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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 337 and 930

RIN 3206-AK86

#### Examining System and Programs for Specific Positions and Examinations (Miscellaneous)

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to revise the Administrative Law Judge Program. The purpose of these revisions is to remove procedures that appear in other parts of this chapter, update outdated information, and remove the internal examining processes from the regulations. Additionally, these revisions describe OPM and agency responsibilities concerning the Administrative Law Judge Program. These regulations continue the basic intent of making administrative law judges independent in matters of appointment, tenure and compensation.

**DATES:** This rule is effective April 19, 2007.

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**SUPPLEMENTARY INFORMATION:** On December 13, 2005, the Office of Personnel Management (OPM) published a proposed rule at 70 FR 73646, to revise the Administrative Law Judge Program. On December 21, 2005, OPM republished the proposed rule at 70 FR 75745 due to information that was inadvertently omitted.

The administrative law judge function was established by the Administrative Procedure Act (APA) (Act of June 11,

1946, 60 Stat. 237, as amended), which is codified, in relevant part, in title 5, United States Code (U.S.C.), at sections 556, 557, 1305, 3105, 3344, 4301(2)(D), 5372, and 7521. Administrative law judges preside in formal proceedings requiring a decision on the record after the opportunity for a hearing. The APA requires that this function be carried out in an impartial manner. To ensure objectivity of administrative law judges and to insulate them from improper pressure, the law made these positions independent of the employing agencies in matters of appointment, tenure, and compensation.

The goal of these revised regulations is to streamline the existing administrative law judge regulations as prescribed in title 5, Code of Federal Regulations (CFR), part 930, subpart B. The proposed regulations remove redundant procedures and outdated information, clarify bar membership requirements, and provide for the administrative law judge examination process to be established in a manner similar to other OPM competitive examinations.

During the comment period, OPM received written comments from six Federal agencies; five professional organizations; the exclusive bargaining representative of administrative law judges serving at the Social Security Administration (SSA) and the Department of Health and Human Services (HHS); and seventeen individuals. Based on these comments, OPM adopts several suggestions and clarifies areas where there appeared to be some confusion and misunderstanding. OPM is addressing the comments according to topics identified.

#### OPM's Authority To Administer the Administrative Law Judge Program

OPM's authority to administer the employment of administrative law judges (formerly called hearing examiners) was created by the APA. Text in section 11(1st) of the APA (5 U.S.C. 1010(1st)) stated that agencies must appoint "qualified and competent" administrative law judges. Although former section 1010(1st) was replaced by 5 U.S.C. 3105 when title 5 was enacted into positive law in 1966, the amendment was not substantive, and the requirement that administrative law judges be qualified and competent

continued to apply. See Pub. L. 89-554, sec. 7(a), 80 Stat. 631 (the purpose of sections 1-6 of the 1966 Act, codifying title 5, was "to restate, without substantive change, the laws replaced by those sections on the effective date of this Act [Sept. 6, 1966]"); H.R. Rep. No. 89-901, at 36 (1965) (replacement of 5 U.S.C. 1010(1st) with 5 U.S.C. 3105 did not effect a substantive amendment); S. Rep. No. 89-1380, at 55 (1966) (same). The APA's legislative history, commenting on this requirement, states that the Civil Service Commission, OPM's forerunner, must "fix appropriate qualifications" for administrative law judges and that the agencies must "seek fit persons." See S. Rep. No. 79-572 (1945), *reprinted in Administrative Procedure Act, Legislative History, 79th Congress, 1944-46*, S. Doc. No. 79-248, at 187, 215 (1946); H.R. Rep. No. 79-1980 (1946), *reprinted in S. Doc. No. 79-248*, at 235, 280.

The President has the authority to set standards for individuals entering into the Federal civil service in the executive branch, and to prescribe rules for competitive examinations. 5 U.S.C. 3301, 3304; *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 n.47 (1976); *Am. Fed'n of Govt. Employees v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976). The President delegated his authority to the Director of OPM through Executive Order 10577, Rule II, codified as amended in 5 CFR 2.1(a). *Mow Sun Wong*, 426 U.S. at 111; *Am. Fed'n*, 543 F.2d at 938. *See also* 5 U.S.C. 1104(a)(1), reflecting the President's authority to delegate the authority for competitive examinations to the Director of OPM. Additionally, Congress required OPM to prescribe regulations for competitive service examinations, including the administrative law judge examination. 5 U.S.C. 1302. *See also Mow Sun Wong*, 426 U.S. at 115 n.47. Under the preceding authorities, OPM is responsible for regulating and conducting competitive examinations for administrative law judges, and for establishing qualification standards for administrative law judge candidates and incumbents that promote the efficiency of the competitive service.

#### Discussion of Comments

Many commenters challenge OPM's authority to modify the administrative law judge program. These commenters

claim that Congress established the administrative law judge position under the APA and only Congress can make the types of changes OPM is proposing. As noted above, we have identified authorities under which OPM administers the administrative law judge program.

Two commenters claim that OPM does not have the authority to approve non-competitive personnel actions for administrative law judges, including but not limited to promotions, transfers, reinstatements, restorations, reassignments, and pay adjustments and that by doing so, OPM violates 5 U.S.C. 7521. OPM's authority to approve movement of administrative law judges such as promotions, reassignments, transfers, reinstatements, restorations, and pay adjustments is prescribed in the existing regulations in §§ 930.204 through 930.210. These regulations are authorized by 5 U.S.C. 1305, which states that OPM may investigate and regulate to give effect to the provisions applicable to administrative law judges in 5 U.S.C. 3105, 3344, 4301, and 5372. OPM has not changed the procedures for approving non-competitive personnel actions, which ensure that such actions are consistent with the statutes cited above.

An agency suggests OPM consider giving agencies the authority to promote, transfer, and detail administrative law judges in excess of 120 days without obtaining OPM's approval. The agency is concerned about being able to bring back a specific judge with the in-depth knowledge of a case after he or she has separated from the agency. OPM is not adopting this suggestion. OPM is responsible for ensuring the independence of administrative law judges, and OPM believes it can best discharge this obligation if it continues to approve these requests. Accordingly, as prescribed in 5 CFR part 930, subpart B, OPM will continue to require agencies to obtain OPM's approval for non-competitive actions such as promotions, reassignments, transfers, reinstatements, restorations, pay adjustments, and details in excess of 120 days. OPM also will continue to work with agencies to fill their vacant administrative law judge positions with qualified administrative law judges as promptly as possible.

One commenter recognizes that OPM has the authority to administer the administrative law judge program; however, the commenter asserts that OPM does not have the authority to re-delegate to agencies the authority to assign an administrative law judge to cases in rotation so far as practicable

and to ensure the independence of the administrative law judge. Under the APA, OPM and the employing agencies have responsibilities related to administrative law judges. Although OPM also has the authority, pursuant to 5 U.S.C. § 1305, to issue regulations concerning the requirement in 5 U.S.C. 3105, the employing agency's obligation to assign its administrative law judges to cases in rotation, insofar as practicable, arises directly under the applicable statute, 5 U.S.C. 3105, not pursuant to any re-delegation from OPM. The language with which the commenter took issue was meant to be descriptive rather than prescriptive. OPM is revising § 930.201(e) and (f) to clarify this point.

### Professional License Requirement

#### Background

Under the APA, administrative law judges preside in formal proceedings requiring a decision on the record after an opportunity for a hearing. Administrative law judges must be held to a high standard of conduct so that the integrity and independence of the administrative judiciary is preserved. OPM has a longstanding policy that an administrative law judge applicant or incumbent must have an active bar membership or a current license to practice law (i.e., must be both licensed and authorized to practice law). The purpose of a professional license is to ensure that administrative law judges, like attorneys, remain subject to a code of professional responsibility. These ethical requirements cannot be waived.

