

# BOOK REVIEWS

MANUAL FOR ADMINISTRATIVE LAW JUDGES. By Judge Merritt Ruhlen. Administrative Conference of the United States: United States Government Printing Office, 1974 (0-537-921). Pp. xi, 125. \$1.40.

*Reviewed by William Jensen\**

## THE *Manual's* AUTHOR

If and when there is established a Hall of Fame for Administrative Law Judges, it will warrant universal respect and credibility only if there is included as an original inductee, Merritt Ruhlen, who retired from federal service in 1972 after twenty-eight distinguished years as an Administrative Law Judge at the Civil Aeronautics Board and four equally outstanding years as a Member of the Administrative Conference of the United States. In 1944, when Judge Ruhlen commenced exhibiting superior and precedential techniques in the conduct of administrative hearings, the Administrative Procedure Act was still several years short of enactment, and the only manual with which this reviewer had any degree of familiarity was a seaman's manual, concerned with such things as the semaphore alphabet, bottom paints, and the difference between a "studdingsail, tack bend" on the one hand, and a "crabber's eye knot" on the other.<sup>1</sup>

Your reviewer had the good fortune of working with Judge Ruhlen in December 1971, when each participated in a Civil Service Commission seminar in Williamsburg, Virginia. As to that seminar, there is retained a personal grievance against Judge Ruhlen: an Administrative Law Judge from one of the major regulatory agencies had churlishly focused upon a theme that the significance of the cases typically assigned our brothers at a different kind of federal agency was considerably short of that of the typical cases over which he was called upon

---

\* Administrative Law Judge, Federal Power Commission (FPC). The views expressed herein are personal views and do not constitute, in whole or in part, official or unofficial views of the FPC.

### THE FOLLOWING CITATION WILL BE USED IN THIS REVIEW:

M. RUHLEN, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* (1974) [hereinafter cited as *MANUAL*].

1. UNITED STATES NAVAL INSTITUTE, *THE BLUEJACKETS' MANUAL* (10th ed. 1940). Then, "Ninety cents, postpaid," but available without charge to "Selected Volunteers."

to preside—to a point where a number of the brothers were on the verge of walking out on the session; your reviewer sought the floor, to the end of seeking to heal the widening breach with a joke miraculously recalled from high school days; but Judge Ruhlen's superior prestige gained him the floor—whereupon he inimitably related *the selfsame story*,<sup>2</sup> to the immense applause of the audience, and the relief of an embarrassing and tense situation.

Now, Judge Ruhlen has written a book, more precisely, a *Manual for Administrative Law Judges (Manual)*, on commission from the Administrative Conference of the United States, under the Conference's "statutory charge to 'arrange for interchange among administrative agencies of information potentially useful in improving administrative procedures.'"<sup>3</sup> Your reviewer—having served as an Administrative Law Judge at two of the major federal regulatory agencies<sup>4</sup>—has been requested "to prepare a Review (in the nature of a book review)" of Judge Ruhlen's *Manual*. While the request generated the same trepidations which Joe Theismann would undoubtedly experience were he similarly requested to review a Soimy Jurgensen *Manual for Quarterbacks*, the invitation (more appropriately, the challenge) has been accepted.

#### THE *Manual* ITSELF

Following a preface<sup>5</sup> and a chapter of introduction,<sup>6</sup> Judge Ruhlen, in Chapters II-IX offers a guided tour of the entire hearing process—from the time the judge is assigned a case through his issuance of a decision therein. The eight chapters devoted to the tour comprise seventy of the *Manual's* eighty pages of text; and Judge Ruhlen clearly has in mind therein what other writers have termed "the big case." Chapter X of the *Manual* (eight pages) deals with "Claims and Enforcement Cases," the former the main fare of Administrative Law Judges assigned to the Social Security Administration (SSA), and the

---

2. The one concerning the lass who had proved unable to duplicate her girlfriend's feat of acquiring a mink coat through the simple expedient of meeting a man with \$5,000, but who eventually acquired one, nonetheless, through meeting 1,000 men with \$5 each.

3. MANUAL III.

4. FPC, 1971-1973 and 1974-present; Federal Communications Commission (FCC), 1973-74.

5. *Preface* to MANUAL at I: "I am fully aware that the uniqueness of each case makes it impossible for a manual such as this to provide definitive answers; at most it can provide generalized suggestions which will have to be applied flexibly and sensibly."

