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Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States

Federal Administrative Law Judges Conference

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Advancing The Judicial Independence And Efficiency Of The Administrative Judiciary

A Report To The President-Elect Of The United States
November 2008
Federal Administrative Law Judges Conference*

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* Reprinted with the permission of the Federal Administrative Law Judges Conference. Authors: (1) Robin J. Arzt, Administrative Law Judge, Social Security Administration, New York Office of Disability Adjudication and Review, B.A. 1975, J.D. 1978, M.B.A. 1985, New York University; (2) David H. Coffman, Administrative Law Judge, Federal Energy Regulatory Commission, B.A. 1964, Southern Methodist University, J.D. 1967, Harvard Law School; and (3) Pamela L. Wood, Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, B.A. 1971, Northwestern University, J.D. 1974, Georgetown University Law Center. Our positions with the Social Security Administration, Federal Energy Regulatory Commission, and U.S. Department of Labor are stated for identification purposes only. This article was written in our private capacity. No official support or endorsement by the Social Security Administration, Federal Energy Regulatory Commission, or U.S. Department of Labor is or should be inferred. The views expressed in this article are ours and do not necessarily represent the views of the Social Security Administration, Federal Energy Regulatory Commission, U.S. Department of Labor, or the United States. We originally drafted the contents of this article as a President-Elect Transition Team Briefing Book entitled “Advancing the Judicial Independence and Efficiency of the Administrative Judiciary,” which was adopted in November 2008 as policy by the Federal Administrative Law Judges Conference (FALJC), a voluntary professional association of federal administrative law judges. The Briefing Book was submitted to then President-Elect Obama’s Transition Team, which posted the report on its website, http://change.gov/open_government/entry/faljc_report_to_the_president_elect/. We acknowledge and have a debt of gratitude to the FALJC officers and Executive Committee members, whose many comments, source materials and suggestions resulted in substantive and editorial improvements in the draft of the Briefing Book. Any errors are those of the authors alone. Comments are welcome at bubobubo@verizon.net.

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I. INTRODUCTION

This report is offered on behalf of the Federal Administrative Law Judges Conference (FALJC), a voluntary professional association of federal administrative law judges, who perform judicial functions within the Executive Branch of the Government. FALJC was organized over 60 years ago for the purpose of improving the administrative judicial process, presenting educational programs to enhance the judicial skills of federal administrative law judges, and representing federal administrative law judges in matters affecting the administrative judiciary. Our membership includes judges from virtually every federal agency that employs administrative law judges. As a result, because of its broad membership base, FALJC is the only independent organization of judges that speaks for the entire administrative judiciary. (Many of our members from the Social Security Administration (SSA) also belong to an affiliate of the AFL-CIO, the Association of Administrative Law Judges.)

We offer these comments to assist you, President-Elect Barack Obama, and your transition team in familiarizing yourselves with issues relating to federal administrative law judges. We hope that you will use our organization as a resource, should issues that involve the administrative judiciary arise in the future.

Federal Administrative Law Judges, also known as "ALJs," derive their powers and judicial independence directly from the Administrative Procedure Act and, as the Supreme Court has recognized, ALJs are the functional equivalent of federal trial judges. ALJs are selected competitively from a register of qualified lawyers currently maintained by the Office of Personnel Management, through a statutorily mandated, merit-based process. Although ALJs are federal employees, they are paid through a system separate from the General Schedule (GS) and Senior Executive Service (SES) and are neither subject to performance evaluations nor eligible for bonuses or other monetary awards. There are over 1,300 ALJs assigned to 31 different agencies, of which the Social Security Administration (SSA) is by far the largest employer. ALJs try cases falling into three broad categories: regulatory cases (economic regulation of rates and services provided by vital industries); entitlement cases (adjudication of claims based upon disability or

death of workers under the Social Security Act and other programs); and enforcement cases (enforcement of statutes and regulations relating to safety and other requirements). For example, judges from the Federal Energy Regulatory Commission conduct hearings to ascertain the fairness and reasonableness of utility rates and practices. In addition, judges from the Department of Agriculture conduct enforcement proceedings under the Animal Welfare Act, and judges from the Department of Labor handle a wide variety of cases that range from adjudicating claims relating to injuries sustained by government contractors in Iraq to hearing "whistleblower" cases premised upon retaliation for reporting securities fraud.¹

II. EXECUTIVE SUMMARY OF RECOMMENDATIONS

ALJs must maintain their judicial independence in order to perform these essential functions in a fair and impartial manner. Such independence is a prerequisite to resolving administrative proceedings in a fair and expeditious manner and to maintaining the litigants' confidence in the fairness and integrity of the judicial process. Nonetheless, we have observed recent efforts to undermine that independence. With those observations in mind, we offer the following recommendations:

1.

