potential for reducing travel time and costs.

Judge Giannasi stated that he objected to deleting the term "high volume case load" from the draft recommendation because the main thrust of the report and recommendation focuses on agencies with high volume case loads and to take all reference to high volume case loads out of the draft recommendation would be contrary to the report. Judge Snook added that he did not think that the term should be deleted. He stated that the use of VTC is a very expensive process and is only justified in agencies with high volume cases. Judge Vittone stated that perhaps some language encouraging agencies without a high volume of cases to look into using video hearings could also be added to the draft recommendation. Mr. Burkley noted that the draft recommendation should include other adjudicatory processes and not just focus on hearings. Ms. Mancini added that shared services and collaboration are important things to add to the recommendation.

Judge Vittone then asked whether there should be a general vote on the recommendation at the meeting or whether the Committee members believed there was a need for a second



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Approved by Committee on Adjudication on 4/27/11 meeting. He also suggested that the changes discussed at the meeting could be made and a revised draft circulated to Committee members and then the Committee could vote on the revised draft by email. Mr. Siegel noted that under the Federal Advisory Committee Act, email voting is not allowed and he suggested that since a second meeting was already been scheduled for April 27th, the Committee members could vote on the revised draft recommendation at that meeting. Ms. Olorunnipa noted that the draft recommendation would be revised per comments and suggestions made at the meeting and circulated to the committee members in advance of the April 27th meeting. Judge Vittone asked whether there were any public attendees who wished to speak at that time. There being none, the meeting was adjourned.