

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Division of Judges

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Memorandum from the Chief Administrative Law Judge, Division of Judges, Division of Judges Audit Report (OIG-AMR-98), dated September 26, 2022

EXECUTIVE SUMMARY

After an individual, employer, or union files an unfair labor practice (ULP) charge, the charge is investigated, and a Regional Director determines whether the charge has merit. Once a Regional Director has determined a ULP charge has merit, absent settlement, a complaint issues and the case is scheduled for a hearing before an Administrative Law Judge (ALJ). Section 3105 of Title 5 U.S. Code provides that proceedings requiring a hearing by an ALJ, such as ULP charges, shall be assigned to ALJs in rotation as far as practicable. If a case does not settle prior to a hearing, the ALJ will conduct the hearing and issue a decision. In 1995, the Board set up time targets based on the length of the transcript and the days from the hearing.

The objective of this audit was to determine the effectiveness of internal controls to ensure the ALJ cases are appropriately assigned and ALJ decisions are issued in a timely manner. The scope of this audit was ALJ cases assigned during Fiscal Year (FY) 2019 – FY 2021. For the rotational assignment of cases, our analysis was based on ALJs employed at the NLRB during the entire scope period.

We determined that the NxGen data related to case assignments and timeliness of decisions was not complete or accurate. In order to complete the audit, we then compiled data from the source records and tested timeliness and then used the data to review the assignment of cases.

We found that during the 3-year scope period, the ALJs and the Division of Judges offices generally did not meet the time targets set by the Board. We also generally found the cases in the Washington Division of Judges office were not assigned on a rotational basis as far as practicable; however, the cases in the New York and San Francisco offices appeared to meet that requirement. We determined that the Division of Judges lacked an appropriate internal control environment. We made four recommendations for corrective action.

The Management Comments generally acknowledged the findings and stated agreement with the recommendations. The comments are included as an appendix to the report.

BACKGROUND

The National Labor Relations Board (NLRB or Agency) was established in 1935 to administer the National Labor Relations Act (NLRA). The NLRB has two primary functions: (1) to investigate and resolve (through settlement, prosecution, or dismissal) allegations of unfair labor practice (ULP) charges by employers and unions; and (2) to investigate and resolve questions concerning representation among employees to determine whether the employees wish to be represented by a union.

After an individual, employer, or union files a ULP charge, the charge is investigated, and a Regional Director determines whether the charge has merit. Once a Regional Director has determined a ULP charge has merit, absent settlement, a complaint issues and the case is scheduled for a hearing before an Administrative Law Judge (ALJ). The individual ALJs are assigned to one of the three Division of Judges Offices. Those offices are located Washington, New York, and San Francisco. Section 3105 of Title 5 U.S. Code provides that proceedings requiring a hearing by an ALJ, such as ULP charges, shall be assigned to ALJs in rotation as far as practicable. If a case does not settle prior to a hearing, the ALJ will conduct the hearing and issue a decision. In 1995, the Board set up time targets based on the length of the transcript and the days from the hearing.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this audit was to determine the effectiveness of internal controls to ensure the ALJ cases are appropriately assigned and ALJ decisions are issued in a timely manner.

The scope of this audit was ALJ cases assigned during Fiscal Year (FY) 2019 – FY 2021. For the rotational assignment of cases, our analysis was based on ALJs employed at the NLRB during the entire scope period.

We reviewed laws, regulations, and Governmentwide policies related to ALJ case assignment and decision issuance. We also reviewed the NLRB Bench Book and the Agency's policies and procedures related to ALJ and timely decision issuance. We interviewed staff in the Division of Judges to

learn about ALJ case assignment, timely decision issuance, and internal controls.

We reviewed NxGen Case Management System (NxGen) reports and those used by the Division of Judges to determine which data fields to test. We identified data fields related to ALJ decisions. We obtained, from the Office of Chief Information Officer (OCIO), an extract of NxGen data for ALJ cases that were assigned during the scope period. We compiled the universe of cases for the following NxGen data fields and tested the compiled data to ensure its accuracy: Transcript Length, Hearing Days, and Session Closed Date. We determined whether the data in the NxGen data fields related to timeliness were accurate and reliable. We used a generally accepted sampling criteria to achieve a 90 percent confidence level. The 90 percent confidence level is consistent with U.S. Government Accountability Office (GAO) guidance and our expected deviation rate.

We obtained a list of ALJs and their office assignments from the NLRB's Office of Human Resources (OHR). We performed analytical tests to determine if the NxGen data provided by the OCIO was complete. We compared the OHR list to the ALJ list provided by the OCIO.

To address data completeness and accuracy issues, we obtained a list of all cases that had an ALJ decision issued in the scope period. We compiled the complete listing of ALJ decisions and their hearing data related to the transcript length and date the hearing closed. Using the compiled data, we created a trend analysis to evaluate timeliness. We also evaluated the case assignment process using the results of the trend analysis.

We reviewed the GAO's *Standards for Internal Control in the Federal Government*, dated September 2014, to identify the relevant internal control standards related to ALJ case assignment and timely decision issuance. We evaluated the internal control policies and procedures to determine whether they met the GAO's internal control standards.

We conducted this performance audit in accordance with generally accepted government auditing standards during the period from November 2021 through August 2022. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a

reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

FINDINGS SUMMARY

We determined that the NxGen data related to case assignments and timeliness of decisions was not complete and accurate. Because we could not rely on that data, we compiled data from the source records. Using the compiled data, we first tested timeliness and then used the data to review the assignment of cases.

We found that during the 3-year scope period, the ALJs and the Division of Judges generally did not meet the time targets set by the Board. We also generally found the cases in the Washington Division of Judges office were not assigned on a rotational basis as far as practicable; however, the cases in the New York and San Francisco offices appeared to meet that requirement. We determined that the Division of Judges lacked an appropriate internal control environment.

DATA COMPLETENESS AND ACCURACY

The GAO internal controls standards state that management should design processes to ensure that transactions are completely and accurately recorded. The internal control guidance states:

- *Completeness* refers to the extent to which relevant data records and fields are present and sufficiently populated; and
- *Accuracy* refers to the extent that recorded data reflect the actual underlying information.

To determine the rotational assignment of cases and timeliness of decisions, we requested an extract of data from the NxGen case management system for the data elements related to ALJ actions, including, but not limited to, the assignment of the case, completed date, brief received date,

session closed date, and office assigned. To ensure that we had data for all the ALJs, we obtained a list of ALJs from the Agency's OHR's payroll system that included data for the accession date, pay, and office assignment. By comparing the two sets of data, we determined that the data from NxGen was incomplete.

Based upon information obtained in interviews, we determined that NxGen data was removed because an ALJ changed positions and the staff involved in maintaining the NxGen data were not able to devise a process to screen the ALJ from accessing the data. We were told that the data remained available in backups of the NxGen system, but at that time the data could not be restored to the NxGen system without losing other data, and that the appropriate officials were attempting to devise a solution to restore the data.

We also determined that the Division of Judges had a practice of removing a "Decision on Hearing Action" when a case was settled by a Settlement ALJ – an ALJ who was assigned to hear the case. The Decision on Hearing Action is the NxGen action that assigns the case to an ALJ for the purpose of a hearing and to issue a decision. When we questioned the ALJ officials who assign the cases, we found that there was no standard secondary source to reconcile the assignment data. One office maintained a secondary assignment record, one office had partial records, and another office had only email messages. Given this information, we determined that there were not sufficient records to independently compile the data for an analysis of case assignments.

Because the Agency removed an ALJ's records from NxGen and the Division of Judges routinely deleted Decision on Hearing actions, we determined that the NLRB's data for ALJ case assignments is incomplete and could not be used to test whether the Division of Judges was assigning cases on a rotational basis.

The deletion of the ALJ's NxGen data also deleted the information related to the issuance of decisions. We did, however, determine, in a random sample of the remaining data, that the Transcript Length data element had an accuracy rate of 80.82 percent. When we independently compiled the transcript length data for all the decisions issued during the scope period, we found that the NxGen

data had an accuracy rate of 83.0 percent. We generally determine that an accuracy rate below 90 percent represents inaccurate data.

Recommendation

1. We recommend that the Division of Judges develop internal controls to ensure the completeness and accuracy of its case processing data to include but not limited to the assignment of cases to ALJs.

TIME TARGET STANDARDS

To determine if ALJ decisions are issued in a timely manner, because of the completeness and accuracy issues with the NxGen data, we compiled decision transcript and hearing data from the source documentation. To complete that process, we also compiled a list of ALJ decisions issued during the scope period.