(a) **We recommend that you appoint agency heads who will respect, uphold, and enforce the provisions of the Administrative Procedure Act (APA) regarding the federal agency administrative adjudication process.** In recent years, agency heads have been making legislative and administrative efforts to erode (1) the APA requirement that ALJs preside over APA hearings, and (2) the APA provisions that ensure the independence of ALJ decision-making.

(b) **We recommend that you oppose and, if necessary, veto any proposed legislation that would permit individual agencies to circumvent the ALJ hiring process or otherwise compromise ALJ independence.** During the past year, both the International Trade Commission and the Federal Trade Commission have sought

1. FALJC, *Documents Library: List of Agency Chief Administrative Law Judges and Designees* (Oct. 2008), <http://005754d.netsolhost.com/faljc7.html>.

to introduce legislation that would have permitted them to circumvent the ALJ selection process and appoint favored employees within their own agencies. The Commissioner of the SSA has proposed legislation that would permit agencies to discipline ALJs for unproven and ill-defined “offenses,” rather than submit such cases to the Merit System Protection Board for a hearing and decision.

2. We recommend that you transfer the responsibility for oversight of the ALJ program from the Office of Personnel Management (OPM) to a newly created independent agency, the Administrative Law Judge Conference of the United States. In recent years, the OPM has eliminated the office that was responsible for such oversight of the ALJ program, and has taken steps to undermine the independence and caliber of the administrative judiciary. These steps have included administering the ALJ candidate exam process in a manner calculated to exclude many of the most qualified applicants, and advocating ALJ performance standards in violation of the APA. The Conference would achieve the goals of (1) maximizing administrative efficiency, (2) ensuring high standards for ALJ candidates, (3) promoting professionalism, (4) promoting public confidence in ALJs’ judicial independence, and (5) facilitating Congressional oversight.

3. We recommend that you support and sign remedial legislation that would allow ALJs to receive all of their earned pay by removing the cap on ALJ locality payments. This cap prevents senior ALJs from receiving significant portions of the locality payments that are supposed to enable these judges to keep pace with the cost of living in their respective pay localities. Removing the cap on this critical portion of ALJs’ earned pay not only would enable them to keep up with the cost of living, but also would end the compression of ALJ pay.

4. We recommend that you support and sign legislation that would enhance ALJ retirement benefits. A large and increasing number of ALJs are required to work until advanced old age because of the need to provide at least 30 years of federal service to receive

an adequate pension. Improving ALJs' pensions would promote vigor of the ALJ workforce and would reduce agency costs.

In this report, we provide a discussion of the recommendations and the issues related to each of them. We stand ready to provide you with additional information and documentation relating to these or any other matters of interest or concern. Please contact Judge Steven Glazer, FALJC President, at 301-332-9214 or faljc@comcast.net for additional information.

III. RECOMMENDATIONS

A. Preserve and Enforce Administrative Due Process, Including Judicial Independence of Administrative Law Judges

We urge you to appoint agency heads who will respect, uphold, and enforce the provisions of the APA regarding the federal agency administrative adjudication process. In recent years, agency heads have been making legislative and administrative efforts to erode (1) the APA requirement that ALJs preside over APA hearings, and (2) the APA provisions that ensure the independence of ALJ decision-making.

The APA was enacted in 1946 to achieve reasonable uniformity and fairness of the administrative process for members of the American public with claims pending before Executive Branch agencies. The APA includes procedural safeguards that ensure fair and uniform standards for the conduct of adjudicatory proceedings, including the merit appointment of ALJs. The APA protections are intended to ensure that Americans receive full and fair due process administrative hearings before independent ALJs who make decisions based only on the evidence in the hearing record and are made without agency pressure. The APA exists for the protection and benefit of the parties who appear before federal agencies for decisions of administrative claims, not for the benefit of the agencies or the agencies' ALJs.

The APA applies to all federal agency adjudications that are (1) made after an unfavorable agency determination under its regulations, and (2) required by statute to be decided on the record after notice and an opportunity for a hearing. APA ALJs must preside over all adjudicatory proceedings to which the APA applies, unless the

agency itself presides, i.e., part or all of an agency's commission or board.