Under the current "OPM Examination Announcement No. 318, as amended, Opportunities in the Federal Government as an Administrative Law Judge," if an applicant wishes to apply for an administrative law judge position the applicant must possess a total of 7 years of experience as an attorney and must be duly licensed and authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. Applicants must continue to be licensed and authorized to practice law throughout the selection process, including any period on the standing register of eligibles. At the time of appointment, the newly appointed administrative law judge is required to be duly licensed and authorized to practice law. Once appointed, the administrative law judge is expected to maintain the qualifying requirement for a professional license to practice law while serving as an administrative law judge in the Federal

competitive service. Additionally, if a retired administrative law judge wishes to return to Federal Service as a senior administrative law judge the retired judge must be duly licensed and authorized to practice law.

OPM is authorized to establish standards for competitive service applicants that will best promote the efficiency of the service. The requirement for administrative law judge applicants and incumbents to be both licensed and authorized to practice law was professionally developed, is supported by a job analysis, and is rationally related to performance in the position to be filled.

The bar license requirement is based on the results of three job analyses of the administrative law judge occupation conducted by OPM's Personnel Research Psychologists in 1990, 1999, and 2002. The job analyses were based on administrative law judge subject matter expert input, and developed and conducted in accordance with the *Uniform Guidelines on Employee Selection Procedures*.

The results of these studies show that Integrity/Honesty is fundamental for performing the duties of an administrative law judge. In particular, the 2002 study documents the usefulness and job-relatedness of requiring, as minimum qualifications, bar membership and seven (7) years of certain qualifying experience. Accordingly, OPM has determined to adhere to its long-standing position that an administrative law judge applicant must demonstrate he or she is an active member or has judicial status that authorizes the practice of law and requires adherence to his or her State's or jurisdiction's ethical requirements.

In meeting OPM's goal to establish the administrative law judge examination process in a manner similar to other OPM competitive examinations, the requirement that a bar membership applies to both applicants and employees is in accordance with all other OPM qualification standards for the competitive service. Failure at any time (applicant or incumbent) to meet a minimum qualification requirement means the individual is not qualified to perform the duties of the position.

In addition, the requirement for administrative law judge applicants and incumbents to be both licensed and authorized to practice law is historically grounded. The Federal Circuit has found that a qualification requirement's long-standing role in administrative law judge selection is an important factor in evaluating the standard's rationality. See *Meeker v. Merit Sys. Protection Bd.*, 319 F.3d 1368, 1378 (Fed. Cir. 2003),

affirming minimum qualification requirement of seven years of relevant legal experience, and noting “the important role that experience has always played in the selection of ALJs”. At the time the APA was approved, most of the agencies and departments recommended to the Civil Service Commission, OPM’s forerunner, that a law degree and bar membership be required of candidates for administrative law judge positions. In subsequent years, a report by the Committee on Hearing Officers of the President’s Conference on Administrative Procedure contained recommendations that in addition to legal experience, a law degree and bar membership be required of all candidates. In the early 1960’s, following the recommendations by the President’s Administrative Conference, the Civil Service Commission established an Advisory Committee to review the entire program. Based on previous recommendations that bar membership be required and the nature of the work, the Advisory Committee made a similar recommendation indicating that the requirement would help ensure that candidates possessed the degree of expertise to perform satisfactorily in the job. The Civil Service Commission adopted the recommendation concerning bar membership and it has been a standard in the Program since 1964.

Minimum qualification requirements do not disappear after an individual is appointed as an administrative law judge. As described in the following discussion of comments, a standard for career-entry promotes the efficiency of the competitive service only if it applies continuously to applicants and incumbents alike.

#### Discussion of Comments

OPM received comments opposing the license requirement for incumbent administrative law judges. A few commenters claim that the license requirement is a new qualification requirement; therefore, the public must be given an opportunity to comment on it. As discussed above, the license requirement is not a new requirement and the **Federal Register** notice proposing these regulations is correct in stating that OPM was clarifying bar membership.

The first category of comments states that OPM exceeded its authority under authorizing statutes. This is incorrect. The President has the power to establish qualifications and conditions of employment in the competitive service under 5 U.S.C. 3301 and 3304, and has delegated this standard-setting authority

to OPM under Executive Order 10577, Rule II, codified as amended in 5 CFR 2.1(a). *See also* 5 U.S.C. 1104(a)(1). OPM is required by 5 U.S.C. 1302 to promulgate regulations for competitive service examinations implementing Rule II. The Supreme Court and the District of Columbia Circuit have ruled that where OPM promulgates a standard under 5 U.S.C. 3301 and 5 CFR 2.1(a), OPM requires no further statutory or executive authority for its action. *See Mow Sun Wong*, 426 U.S. at 113 (holding that where OPM promulgates a standard under 5 U.S.C. 3301 and Rule II, it “may either retain or modify the \* \* \* requirement without further authorization from Congress or the President”); *Hoffman*, 543 F.2d at 941 n.17 (same). It is nonetheless notable that Congress also expressed its specific intent in the legislative history of section 11 of the APA that OPM be responsible for fixing standards to ensure that qualified and competent administrative law judges are appointed.

Several commenters state that while OPM has the statutory authority to establish qualifications for administrative law judge applicants and appointees, including “active” bar membership requirements, OPM’s authority does not extend to incumbent administrative law judges. Under controlling District of Columbia Circuit case law, OPM’s authority under 5 U.S.C. 3301 and 5 CFR 2.1(a) extends to establishing ongoing “conditions of employment for civil servants in the executive branch,” not just appointment qualifications. *Hoffman*, 543 F.2d at 938. A standard for career entry promotes the efficiency of the competitive service only if it applies continuously to applicants and incumbents alike.

According to a second category of comments, even if OPM has the authority to impose a license requirement, its implementation is too broad and not rationally related to OPM’s goals. These commenters assert that the representative licensing jurisdictions allow incumbent judges to take an inactive, judicial, or retired status on grounds that they are not actively engaged in the practice of law, so there is no rational basis for OPM to require “active” bar status or a current license to practice law. Some commenters assert that inactive, judicial, or retired status would continue to subject the incumbent to appropriate State bar disciplinary oversight while exempting them from potentially burdensome fees, continuing legal education requirements, and reexamination requirements. One

commenter asserts that by taking judicial status in lieu of “active” status, an administrative law judge appropriately remains subject to discipline under State codes of judicial conduct, even if the administrative law judge is no longer subject to rules of professional responsibility applicable to practicing attorneys. Another commenter asserts, conversely, that administrative law judges should be allowed to maintain an inactive status specifically so that they will not be subject to disciplinary oversight by State licensing authorities. Two commenters recommend that if the “active” bar membership or current license requirement is adopted, it should be phased in to allow all incumbent administrative law judges time to come into compliance because of the potential financial burden associated with a change in bar status in some jurisdictions.

We disagree with these comments and recommendations because application of the “active” bar membership or current license requirement to both applicant and incumbent administrative law judges promotes the efficiency of the competitive service. Moreover, as it is not a new requirement, a transition period is not needed.

According to a third category of comments, the license requirement will cause administrative law judges to violate State law. Several commenters state that requiring incumbent administrative law judges to maintain a current license to practice law may cause administrative law judges to violate a provision of the Model Code of Judicial Conduct that bars judges from the practice of law. This argument is misplaced. Canon 4G of the Model Code and related Commentary, when incorporated in the law of the relevant licensing jurisdiction, prohibits a judge only from practicing law “in a representative capacity,” and does not prohibit, or in any way restrict, a judge from maintaining a current license to practice law. In addition, the final regulations accommodate State law by allowing an administrative law judge to take judicial status where he or she is prohibited by State law from taking “active” status.

A fourth category of comments raises a concern that the regulations subject administrative law judges to overlapping ethics and license requirements. The commenters state a concern that if incumbent administrative law judges are required to maintain “active” bar membership or a current license to practice law, they may, under 28 U.S.C. 530B(a), be subject to both the rules of professional

responsibility applicable to attorneys practicing in the jurisdiction where the administrative law judge conducts proceedings, and the rules of professional responsibility of the jurisdiction where the administrative law judge is licensed. Pursuant to 28 U.S.C. 530B(c) and the Department of Justice's implementing regulations in 28 CFR 77.2(a), 28 U.S.C. 530B(a) applies only to certain Department of Justice and Independent Counsel officials, and plainly does not apply to any administrative law judge performing a function under 5 U.S.C. 3105.

