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OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 930

RIN 3206–AL67

Programs for Specific Positions and Examinations (Miscellaneous)

AGENCY: U. S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U. S. Office of Personnel Management (OPM) is issuing a final rule to eliminate the licensure requirement for incumbent administrative law judges.

DATES: This rule is effective January 2, 2014.

FOR FURTHER INFORMATION CONTACT: Mike Gilmore by telephone at (202) 606–2429; by fax at (202) 606–2329; by TTY at (202) 418–3134; or by email at *michael.gilmore@opm.gov.*

SUPPLEMENTARY INFORMATION:

Background

On March 20, 2007, OPM published a final rule in the **Federal Register** at 72 FR 12947, codified in subpart B of part 930 of title 5, Code of Federal Regulations (CFR), to revise the Administrative Law Judge Program. These revisions included a requirement for incumbent administrative law judges (ALJs) to ''. . . 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.'' (5 CFR 930.204(b)(1).) Under the Administrative Procedure Act (specifically, sections 556 and 557 of title 5, United States Code (U.S.C.), ALJs preside over formal proceedings requiring a decision on the record after an opportunity for a hearing. The licensure requirement was intended to ensure that ALJs, like attorneys, remain subject to a code of professional responsibility.

On July 18, 2008, OPM published an interim rule with request for comments in the **Federal Register** at 73 FR 41235 suspending the requirement in 5 CFR 930.204(b)(1) that incumbent ALJs must ''possess a professional license to practice law and be authorized to practice law. . . .'' OPM took this suspension action based on reconsideration of the comments received during the notice and comment period for the March 20, 2007, final rule. In response to the interim rule, OPM received written comments from three individuals and three professional organizations. These comments along with the comments received for the October 7, 2010, proposed rule, described below, are addressed in this final rule.

On October 7, 2010, OPM published a proposed rule in the **Federal Register** at 75 FR 61998 to eliminate the licensure requirement for incumbent ALJs. This final rule implements the proposed rule published on October 7, 2010.

During the comment period from October 7, 2010, through December 6, 2010, OPM received written comments from twelve individuals, two professional organizations, and a union. A total of 21 written comments were received in response to the issue of licensure requirements for incumbent ALJs. Of the written comments received, fourteen supported the elimination of the licensure requirement for incumbent ALJs and five opposed elimination. Two remaining comments addressed issues other than the topic of the proposed rule and are, therefore, outside the scope of the rulemaking.

With respect to the combined group of commenters, the majority supported the elimination of the licensure requirement for incumbent ALJs. Of the commenters in the majority, four identified existing mechanisms for regulating conduct, such as the Standards of Ethical Conduct for Employees of the Executive Branch promulgated by the Office of Government Ethics and codified at 5 CFR part 2635, agency-prescribed ethics standards, and the adverse action procedures for ALJs in 5 U.S.C. 7521, as sufficient to ensure that ALJs are held to a high standard of professional conduct. However, three of the commenters expressed a concern that even if a licensure requirement for incumbents is inappropriate, the other mechanisms for regulating conduct described above are inadequate to preserve the integrity and independence of the administrative judiciary. These commenters suggested that ALJs should be required to adhere to a code of judicial conduct such as the Code of Conduct for United States Judges (CCUSJ). The CCUSJ applies to Article I and Article III judges, and not, by its terms, to the Federal administrative judiciary. OPM did not adopt this recommendation because the commenters did not identify the authority under which OPM could make this code applicable to incumbent ALJs Governmentwide.

A professional organization supporting the proposed rule to eliminate the licensure requirement for incumbent ALJs requested that the requirement be eliminated for new appointments of Senior ALJs, arguing that, once appointed, Senior ALJs are subject to sufficient controls on their conduct. An individual inquired whether the licensure requirement applied to reemployed annuitants. OPM did not propose to amend section 930.209 governing the Senior ALJ Program, so the comments are beyond the scope of this rulemaking. OPM notes that the specific bar licensure requirement for appointment as a Senior ALJ has been in place since 1985. OPM explained in the Supplementary Information of the final rule published on April 18, 1985, that the purpose for requiring licensure for Senior ALJs was to give ''assurance to the public that retired ALJs . . . have maintained proficiency in their legal knowledge, skills, and abilities.'' (50 FR 15407)

By way of clarification, OPM notes that under section 930.209(b)(2), Senior ALJs must meet the licensure requirements in section 930.204(b). As amended by this final rulemaking, the licensure requirements in section 930.204(b) will apply only at the time of application (*including* while on the

Senior ALJ list pending reemployment) and at the time of appointment, not during the Senior ALJ's incumbency as a reemployed annuitant.