APA provisions that safeguard ALJ independence from undue agency influence by making ALJs partially independent of their employing agencies include:

- (1) a merit competitive civil service selection process administered by the OPM, rather than by the agencies who employ ALJs, to ensure that ALJs are well qualified, fair, and able to exercise independent judgment in deciding cases without the influence of agency pressure;
- (2) career permanent civil service appointments without a probationary period;
- (3) pay levels that are set by statute and are not based upon performance;
- (4) the requirement of a due process hearing before the Merit Systems Protection Board before an adverse personnel action, such as removal, suspension, reduction in grade, reduction in pay, or a furlough under 31 days, may be taken against an ALJ, which protects APA adjudications from political intrusion by "at will" personnel actions by the President or his appointees against ALJs;
- (5) a separate chain of supervisors for ALJs from those who investigate or prosecute cases for the employing agency, which is a key structural protection of decision maker independence;
- (6) a prohibition of performance evaluations;
- (7) a prohibition of bonus pay and honorary awards for accomplishment in the performance of adjudicatory functions;
- (8) a prohibition of assignment of duties inconsistent with an ALJ's duties as a judge;
- (9) a prohibition of *ex parte* communications with the litigants including agency officials regarding the facts at issue in a case; and
- (10) the assignment of cases by rotation among the ALJs to the extent practicable.

Although the APA permits the enactment of statutes that expressly supersede the APA, it allows only one narrow exception to who may preside over an APA hearing. An agency is permitted to use non-ALJ hearing officers or other employees only when the proposed statute expressly (1) identifies them by a specific job title to conduct specified classes of proceedings, or (2) authorizes the agency

to designate a specific officer or employee, or one of a specific class of officers or employees, to conduct specified classes of proceedings. Congressional legislative history states that the exception is not intended to give agencies a loophole to avoid the use of ALJs, but is intended only to preserve specified statutory hearing officers and, at the same time, ensure the parties of a fair and impartial procedure.

Congress rarely has authorized non-ALJs to preside over APA hearings. For example, during the 1970s, Congress authorized non-ALJs to hear a large backlog of Social Security Act SSI benefit cases, but converted the non-ALJs to ALJ status a few years later.

Several agencies have attempted to side-step the APA safeguards during the last few years, including the Department of Health and Human Services (DHHS), International Trade Commission (ITC), Federal Trade Commission (FTC), and the SSA. These include legislative efforts to use non-ALJs to hear and decide APA cases, and circumvent both the OPM's merit competitive civil service selection process for ALJs and the requirement of an MSPB hearing before certain significant adverse personnel actions may be taken against an ALJ. These efforts are as follows.

First, during 2003, the Centers for Medicare & Medicaid Services (CMS) within the DHHS, which issues the Medicare regulations and initial Medicare case determinations, sought Congressional authority to supervise the Medicare appeals process and used non-ALJs to hear and decide the appeals of CMS' Medicare determinations. This took place when the jurisdiction to hear and decide appeals of Medicare cases was being transferred back to the DHHS from the SSA.

After increased national media attention to the issue, Congress enacted a Medicare jurisdiction transfer statute that expressly requires that (1) Medicare appeals be heard and decided by ALJs appointed pursuant to the APA (as they previously were at SSA), and (2) Medicare ALJs be placed in an administrative office that reports directly to the DHHS Secretary in order to have the highest degree of structural independence of the ALJs as possible within the same agency from the CMS managers and initial decision makers of the Medicare program.²

2. 42 U.S.C. § 1395ff note (2007): transfer of responsibility for Medicare appeals, P.L. 108-173, Title IX, Subtitle D, § 931(a)-(c), 117 Stat. 2396 (Dec. 8, 2003).

Second, during the 110th Congress, the ITC had a provision pending before Congress, section 601 of the Trade Enforcement Act of 2007 (S. 1919) that would allow the ITC to directly hire non-ALJ hearing officers to conduct APA hearings regarding alleged unfair import trade practices under section 337 of the Tariff Act of 1930.³ Since the enactment of the Tariff Act of 1930, the ITC has conducted administrative hearings on the record after notice and an opportunity for a hearing. Upon the APA's enactment in 1946, these adjudications also became APA adjudications, which required ALJs to preside. Since 1975, the Tariff Act expressly has required such hearings to be held in conformity with the APA.

The ITC asked Congress for authority to hire non-ALJs after the OPM turned down the ITC's request that the ITC be allowed to select any ALJ on the candidate register because the ITC wanted ALJs with technical proficiency in intellectual property law. For over 20 years, the OPM has stated that the law prohibits an agency from selecting ALJ register candidates on the basis of agency-related experience, a practice known as "selective certification." Instead, an agency must choose new ALJs under the so-called "Rule of Three," meaning that an agency must choose from the top three judges on the register regardless of their technical qualifications or experience.

The ITC's bill also would provide its non-ALJs with only some of the independence protections that ALJs have under the APA, including: (1) the non-ALJs may be removed from office only for good cause shown upon a hearing conducted on the record the Merit Systems Protection Board; (2) they may not be assigned duties inconsistent with their duties as a judge; (3) there will be no performance evaluations; (4) pay will not be set based upon performance, but will be set by statute the same as for ALJs; and (5) the assignment of cases must be rotated among the decision makers to the extent practicable or as otherwise provided for in the ITC's rules.

