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## Performance management by culture in the NLRB's division of judges and the German labor courts of Appeal

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Institute of Labour Law and  
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IAAEG Discussion Paper Series

**Performance Management by Culture  
in the NLRB's Division of Judges and  
the German Labor Courts of Appeal**

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No. 2002/05

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## Abstract

Professional judges receive a fixed salary and are largely exempt from disciplinary sanctions. How can performance still be secured? Judges share a culture consisting of work-related norms and values, derive status from their standing within the professional community, and are susceptible to peer review. Hence, performance can be managed by maintaining and directing culture. This is illustrated in a case study on the administrative law judges at the U.S. National Labor Relations Board and the judges at the German labor courts of appeal. In both judiciaries, administrative tasks such as personnel selection are delegated to peers, candidates with known norms and values are recruited, and a quantitative benchmarking appeals to judges' norms and values. In sum, performance management relies in each case on professional culture although the two communities of judges belong to differing national cultures and are governed by differing administrative rules.

Keywords: performance management, organizational culture, labor judiciaries

JEL-Classification: J45, M12, K49

# Performance Management by Culture in the NLRB's Division of Judges and the German Labor Courts of Appeal

Martin Schneider\*

## 1 Introduction

“No carrots, no sticks”: This is how Edward B. Miller (1980), former chairman of the National Labor Relations Board (NLRB), summarizes the employment system operating on the NLRB's administrative law judges. Like other employees in public administration, judges are afforded employment security and receive a fixed salary unrelated to performance. Does the absence of overt incentives cause inefficiency? And if not, how do public agencies achieve performance when monetary rewards and disciplinary sanctions are unfeasible? The literature dealing with these questions frequently suggests as answers: professionalism, sense of mission, or culture (e.g. Wilson 1989; Simon 1998; Rainey/Steinbauer 1999).

This paper adds to the literature by comparing attempts to manage performance within two judiciaries: the U.S. NLRB's division of judges and German labor courts of appeal (*Landesarbeitsgerichte*). In both judiciaries, experienced judges are granted a high degree of professional autonomy in adjudicating labor cases: For the sake of judicial independence, judges are tenured and receive a fixed pay. Exemption from overt incentives potentially leads to moral hazard among professional judges. At the same time, professionalism endows judges with a strong common culture. Therefore, performance can be managed by maintaining and directing culture. Observed practices to manage performance in the two judiciaries indeed resort to culture, and the practices are very similar in the two cases, although national culture and institutional background differ.

The case study findings rely on information gained from document analysis and interviews. The most important sources of information were interviews with two presidents and one vice-president of labor courts of appeal in Germany, and interviews with the chief administrative law judge, one associate chief administrative law judge, and two administrative law judges in the NLRB. The German interviews were conducted in 2000, the U.S. interviews in 2001.

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The paper is organized as follows: Section 2 lays out the institutional background in each country and characterizes the judges' task as a professional job: complex, with high skill demands, and performed in autonomy (Mintzberg 1979: 348ff.). These features create moral hazard among judges, but drawing on professional norms and values can alleviate moral hazard. Section 3 casts this idea from the perspective of organizational culture (in particular O'Reilly/Chatman 1996), and section 4 interprets the observed practices of performance management in both judiciaries as attempts to influence culture. The concluding section 5 shortly remarks on how administrative rules could be improved to render performance management for judges more effective.

## **2 Institutional Background: The Professional Job of Labor Judges in the U.S. and Germany**

The NLRB is the U.S. Federal agency that administers the National Labor Relations Act. It conducts representation elections in plants and seeks to prevent and remedy so-called unfair labor practice cases, that is, unlawful actions of employers, employees, or unions in dealing with each other. The NLRB has two components: an investigation or prosecution side headed by the General Counsel and an adjudication side headed by a five-member Board. On the adjudication side, the Board employs a corps of administrative law judges, located in Washington, New York, Atlanta, and San Francisco, who hear unfair labor practice cases and recommend decisions to the Board.

Labor and employment law in Germany is administered not by a government agency but by a court system comprising three instances: local labor courts (*Arbeitsgerichte*), labor courts of appeal (*Landesarbeitsgerichte*), and the Federal Labor Court (*Bundesarbeitsgericht*). These form a specialized, independent branch of the judiciary. Its jurisdiction includes almost any legal conflict arising from the employment relationship and is therefore much larger than the NLRB's jurisdiction. Procedures resemble closely the general civil law procedures. Labor cases at all three levels are heard by professional judges.<sup>1</sup> There are 122 local labor courts all over the country, and 17 labor courts of appeal, typically one in each federal state (*Bundesland*).

