



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

**STATEMENT OF
JOSEPH KENNEDY
ASSOCIATE DIRECTOR
HUMAN RESOURCES SOLUTIONS
U.S. OFFICE OF PERSONNEL MANAGEMENT**

before the

**SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

on

“Examining Due Process in Administrative Hearings”

May 12, 2016

Chairman Lankford, Ranking Member Heitkamp, and members of the subcommittee:

I am pleased to have the opportunity to appear before you this morning to discuss the role of the Office of Personnel Management (OPM) with respect to the hiring process used for Administrative Law Judges (ALJs). I also will discuss the distinction between ALJs and other hearing officers government-wide.

The Role of ALJs

The ALJ position was created by the Administrative Procedure Act (APA) to ensure fairness in administrative proceedings before Federal government agencies. ALJs have two primary duties which are 1) presiding over agency hearings, taking evidence, and acting as a preliminary fact finder in proceedings, and 2) making an initial determination about the resolution of a dispute. As of September 2015, there were 1,778 ALJs employed in agencies across the Federal government who handle benefits or regulatory matters.

Not all Federal agencies use ALJs to adjudicate disputes before the agency. There are several other kinds of hearing officers who conduct administrative proceedings throughout the Federal government. Further, Congress established requirements specific to ALJs that do not apply to

**Statement of Joseph Kennedy, Associate Director, Human Resources Solutions
U.S. Office of Personnel Management**

May 12, 2016

other categories of hearing officers. ALJs are in the Competitive Service, and must meet qualifications standards set by OPM and pass an examination designed and administered by OPM. Other hearing officers are typically in the Excepted Service and are assessed on an agency-by-agency basis. The ALJ competitive examination is designed to test for qualifications and competencies that are relevant to service in any of the agencies that employ ALJs, while Excepted Service hearing officers are assessed based on agency-specific qualifications. Veterans' preference points are given to ALJ applicants who are preference eligible, while agencies hiring other hearing officers are exempt from the rules concerning veterans' preference for the Excepted Service and must apply veterans' preference only to the extent administratively feasible. Like other employees in the Competitive Service, ALJs acquire "competitive status" which allows them to be reinstated in ALJ positions after they leave service. ALJs are subject to separate pay provisions, are not subject to performance evaluations, and may not be given awards. Other hearing officers are governed by the normal rules applicable to other positions in the Competitive and Excepted Service. ALJs may be removed only for cause through an action brought by the employing agency at the Merit Systems Protection Board. The removal of other hearing officers occurs pursuant to the adverse action procedures that govern other positions in the Competitive and Excepted Service.

Finally, OPM has oversight authority for ALJs throughout the Federal government, including authority over ALJ job classification and pay setting. Other categories of hearing officers are subject to the decentralized administration more typical of the rest of the Civil Service.

The Role of OPM in the Hiring Process

Consistent with the Administrative Procedure Act and Civil Service laws, OPM is responsible for establishing ALJ qualifications and classification standards, for determining ALJs' pay according to their duties, developing and administering the ALJ examination, and maintaining a listing, referred to as the "ALJ register," of qualified candidates from which OPM can draw to certify candidates for each geographic location at which an employing agency plans to appoint new ALJs. To preserve the qualified decisional independence of ALJs, OPM also is responsible for approving non-competitive personnel actions affecting incumbent ALJs, such as promotions, transfers, reassignments, reinstatements, and details; and for reviewing agencies' position descriptions for ALJs and the job opportunity announcements that agencies use for reinstating ALJs or for hiring ALJs already employed by other agencies. To assist agencies with their workload challenges, OPM also administers the ALJ Loan program, which allows interagency details of ALJs, and the Senior ALJ program, which permits agencies to bring back retired ALJs for a limited duration. By law, OPM cannot delegate the ALJ examination to any other agency to develop or administer.

**Statement of Joseph Kennedy, Associate Director, Human Resources Solutions
U.S. Office of Personnel Management**

May 12, 2016

The ALJ qualification standard developed by OPM prescribes minimum requirements for entry-level ALJ positions. The current qualification requirements, which were last updated in 2008, are defined in the *Qualification Standard for Administrative Law Judge Positions*. To be qualified for an ALJ position, applicants must be licensed and authorized to practice law, and must also have a full seven years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority; qualifying administrative law experience involves cases in which a formal procedure was initiated by a governmental administrative body.

ALJ applicants also must undergo an examination, which is periodically revised to account for changes in the occupation, incorporate new methodologies, and ensure that assessments are updated and valid. For the current version of the examination, which was first administered in 2013, OPM industrial-organizational psychologists worked closely with incumbent ALJs from across the country, and surveyed the entire Federal ALJ population to develop the current rigorous multi-hurdle assessment process. Given the breadth of input from ALJs across Government and the rigor with which the examination was developed, OPM has great confidence in the ability of this examination to identify top quality candidates for ALJ positions across Government.

Under this assessment process, applicants must first meet the preliminary requirements described in the *Qualification Standard*. Those who meet the preliminary qualification requirements go through an online assessment, which includes a Situational Judgment Test, a Writing Sample, and an Experience Assessment. Applicants whose scores are within the range for the higher-scored sub-group are invited to participate in the in-person component of the examination, which includes a Written Demonstration, Logic-Based Measurement Test, and Structured Interview. Applicants must receive a required minimum score on the Written Demonstration or Structured Interview to be considered to have passed the examination and receive a final numerical rating. Those who do not pass are not eligible to be on the register. Veterans' preference points are added, as appropriate. Eligible candidates are then placed on the ALJ register in descending score order, based upon the final numerical ratings. When an agency wants to hire a new ALJ for a particular location, OPM issues a list of candidates who have indicated a willingness to be considered for that location, which is drawn from the top of the register. Agencies hiring entry-level ALJs make selections from the candidates provided by OPM consistent with the law governing the Competitive Service regarding the order of selection. Once an ALJ is appointed by an agency, the ALJ receives a "career appointment," and is not subject to a probationary period.

**Statement of Joseph Kennedy, Associate Director, Human Resources Solutions
U.S. Office of Personnel Management**

May 12, 2016

OPM is confident there is a robust list of candidates on the current register to take care of the near-term hiring needs of the agencies, as currently indicated. However, we recognize that SSA is facing an unprecedented challenge to manage the existing backlog. We are working closely with them to respond to their concerns and needs regarding increasing the number of candidates to accommodate SSA's aggressive hiring goals to manage the backlog. For example, during the past year, OPM processed additional applicants under the 2013 Job Opportunity Announcement to allow a larger swath of the qualified applicants who had completed and been scored on the on-line assessment to proceed to the balance of the examination. The final scores for these candidates were recently entered and these candidates were added to the register. OPM also added candidates whose appeals were resolved favorably to them and who successfully completed the balance of the examination. In addition, OPM continues to add to the register by conducting ongoing quarterly examinations for 10-point veterans as required by Civil Service law.

OPM recently opened the ALJ examination for applications from March 29 to April 8, 2016, thereby meeting the April 1 deadline for reopening established by Section 846 of the Bipartisan Budget Act of 2015. Prior to opening the current examination and in anticipation of increased hiring needs for the Social Security Administration (SSA) for the next several years, OPM increased full-time staff, recruited additional intermittent staff, and identified internal surge support in preparation for administering the current and future examinations. In addition, OPM conducted an extensive recruitment effort, which included targeting national bar associations, women and minority bar associations, ALJ associations and unions, all Chief ALJs in hiring agencies, and various veteran organizations. When the announcement for entry-level ALJ positions was posted on USAJOBS.gov, it yielded more than 5,000 applications.

OPM is currently reviewing the applications received during the open filing period to determine which applicants satisfy the preliminary qualification requirements and exceed the screen-out level for the on-line assessment. After the administration of the examination to the current applicant pool is complete, the assessment process has been concluded, and final numerical ratings have been calculated, OPM will add to the register all the candidates who successfully completed all components of the examination. Both these new candidates and the candidates currently on the register will remain there until they are appointed to an ALJ position or until OPM develops and administers a new ALJ examination.

OPM's Role in Assisting the Social Security Administration with Its Hiring Needs

While keeping in mind its overall responsibilities to the competitive ALJ examination process, OPM has worked collaboratively with the SSA for over a year to assist SSA with its ALJ hiring needs. OPM met with SSA officials to discuss specific hiring requirements, suggested changes to its process for granting permission to transfer and expanding geographic locations, and

**Statement of Joseph Kennedy, Associate Director, Human Resources Solutions
U.S. Office of Personnel Management**

May 12, 2016

developed a checklist for SSA to use when preparing the documentation OPM uses to audit SSA's selection process. In addition, as noted above, OPM administered the remaining portions of the 2013 examination to an additional wave of applicants who had met preliminary qualifications and taken the on-line assessment, in order to help meet agencies' increased hiring projections in 2016. OPM also surveyed ALJ applicants currently on the register to give them an opportunity to update the locations where they wanted to be considered for ALJ employment. These efforts added depth to the robust candidate pool from which OPM draws to provide ALJ hiring agencies with certificates of candidates for entry-level ALJ employment. OPM is committed to continue working with SSA so it can appoint more ALJs to help eliminate its case backlog.

Conclusion

Members of the Subcommittee, thank you for having me here today to discuss the role of OPM in the ALJ hiring process and the ALJs' independence. I would be happy to address any questions you may have.