The ITC bill left out all of the other ALJ safeguards in the APA that are designed to make ALJs independent in their decision making from the agencies that employ them, including: (1) a separate chain of supervisors from those who investigate or prosecute for the

3. Trade Enforcement Act of 2007, S. 1919, 110th Cong. § 601 (2007).

agency; (2) career permanent civil service appointments without a probationary period; (3) an MSPB hearing before certain adverse personnel actions other than removal may be taken, without which the non-ALJs are vulnerable the same as all other federal employees under part 752 of OPM's regulations; (4) a prohibition of bonus pay and honorary awards; (5) a prohibition of *ex parte* communications with the litigants including agency officials; and (6) hiring through a competitive civil service process administered by the OPM, rather than directly by the employing agency. The ITC directly would hire its non-ALJs.

The ITC's hiring of several ALJs from other agencies during the last year demonstrated that the ITC could hire ALJs with acceptable credentials from other agencies, and without the need to either hire ALJs from the OPM's candidate list or resort to the direct hire of non-ALJs. The ALJs hired by the ITC over the years through the OPM process swiftly have achieved the necessary technical proficiency to decide unfair import trade practices cases.

Third, during the 110th Congress, the FTC had section 4 of the Federal Trade Commission Reauthorization Act of 2008 pending before Congress that would allow the FTC to selectively certify and appoint ALJs who have experience with antitrust or trade regulation litigation and who are familiar with the kinds of economic analysis associated with such litigation.⁴

A single independent agency with exclusive government-wide authority to (1) evaluate and qualify ALJ candidates through a merit civil service process, (2) maintain a certified register of ALJ candidates, (3) certify ALJ candidates from the register to agencies, and (4) approve transfers of ALJs between agencies ensures that ALJs are well qualified, fair, and able to exercise independent judgment in deciding cases without the influence of agency pressure. This vetting process is a vital public protection of the quality of newly hired ALJs that should not be left to the agencies that employ ALJs. However, we also strongly maintain that the OPM no longer should be involved in the evaluation of ALJ candidates or the administration of the ALJ program for the reasons stated in section B below.

4. Federal Trade Commission Reauthorization Act of 2008, S. 2831, 110th Cong. § 4 (2008).

Selective certification casts doubt on the independence of ALJs by allowing agencies to give undue preference to candidates who are or have been employed by those agencies under the guise of “related experience.” Selective certification usurps the OPM ALJ hiring process by lowering the standards of administrative judicial experience and proficiency by letting agencies hire ALJ candidates who have lower overall ratings than other candidates who have gone through the OPM’s exhaustive qualifying and certification process.

We firmly believe that a major strength of the ALJ corps is derived from the diverse professional backgrounds of its members. The experience of the ITC, FTC, and numerous other agencies demonstrates that an otherwise qualified ALJ can acquire the knowledge needed to adjudicate technical issues in relatively short order. ALJs have a long history of effectively evaluating technical evidence, including the testimony of expert witnesses. Selective certification may also circumvent veteran's preference.

Finally, last August, the SSA Commissioner, through the Office of Management & Budget, circulated a draft bill to the agencies that employ ALJs. The bill would amend 5 U.S.C. § 7521 of the APA to allow all agencies, in many instances, to immediately “discipline” ALJs who work for them without a prior finding of good cause established by the Merit Systems Protection Board.⁵

Instances for which discipline would be allowed include whenever an ALJ is (1) indicted or convicted of an imprisonable crime; (2) disbarred or suspended from the practice of law; (3) found by a court or administrative tribunal “to have discriminated against an individual in a protected class, showed disrespect to an individual in a protected class, committed discriminatory physical or verbal conduct against a protected class member, or committed sexual harassment;” or (4) “indicted or convicted of a misdemeanor involving fraud, theft, assault, physical violence, prostitution, solicitation, sexual misconduct, or an offense involving narcotics or is found civilly liable for engaging in one or more of these activities.”

5. FALJC, *Documents Library*: Michael J. Astrue, SSA Comm’r, draft bill, *Civil Service Reform Act Amendments of 2009*, <http://005754d.netsolhost.com/faljc7.html>.

The proposal vaguely calls for “discipline” for certain types of offenses but does not explain what form that “discipline” may take. The proposal’s allowance of an agency to discipline an ALJ for being indicted without a conviction permits agency reprisals when no crime has been proven. Allowing agency action to be based upon a finding of disrespect toward an individual in a protected class permits the possibility of retaliatory complaints by litigants unhappy with case outcomes to be used by agencies for actions against ALJs.