German labor judges at the second instance, the labor courts of appeal, and the administrative law judges at the NLRB are suitable for comparison for two main reasons: First, they are placed in a similar stage of the legal procedure. Second,

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<sup>1</sup> The panel of German labor courts of appeal actually consists of a professional judge and two lay judges. One of these is nominated by trade unions, the other by employers' organizations. Despite the tribunal-like organization, the professional judges dominate hearings and decision making because of their superior expertise in law.

their job and their incentives are typical for professionals in public administration.

*Judges' job in similar stages of procedure*

The judges are placed in similar stages of the procedure because, in both countries, a large number of cases is filtered out in early stages. As a result, those cases that do proceed to a hearing before an administrative law judge or a labor court of appeal are a similar sample: they contain either strong conflicts between the parties or a hard-to-solve legal problem.

Table 1: The reduction of cases in the main stages of procedure (data for 1999)

<b>NLRB</b>			<b>German Labor Court System</b>		
	Absolute	In percent of closed cases		Absolute	In percent of closed cases
Closed unfair labor practice cases	29,741	100	Closed cases	627,892	100
Administrative Law Judges dispositions	1,083	3.6	Dispositions of labor courts of appeal	28,383	4.5
Decisions	419		Decisions	9,006	
Settlements	646		Settlements	9,291	
Board decisions	580	1.9	Dispositions by the Federal Labor Court	813	0.01

Data based on closed cases in 1999

Source of NLRB data: NLRB Annual Report 1999

Source of German data: *Bundesarbeitsblatt* (2000)

In the U.S., the NLRB's regional offices investigate whether a charge filed by a worker, union, or employer has some merit. If so, they seek informal compliance with the law. Only if these attempts at informal settlement fail does the regional office issue a formal complaint. Then a hearing before an administrative law judge will be scheduled, and further attempts at settlement are made both without and with the judge's help. If necessary, the administrative law judge conducts a formal hearing and issues a finding and remedies. This decision will automatically become the Board's decision unless the parties appeal to the Board. As a result of the filtering process, or the "threshing machine", as Miller (1980: 41ff.) puts it, only an estimated 3.6 percent of cases initially filed reach the administrative law judges (table 1).<sup>2</sup>

<sup>2</sup> These figures are based on closed rather than filed cases and refer to 1999. For a more detailed analysis of the filtering processes in unfair labor practice cases, see Cooke et al. (1995: 238-240).

In the German labor court system, a complaint by a worker, union, works council, or employer is initially filed with a local labor court. Prior to a formal hearing, the parties and the professional judge convene to reach a settlement. Particularly in an unfair dismissal allegation, which is the run-of-the-mill legal dispute, a settlement is reached in the vast majority of cases. Only if a formal hearing is necessary does the labor court issue a finding. Either party can file an appeal, based either on points of law or on points of fact, to the second instance. No obligatory settlement conference is scheduled in the second-instance procedure, but parties can decide to settle during the process and are then liberated from the court fees. As a result of the filtering process, only approximately 4.5 percent of cases initially filed reach the labor courts of appeal (table 1). Hence, in both judiciaries, a comparable filtering of cases is achieved.

### *Judges' task as a professional job*

There is a second reason why the two groups of judges are suitable cases for studying performance management in public administration: The job of both groups of judges are typical for professional jobs performed in public administration. These jobs are distinctive for three related characteristics.<sup>3</sup>

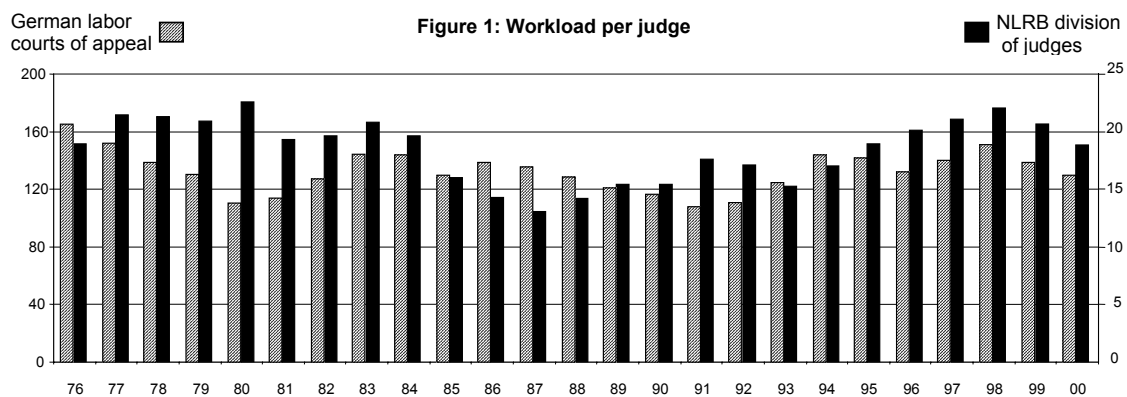
First, a labor judge's *task is complex* and multi-dimensional. The core of the job is to apply a body of law to a particular case. Judges do so by pigeonholing: They extract from the particularities of a dispute those facts that permit to assign the dispute to a particular norm. The relevant norm, in turn, is derived from statute law and case law. In addition to applying the law, judges conduct hearings and write decisions that are subsequently subjected to judicial or agency review. Although judges are adjudicators, they also engage in mediation to reach settlements.<sup>4</sup> Finally, in all these dimensions, a judge's work pace is important: Timeliness of decision-making and a small backlog of cases are emphasized as important goals in both labor judiciaries.