One commenter recommended eliminating the licensure requirement for new appointments. Again, because OPM did not propose to amend the licensure requirements for applicants, the comment is outside the scope of this rulemaking. As noted in the Supplementary Information accompanying the proposed rule published October 7, 2010, OPM remains convinced that active licensure at the time of application and appointment is vital as an indicator that the applicant presenting himself or herself for assessment and possible appointment has been subject to rigorous ethical requirements right up to the time of appointment. (75 FR 61998)

Another commenter recommended modifying the licensure requirement to allow as qualifying an attorney's authorization to practice before a Tribal court when he or she has not been authorized to practice before a court of a State, a Territory, or the District of Columbia. Because OPM did not propose to amend the licensure requirements for applicants, the comment is outside the scope of the rulemaking. However, OPM invites anyone with information concerning whether Tribal courts authorize the practice of law by licensed attorneys who are not authorized to practice before other courts, and whether such attorneys are subject to a code of ethical conduct and bar discipline, to provide such information to OPM's Employee Services so that OPM may consider it in determining what revisions might be appropriate in the future. Please email such information to Mike Gilmore at *Michael.gilmore@opm.gov.*

The same commenter recommended allowing, in lieu of bar licensure, an applicant's enrollment to represent clients before a specific administrative agency, or an applicant's experience in a technical non-legal discipline. OPM cannot accept this comment. Not only is it outside the scope of the rulemaking, but it is at odds with the legal experience and judicial competency requirements for ALJ applicants, as well as the requirement that applicants be subject to a code of ethical conduct.

One professional organization and one individual supported the elimination of the license requirement for incumbent ALJs and suggested that OPM add language to cover non-Federal judges who apply for Federal ALJ positions and whose licensure status is something other than ''active.'' Because OPM did not propose to change the qualification requirements for applicants, this comment is outside the scope of the rulemaking. OPM notes that non-Federal judges who apply for a Federal ALJ job are considered ''applicants'' and must meet the qualifications required by regulation for all applicants, including licensure requirements, at the time of application and appointment.

Two commenters opposing the elimination of the licensure requirement for incumbent ALJs expressed concern about the perceived inequity between Federal ALJs and Federal attorneys. The commenters believe that it is not appropriate to allow incumbent ALJs to be unlicensed when Federal attorneys must maintain an ''active'' bar status. OPM disagrees with this analogy. Attorneys are appointed in the excepted service, subject to qualification standards prescribed by their employing agencies. Except for certain classes of attorneys whose bar licensure is governed by statute, there is no uniform standard for licensure, and agencies have the discretion to establish appropriate standards for their incumbent attorneys. In contrast, ALJs are appointed in the competitive service and are subject to uniform qualification standards prescribed by OPM. OPM has determined that, in light of their unique function and role, incumbent ALJs should not be required to maintain an active bar license. OPM notes, however, that this rule only concerns the qualification requirements to serve as an incumbent ALJ in the Federal service. This rule is not intended to have any effect on an incumbent ALJ's status or responsibilities under state law.

In addition, one of these commenters urged that the bar licensure requirement for incumbent ALJs be reestablished so that ALJs will be subject to mandatory continuing legal education (MCLE) requirements. OPM does not believe this is a compelling justification to reestablish the licensure requirement. MCLE requirements are not uniform among licensing jurisdictions. MCLE offerings typically concern the advocacy and fiduciary responsibilities of lawyers rather than the adjudicative responsibilities of judges. Agencies already have the statutory authority—and the responsibility—to provide training tailored to the specific needs of their ALJ workforces. *See* 5 U.S.C. 1402 and 4103.