As is stated above, the APA requires a due process hearing before the MSPB before an adverse personnel action, such as removal, suspension, reduction in grade, reduction in pay, or a furlough under 31 days, may be taken against an ALJ. This provision, 5 U.S.C. § 7521, protects APA adjudications from political intrusion by “at will” personnel actions by the President or his appointees against ALJs. The current law allows only three exceptions to the requirement that an agency show good cause before the MSPB before firing or otherwise disciplining an ALJ: a suspension or removal in the interests of national security under 5 U.S.C. § 7532; a reduction-in-force action under 5 U.S.C. § 3502; or any action initiated by the Special Counsel under 5 U.S.C. § 1215 for (1) committing a prohibited personnel practice, (2) violating a law, rule or regulation, or engaging in other conduct that is within the jurisdiction of the Special Counsel under 5 U.S.C. § 1216, or (3) knowingly and willfully violating an MSPB order.⁶

We strongly oppose this proposed legislation. The proposal is an attempt to destroy one of the most important features of the ALJs’ decisional independence in the APA: protection from agency discipline or dismissal without accountability to the MSPB.

We urge you to preserve and enforce the APA, including the judicial independence of ALJs, by not signing the proposed legislation from the ITC, FTC, and SSA, or any similar legislation that is in derogation of the APA.

6. 5 U.S.C. § 7521 (2009).

B. Create an Independent Agency to Assume the OPM's Oversight Responsibilities for the Administrative Law Judges Program

We urge you to transfer the responsibility for the ALJ program from the OPM to a newly created independent agency, the Administrative Law Judge Conference of the United States.

Currently, the responsibility for the testing, merit selection, and appointment of federal administrative law judges, and the maintenance of a register of qualified ALJs, lies with the OPM. However, OPM has failed to adequately service the agencies and judges under its mandate. Beginning in 2003, the OPM systematically has adopted or advocated policies that serve to both undermine the independence of the administrative judiciary and reduce the quality and caliber of ALJs on the register.

In 2003, the OPM eliminated the office that, for many years, was responsible for the testing, selection, and appointment of ALJs by transferring these functions to various OPM divisions without coordination between them. This hampered interaction between the OPM and ALJs. Since then, the OPM has taken the position that ALJs are no different from other federal employees and should be covered by a "pay for performance" system that measures performance by agency (i.e., political) goals. If implemented, OPM's position would result in inappropriate agency influence over the functions performed by ALJs and a consequent lack of independence. Performance reviews of ALJs are prohibited by the APA.

The OPM's elimination of the ALJ office also was accompanied by the OPM's efforts to reduce its own accountability in the ALJ selection process. From 1998 to 2004, agencies generally were unable to hire new judges from the ALJ register because of pending litigation.

The OPM issued its final rule in March 2007, which eliminated OPM Examination Announcement No. 318 regarding the ALJ exam process. In establishing a new exam process, the OPM replaced the criteria for appointment of ALJs with vague criteria in the regulations and removed the requirement for litigation experience from the ALJ announcement. Although in the past, ALJs were required to be senior attorneys with significant trial or appellate experience, the register now includes significant numbers of attorney-writers

currently employed by the Social Security Administration who do not have significant litigation experience.

The OPM's reduction in ALJ candidate qualification criteria has been coupled with the OPM's tactic of keeping the ALJ exam open for brief periods of time, which has made it difficult for private sector attorneys to apply. After the March 2007 final rule went into effect, the ALJ exam was opened once in 2007 for the earlier of either (1) two weeks from the opening date, or (2) the end of the date on which the 1250th completed application was received. The latest vacancy announcement opened on July 30, 2008, and was set to close on either (1) the end of August 13, 2008, or (2) the end of the date on which the 600th completed application was submitted, whichever came first. Not surprisingly, the window of opportunity in both instances closed shortly after the opening dates: five days later in 2007 and only one day later in 2008. Applicants who work zealously to complete the lengthy application and submit it to the OPM before the expiration of the already shortened two-week closing date run the risk of having their applications rejected in favor of those submitted by less qualified but quicker applicants. This system is not only arbitrary and capricious, it is utterly wasteful of applicant resources and discourages many otherwise highly-qualified applicants from even trying to apply. This "race to the mailbox" method devalues the application process, but has been in use ever since the OPM issued its March 2007 final rule.

In sum, the OPM no longer is a proponent of the administrative judiciary. Instead, the OPM, has sought to undermine ALJs independence and downgrade ALJs' level of experience and competence. Further, the OPM has failed to perform the important role of ombudsman for the ALJ program.