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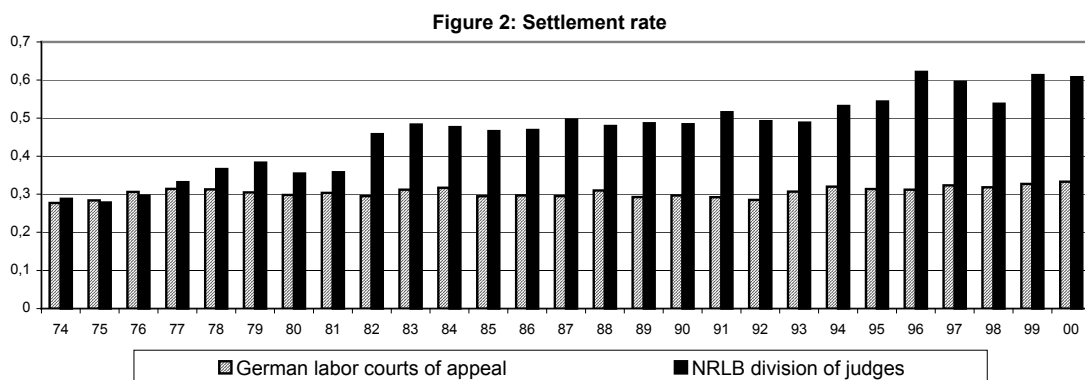
3 In what follows, I use a notion of "professional" that is compatible with Mintzberg (1979: 349ff.), who studies professionals in the organizational context. However, there is not a generally accepted definition of a profession (Matthews 1991: 737). In particular, economic and sociological approaches differ considerably (Roberts/Dietrich 1999).

4 In the NLRB, administrative law judges customarily try to bring about settlements prior to a formal hearing, either in a telephone conference or in a personal conciliation meeting before the hearing. Moreover, in 1995 an additional scheme was introduced, the so-called settlement judge program (Gould 2000: 60ff.): An administrative law judge who will not be the trial judge is assigned to particular cases that are likely to settle and conducts settlement negotiations prior to hearings. In the German labor courts of appeal, attempts at settlement are only implicit. Settlement conferences are held only in the first instance trial. Nevertheless, parties can always decide to settle a case during a trial in order to save court fees, and judges are held to encourage this outcome. Hence, mediation is part of a German judge's task at a labor court of appeal.

In order to convey an impression of the performance in some dimensions of a judge's job, figure 1 through 4 track, for each judiciary, per capita workload, settlement rate, case backlog, and an indicator for timeliness over the past decades. The most striking difference between the U.S. and Germany is the much higher workload of German labor court judges: Per capita workload is sometimes as much as ten times higher for the German judges (figure 1). Presumably, this can be attributed to the strong emphasis in the NLRB on the finding of facts and the weighing of evidence. This, in turn, may be explained by the traditionally antagonistic relationship between employers and unions. Figure 2 reveals a marked increase over time of administrative law judges' settlement rate. This reflects the stronger emphasis within the division of judges on alternative dispute resolution.