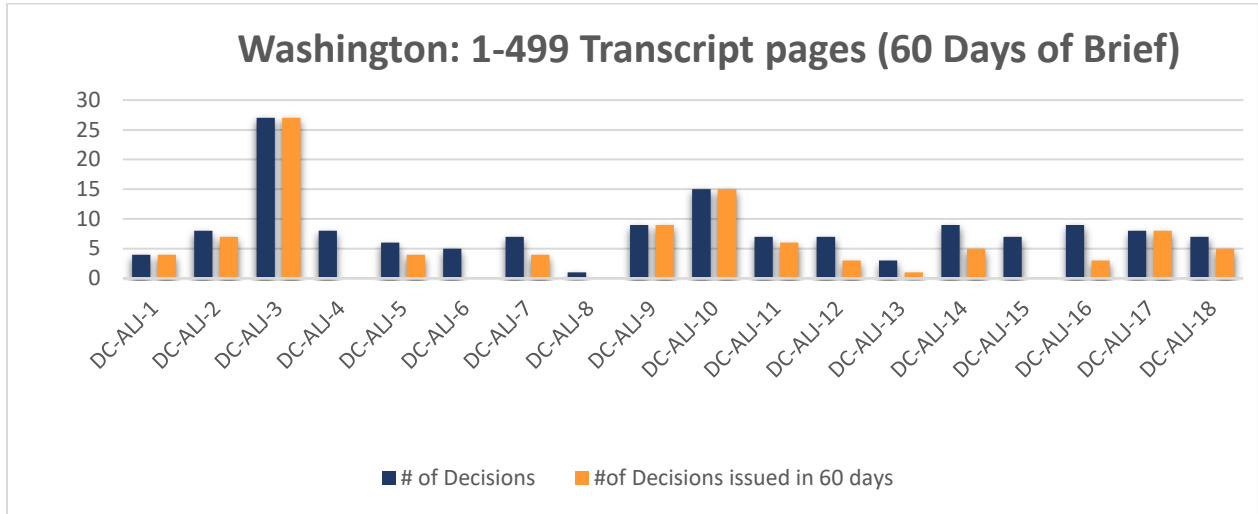
The Division of Judges measures case complexity using the total number of transcript pages. Accordingly, complex cases have more transcript pages. In 1995, the Board implemented the following time targets for the issuance of ALJ decisions:

- For cases under 500 transcript pages, decisions should be issued within 60 days of the receipt of briefs;
- For cases from 500 to 1000 transcript pages, decisions should be issued within 90 days of the receipt of briefs;
- For cases over 1000 pages of transcript, the issue date for decisions should be negotiated between the judge and the office chief judge; and
- A Division-wide time target to issue half of the decisions within 90 days of the close of hearing and within 45 days of the receipt of briefs or submissions.

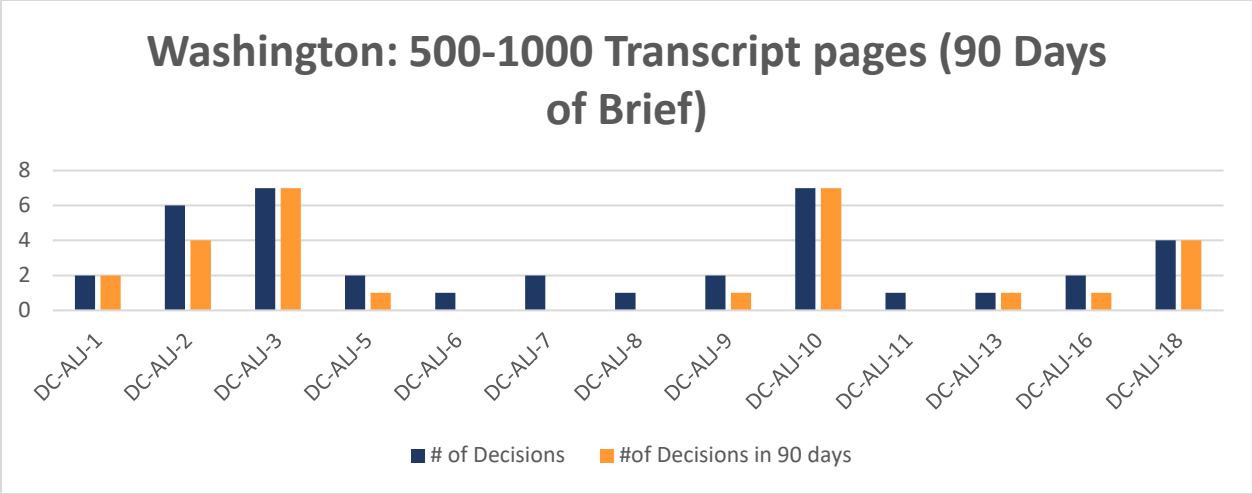
For each Division of Judges office, we completed an analysis of the timeliness of decisions based upon the above criteria. For cases with transcripts that exceeded 1000 pages, the Division of Judges stated that they were not following the time target provision to negotiate the issuance date, and that they rely on the ALJ to determine the appropriate length of time. In our analysis detailed in the charts below, we

assigned each ALJ a random identifier rather than reporting the ALJs by name.

Washington



- For the Washington office, 101 of the 147 decisions (69 percent) were issued within 60 days of the brief;
- Five of the 18 ALJs (28 percent) met the time target that all decisions should be issued within 60 days of the brief for cases under 500 transcript pages; and 13 of the 18 ALJs (72 percent) did not meet the time target;
- The five ALJs that met the time target issued a total of 63 decisions that had a total of 15,188 transcript pages; and
- The 13 ALJs that did not meet the time target issued a total of 84 decisions. For those 84 decisions, there was a total of 20,575 transcript pages. Only 38 of the 84 decisions were issued within the time target.



- For the Washington office, 28 of the 38 decisions (74 percent) were issued within 90 days of the brief;
- A total of 13 ALJs issued decisions with 500-1000 transcript pages. Five of the 13 ALJs (38 percent) met the time target. Eight of the 13 ALJs (62 percent) did not meet the time target;
- The five ALJs that met the time target issued a total of 21 decisions. For the 21 decisions there was a total of 13,093 transcript pages; and
- The eight ALJs that did not meet the time target issued a total of 17 decisions. For the 17 decisions there was a total of 12,167 transcript pages. Only 7 of the 17 decisions were issued within the time target.

For cases with over 1000 transcript pages, the Washington office issued 25 decisions. For the 25 decisions issued there was a total of 36,433 transcript pages. The average brief to decision date was 116 days, with the shortest time being 3 days and the longest time being 703 days.

The chart below provides the Washington ALJs’ statistics for each time target. The ALJs are categorized according to the time target(s) met. We also determined whether each ALJ issued decisions over 1000 pages.

WASHINGTON ALJ TIME TARGET STATISTICS								
	1-499 Transcript pages		500-1000 Transcript pages		>1000 Transcript pages			
ALJs	Total # of Decisions	Transcript pages	Total # of Decisions	Transcript pages	Total # of Decisions	Transcript pages	Time Target Met	>1000 pgs
DC-ALJ-1	4	1355	2	1514	3	3849	Met Both Time Targets	YES
DC-ALJ-3	27	6063	7	4220	3	4426		YES
DC-ALJ-10	15	3369	7	4230	1	1301		YES
DC-ALJ-9	9	2737	2	1522	1	2592	Met Target: 1-499 pgs ONLY	YES
DC-ALJ-17	8	1664	N/A	N/A	N/A	N/A		No
DC-ALJ-13	3	1082	1	550	N/A	N/A	Met Target: 500-1000 pgs ONLY	No
DC-ALJ-18	7	1535	4	2579	1	1451		YES
DC-ALJ-2	8	2286	6	4272	4	5659	Did Not Meet Time Targets	YES
DC-ALJ-5	6	1590	2	1528	1	1200		YES
DC-ALJ-6	5	899	1	726	1	1272		YES
DC-ALJ-7	7	1695	2	1365	1	2329		YES
DC-ALJ-8	1	223	1	600	2	2993		YES
DC-ALJ-11	7	2073	1	554	3	4344		YES
DC-ALJ-16	9	2366	2	1600	1	1476		YES
DC-ALJ-4	8	1860	N/A	N/A	1	1067		YES
DC-ALJ-12	7	1179	N/A	N/A	1	1006		YES
DC-ALJ-14	9	2014	N/A	N/A	1	1468		YES
DC-ALJ-15	7	1773	N/A	N/A	N/A	N/A		No

In terms of issuing decisions, the Washington office appears to have one ALJ (DC-ALJ-3) that outperforms the others. Out of the three ALJs that met the time target, DC-ALJ-3 issued the most decisions with the highest total transcript pages and the lowest average brief to decision days compared to the other Washington ALJs. As shown in the following table, compared to other ALJs that did not meet the standard, DC-ALJ-3 did the same level of work as DC-ALJ-5, DC-ALJ-6, DC-ALJ-7, and DC-ALJ-15 combined.