To correct these deficiencies, **we advocate the creation of a new independent agency, the Administrative Law Judge Conference of the United States, which would be responsible for the functions that the OPM has been performing, or should have been performing**, as proposed by the American Bar Association in 2005⁷ and a bill filed in Congress in 2000.⁸ The Administrative Law Judge

7. ABA House of Delegates Res. No. 106a and Report (August 2005).

8. Administrative Law Judge Conference of the United States Act, H.R. 5177, 106th Cong. (2000).

Conference of the United States specifically would assume all duties with respect to administrative law judges currently mandated to the OPM, including the testing, selection, and appointment of ALJs, the maintenance of an ALJ register, and overseeing the ALJ program. The Conference may also assume additional responsibilities for the purpose of improving the administrative hearing process, including reviewing the rules of procedure and rules of evidence, adopting measures to ensure compliance with ethical standards, and reporting agency compliance with the APA. We believe that, as was stated by the ABA, **the Conference would achieve the following goals: (1) maximizing administrative efficiency; (2) ensuring high standards of ALJ candidates; (3) promoting professionalism; (4) promoting public confidence; and (5) facilitating Congressional oversight.**

C. Allow Administrative Law Judges to Receive All of Their Earned Pay by Removing the Cap on Their Locality Payments

Administrative Law Judges do not receive all of their earned pay.

We urge you to support and sign remedial legislation that would allow ALJs to receive all of their earned pay by removing the cap on ALJ locality-based comparability payments (locality payments). Removing the locality payments cap would end pay compression and permit ALJs' pay to keep pace with the cost of living in their pay localities.

THE ALJ PAY STRUCTURE: The two basic elements of ALJ statutory compensation are basic pay and the locality payments.

There are three levels of basic pay for ALJs: (1) AL-1, for Chief Judges of major agencies; (2) AL-2, for other Chief Judges and all Deputy Chief Judges; and (3) AL-3, for the remaining judges.⁹ The statute prescribes six levels of basic pay for AL-3 judges, ranging from AL-3A to AL-3F. AL-3 judges move from the AL-3A level to the AL-3F level over a period of seven years.¹⁰ ALJ basic pay rates

9. 5 U.S.C. § 5372 (b)(1)(A).

10. 5 U.S.C. § 5372(b)(1)(B).

are various percentages of the pay rate for Executive Level (EL) IV employees.¹¹

Locality payments are additions to basic pay that are calculated as a percentage of basic pay. Locality payments are necessary to provide a federal employee with total pay comparable to that of a non-federal employee who is performing the same level of work in the same pay locality.¹² Locality payments enable federal employees, including ALJs, to keep up with the cost of living in their pay localities.¹³ According to OPM figures, the locality payments for 2008 for the 32 pay localities currently designated range from 13.18% to 32.53% of basic pay.

THE PROBLEM: Unfortunately, ALJ total pay, basic pay plus the locality payments, currently may not exceed the pay rate for EL III.¹⁴ For years, the pay cap has prevented ALJ pay from keeping pace with the cost of living for the majority of ALJs.

The pay cap also serves to compress ALJ pay. The ALJs who have reached the statutory EL III ceiling include: *all* AL-1 and AL-2 judges; AL3-F judges in *27 of the 32* pay localities; *AL3-E* judges in *9 of the 32* pay localities; and even *AL3-D* judges in the San Jose/San Francisco/Oakland pay locality. We estimate that, in 2009, the remaining five of the 32 pay localities will hit the pay ceiling for AL-3Fs, and that six additional localities will run up against the ceiling for AL-3Es.

The compression of ALJ salaries is unfair to the most senior and accomplished ALJs. For example, the Chief ALJ for the Social Security Administration, who currently is responsible for managing over 1,100 ALJs throughout the nation, currently receives the same salary received by relatively junior AL-3D Social Security judges in San Francisco. The application of the pay cap to include locality payments defeats the intent of the ALJ pay statute, which is to reward the most accomplished and senior ALJs by providing them higher basic pay. The pay cap rescinds the higher pay by denying the most accomplished and senior ALJs all but a fraction of their locality adjustment.

11. 5 U.S.C. § 5372(b)(1)(C).

12. 5 U.S.C. §§ 5302(6), 5304.

13. 5 U.S.C. § 5304(h). This statute addresses ALJ locality adjustments.

14. 5 U.S.C. § 5304(g)(2)(A).

The problems from ALJs not receiving all of their earned pay, pay compression and pay levels that do not keep pace with the cost of living, are particularly acute in high-cost areas.