Another commenter suggested that a supervising ALJ who does not maintain an active bar license potentially could assign work that would jeopardize the staff attorney's adherence to the rules of professional responsibility, presumably due to the ALJ's unawareness of such rules. OPM believes this risk is speculative and remote, as the rules of professional responsibility are freely and easily accessible. Moreover, an attorney is obligated to know and follow the applicable rules of professional responsibility. If the attorney perceives a conflict he or she may bring it to the supervising ALJ's attention. The same commenter expressed concern that an unlicensed ALJ who supervises a staff attorney thereby engages in the unauthorized practice of law. OPM does not agree that it is an unauthorized practice of law for a sitting ALJ to review the work of an attorney whose job is to prepare draft judicial opinions.

A professional organization opposing the elimination of the licensure requirement for incumbent ALJs was concerned that removing the licensure requirement will remove an incentive for the ALJs to stay current in relevant areas of the law, will allow a public perception that ALJs are not qualified, and will unnecessarily expose their employing agencies to litigation risk. OPM does not agree that lack of licensure will result in the concerns the professional organization raises. OPM has determined that the bar licensure requirement is not necessary to guarantee the integrity and independence of incumbent ALJs, so there is no basis to impose the requirement solely on the commenter's speculative concerns. Moreover, as previously noted, OPM believes that the existing mechanisms are sufficient to ensure the adequacy of ALJs' training and conduct.

Another commenter's opposition to the elimination of the licensure requirement for incumbent ALJs was based on a belief that it is illogical to require an individual to be licensed at the time of application and appointment but not as an incumbent. OPM disagrees with the commenter's assertion. As noted in the Supplementary Information accompanying the proposed rule, OPM remains convinced that active licensure at the time of application and appointment is vital as an indicator that the applicant presenting himself or herself for assessment and possible appointment has been subject to rigorous ethical requirements right up to the time of appointment. This is no longer necessary after appointment because the ALJ employee becomes subject to the Standards of Ethical Conduct for Employees of the Executive Branch in 5 CFR part 2635 and adverse action procedures pursuant to 5 U.S.C. 7521.

The same commenter expressed a concern that this final rule would establish an inconsistent standard for

adjudicatory officers in the Federal service. OPM wishes to clarify that this rule only concerns the licensure status of incumbent ALJs (including reemployed annuitants) who, as noted above, are employed in the competitive service subject to uniform qualification standards. Members of the administrative judiciary who are not ALJs typically are classified as attorneys, and as such are appointed in the excepted service. *See* 5 CFR 302.101(c)(9). The excepted service by its nature consists of positions where qualification requirements may differ based on the requirements of each agency.

A final concern involved the integrity and objectivity of the administrative judiciary. The commenter believes that without an ''active'' license to practice law, ALJs would abandon their integrity and objectivity when certain parties appear before them. The commenter did not provide evidence of a causal link between active bar licensure and the ability to impartially and objectively adjudicate cases under the Administrative Procedure Act. OPM believes that the risk described by the commenter is speculative and remote.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 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 Federal agencies and employees.

List of Subjects in 5 CFR Part 930

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

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

Accordingly, OPM is revising 5 CFR part 930 as follows:

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

Subpart B—Administrative Law Judge Program

■ 1. The authority citation for subpart B continues to read as follows:

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.

■ 2. Revise § 930.204(b) to read as follows:

§ 930.204 Appointments and conditions of employment.

* * * * *

(b) *Licensure.* At the time of application and any new appointment, 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.

* * * * *

[FR Doc. 2013–28289 Filed 11–29–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0976; Directorate Identifier 2013–NM–198–AD; Amendment 39–17686; AD 2013–24–12]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all The Boeing Company Model 747–8 and 747–8F series airplanes. This AD requires repetitive ultrasonic or dye penetrant inspections for cracking of the barrel nuts and bolts, as applicable, on each forward engine mount, and related investigative and corrective actions if necessary. This AD was prompted by a report of cracked barrel nuts found on a forward engine mount. We are issuing this AD to detect and correct cracked barrel nuts on a forward engine mount, which could result in reduced load capacity of the forward engine mount, and could result in separation of an engine under power from the airplane, and consequent loss of control of the airplane.

DATES: This AD is effective December 17, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 17, 2013.

We must receive comments on this AD by January 16, 2014.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6432; fax: (425) 917–6590; email: *bill.ashforth@faa.gov*.

SUPPLEMENTARY INFORMATION: