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Administrative Law Judges: An Overview

Vanessa K. Burrows, American Law Division

August 5, 2008

Abstract. Administrative law judges (ALJs) preside at formal adjudicatory and rulemaking proceedings conducted by executive branch agencies. ALJs make decisions in these proceedings, and their administrative determinations must be based on the record of trial-type hearings. An ALJ's function as an independent, impartial trier of fact in agency hearings is comparable to the role of a trial judge presiding over non-jury civil proceedings. Although there are many ALJs working in state government, this report describes the role of federal ALJs, with a specific focus on the mission, responsibilities, and appointment of such ALJs. This report also discusses the differences between ALJs and non-ALJ hearing examiners who conduct administrative adjudication in federal agencies.

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CRS Report for Congress

Administrative Law Judges: An Overview

August 5, 2008

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Prepared for Members and
Committees of Congress

Administrative Law Judges: An Overview

Summary

Administrative law judges (ALJs) preside at formal adjudicatory and rulemaking proceedings conducted by executive branch agencies. ALJs make decisions in these proceedings, and their administrative determinations must be based on the record of trial-type hearings. An ALJ's function as an independent, impartial trier of fact in agency hearings is comparable to the role of a trial judge presiding over non-jury civil proceedings. Although there are many ALJs working in state government, this report describes the role of federal ALJs, with a specific focus on the mission, responsibilities, and appointment of such ALJs. This report also discusses the differences between ALJs and non-ALJ hearing examiners who conduct administrative adjudication in federal agencies.

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Administrative Law Judges: An Overview

Introduction

The Administrative Procedure Act (APA) was enacted in 1946 to ensure fairness and due process in executive agency actions or proceedings involving rulemaking and adjudications.¹ In pursuit of this goal, the APA created the position of the Administrative Law Judge (ALJ) within the federal government. ALJs were originally called hearing examiners, and the APA established certain protections to preserve the independence of these hearing officers.² Because ALJs are employees of federal agencies, one of the primary goals behind the creation of the position of ALJs was to ensure that such hearing officers are able to conduct trial-like hearings free from agency coercion or influence.

To the extent that the APA or other relevant laws are applicable, parties in agency proceedings are afforded protections that include, among other things, a hearing on the record with an impartial presiding officer.³ The APA provides that when a statute requires an agency adjudication to be determined on the record, an ALJ or the agency head must preside.⁴ The subject matter of the hearing or proceeding varies among the agencies and includes disability determinations as well as licensing, sanctions, and civil penalty determinations.

In general, ALJs have two primary duties in the administrative adjudication process. The first duty is to preside over the taking of evidence at agency hearings and act as the finder of facts in the proceedings. In support of this duty, ALJs are authorized to regulate the course of the hearing, issue subpoenas, rule on offers of proof and receive relevant evidence, take depositions or have depositions taken, hold settlement conferences, rule on procedural requests, question witnesses, and make

¹ 5 U.S.C. §§ 551 et seq.

² In 1978, Congress changed the title “hearing examiners” to “Administrative Law Judges.” P.L. 95-251, 92 Stat. 183 (1978) (amending 5 U.S.C. §§ 554(a)(2), 556(b)(3), 559, 1305, 3344, 4301, 5335, 5362, 7251).

³ The APA excludes certain proceedings, such as those where decisions rest solely on inspections, tests, or elections. 5 U.S.C. § 554(a)(1)-(6). Requirements regarding “on the record” hearings are set forth at 5 U.S.C. §§ 554. The APA provisions that govern hearings, presiding officers, evidence, and the content of decisions are set forth at 5 U.S.C. §§ 556 and 557.

⁴ 5 U.S.C. §§ 554, 556-557. If the agency head presides, his or her decision is a final order, subject to judicial review. However, “[a]gency heads seldom have the time to preside.” Harold Levinson, *The Status of the Administrative Judge*, 38 AM. J. OF COMP. LAW 523, 526 (1990).

findings of fact and conclusions of law.⁵ An ALJ's other main duty is to act as a decisionmaker by making or recommending an initial determination about the resolution of the dispute.⁶ In all of these regards, ALJs, who are executive branch employees, function much like trial judges in the judicial branch.