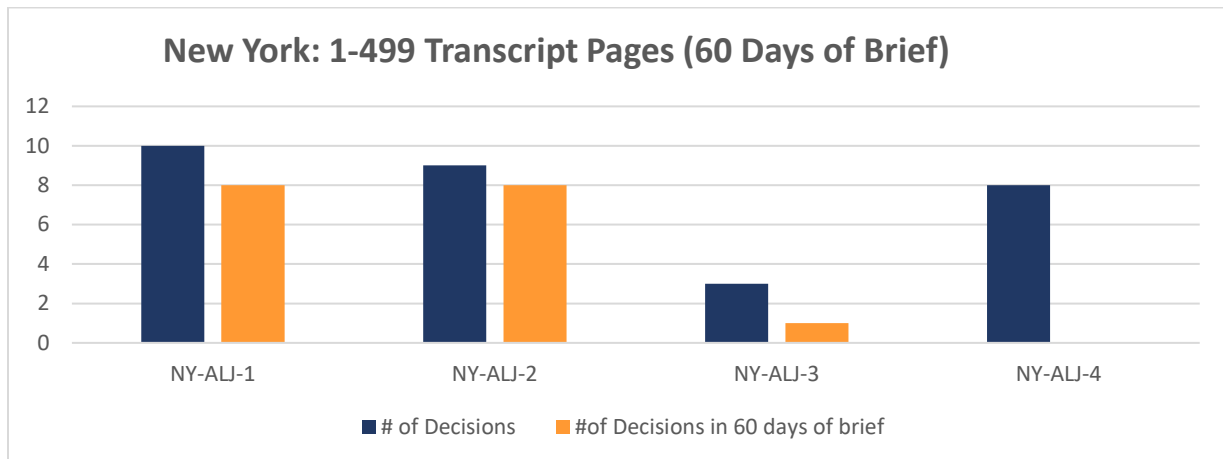
WASHINGTON ALJ COMPARISON						
ALJs	1-499 transcript pages		500-1000 transcript pages		>1000 transcript pages	
	Total # of Decisions	Transcript Pages	Total # of Decisions	Transcript Pages	Total # of Decisions	Transcript Pages
DC-ALJ-3	27	6063	7	4220	3	4426
DC-ALJ-5	6	1590	2	1528	1	1200
DC-ALJ-6	5	899	1	726	1	1272
DC-ALJ-7	7	1695	2	1365	1	2329
DC-ALJ-15	7	1773	N/A	N/A	N/A	N/A
Four ALJ Total	25		5		3	

The total hearing days for the Washington office was 549 days, with an average of 31 days per ALJ. Compared to the other ALJs, DC-ALJ-3 issued significantly more decisions, met all time targets, and had a total of 81 hearing days, the highest in the office.

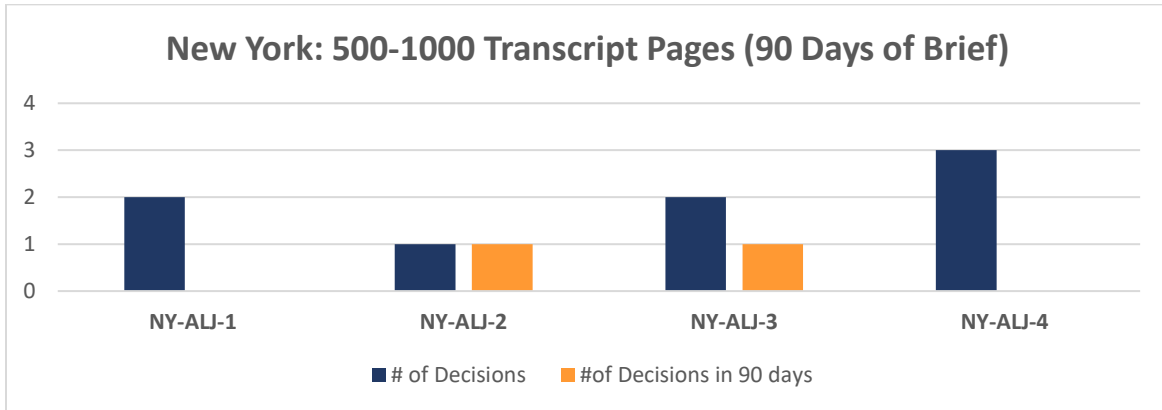
We compared DC-ALJ-3’s total hearing days to the average hearing days for the office and determined that DC-ALJ-3’s hearing days equates to 2.7 ALJs. We also identified the top three ALJs with the greatest total hearing days. The total hearing days for the top three ALJs is 191 days, which is 35 percent of the office. The remaining 15 ALJs had a total of 358 hearing days, which is 65 percent of the office.

Based on our testing we determined that generally the ALJs in the Washington office did not meet the time targets because only 3 of the 18 ALJs met the time targets.

New York



- None of the ALJs met the time target that all decisions should be issued within 60 days of the brief for cases under 500 transcript pages; and
- There was a total of 30 ALJ decisions, with 17 (57 percent) issued within 60 days of the brief. For the 30 decisions issued, there was a total of 7,154 transcript pages.



- For the New York office, two of the eight decisions (25 percent) were issued within 90 days of the brief;
- The one ALJ that met the time target issued one decision. For that decision there was a total of 508 transcript pages; and
- The three ALJs that did not meet the time target issued a total of seven decisions. For the seven decisions there was a total of 4,727 transcript pages. Only one of the seven decisions were issued within the time target.

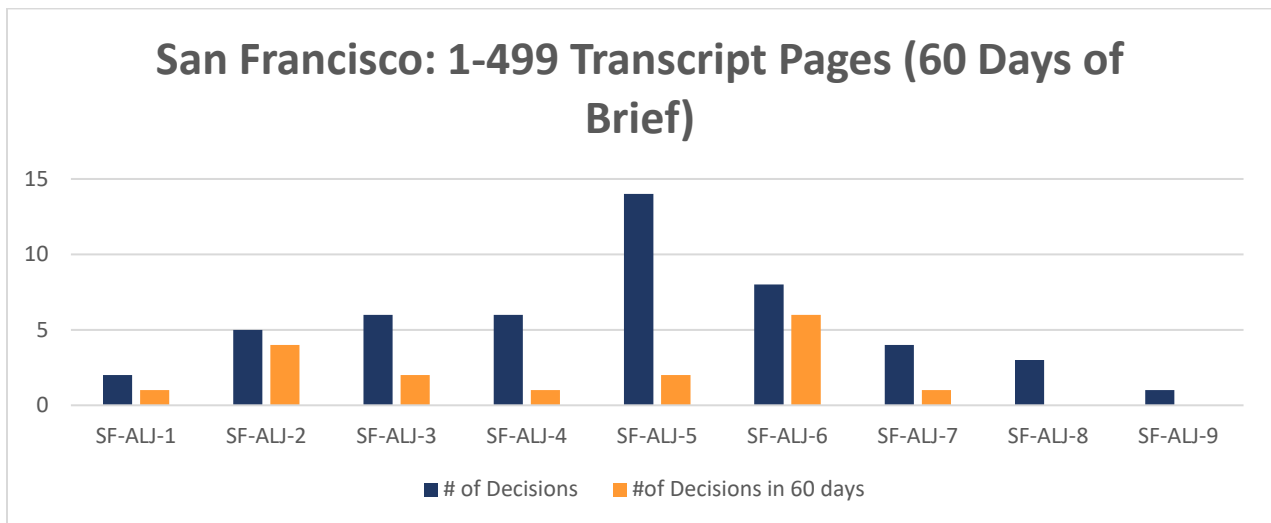
For cases over 1000 transcript pages, the New York Office issued six decisions with a total of 7,804 transcript pages. The average days from brief to decision was 234 days, with the shortest time being 98 days and the longest time being 527 days.

The chart below provides the New York ALJs' statistics for each time target. The ALJs are categorized according to the time target(s) met. We also determined whether each ALJ issued decisions over 1000 pages.

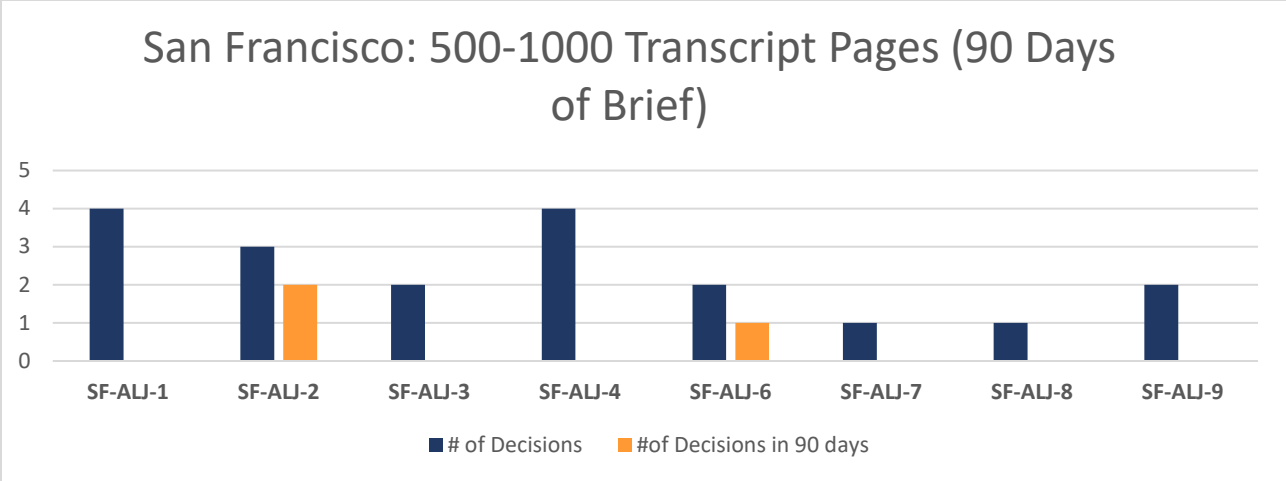
NEW YORK ALJ TIME TARGET STATISTICS								
ALJs	1-499 transcript pages		500-1000 transcript pages		>1000 transcript pages		Time Target Met	>1000 pgs
	Total # of Decisions	Transcript pages	Total # of Decisions	Transcript pages	Total # of Decisions	Transcript pages		
NY-ALJ-2	9	1755	1	508	2	3167	MET: 500-1000 pgs only	YES
NY-ALJ-1	10	2486	2	1440	1	1055	Did Not Meet Time Targets	YES
NY-ALJ-3	3	572	2	1346	2	2200		YES
NY-ALJ-4	8	2341	3	1941	1	1382		YES

Based on our testing we determined that the New York office ALJs did not meet the decision issuance time targets.

San Francisco



- None of the nine ALJs met the time target that all decisions should be issued within 60 days of the brief for cases under 500 transcript pages; and
- There was a total of 49 decisions issued, with 17 (35 percent) issued within 60 days of the brief. For the 49 decisions issued there was a total of 11,337 transcript pages.



- None of the nine ALJs met the time target; and
- There was a total of 19 decisions, with 3 (16 percent) that were issued within 90 days of the brief; For the 19 decisions issued there was a total of 13,349 transcript pages.

For cases over 1000 transcript pages, the San Francisco Office issued 12 decisions. For the 12 decisions issued there was a total of 24,957 transcript pages. The average days from brief to decision was 243 days, with the shortest time being 93 days and the longest time being 401 days.

The chart below provides the San Francisco ALJ statistics for each time target. The ALJs are categorized according to the time target(s) met. We also determined whether each ALJ issued decisions over 1000 pages.

SAN FRANCISCO ALJ TIME TARGET STATISTICS								
ALJs	1-499 transcript pages		500-1000 transcript pages		>1000 transcript pages		Time Target Met	>1000 pgs
	Total # of Decisions	Transcript pages	Total # of Decisions	Transcript pages	Total # of Decisions	Transcript pages		
SF-AIJ-1	2	312	4	2784	3	5114	Did Not Meet Time Targets	YES
SF-AIJ-2	5	1176	3	2261	1	2502		YES
SF-AIJ-3	6	1718	2	1447	N/A	N/A		NO
SF-AIJ-4	6	1592	4	2675	N/A	N/A		NO
SF-AIJ-5	14	2854	N/A	N/A	N/A	N/A		NO
SF-AIJ-6	8	1591	2	1564	1	1718		YES
SF-AIJ-7	4	845	1	860	2	3782		YES
SF-AIJ-8	3	856	1	505	3	7941		YES
SF-AIJ-9	1	427	2	1253	2	3900		YES

Based on our testing we determined that the San Francisco office ALJs did not meet the decision issuance time targets.

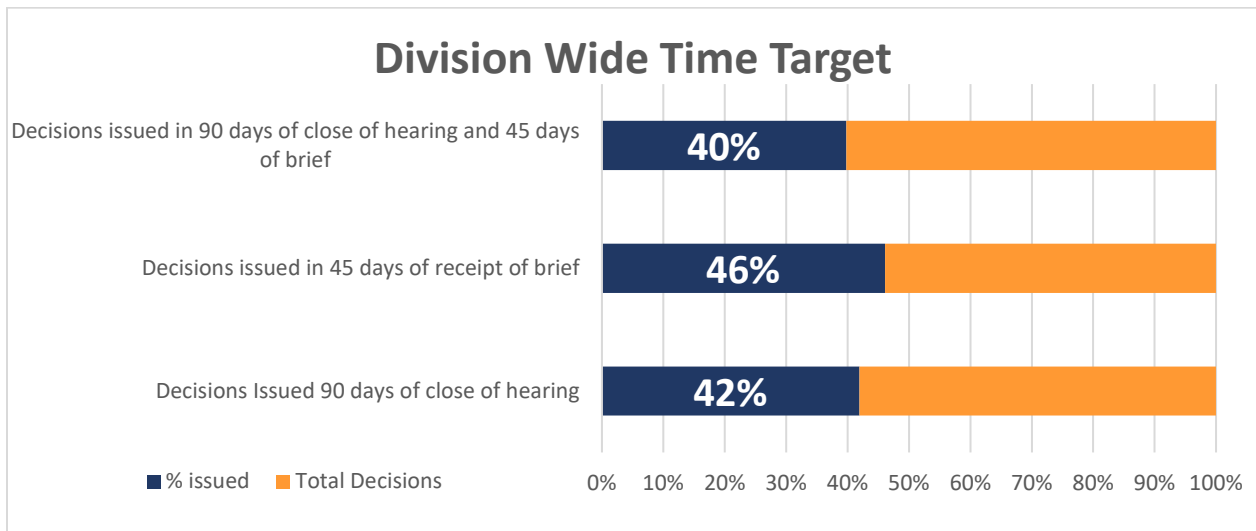
Division of Judges Time Target

In addition to the time targets for individual ALJs, the Division of Judges has a division-wide time target to issue half of their decisions within 90 days of close of hearing and within 45 days of receipt of briefs or submissions.

The Division of Judges time target above can be interpreted in more than one way:

- 1) Half of the decisions should be issued BOTH within 90 days of the close of hearing and within 45 days of the receipt of brief or submissions; or
- 2) Half of the decisions should be issued within 90 days of the close of the hearing and half of the decisions should be issued within 45 days of the receipt of brief or submissions.

Because of the ambiguity, we constructed the following analyses to determine whether the Division of Judges met the Division-wide time target.



During the three-year scope period, the Division of Judges did not meet the Division-wide time target to issue half of the decisions within 90 days of the close of the hearing and 45 days of the receipt of briefs and submissions:

- Only 133 of the 334 decisions (40 percent) were issued within 90 days of the close of hearing and 45 days of

the receipt of briefs, which does not meet the 50 percent target;

- Only 154 of the 334 decisions (46 percent) were issued within 45 days of receipt of brief, which does not meet the 50 percent target; and
- Only 140 of the 334 decisions (42 percent) were issued within 90 days of the close of the hearing.

The Division of Judges decisions were not timely because half of the decisions were not issued within 90 days of the close of the hearing and within 45 days of the receipt of briefs and submissions.

The GAO *Standards for Internal Control in the Government* states that management should periodically review policies, procedures, and related control activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks. If there is a significant change in an entity's process, management reviews this process in a timely manner after the change to determine that the control activities are designed and implemented appropriately.

The Division of Judges manager explained that the enforcement of time standards is done on an ad hoc basis. The manager also explained that if there is a pending decision over 180 days from receipt of the brief the ALJ will be called in an effort to prompt action on issuing the decision. We found, however, that there is no documentation of consistent enforcement of the time standards and management does not take action to address untimely decisions until well after the 60 and 90-day time periods.

Based on the documentation provided to the auditor, the Division of Judges and the Board have not updated or changed the time targets since 1995. Because of the length of time that has passed and the changes in NLRB operations, management does not know if the timeliness requirements have continued relevance and are effective in achieving the entity's objectives or in addressing related risks.

Recommendations

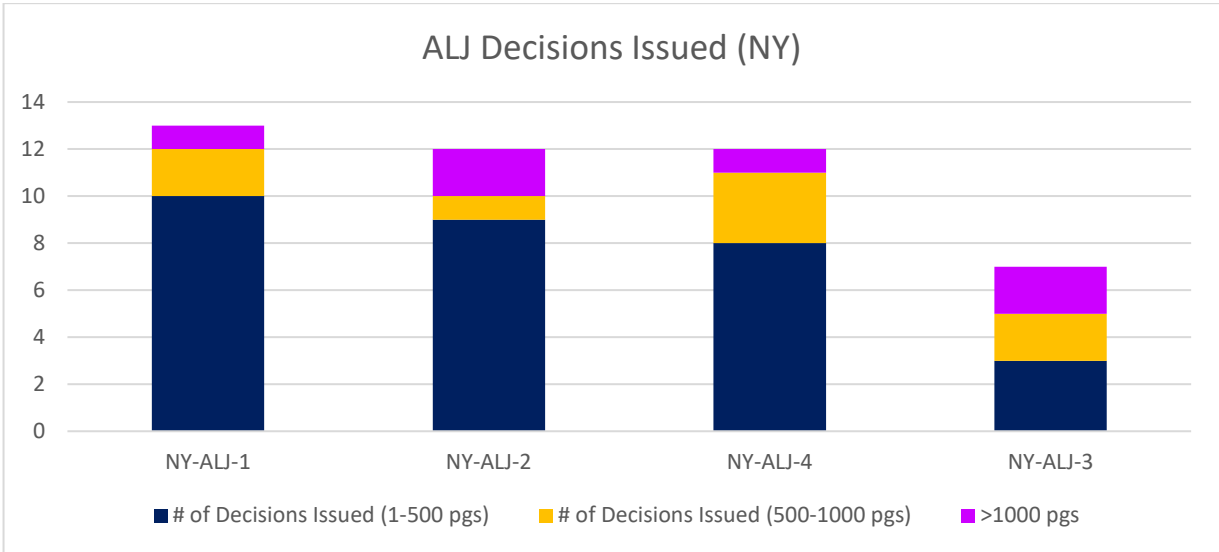
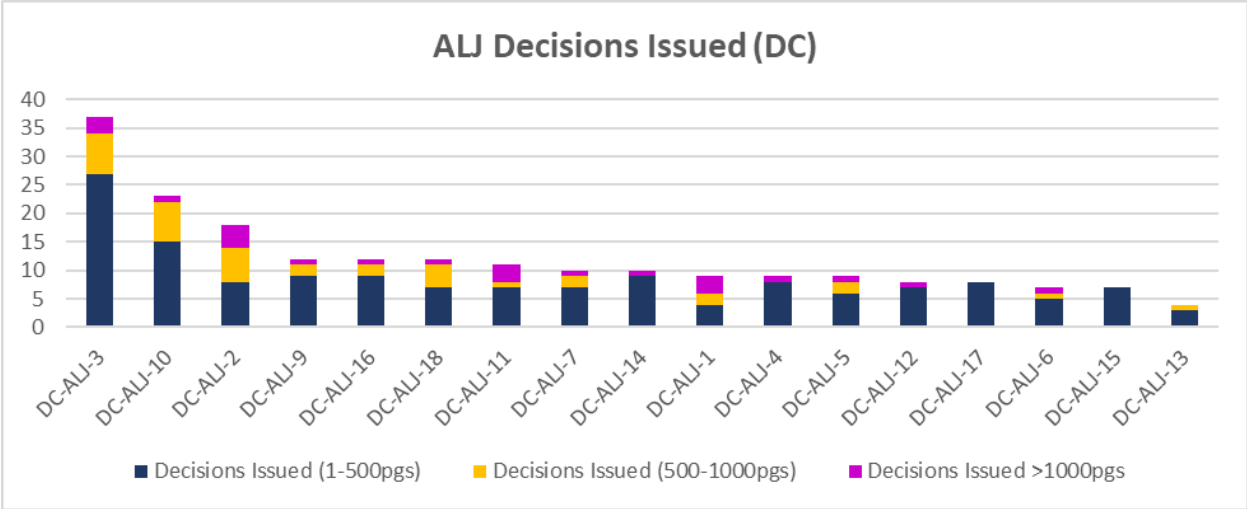
2. We recommend that the Division of Judges consult with the Board and determine if the current decision issuance time targets are relevant and appropriate; and
3. We recommend that the Division of Judges adopt appropriate internal controls to address the issuance of ALJ decisions in accordance with its time targets.

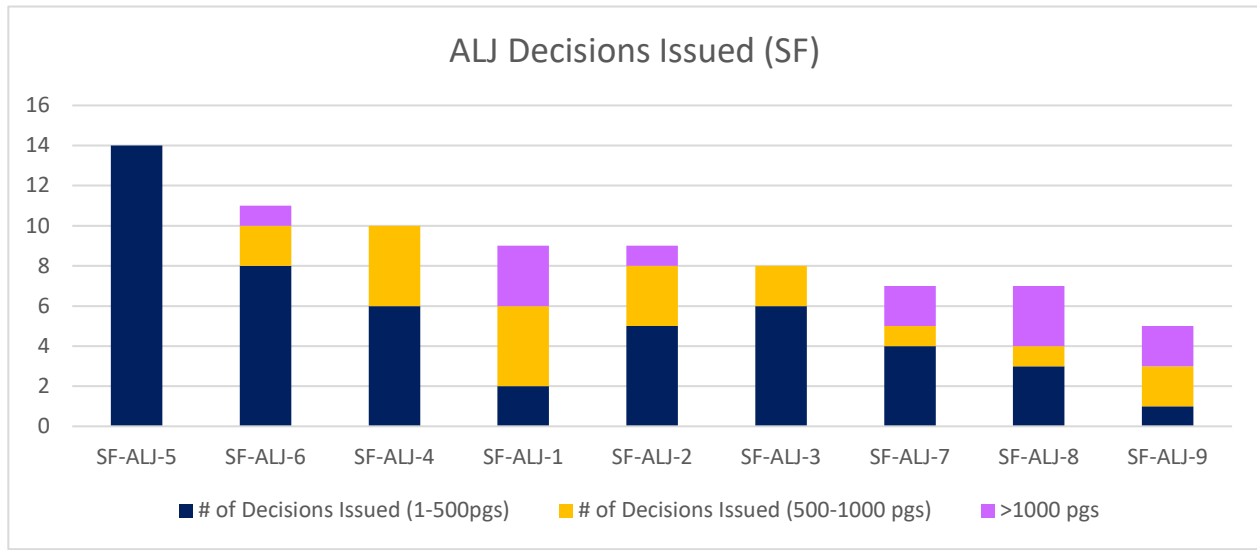
ROTATIONAL ASSIGNMENT OF CASES

Section 3105 of Title 5 U.S. Code states in part that ALJs shall be assigned cases in rotation as far as practicable. The phrase “as far as practicable” has been interpreted to permit an agency to make ALJ assignments “by more than just the mere mechanical rotation of giving the next case on the docket to the top name on the list of available examiners.” The phrase has also been sufficiently expansive enough to permit an agency to consider several factors in making its assignments “such as the complexity of the case and the experience and ability of the ALJ.”

Because we cannot rely upon the assignment information in the NxGen system, we compiled and reviewed the decision data from the source records to determine if any pattern existed within each office and between the offices. Our assumption was that if the cases are assigned on a rotational basis, we should generally find a rotational or balanced distribution of decisions.

We generally observed that for the San Francisco and New York offices, the distribution of decisions was more balanced while the Washington office had a significant difference in the number of decisions issued between the most and least productive ALJs.





When interviewed, the Division of Judges managers explained that they consider the ALJs experience, workload, and ability to issue decisions in a timely manner. One manager also stated that several factors are considered when making case assignments including the ALJ’s “track record.” Complicated cases are assigned to ALJs known to issue decisions faster than others. The manager stated that they review cases beforehand and assign cases that they find interesting to themselves.

To determine the reasonableness of the statements that of the Division of Judges management officials, we used the data from the timeliness analysis. The statistical data for the decisions and timeliness do not support that the objective factors of experience, workload, and ability to issue decisions in a timely manner are driving the assignment of cases in the Washington office. We observed the following:

- A total of 206 decisions were issued by ALJs in the Washington office;
- Three ALJs issued a total of 78 of the 206 (37.9 percent) decisions: (DC-ALJ-3), (DC-ALJ-10), and (DC-ALJ-2);
- The average decisions issued by the three ALJs was 26 decisions;

- If each ALJ in the Washington office produced the same level of work, there would be an average of 12 decisions issued per ALJ;
- DC-ALJ-3 issued 37 of the 206 decisions issued (18 percent), the highest in the office, and is a managing ALJ in the Washington office; and
- The average decisions issued for the remaining ALJs is 9 which is less than half of the average number of decisions issued by three top performing ALJs.

We observed that DC-ALJ 17 met the time targets but only issued eight decisions while DC-ALJ-2 did not meet the time targets and issued 18 decisions. Also, DC-ALJ-2 issued more decisions and had cases that were more complex given the length of the transcripts compared to DC-ALJ-9 and DC-ALJ-18 -- each of whom met one of the time targets. If the Washington office were assigning cases on a rotational basis in conformance with the criteria the management official cited, we would expect that DC-ALJs 9, 17, and 18 to have issued more decisions.

When we interviewed ALJs assigned to the Washington office who generally stated that they can tell by the type of allegations which cases are likely to settle, that there are times when they could have taken on more work, and that they were aware of the pressure to issue decisions timely. At times, two of the ALJs interviewed asked for cases to be assigned.

Given these statistics and the other circumstances described by the manager in selecting cases of interest for themselves, we determined that cases in the Washington office were not assigned on rotational basis.

Recommendation

4. We recommend that the Division of Judges develop and implement policies and procedures that ensure the assignment of cases on a rotational basis.

INTERNAL CONTROLS

From the GAO's *Standards for Internal Control in the Federal Government* we selected the internal control attributes and standards that are applicable to the Division of Judges decision time targets and case assignments. We generally found the Division of Judges was not meeting those standards. The cause of the internal control deficiencies appears to be that the Division of Judges lacks any documented policies and procedures related to ensuring compliance with their time targets or for the assignment of cases. Additionally, the Division of Judges has not reviewed their time targets with the Board to determine if they remain relevant and appropriate. The details of our internal control review are provided at Appendix A. Our recommendations above are related to the control deficiencies. Management should consider the information in Appendix A when implementing those recommendations.

APPENDIX A

GAO - Standards	CONCLUSION	RESULTS
<p>Effective management of an entity’s workforce, its human capital, is essential to achieving results and an important part of internal control. Only when the right personnel for the job are on board and are provided the right training, tools, structure, incentives, and responsibilities is operational success possible.</p>	<p>PARTIALLY MEETS</p>	<p>Title 5 U.S.C. § 3105 states that ALJs shall be assigned to cases in rotation as far as practicable. There are no management directives or other guidance in place that provides instructions to meet the requirement.</p> <p>Management provided the ALJs with time target standards for issuing decisions. The time target standards are not documented in Agency policy or directives. Management has no controls to ensure that time standards are met.</p> <p>There are OPM controls in place ensuring that Management hires qualified individuals. However, Management stated that sometimes they hire ALJs without a background; that they do not have a good way to check work history; and that a change in regulations allowed more attorneys in the pool of applicants that they have to consider. The process to determine whether the ALJ offices are appropriately staffed for case assignment is not documented in policies.</p>

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GAO - Standards	CONCLUSION	RESULTS
<p>Management divides or segregates key duties and responsibilities among different people to reduce the risk of error, misuse, or fraud. This includes separating the responsibilities for authorizing transactions, processing and recording them, reviewing the transactions, and handling any related assets so that no one individual controls all key aspects of a transaction or event.</p>	<p>DOES NOT MEET</p>	<p>For case assignment, there is a lack of segregation of duties. The Deputy Chief ALJ and Associate Chief ALJs assign cases to themselves. Although reviewing case assignments by the Chief ALJ could be a compensating control, there is no documentation that practice has been implemented.</p>
<p>Transactions are authorized and executed only by persons acting within the scope of their authority. This is the principal means of assuring that only valid transactions to exchange, transfer, use, or commit resources are initiated or entered into. Management clearly communicates authorizations to personnel.</p> <p>Management limits access to resources and records to authorized individuals, and assigns and maintains accountability for their custody and use. Management may periodically compare resources with the recorded accountability to help reduce the risk of errors, fraud, misuse, or unauthorized alteration.</p>	<p>DOES NOT MEET</p>	<p>According to management officials, there are no NxGen controls in place that ensure that only the assigning ALJs can make case assignments. Audit trails of changes made to the ALJ action are kept on record for a short period of time -- 3-6 months. There is no procedural guidance for assigning cases in NxGen.</p>

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GAO - Standards	CONCLUSION	RESULTS
<p>A variety of control activities are used in information processing. Examples include edit checks of data entered; accounting for transactions in numerical sequences; comparing file totals with control accounts; and controlling access to data, files, and programs.</p>	<p>DOES NOT MEET</p>	<p>We determined that the ALJ case assignment data is inaccurate, incomplete, and unreliable. According to Management, when an ALJ is assigned as a Settlement ALJ and the case settles, the initial Decision on Hearing case assignment data is deleted from NxGen. Additionally, we found that an ALJ's records were removed from NxGen. As a result, there is no record of those case assignments. The ALJ's records were not readily available for inspection.</p>
<p>Transactions are promptly recorded to maintain their relevance and value to management in controlling operations and making decisions. This applies to the entire process or life cycle of a transaction or event from its initiation and authorization through its final classification in summary records. In addition, management designs control activities so that all transactions are completely and accurately recorded.</p>	<p>DOES NOT MEET</p>	<p>ALJ data relied on to determine timeliness such as the transcript length is inaccurate. When testing the transcript length data element for each transcript in the scope period, we determined it was inaccurate because there was an error rate of 17 percent which exceeds the 10 percent tolerable deviation rate. During our testing we also found that the ALJ data was incomplete because an ALJ's records were removed from NxGen. The ALJ's records were not readily available for inspection.</p> <p>Management provided the ALJs with time target standards for issuing timely decisions. There are no controls in place to ensure the time target standards are met.</p>

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GAO - Standards	CONCLUSION	RESULTS
<p>Management clearly documents internal control and all transactions and other significant events in a manner that allows the documentation to be readily available for examination. The documentation may appear in management directives, administrative policies, or operating manuals, in either paper or electronic form. Documentation and records are properly managed and maintained.</p>	<p>DOES NOT MEET</p>	<p>According to Management, several factors are considered when making ALJ case assignments. Management does not document the methodology used to assign cases to ALJs. There is also no documentation of when a case is recused and reassigned to another ALJ. When a case settles before a Settlement ALJ, the initial Decision on Hearing case assignment information is deleted. The Division of Judges does not have policies to track the assignment of cases -- one office kept a record outside of NxGen; another office did not keep records other than email messages that were not readily available; and one office had partial records. As a result, the Decision on Hearing case assignment data in NxGen could not be reconstructed to determine if the cases were assigned on a rotational basis.</p> <p>Management provided the ALJs with time target standards for issuing decisions timely. The time target standards are not documented in Agency policy or directives. There are no controls in place to ensure the time targets are met.</p>
<p>Management periodically reviews policies, procedures, and related control activities for continued relevance and</p>	<p>DOES NOT MEET</p>	<p>The Agency does not have policies and procedures in place for case assignment. Although there are time</p>

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<p>effectiveness in achieving the entity’s objectives or addressing related risks. If there is a significant change in an entity’s process, management reviews this process in a timely manner after the change to determine that the control activities are designed and implemented appropriately.</p>		<p>standards, they are not documented in Agency policies. Also, there are no controls in place to ensure the time standards are effectively implemented.</p>
<p>Management designs a process that uses the entity’s objectives and related risks to identify the information requirements needed to achieve the objectives and address the risks.</p>	<p>DOES NOT MEET</p>	<p>There is no formal process in place to ensure cases are made in rotation. According to Management, each ALJ office has their own methodology to track case assignments. During our testing we found that case assignment data was routinely deleted from NxGen.</p>
<p>Management processes the obtained data into quality information that supports the internal control system.</p>		<p>NxGen reports are used to determine if decisions are processed timely. The reports produce statistics such as the average transcript pages; average days from close of hearing to decision; and the average days from brief to decision. We found that the transcript data was inaccurate.</p> <p>There are no documented procedures for entering data in NxGen accurately.</p>

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GAO - Standards	CONCLUSION	RESULTS
<p>Management performs ongoing monitoring of the design and operating effectiveness of the internal control system as part of the normal course of operations. Ongoing monitoring includes regular management and supervisory activities, comparisons, reconciliations, and other routine actions.</p>		<p>Management provided the ALJs with time target standards for issuing timely decisions. There are no controls in place to ensure the time standards in place are met.</p> <p>Because of a lack of internal controls, management cannot engage in ongoing monitoring to identify internal control issues.</p>
<p>Management evaluates and documents the results of ongoing monitoring to identify internal control issues.</p>		

MEMORANDUM

To: David P. Berry
Inspector General

From: Robert A. Giannasi
Chief Administrative Law Judge

Date: September 26, 2022

Subject: Division of Judges (OIG-AMR-98)

Introduction

The National Labor Relations Board Division of Administrative Law Judges (Judges Division or Division) greatly appreciates this opportunity to provide comments in response to the Office of the Inspector General's (OIG) above-referenced Audit of the Division. As described below, the Audit focused on two aspects of the Division's operations, spanning Fiscal Years 2019, 2020, and 2021: the timeliness of judges' decisions and the assignment of cases to judges. The Audit makes four specific recommendations to strengthen the Division's operations in these areas: (1) develop internal controls to ensure the completeness and accuracy of the Division's case processing data; (2) determine whether current decision-issuance time targets are relevant and appropriate; (3) adopt appropriate internal controls to ensure judges' timely issuance of decisions; and (4) develop and implement policies and procedures that ensure the assignment of cases on a rotational basis. As further explained below, the Judges Division intends to pursue each of these recommendations.