A fifth category of comments states that the license requirement violates Federalism principles. Two commenters assert that requiring incumbent administrative law judges to maintain a current license to practice law constitutes a Federal infringement on the States' regulation of the legal profession. OPM does not assert in these regulations the authority to preempt State laws governing the licensing of attorneys. Rather, OPM's regulations establish a minimum qualification requirement for an administrative law judge position in the Federal competitive service that incorporates relevant State license requirements. In fact, OPM's regulations avoid conflict with State license requirements by allowing administrative law judges to take a judicial status where State law prohibits an "active" status.

One commenter asserts that requiring incumbent administrative law judges to maintain a current license to practice law in essence gives OPM the authority to make licensing determinations currently made by the States. OPM is not asserting or exercising any authority to license the legal profession in these regulations.

Certain commenters express a concern that by requiring administrative law judges to maintain an "active" bar membership or license to practice law, OPM is defining administrative law judges as persons engaged in the practice of law while performing their official duties. This interpretation is not OPM's position and it is not supported by the text of these regulations.

A sixth category of comments states that the license requirement will allow collateral attacks on administrative proceedings and actions against administrative law judges. Specifically, an agency is concerned that an incumbent administrative law judge's failure to meet the license requirement would encourage a disappointed litigant to collaterally attack the administrative proceedings over which the administrative law judge presides, and could subject the presiding

administrative law judge to State bar complaints related to official adjudicative duties, even though under Supreme Court case law, administrative law judges are immune from lawsuits related to the performance of their official duties. This comment is addressed to the commenter's perception of litigation risk associated with including this longstanding requirement in the revised regulations, rather than the merits or appropriateness of the requirement per se. Accordingly, OPM has disregarded this comment.

A seventh category of comments asserts that the requirement for "active" bar membership or a current license to practice law has a retroactive legal effect. OPM disagrees. As OPM has repeatedly stated, these regulations clarify an existing requirement. They have prospective legal effect, consistent with 5 U.S.C. 551(4) and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

The final category of comments asserts that the license requirement is unconstitutional. Specifically, a commenter asserts that requiring an incumbent administrative law judge to maintain an "active" bar membership or current license to practice law potentially violates the 5th Amendment. OPM disagrees. The license requirement does not effect a deprivation of life, liberty, or property without due process of law. Further, this requirement does not raise an equal protection concern because it does not constitute a classification adversely affecting a category of regulated persons without a rational basis.

OPM has considered all the comments submitted by individuals, professional organizations, agencies, and the exclusive bargaining representative for administrative law judges at SSA and HHS. OPM has not received any compelling argument to change its policy on the professional license requirement for administrative law judges. As we have stated previously, this is not a new requirement but a clarification of a longstanding OPM policy that an administrative law judge must have an "active" bar membership or current license to practice law. The license requirement is a qualification requirement, in addition to the requirement for 7 years of attorney experience, which must be maintained for successful performance as an administrative law judge. It is an on-going permanent requirement for any individual serving in an administrative law judge position.

Consequently, to ensure that the professional license requirement is

maintained, OPM is incorporating the professional license requirement in § 930.204(b) of these regulations and as a Condition of Employment in the Qualification Standard for Administrative Law Judges, which applies to both applicants and incumbents. OPM will also incorporate the requirement in the new administrative law judge vacancy announcement. The final rule expressly reaffirms OPM's longstanding requirement that an administrative law judge possess a professional license to practice law and be authorized to practice law. The requirement attaches at the time of application. If the applicant is determined to be eligible, the requirement continues to apply while the applicant is on the administrative law judge competitive register and at the time of appointment. Following appointment, the requirement continues to apply for as long as the appointee continues to serve as an administrative law judge. The requirement would also apply at the time of application to serve and while serving as a senior administrative law judge.

OPM has provided two alternatives in lieu of "active" status, that is, "judicial" and "good standing" status. Judicial status is acceptable in States that prohibit sitting judges from maintaining an "active" status to practice law. Being in "good standing" is also acceptable in lieu of "active" status in States where the licensing authority construes "good standing" to mean having a current license to practice law.

### **Elimination of the Administrative Law Judge Examination Process**

#### *Background*

A lengthy description of the administrative law judge examination and its procedures is contained in the existing § 930.203. The method by which examinations are conducted and administered, however, is subject to periodic changes. For that reason, OPM has decided to remove from the regulations the detailed language describing the internal examining process and procedures, such as the language concerning periodic open competition, minimum qualifications, supplemental qualifications, participation in examination procedures, and final rating. OPM has concluded, based upon its experience and expertise, that a better vehicle for addressing this type of information is the vacancy announcement, as prescribed in 5 U.S.C. 3330 and 5 CFR part 330, and as required in all other

competitive service vacancy announcements.

Sections 1104, 1302, 3301, and 3304 of title 5, U.S.C., authorize OPM to develop and administer the administrative law judge competitive examination. To maintain the relevance and validity of the examination, OPM has periodically conducted occupational studies of the administrative law judge occupation to revise and update elements of the administrative law judge examination. The administrative law judge examination should be allowed to evolve based on new technology and advances in the state of the art of examination methodology. In order to fulfill its responsibility to develop the administrative law judge examination in the optimal manner, OPM should be in a position to incorporate these advances promptly, without having to amend its regulations. Information on the examination process will be included in the new vacancy announcement for administrative law judge positions. The revised regulations, therefore, do not include detailed information about the examination and related processes.

Since 1963, 5 CFR 337.101(a) has prescribed a general process for scoring competitive examinations, while § 930.203 has prescribed a specialized process for scoring administrative law judge examinations, separate from the default process in § 337.101(a). Prior to 1987, the administrative law judge scoring process was codified in § 930.203(a), and § 337.101(a) contained a cross-reference to § 930.203(a). In 1987 and 1991, however, OPM amended § 930.203 to describe the examination process in additional paragraphs of that section, but OPM did not make a conforming amendment to the cross-reference in § 337.101(a). Because the cross-reference in § 337.101(a) has been out-of-date for several years, and because the revised regulations do not include a detailed description of the examination scoring process, we are replacing the cross-reference with a more general statement that § 337.101(a) applies “except as otherwise provided in this chapter.” Section 930.201(e)(1) of the revised regulations, in turn, states that the use of the examination scoring process published in § 337.101(a) is not required in scoring the administrative law judge examination, consistent with OPM’s and the Civil Service Commission’s regulatory policy, since 1963, of excepting the administrative law judge examination process from the requirements of § 337.101(a).

#### Discussion of Comments

Several commenters oppose the removal of the detailed description of the administrative law judge internal examination process and procedures from the regulations and incorporating the information in an administrative law judge vacancy announcement. The commenters assert that this action will weaken the administrative law judge rating and selection process to the detriment of the American public; may not provide uniformity of treatment or adequate opportunity for public review and comment, particularly where criteria may vary from notice to notice; and will be changeable at will without notice and comment by the public. The commenters suggest that OPM continue incorporating the examination process in the regulations to ensure public confidence, and that OPM publish any changes to the examination process for public comment, so that such changes can be fully evaluated.

OPM’s course of action, in laying out the detailed description of the examination process and procedures in the new vacancy announcement, is consistent with OPM’s practice for other competitive examinations. There has never been any suggestion, in the statutes governing the appointment of administrative law judges, that the examination process and procedures were required to be encompassed in regulations. The examination process and procedures information described in the existing regulations are also described in the current “OPM Examination Announcement No. 318, as amended, Opportunities in the Federal Government as an Administrative Law Judge.” Any significant changes to the administrative law judge examination or examination process will be publicly announced in the vacancy announcement. In addition, OPM is developing a stand-alone administrative law judge qualification standard that will be described and supplemented in the new administrative law judge vacancy announcement. OPM, therefore, is not adopting the suggestion to retain the descriptive language of the examination process and procedures in the regulations.

Several commenters express concern that OPM is eliminating the administrative law judge examination. OPM is not eliminating the administrative law judge examination; in fact, OPM is developing a new administrative law judge examination.