6. MANUAL 2: "To an increasing extent . . . agencies are adopting the decisions of their Judges as final by declining to exercise discretionary review,"

latter typically arising at the National Labor Relations Board, the National Transportation Safety Board, and the Federal Trade Commission. The remaining forty-five pages of the *Manual* are comprised of sample forms for notices, orders, etc. (twenty-seven pages), a bibliography (two pages), a listing of the Code of Federal Regulations citations for the various agencies' procedural rules (three pages), and a reproduction of the Administrative Procedure Act (thirteen pages).

In the eight chapters devoted to "the big case," Judge Ruhlen opens with the *a-to-z* of the prehearing conference, accenting his view that intelligent use of available procedures can make for giant strides in terms of narrowing the questions to be resolved in the hearing process and charting with precision the course of the evidentiary phase of the proceeding. Judge Ruhlen next touches upon discovery matters, other tools useful in the simplification of complex proceedings (*e.g.*, prehearing exchanges of written cases), and intervention or other participation in the case by persons having an interest in its outcome. He goes on to the hearing itself, where the major focus is upon the "Mechanics of the Hearing"—from the judge's opening statement up to the closing of the record—with stops along the way for such matters as the touchstones of proper cross-examination, the admissibility of evidence, and the treatment to be accorded confidential information. Chapter VII of the *Manual* is devoted to the "Techniques of Presiding";<sup>7</sup> and Chapter VIII discusses certain distinctive standards of judicial conduct pertaining to such things as *ex parte* communications, fraternization with counsel and industry representatives, discussions with media representatives, and so forth.

The "big case," of course, subsumes a written decision by the judge, and Judge Ruhlen's Chapter IX is principally concerned with the format of written decisions,<sup>8</sup> the necessity for individual research by the judge,<sup>9</sup> "The Decisional Process,"<sup>10</sup> and the style of the de-

---

7. "The Judge must know his case." *Id.* at 47. "He must be constantly alert, attentive, and in control . . ." *Id.* at 48. "The Judge should not argue with counsel." *Id.* at 49. "Prompt rulings are essential." *Id.* at 50. When counsel "seeks to manage the hearing for the Judge," the latter "must be alert to detect and restrain such counsel." *Id.* at 52. "Off-the-record discussions are frequently helpful in considering mechanical details of the hearing . . ." *Id.* at 58.

8. "No rigid structure can be prescribed for all written decisions, but a certain measure of uniformity in basic outline is customary." *Id.* at 63.

9. "The Judge should study the record and make an independent analysis of the facts and contentions. This requires careful examination of legal and policy precedents of the agency and of the courts." *Id.* at 65.

10. "It is the Judge's duty to decide all cases in accordance with agency policy." *Id.* at 67. Your reviewer has difficulty with this as a universal proposition, as is reflected in an Addendum to this Review.

cision.<sup>11</sup>

### PERSONAL REACTION

The *Manual* was widely distributed by the Administrative Conference upon its publication in April 1974, and your reviewer has since been informed that copies thereof were made available to all federal Administrative Law Judges at that time. Upon receipt of his copy, your reviewer merely browsed it; and in all candor, even this bare courtesy probably would not have been extended had a name significantly lesser than Judge Ruhlen's appeared on the cover. No precise reason for this negative approach to the *Manual* was pondered at the time.<sup>12</sup> Had there been, the full reasoning might have run along the following lines:

After twenty-four years as a lawyer, twenty-two of the twenty-four in the field of Administrative Law, fourteen of the twenty-two in hearing or hearing-related activities, and three of the fourteen as an Administrative Law Judge, the basic cures for deficiencies still obtaining are likely to be effected—if at all—through continued bubbling in the cauldron of the total hearing process, and not through prolonged attention to some other judge's game plan, however skilled that judge. While there is no limit to what younger judges can sponge up from the Judge Ruhlen of the world, such further education can be more surely come by through particularized discussions with them, through attendance of their hearings, and through close study of their initial decisions and orders in light of the pertinent hearing records. Analogously, Sonny Jurgensen can deliver manuals and playbooks to Joe Theismann all season long. But if Joe is to advance from his present capability to future greatness, the progress will have to be made through on the order of a one-to-ten mixture of additional observation of Sonny as he presides to the immediate rear of Len Hauss, and personal game experience in the same posterior position.

After the invitation of the *Duke Law Journal* to contribute to this Administrative Law Issue, your reviewer, of course, studied the *Manual* in great detail. The considered personal conclusions were as follows:

---

11. "Administrative cases frequently involve complicated technical and statistical details and abstract ideas. The Judge should strive to present these in a fashion which a layman can understand." *Id.* at 70.