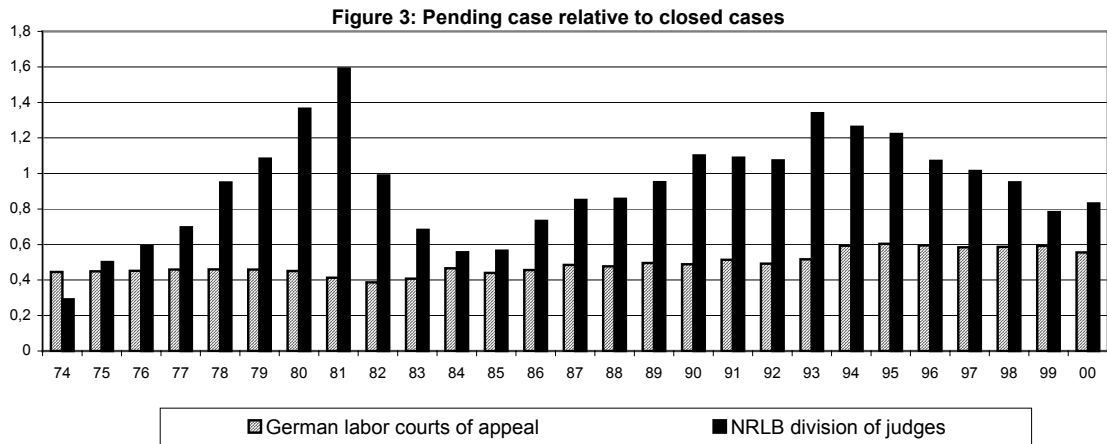


Sources: Productivity figures provided by the NLRB division of judges and by the Bavarian ministry for labor and social affairs; own calculations

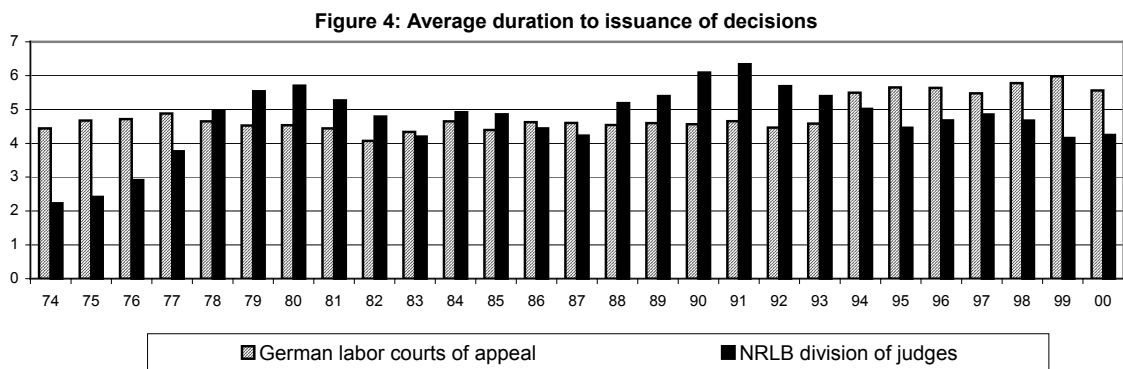


Sources: see figure 1





Sources: see figure 1



Sources: see figure 1

A second characteristic of professionalism follows from task complexity: Judges must hold *considerable skills*. These are acquired at a law school and then during the first years on the job. The on-the-job component of a judge's training is crucial because some of the necessary skills are tacit, i.e. it cannot be communicated (Posner 1990: 108-112). When beginning their office, administrative law judges and judges at the labor courts of appeal hold comparable experience. In both judiciaries, the starting age of the average judge is 44 years, with an almost identical range from 34 to 61 in the NLRB and 32 to 61 at the labor courts of appeal.<sup>5</sup> To become an administrative law judge, lawyers must pass a formalized selection procedure administered for all government agencies by the Office of Personnel Management (OPM). Applicants must be attorneys and must have several years of specified trial experience. Judges at the labor courts of appeal must already be a tenured professional judge and are usually promoted from the local labor courts of the same federal state. This implies that beginners at the labor courts of appeal

<sup>5</sup> These figures are calculated from personnel records for all judges employed at the NLRB in the period 1995 to 2000 and employed at the labor courts of appeal from 1980 to 1996.

must hold at the very least three to five years of tenure as a judge on probation and then as tenured judge.

A third characteristic of professionalism is judges' *autonomy* in performing their job. Task complexity implies that judges are hard to control and therefore independent in practice. Moreover, a strong sense of autonomy is part of judges' professional ethics acquired in the long training period, and this sense of autonomy is confirmed through law by the principle of judicial independence: Judges are supposed to be able to find their decision in an impartial way and free from outside interference. For this reason, it is found appropriate to exempt judges from some incentives and sanctions common to other employees. In the U.S., the 1946 Administrative Procedure Act seeks to protect administrative law judges from influences by the agency. As a result, judges are tenured and may be disciplined or removed only for "good cause" established by another agency, the Merit System Protection Board. Judges' pay is set by statute and OPM regulations, and it depends only on position, location, and tenure, but not on performance. Moreover, administrative law judges are exempt from any performance appraisal (Administrative Conference 1992; Gellhorn/Levin 1990: 274ff.).