THE REMEDY: Legislation that amends 5 U.S.C. § 5304(g) to exclude ALJ locality payments from the pay cap would permit ALJs to receive all of their earned pay, which would eliminate pay compression and permit ALJs' pay to keep pace with the cost of living. Such an amendment would *not* raise ALJs' basic pay. The amendment would do no more than permit ALJs to receive all of their earned pay by removing the cap on locality payments. A revised 5 U.S.C. § 5304(g) that would exclude ALJ locality payments would read as follows (the amendments are in bold).¹⁵

§5304(g)

(1) Except as provided in paragraphs (2) **and** (3), comparability payments may not be paid at a rate which, when added to the rate of basic pay otherwise payable to the employee involved, would cause the total to exceed the rate of basic pay payable for level IV of the Executive Schedule.

(2) The applicable maximum under this subsection shall be level III of the Executive Schedule for—

(A) positions under subparagraphs (A) **and** (C) of subsection (h)(1);

(B) any positions under subsection (h)(1)(D) which the President may determine.

(3) **This subsection shall not apply to a position under subparagraph (B) of subsection (h)(1).**

FALJC supports the enactment of the Federal Judicial Salary Restoration Act (S. 1638, H.R. 3753), which would remediate the long-standing salary erosion experienced by the Article III judiciary with a salary increase and automatic annual pay adjustments.

D. Enhance Retirement Benefits for Administrative Law Judges

A large and increasing number of ALJs are required to work until advanced old age because of the lack of an adequate pension until at least 30 years of federal service is earned.

15. FALJC, *Documents Library*: draft bill, *Administrative Law Judges Locality Payments Relief Act of 2008*, <http://005754d.netsolhost.com/faljc7.html>.

We urge you to support and sign legislation that would enhance ALJ retirement benefits. Improving ALJs' pensions would promote the vigor of the ALJ workforce and would reduce agency costs.

THE FEDERAL DEFINED PENSION BENEFIT STRUCTURE: Administrative Law Judges currently are covered by the same retirement systems as other federal civilian employees: the Civil Service Retirement System (CSRS) and the Federal Employee Retirement System (FERS).

CSRS allows for an immediate full annuity under three circumstances that are applicable to all employees, including ALJs: (1) upon reaching age 55 and completing 30 years of service;¹⁶ (2) upon reaching age 60 and completing 20 years of service;¹⁷ and (3) upon reaching age 62 and completing 5 years of service.¹⁸

A federal civilian employee enrolled in CSRS who retires will receive an annuity that is calculated as follows: $(.015 \text{ or } 1.5\%) \times (\text{first 5 years of service}) \times (\text{average pay}) + (.0175 \text{ or } 1.75\%) \times (\text{next 5 years of service}) \times (\text{average pay}) + (.02 \text{ or } 2\%) \times (\text{all years and months of service over 10 years}) \times (\text{average pay})$. 5 U.S.C. § 8339(a). For example, **a CSRS employee with a 30 year career would receive a pension equal to 56.25% of average pay.** "Average pay" is the largest annual rate resulting from averaging an employee's or Member's rates of basic pay, including locality pay, that were in effect over any 3 consecutive years of federal service.¹⁹

The newer FERS allows for an immediate full annuity upon retirement under three circumstances that are applicable to all employees, including ALJs: (1) upon reaching the Minimum Retirement Age specified in 5 U.S.C. § 8412(h), which ranges from 55 to 57 depending on one's birth date, and completing 30 years of service;²⁰ (2) upon reaching age 60 and completing 20 years of

16. 5 U.S.C. § 8336(a).

17. 5 U.S.C. § 8336(b).

18. 5 U.S.C. § 8336(f).

19. 5 U.S.C. §§ 8331(4), 8401(3).

20. 5 U.S.C. § 8412(a).

service;²¹ and (3) upon reaching age 62 and completing 5 years of service.²²

A federal civilian employee enrolled in FERS who retires will receive an annuity that is calculated as follows: (.01 or 1%) x (all years of service) x (average pay).²³ If a FERS employee retires at or over age 62 with at least 20 years of countable federal service, the employee's annuity is calculated as follows: (.011 or 1.1%) x (all years of service) x (average pay).²⁴ For example, a **FERS employee with a 30 year career would receive a pension equal to only 30% of average pay or, if the employee retires at or over age 62, 33% of average pay.**

THE PROBLEM: The lack of an adequate pension benefit until at least 30 years of federal service is earned is causing a large and increasing number of ALJs to work into advanced old age because:

- (1) they cannot afford a markedly lower standard of living for themselves and their families;
- (2) they are attempting to increase the value of the survivor's pension to which their spouses would be entitled;
- (3) an increasing majority of ALJs are in the FERS, which provides a much smaller pension than the older CSRS;
- (4) an increasing number of ALJs are not career federal employees and enter federal service later in their careers; and
- (5) they cannot otherwise accrue a sufficient number of years of service to be entitled to a pension equal to a percent of average pay that is average for other retiring federal civilian employees.