12. By April 1974, there was completely out of mind that, four months earlier, in his excellent monograph, Chief Judge Zwerdling of the FPC had prefatorially noted that his monograph "is not an Administrative Law Judge's *Manual*, in the sense of detailed instructions as to how to operate—it does not stress mechanics, forms or rituals. Such matters can easily and best be learned on the job itself. What it does attempt to emphasize is basic attitudes and approaches." Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 AD. L. REV. 9 (1973).

1. For what it purports to be—a description of “procedures and tools which may be used by Federal Administrative Law Judges in formal administrative proceedings,”<sup>13</sup> and a treatise on “the Judge’s obligation to manage and govern the proceeding from assignment to decision,”<sup>14</sup>
  - a. it is essentially perfect,
  - b. no other judge known to your reviewer could have done a better job, and
  - c. the Administrative Conference received precisely what it had contracted for—and something more, in that, at this stage of his career, it is doubtful that Judge Ruhlen could draw up a grocery list without there being reflected therein a measure of the philosophy with which he has approached his duties in his many years of public service; but
2. your reviewer simply does not need it—and did not need it even at the time (June 1971) when he first ascended to the position of Administrative Law Judge.<sup>15</sup>

Conclusion 2 may be illustrated through reference to a recent “house-keeping” matter: In September 1974, your reviewer was faced with the necessity for an out-of-town hearing session, to which the public was to be specifically invited, and which was contemplated for a small city (population 13,000) in South Carolina; casual intra-agency inquiry as to who within the agency arranges for a hearing room in such circumstances produced the happy counsel: “Buddy, you are on your

13. MANUAL IX.

14. *Id.* at X.

15. Facts of life should not be taken as immodesty here. In this connection, in his nineteen years of schooling at the FCC, prior to reporting as a judge at the FPC, your reviewer had undoubtedly established a national indoor record in terms of “total years of tutelage by men more able and accomplished than oneself”; and to those patient lawyers, teachers, friends, this effort is gratefully dedicated.

Additionally, when newly-appointed judges report to the FPC’s Chief Judge Zwerdling, he spends the better part of the first week with them in philosophical, subject matter, and procedure-related discussions, during which no question is too elementary. The usual foot-high stack of reading materials is provided—the most valuable of which are an indexed compilation of intra-office memoranda which Chief Judge Zwerdling and his predecessor, Chief Judge Edward B. Marsh, have seen fit to draft over the years. (There is now, of course, Chief Judge Zwerdling’s *Reflections*, see note 12 *supra*, which no Administrative Law Judge—or other serious student of administrative law—should be without.) New judges are also advised by Chief Judge Zwerdling to spend a week or so sampling the prehearing conferences and hearing sessions of experienced judges, and to brainpick those judges as needed.

Finally, here, the FPC’s judges have available to them, for nuts-and-bolts discussions, a three-man staff of first-rate Technical Assistants—for whose continued good health your reviewer prays on a regular basis.

own";<sup>16</sup> unbeknownst to your reviewer, Judge Ruhlen had included in the *Manual* perfect instructions as to obtaining and inspecting out-of-town hearing rooms;<sup>17</sup> but common sense, general knowledge, or whatever dictated (correctly) that one start with the General Services Administration; and several brief phone calls later, suitable hearing facilities—a large classroom in an Army Reserve Center—were assured. Other illustrations could be given equal time here: it is fundamental that a judge does not discuss the merits of a case with a party;<sup>18</sup> and all judges know that they must be conscious of their appearance in public;<sup>19</sup> and common sense dictates that a judge be circumspect in his dealings with the media.<sup>20</sup> Such matters are more elemental even than hornbook pronouncements, and inhere in any decent understanding of the title "judge"—with or without the further description of "administrative law."<sup>21</sup>

#### JUDGES ARE NOT POLLS APART

After reaching the above conclusions, your reviewer determined to test them by means of an objective polling at his own and other federal agencies. Polled were a total of thirty-one judges, representing a total of seven agencies.<sup>22</sup> Concentration was had on the newer judges at each agency, but veteran judges, including some who qualify as "resident curmudgeons" were also interviewed. The results of the poll essentially confirmed the conclusions expressed above. The

---

16. In larger out-of-town cities, hearings are normally conducted in a courtroom in that city's federal building or similar federal facility.