Hiring and Appointment of ALJs

According to the Office of Personnel Management (OPM), there were approximately 1,400 ALJs assigned to 29 federal agencies as of January 2006.⁷ Of these, the agency that hires by far the most number of ALJs is the Social Security Administration (SSA).⁸ Although the federal agency itself hires its ALJs,⁹ OPM "has been exclusively responsible for the initial examination, certification for selection, and compensation of ALJs."¹⁰ ALJs are selected through a merit selection process that is administered by OPM and advertised on the federal government's job listing site, [<http://usajobs.opm.gov>].¹¹ Under this process, OPM periodically conducts competitive examinations and uses the results of these examinations to rank

⁵ 5 U.S.C. § 556.

⁶ The initial decision of the ALJ becomes the final decision of the agency if it is not appealed by the parties or if the agency itself does not seek to review the case on its own motion. *Id.* at § 557(b). The agency's decision, either adopting the ALJ's decision or reversing it, is administratively final and subject to review in federal court. *Id.* at § 704.

⁷ OPM, Administrative Law Judges (January 9, 2006), [<http://www.usajobs.opm.gov/EI28.asp>]. One article asserts that ALJs have a presence in 31 federal agencies. Marcia Coyle, *Feud Festers Over Administrative Law Judge Bench Openings*, National Law Journal (August 31, 2007), [<http://www.law.com/jsp/article.jsp?id=900005557055>].

⁸ Even though the Social Security Administration (SSA) is the federal agency that employs the largest number of ALJs, the statute that governs the agency does not expressly require the use of ALJs in the administrative process; does not expressly make applicable the adjudication sections of the APA to these hearings; and does not require a hearing "on the record." 42 U.S.C. § 405(b). Nevertheless, SSA has used ALJs for decades, "even though the APA on-the-record hearing requirements may not have required it to do so." PAUL R. VERKUIL ET AL., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, VOLUME II, at 791 (1992) (hereinafter ACUS 1992). The SSA has promulgated regulations that provide persons dissatisfied with the agency's decisions or determinations the opportunity to request a hearing before an ALJ. 20 C.F.R. § 404.929. *See generally* 20 C.F.R. Part 404.

⁹ 5 C.F.R. § 930.201(f).

¹⁰ Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112 (1981). The American Bar Association House of Delegates has adopted a resolution "encourag[ing] Congress to establish The Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of [OPM] with respect to [ALJs] including their testing, selection, and appointment." Recommendation Adopted August 8-9, 2005, [<http://www.abanet.org/leadership/2005/annual/dailyjournal/106a.doc>].

¹¹ 5 U.S.C. § 1302.

applicants for ALJ positions according to their qualifications and skills.¹² Under 5 U.S.C. § 3105, agencies are authorized to appoint as many ALJs as necessary for agency proceedings that are required to be on the record.¹³

The qualification standard for ALJ positions prescribes minimum requirements for ALJ positions.¹⁴ Applicants must be licensed attorneys “authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court,” who have a minimum of seven years of “experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level.”¹⁵ Applicants who meet these minimum qualification standards and pass the examination are then assigned a score and placed on a register of eligible hires.¹⁶ Under the regulations, applicants who receive a passing score are entitled to five to ten preference points if they are veterans.¹⁷ Agencies then select an ALJ from the top three available candidates, taking into account the location of the position, the geographical preference of the candidate, and veterans’ preference rules.¹⁸ Although ALJs are generally hired by specific agencies, they can be transferred or detailed to another agency to hear cases if necessary, and if OPM approves.¹⁹

The preference criterion for veterans led to a long-running lawsuit and caused OPM to temporarily suspend the ALJ hiring process for a period of over four years from 1999 to 2003. The litigation arose out of changes that OPM made in 1996 to the scoring formula that is used to rate and rank potential ALJs. These changes, which did not conform to existing regulations but which OPM approved pursuant to its authority to issue variances from the regulations, resulted in a scoring system that assigned proportionally greater weight to the veteran’s preference than the previous system had, thus giving veterans a significant hiring advantage over non-veterans. As a consequence, non-veteran applicants for ALJ positions sued, claiming that the new scoring formula was unlawful. Although the Merit Systems Protection Board

¹² “Except as otherwise provided in this chapter, each applicant who meets the minimum requirements for entrance to an examination and is rated 70 or more in the examination is eligible for appointment.” 5 C.F.R. § 337.101(a).

¹³ *See also* 5 C.F.R. § 930.201(f)(1).

¹⁴ Examining System and Programs for Specific Positions and Examinations (Miscellaneous), 72 Fed. Reg. 12947, 12952 (March 20, 2007). This qualification standard was issued on April 20, 2007, the day after the effective date of OPM’s March 20, 2007, final regulations that updated the ALJ selection process. *See* Memorandum from Linda M. Springer, Director, OPM, to Chief Human Capital Officers, *Issuance of Final Regulations and Qualification Standard for Administrative Law Judge Program* (April 2, 2007), [http://www.chcoc.opm.gov/transmittal_detail.cfm?ID=829].

¹⁵ OPM, Qualification Standard for Administrative Law Judge Positions, [<http://www.opm.gov/qualifications/alj/alj.asp>].

¹⁶ *Id.*

¹⁷ 5 C.F.R. at § 930.203(e).

¹⁸ OPM, Administrative Law Judges, [<http://www.usajobs.opm.gov/ei28.asp>].

¹⁹ 5 C.F.R. §§ 930.201, 930.204, 930.208.

(MSPB) found that the scoring formula violated OPM regulations and the Veteran's Preference Act and ordered OPM to suspend use of the formula,²⁰ the United States Court of Appeals for the Federal Circuit eventually overturned the MSPB decision, holding that the MSPB did not have jurisdiction to review the Veteran's Preference Act claim and that the new scoring formula did not violate OPM regulations.²¹

As a result of the court decision, OPM resumed use of the 1996 scoring formula in 2003, but the agency did not accept new applications at that time because it planned to hire new ALJs from the pool of available applicants who qualified prior to the lawsuit. OPM had worked to develop a new ALJ examination that would replace the old one. As part of the move to update the ALJ selection process, OPM issued a final rule in 2007 that, among other things, (1) eliminated the detailed regulations describing the ALJ examination process; (2) required an active bar membership or current state license to practice law; (3) disallowed an agency's grant of a monetary or honorary award to an ALJ for any "superior accomplishment," so as to maintain ALJ independence; and (4) revised ALJ pay to allow an agency to reduce an ALJ's pay for good cause after a disciplinary proceeding or based on an ALJ's voluntary request for personal reasons.²² OPM created the pay reduction procedure because it "periodically receives [such] requests from agencies" due to "the [ALJ's] desire for a position of less responsibility."²³

According to OPM, the elimination of the regulations describing the ALJ examination process will provide OPM with the flexibility to adopt, via the online job vacancy announcement on the USAJOBS website, periodic changes in the ALJ examination process. However, the Association of Administrative Law Judges and several ALJs have filed suit against OPM regarding the final rule. The suit alleges that OPM "improper[ly] and unlawful[ly] attempted to amend, indirectly, the [APA]."²⁴ The suit also charges that OPM exceeded its statutory authority in issuing the final rule; that "the final rule is arbitrary, capricious, and ... not rational in light of the record"; and that the rulemaking was defective because "the public was not given notice and an opportunity to comment on studies and surveys relied upon by OPM in promulgating the Final Rule."²⁵ The litigation is ongoing.

The ALJ application process remained closed until OPM issued a vacancy announcement for ALJs on May 4, 2007, which closed after only a few days, after

²⁰ *Azdell v. Office of Pers. Mgmt.*, 87 M.S.P.R. 133 (2000).

²¹ *Meeker v. Merit Sys. Prot. Bd.*, 319 F.3d 1368 (Fed. Cir. 2003), *cert. denied*, *Azdell v. James*, 540 U.S. 1218 (2004).

²² *Examining System and Programs for Specific Positions and Examinations (Miscellaneous)*, 72 Fed. Reg. 12947 (March 20, 2007).

²³ *Id.* at 12952; *see* 5 C.F.R. § 930.205(j).

²⁴ *Association of Administrative Law Judges v. United States Office of Personnel Management*, No. 07-0711 (third amended complaint D.D.C.), at 1.

²⁵ *Id.* at 1-2. The court dismissed, without prejudice, a complaint that the rule is inconsistent with the statute's plain language. *Association of Administrative Law Judges v. United States Office of Personnel Management*, No. 07-0711 (Order, February 7, 2008, D.D.C.).

receiving 1,250 applicants.²⁶ Individuals who remained on the previous ALJ register were required to reapply if they still wished to be considered for an ALJ position.²⁷ The suit by the Association of Administrative Law Judges and individual administrative law judges also claims that attorneys in federal agencies received advance warning of the vacancy announcement's posting.²⁸ On October 30, 2007, OPM announced that it had established a new register for filling open ALJ positions, which was based on the May 2007 vacancy announcement.²⁹ At least one agency has already hired from this register.³⁰ The ALJ register reopened on July 30, 2008. The agency noted that the job announcement would remain open until August 13, 2008, or the receipt of the 600th completed application, and the announcement had already closed to the receipt of applications by August 1, 2008.³¹

Selective Certification. In the past, several agencies used the controversial concept of selective certification “to avoid the restrictions upon their appointment of ALJs.”³² Under selective certification, “an agency, upon a showing of necessity and with the prior approval of OPM, [would be] permitted to appoint specially certified eligibles without regard to their ranking in relation to other eligibles on the register who lack the special certification.”³³

In 1941, prior to the enactment of the APA, the Attorney General's Committee on Administrative Procedure advocated specialization of hearing examiners, the predecessors to ALJs, for efficiency reasons. In 1947, OPM's predecessor, the Civil Service Commission,³⁴ established a system of ranking ALJs that allowed agencies

²⁶ The announcement specified that it would close May 18, 2007, or after the receipt of 1250 applicants. OPM, Administrative Law Judges, [<http://www.usajobs.opm.gov/ei28.asp>].

²⁷ OPM, Administrative Law Judges (January 9, 2006), [<http://www.usajobs.opm.gov/EI28.asp>].

²⁸ Association of Administrative Law Judges v. U.S. Office of Personnel Management, No. 07-0711.

²⁹ Memorandum from Linda M. Springer, Director, OPM, to Chief Human Capital Officers, New Administrative Law Judge Register (October 30, 2007).

³⁰ SSA, Press Release, Social Security Offers Positions to 144 Administrative Law Judges, February 26, 2008, [<http://www.socialsecurity.gov/pressoffice/pr/ALJ-hiringpr.pdf>].

³¹ OPM, Administrative Law Judges (August 1, 2008), [<http://www.usajobs.opm.gov/EI28.asp>].

³² Lubbers, *supra* note 10, at 117.

³³ *Id.* The 1979 version of the OPM Examination Announcement No. 318 discussed “[t]he special qualifications for all agencies utilizing selective certification.” *Id.* at 117 n. 32.

³⁴ According to the OPM website (OPM, Glossary of Terms, [<https://www.opm.gov/glossary>]),

[w]hile the [MSPB] is officially the successor agency to the "old" [CSC], the agency now known as [OPM] is the federal agency that ultimately inherited the responsibilities directed to the Chairman of the [CSC] by President Kennedy's 1961 memorandum pertaining to the oversight and coordination of Federal Executive Boards (FEBs) and Federal Executive Associations (FEAs). [OPM] was created as an independent

(continued...)

to pick from the top three candidates on a register.³⁵ A 1954 report by the President’s Conference on Administrative Procedure “criticized the system of appointments that purported to constrain agency discretion in appointing [ALJs] to the top three on the register, but that, in fact, permitted agencies to escape the full effects of this constraint,” by requesting selective certification, among other methods.³⁶ The President’s Conference wanted agencies to be able to choose from any candidate on the list of eligible hires.³⁷ However, this recommendation “that agencies be free to appoint any person on the qualified list effectively ensured that agencies wishing to appoint persons with specialized knowledge would be free to do so.”³⁸ In 1962, a Civil Service Commission advisory committee on ALJs recommended “allowing individual agencies to require special qualifications for appointment.”³⁹

The same year, however, the Staff Director of the Administrative Conference wrote a report opposing selective certification “on the ground that general capabilities and intelligence were more important than skill in the law and politics of a particular agency.”⁴⁰ This report noted that selective certification led to “undesirable inbreeding,” because agency ALJs who were selectively certified as having met the specific subject matter criteria were most likely to previously have been agency staff attorneys. A later 1969 report confirmed this: In a five-year span, “52 of 66 ALJs appointed by the agencies using selective certification had previously been employed on the staffs of those agencies.”⁴¹ Additionally, according to a 1968 law review article, at that time, “about half of the hiring agencies formally required special subject-matter expertise for selection.”⁴²

From 1973 until a 1984 ALJ examination announcement by OPM, eligible ALJs “with the types of special expertise recognized by the selectively certifying agencies were, in effect, asterisked on the registers, and those agencies were permitted to select from the asterisked eligibles.”⁴³ Many agencies had selective certification — including the Coast Guard, Securities and Exchange Commission, National Labor Relations Board, Federal Communications Commission, Department of Agriculture, Civil Aeronautics Board, Federal Energy Regulatory Commission, Department of

³⁴ (...continued)

establishment by Reorganization Plan Number 2 (5 U.S.C. appended) effective January 1, 1979, pursuant to Executive Order 12107 of December 28, 1978. Many of the functions of the former [CSC] were transferred to this new agency. The duties and authority are specified in the Civil Service Reform Act of 1978 (5 U.S.C. 1101).

³⁵ ACUS 1992, *supra* note 8, at 931.

³⁶ *Id.* at 837.

³⁷ *Id.*

³⁸ *Id.* at 837-38.

³⁹ *Id.* at 933.

⁴⁰ *Id.* at 840.

⁴¹ Lubbers, *supra* note 10, at 118.

⁴² ACUS 1992, *supra* note 8, at 934.

⁴³ *Id.* at 935.

Labor, Interstate Commerce Commission, Social Security Administration (for positions in Puerto Rico), and the Bureau of Alcohol, Tobacco, and Firearms.⁴⁴

In 1984, OPM ended the selective certification procedure in Examination Announcement No. 318. Agencies were no longer allowed to formally require subject-matter expertise. The announcement did not explain the reason for the change, but stated: “Where agencies can justify by job analysis that special qualifications enhance performance on the job, agencies may give priority consideration in filling vacant positions to applicants with special qualifications.”⁴⁵ However, the announcement did not define the meaning of the terms “priority consideration.” From text later in the announcement, it appears to mean that an agency could “give priority consideration” to applicants with agency-specific experience that have the same numerical ranking as ALJs without agency-specific experience. Irrespective of the 1984 announcement, agencies must select from “the highest three eligibles available for appointment on the certificate, taking into consideration veteran preference rules.”⁴⁶

Agencies such as the International Trade Commission have requested that OPM allow them to choose an ALJ candidate from the entire list of eligible hires, based on the candidate’s agency experience and technical qualifications, rather than the candidate’s placement as one of the top three candidates.⁴⁷ The Social Security Administration and others have argued in favor of granting bonus points to candidates who have subject matter experience “to provide such candidates with a reasonable opportunity for selection.”⁴⁸ However, it does not appear that OPM is willing to allow this practice of selective certification again.⁴⁹ Additionally, the American Bar Association has opposed the ITC’s proposal and in the past, one section of the American Bar Association appeared to oppose selective certification.⁵⁰

⁴⁴ Lubbers, *supra* note 10, at 117. The agencies using selective certification obtained 82% of their ALJs using this process, according to a 1974 study. *Id.* at 118.

⁴⁵ OPM, EXAMINATION ANNOUNCEMENT NO. 318 (May 1984), at 8.

⁴⁶ *Id.* at 16; 5 C.F.R. § 332.404; *see also* 5 C.F.R. § 302.201 — Persons entitled to veteran preference.

⁴⁷ *See* S. 1919, Trade Enforcement Act of 2007, § 601.

⁴⁸ Submission for the Record from James R. Hitchcock, Senior Attorney-Advisor and President, Association of Attorney-Advisors, Office of Disability Adjudication and Review, to House Committee on Ways and Means, Subcommittee on Social Security, Hearing on the Hiring of Administrative Law Judges at the Social Security Administration (May 1, 2007), [<http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6088>]; Lubbers, *supra* note 10, at 127.

⁴⁹ *See* Letter from Denise A. Cardman, Acting Director, American Bar Association, Governmental Affairs Office, to The Honorable Max Baucus, Chairman, Senate Committee on Finance, and The Honorable Charles E. Grassley, Ranking Member, Senate Committee on Finance, Re: Opposition to Section 601 of S. 1919, to Permit the ITC to Hire Non-ALJs to Conduct APA Hearings (October 3, 2007), [<http://www.abanet.org/adminlaw/conference/2007/Tabs/Tab4ITC.pdf>].

⁵⁰ “In the 1960s, the ABA’s Section of Administrative Law and Regulatory Practice (continued...)”

ALJ Independence and Performance Evaluations

To insulate ALJs from agency influence, the APA expressly provides that an ALJ may not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”⁵¹ Additionally, 5 U.S.C. § 554(d) provides that, for many types of proceedings, agency employees who are performing investigative or prosecuting functions “may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review ... except as witness or counsel in public proceedings.” A 1937 Committee on Administrative Management report had initially recommended the “separation of adjudicatory functions and personnel from investigative and prosecution personnel in the agencies.”⁵² Additionally, an OPM regulation further emphasizes that employing agencies of ALJs have “[t]he responsibility to ensure the independence of the administrative law judge.”⁵³

However, the APA does not specifically prevent agencies from undertaking performance evaluations of ALJs.⁵⁴ Rather, civil service performance appraisal statutes prohibit an agency from conducting performance evaluations of its ALJs for the purpose of pursuing some action to modify the behavior of its ALJs by adjusting salary, tenure, or the like.⁵⁵ For example, 5 U.S.C. § 4301(2)(D) expressly excludes

⁵⁰ (...continued)

persuaded OPM’s predecessor agency, the Civil Service Commission, to eliminate its ALJ selective certification process.” *See id.*

⁵¹ 5 U.S.C. § 554(d). Prior to the enactment of the APA, “[o]n many occasions, the person used as the hearing examiner was the same person who had conducted the initial investigation and written the initial complaint.” WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW, § 8.06, at 244 (4th ed. 2000). For an example of what investigative functions may encompass, see *Twigger v. Schultz*, 484 F.2d 856 (3d Cir. 1973). In that case, the court analyzed 5 U.S.C. § 554(d) as applied to proceedings involving the revocation of a customhouse broker’s license, although the presiding officer was not an ALJ but another hearing officer permitted by 5 U.S.C. § 556(b):

Thus, although technically the decision to initiate formal revocation or suspension proceedings was made by the Commissioner of Customs, that decision was made as a result of an investigation initiated and reviewed by the District Director and after consideration of his recommendations. This investigating officer presided at the hearing and recommended a decision. And although technically the decision was made by an Assistant Secretary, it was made on the agency record compiled by the District Director and in the light of his recommended decision. Plainly, then, if ... 5 U.S.C. § 554(d) applies ... it was violated.

Id. at 858-59.

⁵² *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953).

⁵³ 5 C.F.R. § 930.201(f)(3).

⁵⁴ ACUS 1992, *supra* note 8, at 1012.

⁵⁵ 5 U.S.C. § 4301(2)(D); *see also* 5 U.S.C. § 4302; 5 C.F.R. § 930.211. The 1978 Civil Service Reform Act “explicitly exempted ALJs from the performance appraisals required (continued...)”

ALJs appointed under 5 U.S.C. § 3105 from the definition of employees subject to performance appraisals and ratings. Otherwise, for most agency employees, 5 U.S.C. § 4302 provides that each agency must develop one or more performance-appraisal systems for its employees, using the results as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining or removing employees, and assisting employees in improving unacceptable performance. OPM regulations also provide that “[a]n agency may not rate the job performance of an administrative law judge,” or grant monetary or honorary awards or incentives to ALJs.⁵⁶

In the past, Congress has addressed proposals which would establish an ALJ Performance Review Board or standards for evaluations of ALJ performance. For instance, three bills in the 96th Congress — S. 262, H.R. 6768, and S. 755 — would have provided, respectively, that performance evaluations of ALJs should be conducted once every 10 years, at least every six years, or that appointment of ALJs should be for seven- to 10-year terms, with reappointment based on performance evaluations.⁵⁷ These bills would not have vested the employing agencies with the authority to evaluate ALJs. Rather, other entities were chosen, such as the Administrative Conference of the United States (ACUS) and OPM. Extensive hearings were held, and witnesses reaffirmed the need for ALJ independence and evaluations free from agency pressures.⁵⁸ These or other similar proposals were not enacted.

ALJ Removal and Discipline

ALJs are not subject to probationary periods.⁵⁹ Rather, an ALJ position is considered a career appointment.⁶⁰ Section 7521 of Title 5, United States Code states: “An agency may remove, suspend, reduce in level, reduce in pay, or furlough for 30 days or less an administrative law judge only for good cause established and determined by the [MSPB] on the record and after opportunity for a hearing before the Board.”⁶¹ However, Congress did not define what constitutes “good cause.”⁶² The general rule appears to be that “[a]ctions by an ALJ that undermine confidence in the administrative adjudicatory process constitute good cause for disciplinary

⁵⁵ (...continued)

under that system,” in order to maintain “the present system of providing protection for [ALJs].” ACUS 1992, *supra* note 8, at 1011 n. 1199.

⁵⁶ 5 C.F.R. § 930.206.

⁵⁷ S. 262, 96th Cong., 2d Sess. (1980); H.R. 6768, 96th Cong. 2d Sess. (1980); S. 755, 96th Cong., 2d Sess. (1980).