General Overview of the Judges Division

During the Audit period, the Judges Division employed an average of 30 judges, four of whom also performed considerable administrative duties in addition to settling cases, conducting trials, and issuing decisions. Those four judges are the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, and two Associate Chief Administrative Law Judges. The Chief Judge and Deputy Chief Judge are located in the Division's Washington, D.C. office, one of the Associate Chief Judges is located in the New York, NY office, and the other is located in San Francisco, CA. Although judges may be stationed and hear cases in any part of the country, each judge is formally assigned to one of those offices.

During the Audit period, the Division docketed roughly 800 unfair labor practice cases per year at the request of the Agency's Regional offices. The vast majority of docketed cases settle before a hearing opens, however; about half of those settlements are achieved without the involvement of the

assigned judge and the other half with substantial involvement by either the assigned judge or a separately assigned settlement judge. Approximately 20 percent of assigned cases go to trial, though which 20 percent is unknown at the time of assignment.

The Deputy Chief Judge and the two Associate Chief Judges assign incoming cases to their office's judges. The assignment of these cases can be a very dynamic process. New cases come into each of the D.C., NY, and CA offices on a weekly basis, excepting holiday weeks, and typically are assigned to a particular judge about 3 or 4 weeks before the scheduled trial. Given the weekly influx of cases, not all of an office's judges may be available. Judges may be in the midst of, or on the verge of opening, hearings in other cases, they may be working on lengthy decisions in other priority cases, or they may simply be on leave. Additionally, the assigning judge often needs to consider the nature of an incoming case, including its apparent length and complexity, in selecting from among the office's available judges. Further, given the uncertainties associated with trial dates and settlements, there may be situations in which there is no available judge to take an incoming case. In that circumstance, the assigning judge may take the case to support the office's efficient casehandling and minimize any delay to the parties. Last, as indicated, only about 20 percent of cases go to trial, and most of those do not go to trial on the first docketed trial date. In fact, many cases are postponed, mostly for reasons outside the Division's control, such as the Region conducting further investigation, the pendency of pretrial disputes before the Board, or scheduling conflicts between the parties. These postponements are relevant to the assignment of cases because if a case is postponed for a significant period of time, it likely will be returned to the office's pool of docketed cases for future reassignment.

For those cases that are assigned and proceed to a hearing, processing times can vary greatly. Some cases may present only a single, straightforward issue for decision while other cases may present many complex issues for consideration by the judge. As a result, trials can range from a stipulated record to one day of hearing testimony to lengthy multi-session trials of up to 10,000 pages of transcript and 50 days of hearing. Additionally, both before and during a trial, the assigned judge may be called upon to resolve many preliminary, procedural, evidentiary, or subsidiary matters, such as motions to quash subpoenas, to exclude evidence, and for summary disposition. Notably, moreover, the judges must personally handle these matters, as they have no legal staff or law clerks.

Nevertheless, the Judges Division has always been highly productive: In Fiscal Year 2019, the Division disposed of 642 cases, 159 by decision and 483 by settlement; in Fiscal Year 2020, the Division disposed of 440 cases, 102 by decision and 338 by settlement; and in Fiscal Year 2021, the Division disposed of 556 cases, 112 by decision and 444 by settlement. Significantly, the Division achieved the Fiscal Year 2020 and 2021 numbers despite the challenges presented by the COVID-19 pandemic, which included a temporary suspension of hearings and delays resulting from the Agency's transition to virtual hearings using the Zoom platform.

Discussion

With that background, we turn now to the four specific recommendations made in the Audit report.

Recommendation (1): develop internal controls to ensure the completeness and accuracy of the Division's case processing data

As stated, the Division accepts this recommendation. The Division keeps internal case processing data for each judge, which includes numbers of decisions and settlements (as recounted above), the elapsed time between the close of each hearing and the receipt of post-hearing briefs, and the subsequent time to issuance of a decision. Also included in the Division's records are the number of trial days and transcript pages for each case. This information is included in annual reports that are provided to the Board, senior Agency management officials, and all judges.

The Division's case processing data is also transferred to and maintained in NxGen, but, as the Audit report found, there are gaps in the completeness and accuracy of the data in NxGen for several reasons. One, as discussed in the exit interview between OIG and the Division, there is a data entry issue that has affected the completeness and accuracy of that data. The Division is already taking steps to address this issue. Specifically, the Division is instituting procedures to double check the data entered into NxGen by the Division's support staff.

Two, as the Audit report also found, the Division's data in NxGen was incomplete because the data associated with a particular judge who left the Division in the middle of Fiscal Year 2021 was deleted from the system. This deletion was not caused by or attributable to Judges Division staff. Although this deletion was later corrected, the Division will work with the Office of the Chief Information Officer (OCIO) and Agency management to investigate what internal controls might be implemented to prevent a future recurrence with any other departing judge.

Three, the Division understands that NxGen is currently unable to track both the assignment of a trial judge to a case and the assignment of a settlement judge to the same case. As a result, when a case is transferred from a trial judge to a settlement judge, the Division replaces the name of the former with that of the latter in NxGen, which results in the loss of the initial assignment data. The Division is undertaking steps to independently maintain records showing transfers of cases from trial judges to settlement judges. The Division, however, will also explore with OCIO and Agency management tracking this information in NxGen, and what controls may be needed to ensure the relevant data is captured and preserved.

Last, budget permitting, the Judges Division is committed to providing its staff with any appropriate training that may be necessary to remedy the foregoing areas of concern.

Recommendations (2) and (3): determine whether current decision-issuance time targets are relevant and appropriate; adopt appropriate internal controls to ensure the judges' timely issuance of decisions

The Judges Division accepts these recommendations as well. Initially, the Division observes that its case-issuance time targets are framed in normative terms in recognition of the fact that hard-and-fast deadlines would be inappropriate given the nature of case-by-case adjudication. Nevertheless, the Division fully supports measuring judges' timeliness in issuing decisions and holding them accountable for any unjustifiable delays. Moreover, the Division agrees to evaluate the relevance and appropriateness of its existing time targets. These time targets were established by the Board in the mid-1990s, and thus are more than a quarter-century old. Since then, it is possible that there have been significant changes in the length and complexity of the cases brought before the Division. Our experience would also suggest there has been a significant increase in the litigiousness of the parties who come before the Division and the Agency overall. Accordingly, the Division will convene a working group comprising the Chief of Staff and experienced judges to make recommendations to the Board on whether the existing time targets should be revised and, if so, what time targets should be implemented going forward.

Whatever time targets may be retained or established for judges' issuance of decisions, the Division accepts the Audit report's further recommendation to adopt appropriate internal controls to monitor adherence to such time targets. As background, the Chief Judge, Deputy Chief Judge, and the Associate Chief Judges periodically remind their judges of the existing time targets and informally monitor their judges' timeliness. As the Audit report points out, however, a judge with a pending decision typically is not contacted until at least 180 days from the filing of post-hearing briefs, well beyond the applicable time target for most cases. The Division therefore agrees it would be beneficial to establish written procedures for oversight of pending decisions.

At the same time, however, the Division is sensitive to unique aspects of its judges' positions and work that will require thoughtful consideration in adopting and enforcing internal controls related to time targets. The Administrative Procedure Act (APA) appropriately contemplates a degree of independence for administrative law judges. As one concrete example, unlike most Federal employees, judges are not subject to annual performance evaluations. Although this independence relates primarily to judges' substantive decision-making, it also warrants consideration in thinking about placing temporal constraints on judges' deliberative processes. Relatedly, the Agency stands to benefit from striking an appropriate balance between speed and quality. Well-reasoned decisions, even if issued beyond established time targets, may reduce the Agency's overall processing time to the extent such decisions discourage appeals to the Board. In Fiscal Year 2021, for example, parties accepted approximately 60 percent of decisions issued by the Judges Division. But even when such decisions are appealed to the Board, the higher the quality of the judge's decision, the less likely it is that the Board will need to expend significant time and resources reviewing it. For these reasons, the determination of appropriate time targets will necessarily have to afford the judges a degree of independence with respect to the manner in which they process their cases.