17. *MANUAL* 54-55.

18. *Id.* at 59-60.

19. *Id.* at 60.

20. *Id.* at 61.

21. The Federal Administrative Law Judges Conference has formally adopted the Code of Judicial Conduct "insofar as it does not conflict with Federal law, or with agency rule or policy consistent with the independence of administrative law judges, and insofar as it is not otherwise plainly inapplicable." Federal Administrative Law Judges Conference News Letter 6 (Summer 1973).

22. No judges currently with the Social Security Administration (SSA) were interviewed, but three of the interviewees had moved to major regulatory agencies from SSA judgeships. These three judges accented that the *Manual* devotes only four pages to SSA cases; and that those pages would have to be greatly expanded upon in order to be of significant assistance to SSA judges. They pointed out that the SSA indoctrinates judicial appointees with a seven-week orientation program at facilities in Alexandria, Virginia; and that, although the orientation program is primarily geared to SSA statutes and policy and to claims involving "medical matters," hearing procedures are also dwelt upon. It may be noted that, as of December 1973, Administrative Law Judges at the SSA numbered 420, or nearly 54% of the federal government's 780 Administrative Law Judges. For a complete distributional breakdown, see Dullea, *Development of the Personnel Program for Administrative Law Judges*, 25 *AD. L. REV.* 41, 47 (1973).

judges who either had thoroughly read or had only browsed the *Manual* were unanimously agreed that the *Manual* was an excellent effort, and that it said all that can be said in such a *Manual* about as well as it can be said.<sup>23</sup> Typical reactions in the foregoing respect were that "It's nice to have it all in one place," and "It can be used as a check-list."<sup>24</sup>

Two veteran judges—one of whom had not opened the *Manual*—did "about-faces" when it settled with them that their original negative reactions (in terms of the *Manual's* utility) might contribute to an adverse review of an "old friend's" effort. Upon such reconsideration, they agreed that all new judges would be helped by the *Manual*. And the "non-reader" of the two (a resident curmudgeon)—upon being apprised that even the newer judges were not using the *Manual*—rather colorfully adapted to "new judges" the adage: "You can tell a man from Harvard, but you can't tell him much."<sup>25</sup> Another veteran judge—who also has served as a judge at two agencies—was certain that the *Manual* would have been very useful to him when he first became a judge some fifteen years ago. However, among the younger judges interviewed, the consensus reaction was: "It repeats what I already know." The most vigorous "defender" of the *Manual's* utility was a new judge, who, as a veteran hearing attorney and a former opinion writer, "already knew the *abc's* of being a judge," found extremely useful two features of the *Manual*: the bibliography and the listing of the CFR citations as to procedural rules. This new judge had more to say—and zeroed in on a thought which had theretofore flirted with your reviewer, but had not yet seduced him. At the time of the *Manual's* issuance, the new judge had been a supervisory hearing attorney carrying in tow a number of young hearing attorneys of varying degrees of experience. Impressed with aspects of the *Manual*, he had secured copies thereof for each of his charges—who thereafter found it useful as to such things as "when to ask for a recess," "when to ask to go off the record," etc. And later, two veteran judges (one, another resi-

---

23. Five of the judges, including one of the newer judges, had not read the *Manual*, although each carried it in his book trough. Said one of the older of these judges (who has served as a judge at two major regulatory agencies): "There is no judge for whom I have greater respect than Merritt Ruhlen; but I know more about [my present agency] than he does."

24. The (new) judge from whom this is an exact quote was not, however, so using the *Manual*.

25. It is doubtful that the adage should continue to be taken as universal. In this connection, your reviewer has it—on information and belief—that large numbers of Harvard graduates are responding well to efforts at rehabilitation. On the other hand, a close friend professes recollection of having once shared an office with one such, who—when the friend responded to a knock on the door with "Who's there?", and received the answer, "It's me"—looked up and inquired: "What is he trying to say?"

dent curmudgeon) independently observed that the *Manual* is useful in that "it tells the outside world what we do," and "it should prove very useful in the law schools."