⁵⁸ See *Administrative Law Judge System: Hearings Before the Subcomm. for Consumers of the Comm. on Commerce, Science, and Transportation*, 96th Cong., 2d Sess. 53 (1980).

⁵⁹ See 5 U.S.C. § 3321; 5 C.F.R. § 930.204(a).

⁶⁰ 5 C.F.R. § 930.204.

⁶¹ 5 C.F.R. § 930.211; 5 U.S.C. § 7521.

⁶² See *SSA v. Goodman*, 19 M.S.P.R. 321, 325 (1984).

action.”⁶³ The MSPB has found that good cause existed or that the agency showed substantial evidence of good cause in cases where ALJs: sexually harassed employees; refused to travel or refused to schedule cases that required travel; “refused to deliver legal documents”; showed reckless disregard for the personal safety of others; failed to meet financial obligations; misused official mail envelopes; violated agency rules and an agency settlement agreement regarding the unauthorized practice of law; demonstrated an inability to work due to a disability or extended absence; declined to set hearing dates; and had “a high rate of significant adjudicatory errors.”⁶⁴

Low productivity does not likely constitute “good cause” to remove or otherwise discipline ALJs. Performance appraisal cases involving the Social Security Administration established that agencies may keep case disposition statistics and use them in disciplinary, removal, or other actions under 5 U.S.C. § 7521.⁶⁵ An agency’s statistics should take into account comparative productivity, which the MSPB indicated could be shown by measuring different types of statutory appeals, different types of dispositions, the complexities of the cases, evidence demonstrating that all ALJ cases were not “fungible,” and evidence disproving that “even with a random assignment method, a single ALJ could have been assigned a disproportionate share of difficult, and therefore more time-consuming, cases.”⁶⁶ Disciplinary actions brought by the agency that relate to low productivity will not meet the standards for good cause removal if the agency action itself improperly interferes with an ALJ’s performance, such as “interference with the writing of opinions or interference with the way in which an ALJ conducts hearings.”⁶⁷

According to a 1992 report, agencies had brought less than 24 cases to remove or discipline ALJs since 1946; only five forced removals occurred between 1946 and 1992.⁶⁸ Agencies may “think twice before mounting an expensive, time consuming, and disruptive case against one of [their] own sitting judges.”⁶⁹ The procedures for MSPB hearings are set forth in 5 C.F.R. Part 1201.

Although an ALJ’s pay may only be reduced for good cause, as mentioned above, the 2007 OPM final rule allows the employing agency to reduce the basic pay of an ALJ if the ALJ “submits to the employing agency a written request for a voluntary reduction due to personal reasons” and OPM approves.⁷⁰ Additionally, ALJs may be subject to an agency reduction in force, which may occur “when there

⁶³ MICHAEL ASIMOW, ED., A GUIDE TO FEDERAL AGENCY ADJUDICATION 172 (2003).

⁶⁴ *Id.* at 172-76.

⁶⁵ ACUS 1992, *supra* note 8, at 1020-21.

⁶⁶ *Goodman*, 19 M.S.P.R. at 332.

⁶⁷ ASIMOW, *supra* note 63, at 176-77.

⁶⁸ ACUS 1992, *supra* note 8, at 1018.

⁶⁹ *Id.* at 1021.

⁷⁰ 5 C.F.R. § 930.205(j).

is a surplus of employees at a particular location in a particular line of work.”⁷¹ An ALJ who is part of a reduction in force may have his or her name placed on OPM’s ALJ priority referral list as well as the agency’s own reemployment priority list.⁷²

Adjudication by ALJs and Non-ALJ Hearing Officers

In general, ALJs hear cases that fall into four different categories: (1) enforcement cases; (2) entitlement cases; (3) regulatory cases; and (4) contract cases.⁷³ Enforcement cases typically involve claims that federal agencies bring against individuals and companies in order to enforce federal law. Entitlement cases usually involve adjudication of an individual’s claim that he or she is eligible to receive certain federal benefits. Regulatory cases generally involve decisions about rates, licenses, or other requirements that govern certain industries. Contract cases typically involve claims against the government for contractual breaches.