One commenter identifies several factors that the commenter believes are a prerequisite to being an excellent candidate for an administrative law

judge position such as decision-making, developing evidence, and assessing credibility. The commenter requests that OPM consider these factors in the examination process for selecting effective administrative law judge candidates. The commenter’s suggestion for specific criteria to be used for rating candidates in future administrative law judge examinations is outside the scope of this rulemaking and will not, therefore, be considered in the context of revising these regulations.

Two commenters express a concern related to the conforming revision. The first comment by an agency suggests that the change to 5 CFR 337.101(a) is in conflict with § 930.201(e)(1). OPM disagrees. Section 337.101(a) prescribes a scoring process while allowing alternatives. Section 930.201(e)(1) gives OPM the option to use this scoring process or an alternative, depending on the examining methodology used to develop the administrative law judge competitive examination. The second commenter did not clearly state an objection to the revision and we therefore do not address it.

#### Elimination of OPM Examination Announcement No. 318, as Amended

##### *Background*

The revised regulations remove any reference to “OPM Examination Announcement No. 318, as Amended, Opportunities in the Federal Government as an Administrative Law Judge” (Announcement). The Announcement is a vacancy announcement issued in 1993 and amended in 1996 to recruit individuals for administrative law judge positions in the Federal competitive service. It describes the duties of an administrative law judge, the rating process, qualifying education and experience requirements, the rating appeal process, and general information for the applicant. The Announcement is similar to other vacancy announcements used to recruit individuals for positions into the Federal Government, except that it was incorporated by reference in the existing regulations. In the existing regulations, the Announcement is referenced to the extent that it addresses meeting the examination or qualification requirements for an administrative law judge position.

#### Discussion of Comments

Several commenters oppose the removal of the reference to the Announcement from the regulations. The commenters claim OPM is removing the administrative law judge qualification requirements, omitting

qualifying military experience, and eliminating the administrative law judge examination. These commenters suggest OPM retain the Announcement in the regulations.

There appears to be a misunderstanding among commenters that by eliminating the Announcement from the regulations, OPM is eliminating the qualification requirements for administrative law judges. To the contrary, § 930.201(e)(3) of the revised regulations specifically authorizes OPM to issue a qualification standard for administrative law judges. The regulations also prescribe a qualification requirement for “active” bar membership or a current license to practice law. OPM has separately posted for comment, on its Web site, a stand-alone qualification standard prescribing the proposed minimum qualification requirements for administrative law judge positions, including the bar license requirement. When the qualification requirement is finalized, it will again be posted on OPM’s Web site, consistent with OPM’s practice in publishing other qualification standards. The new administrative law judge vacancy announcement will describe the minimum qualification requirements for administrative law judge positions and provide supplemental information, as needed.

OPM received a consolidated comment submission from the Departments of the Army, Air Force, and Navy; Headquarters, U.S. Marine Corps; and the Department of Homeland Security, U.S. Coast Guard, expressing concern that OPM omitted language to allow military experience as qualifying for an administrative law judge position. It was not OPM’s intent, in drafting its proposed qualification standard, to eliminate military experience as qualifying experience for an administrative law judge position. In order to make this principle more clear, OPM is adopting the military services’ comments to the extent necessary to reflect differences in terminology between military and civilian legal practice. For additional information, OPM has published on its Web site guidance on how to credit military experience, at <http://www.opm.gov/qualifications>, and on veterans’ preference, at <http://www.opm.gov/veterans>.

#### Definition of Superior Qualifications

OPM proposed to revise the definition of “superior qualifications” which is covered in the existing § 930.210(g)(2). The definition of “superior qualifications” is redesignated to § 930.202 in the final regulations.

#### Discussion of Comments

Several commenters oppose the proposed expanded definition for “superior qualifications.” The commenters state that OPM’s proposal to add the phrase “special skills that will meet a demonstrated need of the hiring agency” is equivalent to selective certification criteria and suggest OPM remove the phrase from the definition. OPM is adopting the suggestion and is removing this phrase from the superior qualifications definition.

#### Definition of Removal

OPM proposed to revise the definition of “removal” for clarity.

#### Discussion of Comments

Two commenters claim the proposed definition of “removal” violates 5 U.S.C. 7521 because it excludes the phrase “involuntary reassignment, demotion, or promotion to a position other than that of an administrative law judge.” The commenters suggest that OPM retain the existing definition for “removal.” OPM does not object to keeping the existing definition for “removal” and is adopting the suggestion.

#### Administrative Law Judge Pay System

OPM proposed to add a new paragraph (i) to § 930.205 to clarify that an agency may reduce the level or rate of basic pay of an administrative law judge for good cause after the Merit Systems Protection Board (MSPB) orders the action, as provided in § 930.211, or to reduce the level of basic pay of an administrative law judge if agreed upon by the administrative law judge with OPM’s prior approval. The reason for the proposal is that OPM periodically receives requests from agencies to reduce an administrative law judge’s level of basic pay, based on the administrative law judge’s voluntary request for personal reasons (e.g., the desire for a position of less responsibility). These requests are thoroughly documented by the agency prior to OPM’s approval.

#### Discussion of Comments

Two commenters oppose OPM’s proposed revisions of § 930.205(i), asserting that the revisions violate 5 U.S.C. 7521, Actions against administrative law judges. The commenters suggest that the revisions would allow an agency to negotiate a settlement agreement with the administrative law judge prior to an MSPB “good cause” hearing which may result in a voluntary request for a reduction in pay from the administrative law judge. OPM did not

intend such a result in proposing this revision. OPM’s regulations governing administrative law judges do not address settlement agreements.

In response to the comments, OPM is revising the proposed language to distinguish with greater precision between a reduction in an administrative law judge’s level or rate of basic pay following a disciplinary proceeding, governed by §§ 930.205(i) and 930.211, and a reduction in an administrative law judge’s level of basic pay based on a voluntary request for personal reasons. OPM is adding a new paragraph (j) to § 930.205 to describe a reduction in pay based on a voluntary request for personal reasons.

#### Priority Referral List

OPM proposed revising § 930.215(c)(5) of the existing regulations, redesignated as § 930.210(c)(3), in order to emphasize a hiring flexibility that allows an agency, with OPM’s approval, to fill its administrative law judge positions by reassigning administrative law judges within its workforce, in lieu of selecting a displaced administrative law judge on OPM’s priority referral list. The intent of this revision was to emphasize that an agency does have the option of selecting an administrative law judge from other than the OPM priority referral list.

#### Discussion of Comments

Three commenters oppose the proposed revisions of § 930.210(c)(3). The commenters state that the revisions will permit an agency to circumvent the use of the OPM priority referral list by intra-agency reassignment of administrative law judges or appointment of an administrative law judge from an OPM certificate of eligibles; that it will allow an agency to bypass an adversely affected administrative law judge who has very few opportunities for reappointment, yet who is qualified for appointment at all agencies and in any administrative law judge position at any agency; and that by removing the phrase “extraordinary circumstances” from the existing regulations, the proposed regulations might not allow adequate oversight. After reviewing these comments, OPM is not implementing the proposed hiring flexibility. The existing provision will be restored, except for clarifying language specifically explaining that OPM has the authority “under extraordinary circumstances” to allow an agency to fill a vacant position through competitive examining, promotion, transfer, reassignment, or reinstatement procedures instead of selecting a

displaced administrative law judge from OPM's priority referral list.

One commenter suggests that OPM allow administrative law judges on OPM's priority referral list to have two opportunities for declining an offer of full-time employment as an administrative law judge before the administrative law judge's eligibility on the OPM priority referral list terminates. OPM disagrees with this commenter and is not adopting the suggestion. With the limited number of administrative law judge positions open at any given time and the infrequency of vacancies, OPM does not believe it is appropriate for a displaced administrative law judge to have more than one opportunity to decline an offer of full-time employment as an administrative law judge at the pay level held at the time of reduction in force and in the geographical location indicated as acceptable. OPM will continue its long-standing practice of allowing only one full-time employment offer declination before an administrative law judge is terminated from OPM's priority referral list.

**Suitability**

OPM has published suitability regulations in 5 CFR part 731 and in the existing administrative law judge regulations in §§ 930.214(c) and 930.216(f). The revised regulations clarify the suitability requirements. The revised provisions appear in §§ 930.204(a), 930.209(b)(3) and 930.211(c)(1).