Finally, in terms of the poll, some one quarter of the judges interviewed were of the initial opinion that, as the Civil Service Commission's registers from which the various agencies normally choose new Administrative Law Judges become increasingly barren of applicants showing many years of experience—either as staff lawyers at regulatory agencies, or as private practitioners before such agencies—and as those agencies turn to candidates possessing near-minimal "qualifying experience,"<sup>26</sup> the *Manual* will become of increasing utility. Upon further reflection, however, a majority of those judges rethought the matter essentially as follows:

Most of the Chief Judges at the major federal regulatory agencies are extremely cautious in the filling of vacancies, and most would rather play a waiting game and continue the vacancy than see it filled by a candidate of only marginal qualifications. True, the GS-16 registers are "drying up"—principally because the enduring "freeze" on salaries at the \$36,000 level has discouraged persons already at that level in the same or lower grade from making the effort to gain admission to the registers.<sup>27</sup> At the major federal regulatory agencies, a pattern seems

---

26. Charles J. Dullea, Director, Office of Administrative Law Judges, Civil Service Commission, in his *Development of the Personnel Program for Administrative Law Judges*, *supra* note 22, at 45, reports that the experience-requirements for judges are as follows (footnote omitted);

In addition to membership in a bar, each applicant must demonstrate that he possesses a certain length, type and level of experience. At least seven years of qualifying experience is required. Qualifying experience may be obtained in certain judicial positions, by responsible involvement in formal cases coming before governmental regulatory bodies or by preparing and trying (or hearing) cases in courts of original and unlimited jurisdiction.

In order to qualify at GS-15 or at GS-16 at least one year of an applicant's qualifying experience must have been of a level of difficulty and complexity characteristic of at least the next lower grade level in the Federal service. This level of experience must have been obtained within seven years of the date of application.

27. As of December 31, 1974, the paycales for GS-15 were specified at \$29,818-to-\$38,764, and for GS-16 at \$34,607-to-\$43,839. However, because of the strictures of other applicable salary legislation, all government employees in the GS series (including those at GS-17 and GS-18) were limited to \$36,000. That restriction, together with rises in the cost of living (which, to the possible surprise of some, also affect persons who have not received raises in two-to-five years) has caused what many regard as cruel and ludicrous results, exemplified by the following: Assume a GS-16 who could have retired on December 31, 1973, with a pension (because of longevity) at 60% of a "high-three" average of \$36,000. To this would have been added a 5.5% cost-of-living increase; and the retiree would subsequently have received additional cost-of-living increases of 6.4% (June 30, 1974) and 7.3% (December 31, 1974). Accordingly, with compounding, his pension on January 1, 1975, would have stood at \$26,016. However, had he delayed retirement until April 1, 1975, his "high-three" percentage would have

to be developing: the Chief Judges keep an eye open for judges who—originally “passed over” for GS-16 judgeships—are exhibiting superior skills at SSA at the GS-15 level. Because the bulk of the standouts will have had prior administrative law experience to complement their judicial experience, the *Manual* will be principally useful to them only as a “check-list.”<sup>28</sup>

#### WHAT WENT WRONG?

If the poll detailed above was of a representative and fair sample of judges—and it is respectfully recommended that the Administrative Conference of the United States conduct a poll of its own, as by a questionnaire to all of the some 800 members of the federal administrative judiciary—it is proper to ask at this point: “What went wrong?”

The matter must first be looked at from Judge Ruhlen’s perspective of what can be termed a “Project Manual”; and here, based on the unanimity in the pertinent responses from the judges interviewed, the answer is clear: nothing went wrong, and Judge Ruhlen simply prepared and delivered to the Administrative Conference precisely what it had bargained for and commissioned—a *Manual for Administrative Law Judges* with which there can be little quarrel in terms of its overall technical perfection. But if, as the above poll seems conclusively to show, the *Manual* is *not* being used—and probably will not be used—something clearly went awry at the Administrative Conference, and the *Manual* need not have been commissioned in the first place. Why, then, was it commissioned? What was the data base or input which led the Administrative Conference to believe that the *Manual* was a worthwhile project? The Administrative Conference can, of course, speak for itself on this point. Until it persuasively does, however, your reviewer will continue with an opinion formed early in the polling process and greatly shored up as he canvassed the down-state precincts and focused upon the impressive “qualifying experience” which the judges interviewed had uniformly brought to the ad-

---

risen only to 62.5%, and his cost-of-living entitlement would have stood at only 7.3%. In those circumstances, his yearly pension, as of April 1, 1975, would have totalled \$24,143—a penalty of \$1,873 per year for not having retired fifteen months earlier. In passing, it may be noted that the Conference of Administrative Law Judges of the American Bar Association is seeking to have established a separate salary and classification schedule for Administrative Law Judges apart from any other classification schedule as a program consonant with the established concept that Administrative Law Judges constitute the “administrative judiciary” of the federal government. ABA Conference of Administrative Law Judges Newsletter (Nov. 22, 1974).