Not all executive branch agencies use ALJs to adjudicate disputes before the agency. For example, immigration judges in the Executive Office of Immigration Review are not required to be ALJs; nor are hearing officers at the Veterans Administration who review certain benefits cases.⁷⁴ There are numerous non-ALJ hearing officers who review similar administrative appeals throughout the federal government. In fact, when the APA was enacted, the statute did not require agencies to use ALJs because Congress “intended to leave the decision to employ ALJs to agency-specific legislation by stating that ALJs would only be required where statutes called for ‘on the record’ hearings.”⁷⁵ Thus, upon enactment of the APA, the ALJ provisions became applicable only to those agencies that were required to conduct “on the record” hearings or that subsequently were subject to such a requirement. Agencies that are not required to conduct hearings on the record may also use hearing examiners to preside over various agency proceedings, but the decisionmaking independence of these non-ALJs is generally less protected than that of their ALJ counterparts.⁷⁶

Although there is ample precedent for using non-ALJs to conduct administrative adjudication in the federal agencies, there are significant differences between ALJs and non-ALJs in terms of independence, training, experience, and compensation that may affect how these two types of hearing officers review administrative appeals. Indeed, despite the fact that ALJs are agency employees and are located within and paid by the agency, they are not subject to agency management. Certain requirements operate to preserve the ALJs integrity, independence, and insulation from agency

⁷¹ 5 C.F.R. § 351.201(a)(1).

⁷² 5 C.F.R. § 930.210.

⁷³ ACUS 1992, *supra* note 8, at 784-85.

⁷⁴ *Id.* at 785.

⁷⁵ *Id.* at 790; *see also* 5 U.S.C. §§ 553, 554. These sections, which govern cases in which agency proceedings are required to be on the record, mandate the application of 5 U.S.C. § 556, which requires ALJs to preside over such hearings.

⁷⁶ ACUS 1992, *supra* note 8, at 798-99.

influence.⁷⁷ For example, the competitive selection process described above is conducted by OPM, not the agency; appointment is restricted to those determined eligible by OPM; and an agency may remove, suspend, reduce in grade, reduce in pay, or furlough for 30 days or less an ALJ only for good cause, which is established and determined by the MSPB on the record and after opportunity for a hearing.⁷⁸ Thus, ALJs are largely independent of their employing agencies in matters of their salaried compensation and tenure.

Since non-ALJs are appointed by the agencies that employ them rather than a neutral party, the terms and conditions of their employment are controlled by their respective agencies. Therefore, non-ALJs are potentially subject to a greater degree of agency influence than ALJs. In addition, the ALJ merit selection procedure ensures that ALJs are highly qualified and trained.⁷⁹ In contrast, non-ALJs come from a variety of backgrounds and range widely in terms of experience and legal training. For example, hearing officers may be non-ALJ judges or even non-lawyers or non-governmental examiners.⁸⁰ Nevertheless, “[m]any of these presiding officers preside over relatively formal proceedings and perform functions virtually indistinguishable from those performed by ALJs,” according to one law professor.⁸¹ Such hearing officers are prevalent throughout the federal government. A 1991 study identified “over 2700 federal agency employees who preside at hearings but are not ALJs.”⁸²

As a result of these perceived differences between ALJs and non-ALJs, proponents of using ALJs argue that their independence and generally superior training and experience make ALJs better qualified to review administrative appeals. On the other hand, proponents of using non-ALJs point to the successful use of non-ALJs in a variety of administrative settings as evidence of the merits of non-ALJs. In addition, some observers argue that ALJ independence has disadvantages as well as advantages:

When many similar cases have to be decided in circumstances where consistent outcomes are desirable, maximum independence of deciders may not be an institutional asset. It is at least arguable, in other words, that the great value of the ALJ — that of decisional independence — is diminished in a system where caseload management must be the critical variable.⁸³

⁷⁷ The federal courts have generally upheld these requirements relating to ALJ independence. *See, e.g.*, *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 142 (1953) (finding that hearing officers — later ALJs — “were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons”).

⁷⁸ 5 U.S.C. § 7521; 5 C.F.R. § 930.214.

⁷⁹ ACUS 1992, *supra* note 8, at 787-88

⁸⁰ *Id.* at 789-90.

⁸¹ CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE*, § 5.24.

⁸² *Id.*

⁸³ ACUS 1992, *supra* note 8, at 866.

Ultimately, it appears that both types of hearing officers — ALJs and non-ALJs — have strengths and weaknesses. If, however, Congress is concerned about approving the use of non-ALJs, it could consider alternatives, such as imposing time limits on any use of non-ALJs or by specifying precisely what types of review mechanisms the agency should use.