**Discussion of Comments**

Two commenters state that the suitability language in the revised § 930.211(c)(1) is a new requirement and object to it. The commenters imply that suitability actions against administrative law judge applicants and incumbents are not consistent with 5 U.S.C. 7521, governing adverse actions. OPM disagrees. Administrative law judge applicants, appointees, and employees, like other competitive service applicants, appointees, and employees, are subject to suitability investigations and determinations. The adverse action provisions in 5 U.S.C. 7521, and the suitability provisions in 5 CFR parts 2, 5, and 731 apply independently to administrative law judges. The suitability requirement is not new and the text of §§ 930.204(a), 930.209(b)(3) and 930.211(c)(1) include only clarifying changes.

**Performance and Incentive Awards**

The existing regulations state, at § 930.210(b), "An agency may not grant a monetary and honorary award under 5 U.S.C. 4503 for superior

accomplishment by an administrative law judge in the performance of adjudicatory functions." OPM removed the phrase "in the performance of adjudicatory functions" in redesignated § 930.206(b), and added references to 5 U.S.C. 4502 and 4504.

**Discussion of Comments**

One commenter claims OPM made a substantial change to the regulations on the granting of any award or financial incentives to an administrative law judge. The commenter insists that by eliminating the phrase "in the performance of adjudicatory functions," OPM strips all possibility of any awards or financial incentives for an administrative law judge, even if the administrative law judge performs executive and management functions in an exemplary manner, devises an innovative administrative technique, or makes a suggestion outside the duties of an administrative law judge that saves an agency thousands of dollars. The commenter claims this is discriminatory and, therefore, urges OPM to retain the existing language.

Under the APA, OPM has the responsibility to ensure the independence of an administrative law judge in matters of appointment, tenure, and compensation, as well as to ensure independent judgments from administrative law judges. See 5 U.S.C. 1305 (authorizing OPM to regulate and investigate agencies to give effect to 5 U.S.C. 3105, 3344, 4301(2)(D), and 5372); *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 139-142 (1953). An award or discretionary financial incentive of any kind poses an unacceptable risk of interfering with an administrative law judge's judicial independence, and could have the additional effect of circumventing the legal prohibition against performance appraisals. See 5 U.S.C. 4301(2)(D), § 930.211 of OPM's existing regulations, and § 930.206(a) of the final regulations published with this notice. By removing the phrase "in the performance of adjudicatory functions" from the regulations and adding specific references to 5 U.S.C. 4502 and 4504 to the regulations, OPM is clarifying that monetary or honorary awards or financial incentives of any kind, whether granted under Chapter 45 or other authority, are prohibited. OPM is not adopting the commenter's suggestion, and is adding clarifying language to state that honorary, as well as monetary awards and incentives are prohibited.

OPM received two opposing views on the issue of pay for performance for administrative law judges. OPM did not

consider either view since the existing law does not permit administrative law judges to be rated on performance.

**General Comments**

One commenter suggests that all Federal administrative judges become administrative law judges for consistency and for the best interest of the public. This recommendation is both contrary to the requirements of the APA and outside the scope of these regulations, and cannot be considered.

OPM received several comments requesting the reestablishment of an Office of Administrative Law Judges within OPM. This comment cannot be considered, as it concerns OPM's internal management and organization, a matter outside the scope of these regulations.

**Derivative Table Comparing New Section Numbers in Part 930, Subpart B With Current Section Numbers.**

The following derivation table has been prepared to make it easier for readers to compare OPM's new rule in part 930, subpart B, with the current regulations.

DERIVATION TABLE FOR 5 CFR 930 SUBPART B

New section	Current section
930.201 .....	930.201.
930.201(a) .....	930.201(a).
930.201(b) .....	930.201(b).
930.201(c) .....	930.203b.
930.201(d) .....	New.
930.201(e)(1) through (11).	New.
930.201(f)(1) through (4).	New.
930.201(f)(2) .....	930.212.
930.202 .....	930.202.
Administrative Law Judge Position.	930.202(c).
Agency .....	930.202(a).
Detail .....	930.202(b).
	930.202(d) (Removed).
	930.202(e) (Removed).
Removal .....	930.202(f).
Senior Administrative Law Judge.	930.216(a)(2).
Superior Qualifications	930.210(g)(2).
930.203 .....	930.201(c).
930.204 .....	930.203a.
930.204(a) .....	930.203a(a) and (b).
930.204(b) .....	New.
930.204(c) .....	930.203a(c).
930.204(c)(1) .....	930.203a(c)(1).
930.204(c)(2) .....	930.203a(c)(2).
930.204(c)(3) .....	930.203a(c)(3) (Revised).
930.204(c)(4) .....	930.203a(c)(4) (Revised).
	930.203a(d) (Removed).
930.204(d) .....	930.203a(e).

DERIVATION TABLE FOR 5 CFR 930  
SUBPART B—Continued

New section	Current section
930.204(e) .....	930.204 (Revised).
930.204(f) .....	930.205 (Revised).
930.204(g) .....	930.207 (Revised).
930.204(h) .....	930.206 (Revised). 930.208 (Removed).
930.204(i) .....	New.
930.205 .....	930.210.
930.205(f)(2) .....	930.210(g)(2).
930.205(i) .....	New.
930.205(j) .....	New.
930.206 .....	930.210(j) through (m) (Removed).
930.206(a) .....	New title.
930.206(b) .....	930.211.
930.207 .....	930.206(b).
930.208 .....	930.209.
930.209 .....	930.213.
930.210 .....	930.216.
930.211 .....	930.215.
930.211 .....	930.214.

**Executive Order 12866, Regulatory Review**

This proposed rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

**Regulatory Flexibility Act**

I certify that these regulations would not have a significant economic impact on a substantial number of small entities (including small businesses, small organizational units, and small governmental jurisdictions) because they would affect only some Federal agencies and employees.

**List of Subjects in 5 CFR Parts 337 and 930**

Administrative practice and procedure, Computer technology, Government employees, Motor vehicles.

U.S. Office of Personnel Management.

**Linda M. Springer,**  
*Director.*

■ Accordingly, OPM is amending 5 CFR parts 337 and 930 as follows:

**PART 337—EXAMINING SYSTEM**

■ 1. The authority citation for part 337 is revised to read as follows:

**Authority:** 5 U.S.C. 1104(a), 1302, 2302, 3301, 3302, 3304, 3319, 5364; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; 33 FR 12423, Sept. 4, 1968; and 45 FR 18365, Mar. 21, 1980; 116 Stat. 2135, 2290; and 117 Stat 1392, 1665.

**Subpart A—General Provisions**

■ 2. Revise § 337.101 paragraph (a) to read as follows:

**§ 337.101 Rating applicants.**

(a) OPM shall prescribe the relative weights to be given subjects in an examination, and shall assign numerical ratings on a scale of 100. 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.

\* \* \* \* \*

**PART 930—PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS (MISCELLANEOUS)**

■ 3. Revise Subpart B to read as follows:

**Subpart B—Administrative Law Judge Program**

Sec.

- 930.201 Coverage.
- 930.202 Definitions.
- 930.203 Cost of competitive examination.
- 930.204 Appointments and conditions of employment.
- 930.205 Administrative law judge pay system.
- 930.206 Performance rating and awards.
- 930.207 Details and assignments to other duties within the same agency.
- 930.208 Administrative Law Judge Loan Program—detail to other agencies.
- 930.209 Senior Administrative Law Judge Program.
- 930.210 Reduction in force.
- 930.211 Actions against administrative law judges.

**Authority:** 5 U.S.C. 1104(a), 1302(a), 1305, 3105, 3301, 3304, 3323(b), 3344, 4301(2)(D), 5372, 7521, and E.O. 10577, 3 CFR, 1954–1958 Comp., p. 219.

**Subpart B—Administrative Law Judge Program**

**§ 930.201 Coverage.**

(a) This subpart applies to individuals appointed under 5 U.S.C. 3105 for proceedings required to be conducted in accordance with 5 U.S.C. 556 and 557 and to administrative law judge positions.

(b) Administrative law judge positions are in the competitive service. Except as otherwise stated in this subpart, the rules and regulations applicable to positions in the competitive service apply to administrative law judge positions.