28. Additionally, as is the case at the FPC, see note 15 *supra*, chief judges at most of the major federal regulatory agencies have intensive orientation programs for newly-appointed judges.

ministrative bench: the Administrative Conference simply misjudged and underestimated the caliber of the candidates which the Civil Service Commission's present standards have sifted out for agency selection.

There was, of course, a time when the top-ranked Administrative Law Judges (then termed "Hearing Examiners") were at the GS-13 level, and when a great many of the judges selected had turned to the judges' register only when they had become "dead-ended" in staff positions at the GS-12 level. But that was some twenty years ago—at a time when

personal qualifications investigations were not conducted and candidates were not required to appear for oral interviews. Instead, confidential inquiries were used to obtain information regarding competitors' personal and professional qualifications from individuals who had knowledge of these matters.<sup>29</sup>

However, the basic present high standards have been in effect since the early 1960's,<sup>30</sup> with a result that the judges appointed in the past dozen or so years have consistently been of outstanding quality in terms of professional attainment.<sup>31</sup> Individual appointees and their qualifications will not be discussed. It may be generally observed, however, that virtually all appointees during those years personally known to your reviewer would have been adjudged, by most knowledgeable persons, as professional successes even had they ended their careers just prior to being selected as Administrative Law Judges. That this conclusion appears not to have fully registered with the Administrative Conference of the United States (witness the *Manual*) is a dismaying circumstance to which the Federal Administrative Law Judges Conference and the Conference of Administrative Law Judges of the American Bar Association may wish to direct additional missionary efforts.<sup>32</sup>

---

29. Dullea, *supra* note 22, at 43.

30. *Id.* at 44-45. See note 26 *supra*.

31. Your reviewer's basic experience has been set forth earlier herein, and does not reflect that he had served as an Assistant General Counsel and as Chief for Law, Review Board, in his last two positions at the FCC prior to first reporting to the FPC as an Administrative Law Judge. Even as amplified, however, his total "apprenticeship" qualifications would rank no higher than average against the parallel qualifications of the recent judicial appointees at these two agencies. (The "scores" on file in Mr. Dullea's office, see note 26 *supra*, will, it must be sadly reported, more than support this statement.)

32. While the Administrative Conference is a convenient "whipping boy" for purposes of this Review and presentation, the overall problem—adequate and meaningful professional recognition of the federal administrative judiciary as presently constituted—runs considerably past that admirably intentioned body to the various regulatory agencies themselves, which may be the actual motherlodes of the remaining veins of negativism

SALVAGING THE *Manual*

Earlier herein it was recommended that the Administrative Conference conduct a poll of its own through a suitable questionnaire to the some 800 federal Administrative Law Judges now sitting throughout the country. Should any such exhaustive poll confirm the results of the very limited poll conducted for purposes of this review—an excellent technical effort, but one of little practical utility to those to whom it is specifically addressed—a conclusion might follow that the *Manual* adds up to an essential waste of a distinguished judge's time and capability. That the conclusion would not be entirely valid, however, has already been suggested above—in that part of this Review which reports that a new judge earlier had found the *Manual* useful as a training aid for young hearing attorneys,<sup>33</sup> and that two judges saw value in the *Manual* in that "it tells the outside world what we do," and "it should prove very useful in the law schools."

The foregoing observations provided a measure of tintinnabulation for your reviewer, who can personally attest that the *Manual*—even in its present form—would have been of at least some aid and comfort in his earlier roles as an administrative law student, grappling with the full implications of the concepts "notice and opportunity to be heard"; as a private practitioner, seeking to establish that a furloughed elevator operator was being unjustly denied unemployment compensation; as an "application processor" framing issues for an *Ashbacker*<sup>34</sup> hearing; as a staff attorney "drafted" into hearing work on short notice;<sup>35</sup> and as an opinion writer seeking to fully comprehend the context in which a disputed ruling had been rendered in the proceedings below.

At this juncture, the recommendation self-constructs: deliver the *Manual* back to Judge Ruhlen, and commission him to retitle it, recast

---

still extant with respect to Administrative Law Judges generally. For example, the FCC clings to a time-consuming and paper-shuffling procedure—appropriate (perhaps) twenty years ago—whereunder its judges are not permitted to pass upon motions for issue modification. See 47 C.F.R. § 0.365(b)(1) (1973). Again, at the FPC, without specific authorization in the hearing order, a judge may not alter a date established by the Commission therein. See 18 C.F.R. § 1.13(e) (1974). These and similar archaic manifestations of agency disrespect for and distrust of its judges are evidence that Administrative Law Judges are still some years away from fully qualifying for Virginia Slims accolades.