In Germany, similarly, the pay that judges at the labor courts of appeal receive is regulated by statute law. In analogy to public servants' salaries, pay levels are strictly tied to the office, they depend on family status, but are unaffected by age, tenure, or location.<sup>6</sup> Judges are afforded the status of civil servants and therefore employed for lifetime. Unlike U.S. administrative law judges, performance appraisals are not in principle considered as inappropriate. First-instance labor judges are evaluated regularly, and their promotion is influenced by these evaluations. Judges at the labor courts of appeal, however, are not evaluated on a regular basis.

Overall, in both cases, administrative rules protect judges from outside interference and grant them an outstanding degree of autonomy. Therefore, the two cases are appropriate for studying performance management of professionals in the absence of obvious incentives and sanctions.

### **3 The Idea: Maintaining and Directing Culture in a Professional Community**

Since professional work is complex, skilled, and performed in autonomy, it gives rise to moral hazard, that is, the risk that professionals perform their job in a way that is not conducive to the agency's goal (Wilson 1989: 155; Dewatripont/Jewitt/Tirole 1999). For instance, administrative law judges could expend

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<sup>6</sup> In the first instance, however, pay rises with age.

overly large resources on evaluating the evidence whereas the agency may prefer a swift issuance of decisions. Because monetary rewards and disciplinary sanctions are unfeasible to alleviate moral hazard, performance must be managed instead in more covert ways.

In essence, the performance of judges is managed by maintaining and directing a “sense of mission”, that is, a strong organizational culture. It consists of a set of values and norms “that is widely shared and strongly held throughout the organization” (O’Reilly/Chatman 1996: 166; see also Wilson 1989: 95). “Values” refer to the priorities of an organization, for instance its overall objective, whereas “norms” specify expected behaviors on the job. For example, a key value in labor judiciaries may be the promotion of more constructive union-employer relations. This may invoke a norm according to which judges should try to help parties to settle. If judges embrace the judiciary’s culture, they are likely to put effort into promoting its goals, and this likely leads to increased performance.

Organizational culture is supposedly strong among judges because these share the same professional background and can be understood as a “professional community”: “a group of people who consider themselves to be engaged in the same sort of work; who identify (more or less positively) with their work; who share a set of values, norms, and perspectives that apply to, but extend beyond, work related matters; and whose social relationships meld the realms of work and leisure” (Van Maanen/Barley 1984: 294f.). In such communities, poor performance may be disciplined as the breach of a norm: It may invoke guilt or shame, and provoke criticism by peers (Kandel/Lazear 1992).

Hence, management by culture predominantly means self-management; it rests on the “power of expertise” (Mintzberg 1979: 351). For example, a textbook on administrative law acknowledges that “only the powers of persuasion – and, perhaps, the benefits of peer pressure and professional education – are available” in directing the performance of administrative law judges (Gellhorn et al. 1987: 868).

Self-management does not imply, however, that the agents who are in charge of supervising judges completely renounce performance management. They engage in performance management indirectly: by influencing organizational culture. First, they seek to *maintain culture* by hiring members with “good agent character” (Cooter/Eisenberg 2000). These are judges or other lawyers who hold norms and values that are identical to or compatible with those of incumbents. Second, they try to *direct culture*, that is, to shape the values and norms that judges hold. This is most obvious when new judges are “socialized” into the organization. But culture is incessantly changed by symbolic management: actions that “that set goals, focus attention, and help people interpret events in ways that emphasize their intrinsic importance” (O’Reilly/Chatman 1996: 172). Practices that reflect such attempts to maintain and direct culture are laid out in the following section.

## 4 Three Similarities in Performance Management

The comparative design permits to generalize from more than one case (Yin 1998: 239-242), for the two groups of labor judges conveniently combine differences and similarities. The administrative law judges and the judges at the labor court of appeal perform similar jobs (see section 2) and can each be considered a professional community. Under these conditions, performance management is likely to rely on the management of culture.

The groups of judges differ, however, in the administrative rules to which they are subjected. For instance, German judges are hired by promoting judges from within the three-instance court system, whereas the NLRB has to apply the centralized selection procedure administered by OPM. Moreover, the two communities are from two different countries and therefore have different national cultures. If the empirical case study reveals similar ways of managing performance – in spite of the differences in administrative rules and national culture – this suggests that organizational culture is important in managing professional communities.

As the analysis reveals, the two judiciaries share three similarities in performance management. In what follows, I spell out these similarities and then interpret them from the proposed perspective of organizational culture.