(c) The title “administrative law judge” is the official title for an administrative law judge position. Each agency must use only this title for personnel, budget, and fiscal purposes.

(d) The Director of OPM, or designee, shall prescribe the examination methodology in the design of each administrative law judge examination.

(e) OPM does not hire administrative law judges for other agencies but has the authority to:

(1) Recruit and examine applicants for administrative law judge positions, including developing and administering the administrative law judge examinations under 5 U.S.C. 3301, 3304, 1104(a), and 1302, and Executive Order 10577, as amended, except OPM is not required to use the examination scoring process in 5 CFR 337.101(a);

(2) Assure that decisions concerning the appointment, pay, and tenure of administrative law judges in Federal agencies are consistent with applicable laws and regulations;

(3) Establish classification and qualification standards for administrative law judge positions;

(4) Approve noncompetitive personnel actions for administrative law judges, including but not limited to promotions, transfers, reinstatements, restorations, and reassignments;

(5) Approve personnel actions related to pay for administrative law judges under § 930.205(c), (f)(2), (g), and (j);

(6) Approve an intra-agency detail or assignment of an administrative law judge to a non-administrative law judge position that lasts more than 120 days or when an administrative law judge cumulates a total of more than 120 days for more than one detail or assignment within the preceding 12 months;

(7) Arrange the temporary detail (loan) of an administrative law judge from one agency to another under the provisions of the administrative law judge loan program in § 930.208;

(8) Arrange temporary reemployment of retired administrative law judges to meet changing agency workloads under the provisions of the Senior Administrative Law Judge Program in § 930.209;

(9) Maintain and administer the administrative law judge priority referral program under § 930.210(c);

(10) Promulgate regulations for purposes of sections 3105, 3344, 4301(2)(D) and 5372 of title 5, U.S.C.; and

(11) Ensure the independence of the administrative law judge.

(f) An agency employing administrative law judges under 5 U.S.C. 3105 has:

(1) The authority to appoint as many administrative law judges as necessary for proceedings conducted under 5 U.S.C. 556 and 557;

(2) The authority to assign an administrative law judge to cases in rotation so far as is practicable;

(3) The responsibility to ensure the independence of the administrative law judge; and



(4) The responsibility to obtain OPM's approval before taking any of the personnel actions described in paragraphs (e)(4) through (8) of this section.

#### § 930.202 Definitions.

In this subpart:

*Administrative law judge position* means a position in which any portion of the duties requires the appointment of an administrative law judge under 5 U.S.C. 3105.

*Agency* has the same meaning given in 5 U.S.C. 551(1).

*Detail* means the temporary assignment of an administrative law judge from one administrative law judge position to another administrative law judge position without change in civil service or pay status.

*Removal* means discharge of an administrative law judge from the position of an administrative law judge or involuntary reassignment, demotion, or promotion to a position other than that of an administrative law judge.

*Senior administrative law judge* means a retired administrative law judge who is reemployed under a temporary appointment under 5 U.S.C. 3323(b)(2) and § 930.209 of this chapter.

*Superior qualifications* means an appointment made at a rate above the minimum rate based on such qualifications as experience practicing law before the hiring agency; experience practicing before another forum in a field of law relevant to the hiring agency; or an outstanding reputation among others in a field of law relevant to the hiring agency.

#### § 930.203 Cost of competitive examination.

Each agency employing administrative law judges must reimburse OPM for the cost of developing and administering the administrative law judge examination. Each agency is charged a pro rata share of the examination cost, based on the actual number of administrative law judges the agency employs. OPM computes the cost of the examination program on an annual basis and notifies the employing agencies of their respective shares after the calculations are made.

#### § 930.204 Appointments and conditions of employment.

(a) *Appointment*. An agency may appoint an individual to an administrative law judge position only with prior approval of OPM, except when it makes its selection from the list of eligibles provided by OPM. An administrative law judge receives a career appointment and is exempt from

the probationary period requirements under part 315 of this chapter. An administrative law judge appointment is subject to investigation, and an administrative law judge is subject to the suitability requirements in part 731 of this chapter.

(b) *Licensure*. At the time of application and any new appointment and while serving as an administrative law judge, the individual must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. Judicial status is acceptable in lieu of "active" status in States that prohibit sitting judges from maintaining "active" status to practice law. Being in "good standing" is also acceptable in lieu of "active" status in States where the licensing authority considers "good standing" as having a current license to practice law.

(c) *Appointment of incumbents of newly classified administrative law judge positions*. An agency may give an incumbent employee an administrative law judge career appointment if that employee is serving in the position when it is classified as an administrative law judge position on the basis of legislation, Executive order, or a decision of a court and if:

(1) The employee has competitive status or is serving in an excepted position under a permanent appointment;

(2) The employee is serving in an administrative law judge position on the day the legislation, Executive order, or decision of the court on which the classification of the position is based becomes effective;

(3) OPM receives a recommendation for the employee's appointment from the agency concerned; and

(4) OPM determines the employee meets the qualification requirements and has passed the current examination for an administrative law judge position.

(d) *Appointment of an employee from a non-administrative law judge position*. Except as provided in paragraphs (a) and (c) of this section, an agency may not appoint an employee who is serving in a position other than an administrative law judge position to an administrative law judge position.

(e) *Promotion*. (1) Except as otherwise stated in this paragraph, 5 CFR part 335 applies in the promotion of administrative law judges.

(2) To reclassify an administrative law judge position at a higher level, the agency must submit a request to OPM. When OPM approves the higher level

classification, OPM will direct the promotion of the administrative law judge occupying the position prior to the reclassification.

(f) *Reassignment*. Prior to OPM's approval, the agency must provide a bona fide management reason for the reassignment.

(g) *Reinstatement*. An agency may reinstate a former administrative law judge who served under 5 U.S.C. 3105, passed an OPM administrative law judge competitive examination, and meets the professional license requirement in paragraph (b) of this section.

(h) *Transfer*. An agency may not transfer an individual from one administrative law judge position to another administrative law judge position within 1 year after the individual's last appointment, unless the gaining and losing agencies agree to the transfer.

(i) *Conformity*. Actions under this section must be consistent with § 930.201(f).

#### § 930.205 Administrative law judge pay system.

(a) OPM assigns each administrative law judge position to one of the three levels of basic pay, AL-3, AL-2 or AL-1 of the administrative law judge pay system established under 5 U.S.C. 5372 in accordance with this section. Pay level AL-3 has six rates of basic pay, A, B, C, D, E, and F.

(1) The rate of basic pay for AL-3, rate A, may not be less than 65 percent of the rate of basic pay for level IV of the Executive Schedule. The rate of basic pay for AL-1 may not exceed the rate for level IV of the Executive Schedule.

(2) The President determines the appropriate adjustment for each level in the administrative law judge pay system, subject to paragraph (a)(1) of this section. Such adjustments take effect on the 1st day of the first pay period beginning on or after the first day of the month in which adjustments in the General Schedule rates of basic pay under 5 U.S.C. 5303 take effect.

(3) An agency must use the following procedures to convert an administrative law judge's annual rate of basic pay to an hourly, daily, weekly, or biweekly rate:

(i) To derive an hourly rate, divide the annual rate of pay by 2,087 and round to the nearest cent, counting one-half cent and over as the next higher cent.

(ii) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the administrative law judge's basic daily tour of duty.

(iii) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, respectively.

(b) Pay level AL-3 is the basic pay level for administrative law judge positions filled through a competitive examination.

(c) Subject to OPM approval, agencies may establish administrative law judge positions in pay levels AL-2 and AL-1. Administrative law judge positions are placed at these levels when they involve significant administrative and managerial responsibilities.

(d) Administrative law judges must serve at least 1 year in each AL pay level, or in an equivalent or higher level in positions in the Federal service, before advancing to the next higher level and may advance only one level at a time.