33. With misplaced emphasis, Judge Ruhlen himself recognizes that the *Manual* "may also assist private and government counsel who appear before [Administrative Law Judges]." *Preface* to MANUAL at IX.

34. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

35. Thanks here to the Administrative Law Judges (then, Hearing Examiners) who, in their initial decisions, graciously overlooked your reviewer's many "bloopers" at the hearings before them.

it, and restructure it to the end of rendering it of prime utility to the law student, *e.g.*, in seeing the entire picture of which a Supreme Court opinion in a landmark administrative law case is only a part; to the practitioner—government and private—sentenced to test his wings in a hearing at a regulatory agency; and to the applicants, intervenors, and interested public who have so much at stake in this quite serious business of determining (in rate cases) whether the proposed rate is just and reasonable, (in certificate cases) whether issuance of the certificate would serve the public convenience and necessity, and (in comparative cases) the applicant who would best serve the public interest, convenience, and necessity.<sup>36</sup> In the recommended form, the *Manual* could still be informative to the new judge donning his robes with but minimal hearing experience; and it would greatly increase the likelihood that, at all pitstops along the administrative raceway, both the drivers, the mechanics, the officials, and the fans have unimpeded views as to precisely what is going on.<sup>37</sup> If and when such a *Manual* ever comes into existence, your reviewer will neither demand nor expect a lavish award—such as money.<sup>38</sup> A “Merritt” badge will be sufficient.

#### ADDENDUM

##### *The Judge as a Computer*

A prime value of projects such as this *Manual* is that virtually any topic or point therein can serve as a launching pad for lively discussion, debate, and dissent among others in the administrative law arena. Judge Ruhlen, himself, seems to encourage debate in his all-too-brief preface to the *Manual*: “My efforts will be sufficiently rewarded if they stimulate each Judge to devise new procedures and adapt old ones to meet the novel problems that the administrative process continually presents.”<sup>39</sup> A number of Judge Ruhlen’s topics and points “stimulated” your reviewer, and one such “knee-jerking” point will be touched upon in these concluding paragraphs.<sup>40</sup>

---

36. One former federal official once privately and uncharitably paraphrased the comparative test as “the determination of just which cheese stands alone.”

37. Prior to any such undertaking by Judge Ruhlen—to forestall a second essential misuse of his remarkable talents—the law schools, the private law firms, the bar associations, the government hearing units, and the interested public should be queried as to the sufficiency of presently-available information sources and training aids, and whether an enlarged and recast *Manual* would fulfill a needed requirement.

38. But see note 27 *supra*.

39. MANUAL X.

40. Other topics which, in themselves, could serve as bases for extensive law review articles are discovery, interlocutory appeals, and oral decisions.

In his discussion of "The Decisional Process," Judge Ruhlen states:

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. It is the Judge's duty to decide all cases in accordance with agency policy. Even when court decisions (other than those of the Supreme Court) have found the agency's position to be erroneous, he is bound to apply the agency view if the agency has authoritatively declared its nonacquiescence in the decisions.<sup>41</sup>

If one strains a bit, one can spell out from the foregoing the proposition that Administrative Law Judges should function as mere "computers" into which evidentiary presentations and agency precedents are to be plugged, to the end of mechanically cementing and continuing those precedents, irrespective of the judge's considered view of the matters at hand. With similar exertion, one can reach the same proposition from so much of Chief Judge Zwerdling's monograph as counsels that an Administrative Law Judge "is governed, as in the case of any trial court, by the applicable and controlling precedents."<sup>42</sup> There are, of course, "low-profile" and "don't-make-waves" Administrative Law Judges who would categorically subscribe to the view that it is not within their ambits to suggest to their agencies that a precedent of long standing should be changed or that it should at least be looked at anew in the light of a new day.<sup>43</sup> Perhaps your reviewer is not long enough away from years in "policy" positions, and too few years behind the gavel. He believes, however, that in the changed (and outrageously

---

41. MANUAL 66-67 (footnote omitted). For present purposes, it is convenient to ignore that Judge Ruhlen finishes the quoted paragraph as follows: "However, if the parties have introduced evidence or arguments, not previously considered by the agency which tend to show that established policy should be changed, the Judge should consider such contentions and if he is convinced he should so find." *Id.* (footnote omitted).