Based upon the OPM statistics, the average age at voluntary retirement of federal civilian employees gradually has fallen as the length of service gradually has risen. Contrary to the trend in the federal civilian workforce, the average age at voluntary retirement for ALJs is rising as the average length of service at retirement is gradually declining. At retirement, the average ALJ is eight to ten years older than the average federal civilian employee. However, **the averages do not tell the whole story of the advanced ages till**

21. 5 U.S.C. § 8412(b).

22. 5 U.S.C. § 8412(c).

23. 5 U.S.C. § 8415(a).

24. 5 U.S.C. §§8415(a), 8415(g).

which many ALJs must work to acquire the 30 years of federal service that is average for the federal civilian workforce.

Although the contribution of the more senior members of the ALJ corps to federal administrative adjudication is of high caliber, **over 25% of the currently employed ALJs will have to work until or past age 75 to achieve a federal pension based on 30 years of federal service.** This is more than double the 12% of ALJs who retired during 1995-1999 at age 75 or above. **Another 25% of the currently employed ALJs will have to work until ages 70-74 to achieve 30 years of federal service.** SSA ALJs, who are over 80% of the ALJ work force, have an average of nearly a decade less of federal service accrued by any given age than the average federal civilian employee. Although **about half of ALJs will have to work until or past age 70 to achieve an average federal pension,** federal employees at or over the age of 70 are unusual. Federal employees over the age of 75 are rare.

THE REMEDY: Legislation that would increase the rate of pension benefit accrual will result in (1) a normal rate of turnover from timely retirements by ALJs before they reach advanced old age, and (2) a dignified retirement at reasonable ages for virtually all ALJs. An enhanced pension benefit would serve as an incentive for ALJs to retire earlier by taking years off the length of time it takes ALJs' pensions to reach the percent of average pay that is average for civilian federal employee pensions.

An enhanced pension benefit would serve as an incentive to ALJs to retire sooner by taking years off the length of time it takes ALJs' pensions to reach the percent of average pay that is average for civilian federal employee pensions.

The resulting reduction of the average age at retirement of ALJs also will reduce the ALJ payroll, since younger ALJs often have not yet reached the top of the seven-year pay-step ladder. Once an ALJ retires, the agencies no longer are paying the ALJ's compensation and the ALJ's pension is paid by the CSRS and FERS Retirement Fund, which is administered by the OPM.

Therefore, **improving ALJs' pensions would promote the vigor of the ALJ workforce for the benefit of the American public and would reduce agency costs.**

All of the employee groups who have received a CSRS and FERS annuity enhancement receive the same increased annual pension benefit accrual rate as the Members of Congress and Congressional

staff: 2.5% in CSRS and 1.7% in FERS. The enhanced groups include many federal law enforcement employees and, in CSRS, four groups of federal judicial officers: (1) U.S. Bankruptcy Judges; (2) U.S. Magistrates; (3) U.S. Court of Federal Claims Judges; and (4) U.S. Court of Appeals for the Armed Forces Judges.

Under the proposed legislation,²⁵ an ALJ who voluntarily retires under a currently existing CSRS or FERS immediate annuity option, and who also has at least 10 years of ALJ service, would receive (1) the entire pension benefit accrued under the currently existing CSRS and/or FERS annuity rules, but with (2) an increased pension accrual rate of 2.5% per year in CSRS or 1.7% in FERS of the ALJs' average pay for all years of ALJ service in CSRS and up to 20 years of ALJ service in FERS. Up to five years of countable military service also would be enhanced.

The ALJ pension bill also would provide ALJs with two new immediate annuity options in CSRS and FERS: (1) a full annuity upon separation from service after becoming 60 years of age and completing 10 years of ALJ service; and (2) a reduced annuity upon voluntary early retirement before age 60 and after completing 10 years of ALJ service. An ALJ is not required to meet any of the currently existing CSRS or FERS immediate annuity options to be entitled to an ALJ annuity.

The ALJ pension reform bill is a very low cost bill based upon the CBO Cost Estimate for the first version of the bill, H.R. 2316, which was filed in 2003. **Because the CBO does not take payroll savings into account, the reduced ALJ payroll from the acceleration effect of the pension bill on the ALJs' retirement would reduce the cost of the bill to the agencies below the cost that was estimated by the CBO.**

25. Administrative Law Judges Retirement Act of 2008, H.R. 6706, 110th Cong. (2008). The bill needs changes to bring it into line with the provisions for Members of Congress, Congressional staff, and other enhanced groups. However, the annuity accrual rates are the same.

Respectfully submitted,

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