### *Delegation of administration to peer judges*

In both judiciaries, supervision and therefore performance management are not executed by outside administrators but delegated to peer judges. Supervision of judges at the German labor courts of appeal formally rests with the ministries of labor or of justice at the level of the federal states. According to the German Labor Court Act (*Arbeitsgerichtsgesetz*), however, supervision may be delegated to the president of each labor court of appeal, and this possibility is heavily used. As a result, these presidents, among other things, interview applicants for a vacancy and administer performance data used to benchmark judges' performance (see below). In the NLRB, similarly, such administrative tasks are delegated to the chief administrative law judge in Washington and three associate chief administrative law judges in Atlanta, New York, and San Francisco although supervision formally rests with the chairman of the Board. Hence, it is the chief judges who suggest candidates to fill vacancies and assign cases to judges.

Why do the supervising agencies in both judiciaries entrust important administrative tasks to peer judges and hence give up some control over performance management? After all, this may aggravate moral hazard among judges. Two complementary rationales are plausible.

In a first interpretation, peer review may be employed because it is likely to enhance the acceptance of performance management among judges. Chief judges

and court presidents belong to the professional community and, hence, the primary reference group of judges. Therefore, attempts by court presidents and chief judges to manage performance may be perceived as acts of professional self-management rather than bureaucratic control. It is suggestive that NLRB's chief judges consider themselves as "administrators" not "supervisors". By contrast, attempts by ministries or Board members to manage performance are likely to be felt as an infringement of judicial independence and professional autonomy.

As a second rationale, peer review permits symbolic management actions to shape culture: Since chief judges and court presidents are involved in adjudication themselves, they are able by their work behavior to emphasize certain dimensions of a judge's work and thereby to set performance goals. For instance, an alternative dispute resolution scheme, the "settlement judge program", was introduced in the NLRB's division of judges in 1995: An administrative law judge who will not be the trial judge is assigned to particular cases and conducts settlement negotiations prior to hearings. The program met only mixed support by judges because some were uncomfortable with the role of mediator and wished not to act as settlement judge (Gould 2000: 80). In this situation, the chief administrative law judge himself took over a large number of assignments to settlement negotiations. By doing so, he emphasized the importance of the settlement judge program and focused other judges' attention to the settlement goal.

#### *Internal recruitment of new judges*

In both judiciaries, internal recruitment prevails. As the German Labor Court Act specifies, professional, tenured judges can become judge at a labor court of appeal (Schmidt/Luczak 1994: 229). Hence, there is no formal requirement to be a specialist in labor law. In practice, a vacancy is made known in the respective federal state, and the president of the labor court of appeal suggests a candidate, who is then usually confirmed by the supervising ministry. As a result of this selection procedure, judges are almost exclusively drafted from the local labor courts, the first instance, of the same federal state, and judges already hold considerable experience in labor adjudication.

The hiring of NLRB's administrative law judges must observe the selection procedure administered by the Office of Personnel Management (OPM). Since the mid 1980s, all applicants for a judge's position in any of the federal agencies must go through a centralized competition. Applicants must meet certain requirements, such as years of trial experience as an attorney, must pass three rounds of examinations, and are then ranked into a general register according to a point system that also includes a veterans' preference. From this register, the NLRB can select among the top judges even if lower-ranked judges hold more experience in labor adjudication.

The NLRB has been dissatisfied with this procedure and prefers candidates with experience in labor law. Therefore, the NLRB has hired judges usually by trans-

ferring administrative law judges from other agencies. By doing so, the NLRB does not need to observe competitive hiring and can circumvent OPM procedures. As a result, 68 of the 92 judges who were employed by the NLRB between 1995 to 2000 or some sub-period had worked for the NLRB in their previous career. As in the German judiciary, judges are recruited from within.

Why does internal recruitment prevail in both judiciaries? It might be the result of non-competitive sponsorship. If this were true, internal recruitment would be detrimental to the judiciaries' performance because the average ability of hired judges may suffer. It is unlikely, however, that non-competitive sponsorship is dominant: Among other administrative tasks, the hiring process is largely delegated to chief judges and court presidents. Since these must cooperate with the judges hired subsequently, they have a crucial interest in selecting able judges.

As the proposed theory of culture suggests, internal recruitment may have important advantages that may secure good performance. For one thing, task complexity and professional autonomy imply that a judge's job is hard to control and that moral hazard is a potential problem. In this situation, hiring the right people becomes crucial. By drafting judges from within the NLRB or within the labor court system, management already knows the applicants' quality, in terms of specialized knowledge of labor law, speediness of issuing decisions, and other relevant aspects. Hence, internal recruitment substantially reduces the uncertainty in hiring and makes sure that candidates with "good agent character" (Cooter/Eisenberg 2000) are recruited.