42. Zwerdling, *supra* note 12, at 12. Like Judge Ruhlen, Chief Judge Zwerdling allows "breathing room" by going on to temper as follows:

Commonly, with respect to a substantial portion of the controverted issues which must be resolved in a contested case, the situation is one in which it cannot be said that there are clearly and admittedly controlling and binding precedents which are admittedly dispositive. *Id.* at 12-13.

43. It is emphasized that neither Judge Ruhlen nor Chief Judge Zwerdling should be regarded as of the above descriptions. Beyond what has been quoted at note 41 *supra*, Judge Ruhlen counsels (in part) as follows:

The whole purpose of the Judge's decision is to give the agency the benefit of his judgment after a proceeding specifically designed to elicit the truth of the matter; nothing whatever is gained if he seeks to set before the agency members instead only a mirror of their own thoughts, no matter how obtained. MANUAL 67.

In addition, Chief Judge Zwerdling stresses: "The importance of the administrative law judge's genuine independence and objectivity cannot be exaggerated. It is fair to say that it is one of the important keystones of the parties' confidence in the basic fairness of administrative proceedings." Zwerdling, *supra* note 12, at 13.

fictionalized) circumstances hypothesized below,<sup>44</sup> he would still feel it entirely proper to seek to persuade as follows:

207. Under the "attitude" issue herein,<sup>102</sup> the record shows that C.B. Esser, president of and 56% stockholder in Videoactive Corp., keeps his wife locked in a closet on days when the community's boutiques are conducting clearance sales. Staff cites as dispositive here A.B. and N.B. Sears, 143 F.C.C.3d 812 (1979), wherein the principal partner's mode of restraint on his mate in similar circumstances was to chain her to the washing machine. The Commission reasons (*id.* at 1027) as follows:

Given his admitted attitude toward his spouse's spending habits, it is entirely conceivable that Mr. N.B. Sears might soon do her in completely, and dispose of the body—say, in a freshly-poured footing for the proposed antenna tower. Quite obviously, this could materially weaken the structure, which might ultimately collapse in the middle of, *e.g.*, the promising "Name That Bird" program, with a consequence that thousands of children among the viewers would be driven to their homework, if not to the "Sex and Violence Hour" on the community's other channel.

208. The Presiding Judge believes, however, that the *Sears* case should no longer be viewed as controlling. First, it may be observed that the cited case was decided by the Commission by a 5-2 vote; and that two Commissioners subscribing to the majority view were women who are no longer with the Commission. Second, and even more persuasive, the recent creation of the Federal Inflation Board reflects a current national policy against indiscriminate spending by housewives. Thus, while ultimate possibilities and consequences of the type feared by the Commission in the *Sears* case are present in the instant case with respect to Mr. Esser, it is believed that, on balance, they are outweighed by his demonstrated farsightedness in terms of national economic objectives.

---

102. The "attitude" issue was one of 34 character issues added to the proceeding by the Review Board in its order herein of July 30, 1982 (212 F.C.C.3d 482), and it reads, in full, as follows:

To determine C.B. Esser's total attitude toward his wife, and to determine, in the light of the evidence adduced with respect thereto, whether Videoactive possesses the requisite character qualifications to be a licensee of this Commission.

In the normal scheme of things, the Review Board and the Commission would ultimately again have the basic question before them, and each would be free to accept or to reject the recommended change of policy. Furthermore, although it is true that—with the presiding judge merely

---

44. The fiction does, of course, facilitate some good fun with old friends at the FCC.

reporting Videoactive's pertinent arguments and mechanically following the *Sears* case—the basic question would also reach the higher authorities, those authorities would be without the independent views of the presiding judge—charged with the same duties as they are to seek to advance the public interest and to contribute to the continued evolution of this still young field of Administrative Law. Were Administrative Law Judges generally to subscribe to approaches significantly meeker than that reflected above, the Civil Service Commission's actions of more than a decade ago,<sup>45</sup> adopting the present high qualifications standards for Administrative Law Judges, will have proved to be meaningless and unproductive actions; and the entire corps of Administrative Law Judges will have lost a large measure of the added respect which dedicated jurists, such as Chief Judge Zwerdling and Judge Ruhlen, have created for it.

---

45. See note 26 *supra* and text accompanying notes 29-31 *supra*.