Last, the Judges Division values the role its judges play in facilitating settlements, which may occur at any point in a proceeding, including post-hearing. Exploring the possibility of settlement often takes time. When successful, though, settlements obviously shorten the lifecycle of a case and save the Agency considerable resources.

In sum, the Division will initiate a review to determine whether its existing decision-issuance time targets are relevant and appropriate. The Division will also adopt appropriate internal controls to monitor the judges' timely issuance of decisions, taking into account the additional considerations discussed above.

Recommendation (4): develop and implement policies and procedures
that ensure the assignment of cases on a rotational basis

As stated above, the Division agrees cases should be assigned to judges on a rotational basis "so far as practicable." The Division believes that in practice it already makes a good faith effort to abide by this standard. Nevertheless, the Division agrees to develop and implement written policies to memorialize that practice and promote its consistent application.

There is no question that the Chief Judge, the Deputy Chief Judge, and the Associate Chief Judges (collectively, the Assigning Judges) have the authority to assign (or reassign) unfair labor practice cases to the Division's judges. See Section 102.34 of the Board's Rules and Regulations. As to the manner of making these assignments, the Division joins the Audit report in looking to the APA, which relevantly provides, "Administrative law judges shall be assigned to cases in rotation so far as practicable." 5 U.S.C. § 3105 ("Appointment of Administrative Law Judges"). Further, as recognized by the Audit report, the Supreme Court has read "so far as practicable" to permit consideration of various factors, including whether an available judge is "qualified to hear the case at hand, having regard to the complexity and difficulty thereof, together with the experience and ability of the [judge]." See *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 139-140 (1953); see also *AAACON Auto Transportation, Inc. v. ICC*, 792 F.2d 1156, 1163 (D.C. Cir. 1986). Thus, there is no requirement that cases be assigned to judges in "mechanical rotation." *Ramspeck*, above, at 140.¹

Consistent with the foregoing, the Judges Division considers various circumstances in assigning cases to judges. As the Assigning Judges work through their respective office's roster of judges, they consider the judges' demonstrated skill, ability, and experience, especially when a docketed case appears to be challenging in terms of volume, complexity, or both. The Assigning Judges also consider each judge's scheduling availability and current caseload, particularly where a judge has cases that have already gone to hearing and are awaiting drafting of a decision. An additional factor is a judge's

¹ Moreover, as a general matter (putting aside, as examples, concerns over a judge's impartiality or the validity of the judge's original appointment as an administrative law judge), the designation of a particular judge to a particular case typically "is a matter for administrative determination by the Board with which parties have no concern." *East Texas Steel Castings Co.*, 116 NLRB 1336, 1337 (1956), *enfd.* 255 F.2d 284 (5th Cir. 1958).

geographic proximity to the hearing location, as the Assigning Judges aim to avoid overburdening their judges with extensive travel and unnecessarily expending Agency resources. Further, judges occasionally volunteer or ask for additional cases, and the Assigning Judges consider these requests as well. Based on these practices, the Division believes it is assigning cases on a rotational basis “so far as practicable.”

The Division acknowledges, however, that its assignment practices are not reflected in any documented policy or procedure, and that they should be. Developing and implementing written policies regarding case assignments would strengthen internal controls within the Division, and likely resolve many of the Audit report’s remaining concerns.

For example, the Audit report states that the Division’s case assignment information in NxGen was not “sufficiently reliable” to determine whether assignments were made in rotation, so the report instead looks for a “rotational or balanced distribution of decisions,” as a proxy for initial assignments. The Division understands that the OIG took this approach because of the NxGen data issues discussed in connection with Recommendation (1), above. The Division nevertheless believes that no firm conclusions can be drawn based on this approach, as explained below, but the initial point is that implementing written assignment procedures, which could include a system for documenting all case assignments, would ensure the availability of this data for future analysis.

In turn, implementing a system for documenting case assignments and correcting any NxGen data problems would make it unnecessary to attempt working backward from after-the-fact data on issued decisions, which the Division believes does not accurately reflect whether initial case assignments were made on a rotational basis so far as practicable. Most significantly, in any given year, the number of assigned cases far exceeds the number of decided cases. As described above, the vast majority of cases settle long before being decided by a judge, with many of those settlements occurring after assignment, but before the opening of the hearing. In Fiscal Year 2021, for example, the Division recorded 444 settlements while issuing 112 decisions, thus highlighting the incompleteness of any picture painted by the body of decided cases.

Further, even looking at the subset of decided cases, one cannot reconstruct the circumstances that were present when those cases were assigned.² Naturally, decisions issue months after cases are assigned to judges. As a result, decided cases reveal little about the circumstances facing the Assigning Judges at the time of assignment, including their judges’ trial schedules, decision-writing backlogs, or even simply leave schedules. Moreover, although the Audit report attempts to account for the complexity of cases by looking to transcript lengths and timeliness of decisions, these too are

² The Audit report concludes that cases appear to have been assigned on a rotational basis as far as practicable in the Division’s New York and San Francisco offices, but not in the Washington, D.C. office. The Division submits that the flaws in the decision-based approach used in the Audit report apply with respect to all three offices, such that no firm conclusions may be drawn as to any office’s assignment of cases.

imperfect bases for assessing the Assigning Judges' decision-making months earlier.³ Inevitably, some cases that initially appeared straightforward to the Assigning Judge may turn out to be complicated, and, conversely, seemingly complex cases may be simplified or narrowed based on the parties' trial strategies, partial settlements, or other factors. Last, to manage the weekly inflow of new cases to the Division, the Assigning Judges may assign multiple cases to a particular judge on the assumption that one or more of those cases will settle. In the event anticipated settlements fail to materialize, however, those cases may be reassigned to other judges, which also points up a potential disconnect between the universe of decided cases and that of assigned cases.

Finally, the Audit report points out that the Assigning Judge in the Washington, D.C. office stated that the Assigning Judges self-assign cases they find interesting. Relatedly, the report notes that judges within that office reported there were times they could have taken additional cases, and that two judges in the office reported asking for additional cases.⁴ These circumstances contributed to the Audit report's conclusion that cases in the Washington, D.C. office were not assigned on a rotational basis so far as practicable during the review period.⁵ The Division is not aware of any regulatory or judicial prohibition on administrative law judges assigning cases to themselves or giving additional cases to judges who ask for additional work (absent recusal or other concerns not present here), and has no reason to believe that such assignments are inappropriate. See, e.g., *Sykes v. Bowen*, 854 F.2d 284, 287-288 (8th Cir. 1988) (finding no error in judge's reassignment of a remanded case to himself). The Division also notes that the Assigning Judges' ability and willingness to take cases themselves supports the capacity of each office to efficiently manage its caseload.⁶ The Division agrees, however, that such assignments should be governed by the same factors the Assigning Judges consider when assigning cases to others, including judges' relative capacity to take additional cases. Further, the Division agrees that any concern over self-assignments can be addressed by establishing written policies governing the process of assigning cases in all circumstances.

³ As discussed above, the Division intends to reevaluate its decision-issuance time targets, which will include consideration of the validity of using transcript length as a marker of complexity.

⁴ The Audit report states at p. 19 that some judges attached to the Washington office were interviewed and two of them stated that "at times" they asked "for cases to be assigned." The report does not state whether those requests were granted or denied. The Deputy Chief Judge who assigns cases in that office regularly assigns cases to judges who ask for additional work, unless in his judgment the various "assignment" considerations described above, including a requesting judge's current case assignments, militate against giving the judge more cases. Further, when considering volunteers, especially for lengthy West-coast cases, the Deputy Chief Judge attempts to give first priority to the first volunteer, meaning requests from later volunteers may go unmet.

⁵ Relatedly, in Appendix A, the Audit report finds that the Division does not adequately segregate duties because the Assigning Judges self-assign cases.

⁶ The Division observes that, even with the Deputy Chief Judge in Washington, D.C. self-assigning cases, the relevant tables in the Audit report indicate that the numbers of decisions issued by other judges in that office were on par with the numbers of decisions issued by their colleagues in New York and San Francisco.

Conclusion

The Judges Division greatly appreciates the work of the Office of the Inspector General in auditing the Division and crafting recommendations to strengthen its operations. The Division shares that goal. Accordingly, the Division will begin work on the commitments and projects discussed above as expeditiously as possible.