For another thing, judges who are recruited internally have been socialized in the same or very similar organization: the prosecution side of the agency or the first instance of the same labor court system. Hence, these judges already belong to the same professional community, they tend to hold already the values and norms that are important in directing judges' effort and commitment toward the organization's goals. Therefore, by recruiting internally, management can retain a corps of judges who are cohesive in values and norms and can secure widespread agreement to the same norms throughout the professional community.

### *Soft benchmarking*

Chief judges and court presidents use data generated for reporting purposes to maintain a quantitative if soft benchmarking among individual judges and different regions. The labor courts of appeal collect data that are compiled into summary statistics on the work of the courts and are published annually (*Statistik zur Tätigkeit der Landesarbeitsgerichte*). Figures include: the number of new cases, closed cases, pending cases, settlements, and indicators on timeliness. The presidents of the labor courts of appeal, however, use the raw data to publicize within the court the performance of each judge: The court presidents hand out the comparative statistics, including names, to all judges. Hence, they create the "judge of glass" (*"gläserner Richter"*), as one German court president puts it. Further-

more, in 1976, the supervising ministries at state level introduced a comparative statistics at federal state level in order to compare the workload and productivity of courts between the regions (*Bayernstatistik*).

In the NLRB, the chief administrative law judge maintains productivity statistics for judges in order to inform the Board annually on the operation of the division of judges. The annual report contains time-series data at an aggregate level and annual performance figures for individual judges. The indicators include the number of closed hearings, days spent in hearings, settlements, issued decisions, and elapsed days on average between hearing and the issuance of decisions. Although the Board is the receiver of the annual report, chief judges also distribute the report among all judges. Hence, individual performances are exposed to the entire professional community. According to chief judges, the report is also consulted to examine the comparative performance of the four regions.

In private organizations, a quantitative appraisal of comparative performance (benchmarking) is often employed to compute performance-related outcomes such as pay or budget. The employment system governing both judiciaries, however, prohibits low performance to be sanctioned. Hence, practiced benchmarking in both judiciaries is soft: it does not lead to material rewards or penalties for judges.

The perspective of organizational culture provides two rationales why benchmarking, if only soft, may be an effective tool of performance management. First, benchmarking indicates what management, that is, chief judges and court presidents, consider as important dimensions of judicial performance. Psychological goal-theory (Locke/Latham 1990; Klein et al. 1999) has argued that goal-setting can alter behavior because it channels work behavior towards those dimensions of the job that are measured. In order to enhance performance, however, it is crucial that workers commit to the goal. Goal commitment, in turn, is likely to be high among workers who also endorse the organization's key values. In essence, therefore, goal-setting by benchmarking makes sense in the two judiciaries because the professional community has internalized the values that are reflected in the performance figures: a rash resolution of disputes and attempts at settlement.

Second, soft benchmarking may be effective in enhancing performance because it sharpens peer review. At the very least, judges expect each other to cope with their individual workload – “to pull one's own weight”, as one administrative law judge puts it. By measuring comparative performance, it becomes transparent who is able to pull one's own weight, and who is not. Judges usually care about their standing within the professional community; it is the primary reference group for judges. Hence, a consistently bad performance may entail a loss of status within the agency. This prospect may invoke more effort among judges in the first place.

Overall, the three similarities can be interpreted from the perspective of performance management by culture. Whenever supervising agents hold some discretion in delegation, hiring, and performance measurement, they employ it in ways indicating the key role of maintaining and directing culture. Consistent with this finding, the main differences that do exist are dictated by administrative rules.<sup>7</sup>

## 5 Improving Performance Management

The two communities of judges studied here belong to differing national cultures and are subjected to differing administrative rules, yet the logic of performance management by professional culture prevails in both judiciaries. This finding reflects the key traits of professional work in public administration: complex tasks performed in the absence of overt incentives. This finding is in line with the prevalence of culture in controlling professional work in other professional bureaucracies such as universities, hospitals, accounting firms, or law partnerships (Mintzberg 1979). In the professional bureaucracy, self-management, peer review, and reputation are important means of control. Hence, performance management for judges could be improved by changing administrative rules so as to increase self-management, for instance in hiring, case assignment, and performance appraisals.

It is sometimes suggested to introduce monetary incentives to individual judges in order to enhance their effort and performance (e.g. Miller 1980: 70f.). As the case studies show, however, performance is managed within judiciaries much as it is managed in partnerships. But in partnerships, profit sharing substantially enhances the incentives for professionals to review their peers (Kandel/Lazear 1992). Thus, not individual monetary rewards, but collective incentives comparable to profit sharing seem compatible with performance management in courts.

## References

Administrative Conference of the United States (1992): Recommendation 92-7. The Federal Administrative Judiciary. Washington.  
 Bundesarbeitsblatt, various issues.

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<sup>7</sup> For instance, chief judges in the NLRB assign cases in a non-random way because the U.S. Administrative Procedure Act leaves some discretion in case assignment. In the German labor courts of appeal, by contrast, cases are assigned randomly to judges because this is a legal requirement.



- Cooke, William N.; Aneil K. Mishara; Gretchen M. Spreitzer (1995): The Determinants of NLRB Decision-Making Revisited. In: *Industrial and Labour Relations Review* 48(1995): 237-257.
- Cooter, Robert D.; Melvin Eisenberg (2001): Fairness, Character, and Efficiency in Firms. *The Berkeley Law & Economics Working Papers* (2001) No. 1, Article 8. (<http://www.bepress.com/blewp/default/vol2001/iss1/art8>)
- Dewatripont, Mathias; Ian Jewitt; Jean Tirole (1999): The Economics of Career Concerns, Part II: Application to Missions and Accountability of Government Agencies. In: *Review of Economic Studies* 66(1999): 199-217.
- Gellhorn, Ernest; Ronald M. Levin (1990): *Administrative Law and Process in a Nutshell*. 3<sup>rd</sup> ed. St. Paul et al.: West Publishing Company.
- Gould, William B. (2000): *Labored Relations: Law, Politics, and the NLRB. A Memoir*. Cambridge (Mass.) et al.: MIT Press.
- Kandel, Eugene; Edward P. Lazear (1992): Peer Pressure and Partnerships. In: *Journal of Political Economy* 100(1992)4: 801- 817.
- Klein, Howard J. et al. (1999): Goal Commitment and the Goal-Setting Process: Conceptual Clarification and Empirical Synthesis. In: *Journal of Applied Psychology* 84(1999)6: 885-896.
- Locke, Edwin A.; Gary P. Latham; Miriam Erez (1988): The Determinants of Goal Commitment. In: *Academy of Management Review* 13(1988)1: 23-39.
- Matthews, R.C.O. (1991): The Economics of Professional Ethics: Should the Professions be More Like Business? In: *Economic Journal* 101(1991): 737-750.
- Miller, Edward B. (1980): *And Administrative Appraisal of the NLRB*. Revised Edition. Philadelphia: University of Pennsylvania.
- Mintzberg, Henry (1979): *The Structuring of Organizations. A Synthesis of the Research*. Englewood Cliff: Prentice-Hall.
- O'Reilly, Charles A.; Jennifer A. Chatman (1996): Culture as Social Control: Corporations, Cults, and Commitment. In: *Research in Organizational Behavior* 18(1996): 157-200.
- Posner, Richard A. (1990): *The Problems of Jurisprudence*. Cambridge (Mass.), London: Harvard University Press.
- Rainey, Hal G.; Paula Steinbauer (1999): Galloping Elephants: Developing Elements of a Theory of Effective Government Organizations. In: *Journal of Administration Research and Theory* 9(1999): 1-32.
- Roberts, Jennifer; Michael Dietrich (1999): Conceptualizing Professionalism: Why Economics Needs Sociology. In: *American Journal of Economics and Sociology* 58(1999)3. (<http://www.findarticles.com>, 25 July 2002)
- Schmidt, Klaus/Luczak, Stefan (1994): Der Berufsrichter in der Arbeitsgerichtsbarkeit. In: *Die Arbeitsgerichtsbarkeit. Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*. Neuwied et al.: Luchterhand, S. 221-251.
- Simon, Herbert A. (1998): Why Public Administration? In: *Journal of Public Administration Research and Theory* 8(1998): 1-11.
- Van Maanen, John; Stephen R. Barley (1984): Occupational Communities: Culture and Control in Organizations. In: *Research in Organizational Behavior* 6(1984): 287-365.
- Wilson, James Q. (1989): *Bureaucracy. What Government Agencies Do and Why They Do it*. 2<sup>nd</sup> ed. New York: Basic Books.

Yin, Robert K. (1998): The Abridged Version of Case Study Research: Design and Method. In: Leonard Bickman; Debara J. Rog (eds.): Handbook of Applied Social Research Methods. Thousand Oaks et al.: Sage: 229-259.