(e) Except as provided in paragraph (f) of this section, upon appointment to an administrative law judge position and placement in level AL-3, an administrative law judge is paid at the minimum rate A of AL-3. He or she is automatically advanced successively to rates B, C, and D of that level upon completion of 52 weeks of service in the next lower rate, and to rates E and F of that level upon completion of 104 weeks of service in the next lower rate. Time in a non-pay status is generally creditable service when computing the 52-or 104-week period as long as it does not exceed 2 weeks per year for each 52 weeks of service. However, absence due to unformed service or compensable injury is fully creditable upon reemployment as provided in part 353 of this chapter.

(f) Upon appointment to a position at AL-3, an administrative law judge may be paid at the minimum rate A, unless the administrative law judge is eligible for the higher rate B, C, D, E, or F because of prior service or superior qualifications, as provided in paragraphs (f)(1) and (f)(2) of this section.

(1) An agency may offer an administrative law judge applicant with prior Federal service a higher than minimum rate up to the lowest rate of basic pay that equals or exceeds the applicant's highest previous Federal rate of basic pay, not to exceed the maximum rate F.

(2) With prior OPM approval, an agency may pay the rate of pay that is next above the applicant's existing pay or earnings up to the maximum rate F. The agency may offer a higher than minimum rate to:

(i) An administrative law judge applicant with superior qualifications (as defined in § 930.202) who is within reach for appointment from an

administrative law judge certificate of eligibles; or

(ii) A former administrative law judge with superior qualifications who is eligible for reinstatement.

(g) With prior OPM approval, an agency, on a one-time basis, may advance an administrative law judge in an AL-3 position with added administrative and managerial duties and responsibilities one rate above the administrative law judge's current AL-3 pay rate, up to the maximum rate F.

(h) Upon appointment to an administrative law judge position placed at AL-2 or AL-1, an administrative law judge is paid at the established rate for the level.

(i) An employing agency may reduce the level or rate of basic pay of an administrative law judge under § 930.211.

(j) With prior OPM approval, an employing agency may reduce the level of basic pay of an administrative law judge if the administrative law judge submits to the employing agency a written request for a voluntary reduction due to personal reasons.

#### § 930.206 Performance rating and awards.

(a) An agency may not rate the job performance of an administrative law judge.

(b) An agency may not grant any monetary or honorary award or incentive under 5 U.S.C. 4502, 4503, or 4504, or under any other authority, to an administrative law judge.

#### § 930.207 Details and assignments to other duties within the same agency.

(a) An agency may detail an administrative law judge from one administrative law judge position to another administrative law judge position within the same agency in accordance with 5 U.S.C. 3341.

(b) An agency may not detail an employee who is not an administrative law judge to an administrative law judge position.

(c) An agency may assign an administrative law judge to perform non-administrative law judge duties only when:

(1) The other duties are consistent with administrative law judge duties and responsibilities;

(2) The assignment is to last no longer than 120 days; and

(3) The administrative law judge has not had a total of more than 120 days of such assignments or details within the preceding 12 months.

(d) OPM may authorize a waiver of paragraphs (c)(2) and (c)(3) of this section if an agency shows that it is in the public interest to do so. In

determining whether a waiver is justified, OPM may consider, but is not restricted to considering, such factors as unusual case load or special expertise of the detailee.

#### § 930.208 Administrative Law Judge Loan Program—detail to other agencies.

(a) In accordance with 5 U.S.C. 3344, OPM administers an Administrative Law Judge Loan Program that coordinates the loan/detail of an administrative law judge from one agency to another. An agency may request from OPM the services of an administrative law judge if the agency is occasionally or temporarily insufficiently staffed with administrative law judges, or an agency may loan the services of its administrative law judges to other agencies if there is insufficient work to fully occupy the administrative law judges' work schedule.

(b) An agency's request to OPM for the services of an administrative law judge must:

(1) Identify and briefly describe the nature of the cases(s) to be heard;

(2) Specify the legal authority for which the use of an administrative law judge is required; and

(3) Demonstrate, as appropriate, that the agency has no administrative law judge available to hear the case(s).

(c) The services of an administrative law judge under this program are made from the starting date of the detail until the end of the current fiscal year, but may be extended into the next fiscal year with OPM's approval. Decisions for an extension are made by OPM on a case-by-case basis.

(d) The agency requesting the services of an administrative law judge under this program is responsible for reimbursing the agency that employs the administrative law judge for the cost of the service.

#### § 930.209 Senior Administrative Law Judge Program.

(a) OPM administers a Senior Administrative Law Judge Program in accordance with 5 U.S.C. 3323(b)(2). The Senior Administrative Law Judge Program is subject to the requirements and limitations in this section.

(b) A senior administrative law judge must meet the:

(1) Annuitant requirements under 5 U.S.C. 3323;

(2) Professional license requirement in § 930.204(b); and

(3) Investigations and suitability requirements in part 731 of this chapter.

(c) Under the Senior Administrative Law Judge Program, OPM authorizes agencies that have temporary, irregular

workload requirements for conducting proceedings in accordance with 5 U.S.C. 556 and 557 to temporarily reemploy administrative law judge annuitants. If OPM is unable to identify an administrative law judge under § 930.208 who meets the agency's qualification requirements, OPM will approve the agency's request.

(d) An agency wishing to temporarily reemploy an administrative law judge must submit a written request to OPM. The request must:

(1) Identify the statutory authority under which the administrative law judge is expected to conduct proceedings;

(2) Demonstrate the agency's temporary or irregular workload requirements for conducting proceedings;

(3) Specify the tour of duty, location, period of time, or particular cases(s) for the requested reemployment; and

(4) Describe any special qualifications the retired administrative law judge possesses that are required of the position, such as experience in a particular field, agency, or substantive area of law.

(e) OPM establishes the terms of the appointment for a senior administrative law judge. The senior administrative law judge may be reemployed either for a specified period not to exceed 1 year or for such time as may be necessary for the senior administrative law judge to conduct and complete the hearing and issue decisions for one or more specified cases. Upon agency request, OPM may reduce or extend such period of reemployment, as necessary, to coincide with changing staffing requirements.

(f) A senior administrative law judge serves subject to the same limitations as any other administrative law judge employed under this subpart and 5 U.S.C. 3105.

(g) A senior administrative law judge is paid the rate of basic pay for the pay level at which the position has been classified. If the position is classified at pay level AL-3, the senior administrative law judge is paid the lowest rate of basic pay in AL-3 that equals or exceeds the highest previous rate of basic pay attained by the individual as an administrative law judge immediately before retirement, up to the maximum rate F.

#### § 930.210 Reduction in force.

(a) *Retention preference regulations.* Except as modified by this section, the reduction in force regulations in part 351 of this chapter apply to administrative law judges.

(b) *Determination of retention standing.* In determining retention standing in a reduction in force, each agency lists its administrative law judges by group and subgroup according to tenure of employment, veterans' preference, and service date as outlined in part 351 of this chapter. Because administrative law judges are not given performance ratings (see § 930.206), the provisions in part 351 of this chapter referring to the effect of performance ratings on retention standing are not applicable to administrative law judges.

(c) *Placement assistance.* (1) An administrative law judge who is reached in an agency's reduction in force and receives a notification of separation is eligible for placement assistance under the agency's reemployment priority list established and maintained in accordance with subpart B of part 330 of this chapter.

(2) An administrative law judge who is reached by an agency in a reduction in force and who is notified of being separated, furloughed for more than 30 days, or demoted, is entitled to have his or her name placed on OPM's administrative law judge priority referral list for the level in which last served and for all lower levels.

(i) To have his or her name placed on the OPM priority referral list, a displaced administrative law judge must provide OPM with a request for priority referral placement, a resume or equivalent, a list of acceptable geographical locations, and a copy of the reduction in force notice at any time after the receipt of the specific reduction in force notice, but not later than 90 days after the date of separation, furlough for more than 30 days, or demotion.

(ii) Eligibility on the OPM priority referral list expires 2 years after the effective date of the reduction in force action.

(iii) Referral and selection of administrative law judges are made without regard to selective certification or special qualification procedures.

(iv) Termination of eligibility on the OPM priority referral list takes place when an administrative law judge submits a written request to terminate eligibility, accepts a permanent full-time administrative law judge position, or declines one full-time employment offer as an administrative law judge at or above the level held when reached for reduction in force at geographic locations indicated as acceptable under paragraph (c)(2)(i) of this section.

(3) When there is no administrative law judge available on the agency's reemployment priority list, an agency may fill a vacant administrative law

judge position only from OPM's priority referral list, unless the agency obtains prior approval from OPM to fill the vacant position through competitive examining, promotion, transfer, reassignment, or reinstatement procedures. OPM will grant such approvals only under extraordinary circumstances. The agency must demonstrate that the potential administrative law judge candidate possesses experience and qualifications superior to any available displaced administrative law judge on OPM's priority referral list.

#### § 930.211 Actions against administrative law judges.

(a) *Procedures.* 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 Merit Systems Protection Board on the record and after opportunity for a hearing before the Board as prescribed in 5 U.S.C. 7521 and 5 CFR part 1201. Procedures for adverse actions by agencies under part 752 of this chapter do not apply to actions against administrative law judges.

(b) *Status during removal proceedings.* In exceptional cases when there are circumstances in which the retention of an administrative law judge in his or her position, pending adjudication of the existence of good cause for his or her removal, is detrimental to the interests of the Federal Government, the agency may:

(1) Assign the administrative law judge to duties consistent with his or her normal duties in which these circumstances would not exist;

(2) Place the administrative law judge on leave with his or her consent;

(3) Carry the administrative law judge on annual leave, sick leave, leave without pay, or absence without leave, as appropriate, if he or she is voluntarily absent for reasons not originating with the agency; or

(4) If the alternatives in paragraphs (b)(1) through (b)(3) of this section are not available, the agency may consider placing the administrative law judge in a paid non-duty or administrative leave status.

(c) *Exceptions from procedures.* The procedures in paragraphs (a) and (b) of this section do not apply:

(1) In making dismissals or taking other actions under 5 CFR part 731;

(2) In making dismissals or other actions made by agencies in the interest of national security under 5 U.S.C. 7532;

(3) To reduction in force actions taken by agencies under 5 U.S.C. 3502; or

(4) In any action initiated by the Office of Special Counsel under 5 U.S.C. 1215.

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## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

#### 10 CFR Part 490

RIN 1904-AB66

#### Alternative Fuel Transportation Program; Alternative Compliance

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) today publishes a final rule to implement section 514 of the Energy Policy Act of 1992, as amended by section 703 of the Energy Policy Act of 2005, which allows States and alternative fuel providers to petition for a waiver of the alternative fueled vehicle (AFV) acquisition requirements. Today's final rule requires that for a State or alternative fuel provider to be granted a waiver, the State entity or alternative fuel provider must request a waiver to demonstrate that in lieu of complying with the applicable AFV acquisition requirement for a model year, it will take other actions to reduce its annual petroleum motor fuel consumption by an amount equal to 100 percent alternative fuel use in all of the fleet's AFVs, including AFVs that the State entity or alternative fuel provider would have been required to acquire if there was no waiver.

**DATES:** *Effective Date:* The final rule is effective April 19, 2007.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Bluestein, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, FreedomCAR and Vehicle Technologies Program, Mailstop EE-2G, Room 5F-034, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-6116 or [linda.bluestein@ee.doe.gov](mailto:linda.bluestein@ee.doe.gov), or Mr. Chris Calamita, U.S. Department of Energy, Office of General Counsel, GC-72, Room 6B-256, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-9507 or [Christopher.calamita@hq.doe.gov](mailto:Christopher.calamita@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Introduction and Background
- II. Public Comments

#### III. Discussion of the Final Rule

- A. Eligibility for alternative compliance waiver
  - B. Petroleum reduction calculation
    1. Cumulative inventory
    2. Calculation procedure
  - C. Eligible reductions in petroleum consumption
    1. Light-duty vehicles
    2. Medium- and heavy-duty vehicles
    3. Nonroad vehicles
    4. Rollover of excess petroleum reduction
  - D. Waiver applications
  - E. Application deadlines
  - F. Use of credits
  - G. Reporting requirement
  - H. Sanctions for violations
  - I. Exemptions
  - J. Record retention
  - K. Other comments
- IV. Regulatory Review
- A. Executive Order 12866
  - B. National Environmental Policy Act
  - C. Regulatory Flexibility Act
  - D. Paperwork Reduction Act
  - E. Unfunded Mandates Reform Act of 1995
  - F. Treasury and General Government Appropriations Act, 1999
  - G. Executive Order 13132
  - H. Executive Order 12988
  - I. Treasury and General Government Appropriations Act, 2001
  - J. Executive Order 13211
  - K. Congressional Notification
- V. Approval by the Office of the Secretary

#### I. Introduction and Background

Title V of the Energy Policy Act of 1992 (Pub. L. 102-486; the Act) established requirements for covered alternative fuel providers ("covered persons") and States to acquire set percentages of AFVs. (42 U.S.C. 13251(a) and 13257(o)) As of 1999, 90 percent of light-duty motor vehicles acquired by a covered person must be AFVs. As of 2000, 75 percent of light-duty motor vehicles acquired for a State fleet<sup>1</sup> must be AFVs. Section 508

<sup>1</sup> Section 301 of the Act defines "fleet" as "a group of 20 or more light-duty motor vehicles, used primarily in a metropolitan statistical area or consolidated metropolitan statistical area, as established by the Bureau of the Census, with a 1980 population of more than 250,000, that are centrally fueled or capable of being centrally fueled and are owned, operated, leased, or otherwise controlled by a governmental entity or other person who owns, operates, leases, or otherwise controls 50 or more such vehicles, by any person who controls such person, by any person controlled by such person, and by any person under common control with such person, except that such term does not include—

- (A) motor vehicles held for lease or rental to the general public;
- (B) motor vehicles held for sale by motor vehicle dealers, including demonstration motor vehicles;
- (C) motor vehicles used for motor vehicle manufacturer product evaluations or tests;
- (D) law enforcement motor vehicles;
- (E) emergency motor vehicles;
- (F) motor vehicles acquired and used for military purposes that the Secretary of Defense has certified to the Secretary must be exempt for national security reasons;

provides for the use of credits in complying with the AFV requirements. (42 U.S.C. 13258) Title V also provides for an exemption process from the AFV requirements. (42 U.S.C. 13251(a)(5) and 13257(i)) As directed by the Act, DOE issued regulations, 10 CFR part 490—Alternative Fuel Transportation Program, to implement the AFV provisions. (61 FR 10622; March 14, 1996).

On August 8, 2005, the Energy Policy Act of 2005, (Pub. L. 109-58; EPACT 2005) was signed into law. In part, EPACT 2005 provides additional flexibility for States and covered persons subject to AFV acquisition requirements under 10 CFR part 490. Specifically, section 703 of EPACT 2005 adds an alternative compliance program (entitled "Alternative Compliance") under section 514 of title V of the Act. (42 U.S.C. 13263a) Section 514 authorizes DOE to grant to covered persons and States a waiver from the AFV acquisition requirements under section 501 (42 U.S.C. 13251) and section 507(o) (42 U.S.C. 13257(o)), respectively. The statute provides that any State or covered person may apply for an alternative compliance waiver, and that DOE must grant the waiver if the State or covered person demonstrates that its fleet will reduce annual petroleum consumption by an amount equal to the amount of petroleum it would reduce if the fleet's cumulative inventory of AFVs operated 100 percent of the time on alternative fuel (42 U.S.C. 13263a(a) and (b)). (Under the AFV requirements, States are not required to operate AFVs on alternative fuel and covered persons are required to operate their AFVs on alternative fuel only when it is available. (42 U.S.C. 13251(a)(4)) In addition, the State or covered person requesting a waiver must be in compliance with all applicable vehicle emission standards established by the Environmental Protection Agency under the Clean Air Act.

On June 23, 2006, DOE issued a notice of proposed rulemaking (NPR) to establish procedures for the submission of, and action on, applications for alternative compliance waivers submitted by States and covered persons subject to AFV acquisition requirements under part 490, 71 FR 36034, June 23, 2006. In the NPR, DOE proposed to add a new subpart I to part 490, which would include provisions

(G) nonroad vehicles, including farm and construction motor vehicles; or

(H) motor vehicles which under normal operations are garaged at personal residences at night[.]