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 COMPTROLLER GENERAL OF THE UNITED STATES  
 WASHINGTON, D.C. 20548

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July 18, 1978

*Relieved  
 Note  
 2/11/78*

The Honorable Alvin Baldus  
 Chairman, Subcommittee on Energy,  
 Environment, Safety and Research  
 Committee on Small Business  
 House of Representatives



Dear Mr. Chairman:

In response to a recommendation in your Subcommittee's report, "Impact of the Administration of the Occupational Safety and Health Act on Small Business," we have reviewed certain aspects of the Occupational Safety and Health Review Commission.

As agreed with your office, because we were also making a broad review of administrative law judges in a number of agencies, including the Commission, we limited our work to the effects of Rule 91a (29 CFP 2200.91a) on small employers. This rule specified that, effective January 3, 1977, a petition for discretionary review of a Commission administrative law judge's decision shall be filed only upon one or more of the following grounds:

- (1) A finding of material fact is not supported by a preponderance of the evidence.
- (2) The decision is contrary to law or to the Commission's duly promulgated rules or decisions.
- (3) A substantial question of law, abuse of discretion, or policy is involved.
- (4) A prejudicial error of procedure was committed.

The rule also required that each issue be separately numbered, plainly and concisely stated, and supported by citations to the record when applicable.

On February 3, 1978, the Commission eliminated the requirement of citations to the record because of difficulties encountered by parties not represented by attorneys.

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 (20681)

Although in its original form Rule 91a appears to make petitioning a more demanding task, the Commission's recent action should alleviate the difficulty. We do not believe Rule 91a has significantly hurt small businesses because

--employers generally did not petition for review either before or after the rule was implemented;

--few petitions for review were denied after implementation; and

--Commission review usually did not change the employer's status.

These matters are detailed below.

EMPLOYERS DO NOT PETITION  
IN MOST CASES

The Commission gave us a computer list of cases that the Commissioners had directed for review as of December 29, 1977. The list generally excluded cases completed before June 30, 1977. Since the Commission took an average of more than a year to review a judge's decision, the list should have included most cases directed for review in 1977. For 1976, it was probably less complete.

There were no petitions for most cases directed for review. For 1976, the list showed 450 cases directed, of which 104 and 95 had been petitioned by employers and the Department of Labor, respectively. For 1977, the list showed 276 cases directed, of which 74 and 59 had been petitioned by employers and the Department of Labor, respectively.

A Labor official believed that there were fewer petitions in 1977 because (1) fewer OSHA inspections had been made and fewer cases had been heard by judges and (2) the law had become more established and the judges more experienced, resulting in fewer issues to appeal.

FEW PETITIONS ARE DENIED

A Commission list showed that 34 petitions for review were denied in 1977. For eight cases, the files either were in use or had been packed for shipment to storage. Of the 26 cases for which files were available, 6 had been directed for review or settled before a hearing. The 20 denied cases had all been petitioned by employers.

The 20 cases involved 19 employers. Of these, six employed 20 or fewer people, five employed between 21 and 99, six

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employed over 100, and for two we could not determine the number of employees. The 20 cases involved 35 violations. The administrative law judges vacated 5 violations, decreased 11 fines, and increased 1 fine (from \$35 to \$50).

COMMISSION DECISIONS USUALLY  
AFFIRM JUDGES' DECISIONS

Commission statistics for 1976 show that, in 79 percent of the cases, the administrative law judge either vacated some or all of the Secretary's citations or reduced or eliminated the proposed penalties. The statistics also show that employers benefited similarly in 75.5 percent of the cases that went before the Review Commission.

However, the latter figure represents the difference between what the Secretary of Labor proposed and the final outcome of the case, not the difference between what the administrative law judge and the Commission decided. We reviewed 66 Review Commission decisions--40 made in 1976 and 26 made in 1977--to determine how the Commission's decisions differed from those of the judges. The Commission remanded eight cases and decided not to review two cases. The disposition of the other 56 cases is shown below.

Results of Commission Review  
of Judges' Decisions

<u>Commission action</u>	<u>Number of cases</u>
Affirmed decision, including penalty	33
Affirmed decision but:	
Reduced penalty	4
Changed penalty (note a)	1
Reversed decision and:	
Vacated	1
Cited without penalty	1
Cited with penalty	5
Mixed decision--for example, part affirmed and part reversed	<u>11</u>
Total	<u>56</u>

a/The penalty was changed to correct an inconsistency between the penalties shown in the judge's report and those shown in the judge's order.

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As shown above, in most cases the Commission affirmed the judges' decisions, although in four cases the penalty was reduced. However, the Commission reversed the judges and imposed penalties in five cases.

Thus, Commission review generally did not change the employer's status. When the status did change, employers were hurt about as often as they benefited.

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Our report "Administrative Law Process: Fetter Management Is Needed" (FPCD-78-25, May 15, 1978) already provided to your Subcommittee, makes a number of recommendations for improving the administrative law process at the Commission and other Federal agencies.

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We discussed our findings with officials of the Occupational Safety and Health Review Commission and considered their views in this report.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the issue date. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,



Comptroller General  
of the United States