

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## 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:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is republishing the proposed rule published on December 13, 2005, due to information that was inadvertently omitted. The purpose of these regulations is 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 The purpose of these revisions is to remove procedures that appear in other parts of this chapter, update outdated information, and remove the internal examining processes from the regulations.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. This proposed regulation continues the basic intent of making administrative law judges independent in matters of tenure and compensation.

**DATES:** Comments must be received on or before February 21, 2006.

**ADDRESSES:** Send, deliver, or fax written comments to: Mr. Mark Doboga, Deputy Associate Director for Talent and Capacity Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street NW., Washington, DC 20415-9700; e-mail: [employ@opm.gov](mailto:employ@opm.gov); fax: (202) 606-2329.

Comments may also be sent through the Federal eRulemaking Portal at: <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Watson by telephone at (202) 606-0830; by fax at (202) 606-2329; by

TTY at (202) 418-3134; or by e-mail at [linda.watson@opm.gov](mailto:linda.watson@opm.gov).

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is republishing the proposed rule published on December 13, 2005, (70 FR 73646) 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) and codified in title 5, United States Code (U.S.C.), sections 556, 557, 1305, 3105, 3344, 4301(2)(D), 5372, and 7521. Administrative law judges preside at formal hearings and make or recommend decisions on the basis of the record. The APA requires that this function be carried out in an impartial manner. To assure 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 tenure and compensation.

The goal of this revision is to streamline the current administrative law judge regulations as prescribed in 5 CFR part 930, subpart B. Therefore, OPM is proposing a substantive rewrite of the administrative law judge regulations to eliminate procedures that appear in other parts of this chapter, remove the internal examination process, and remove obsolete instructions for implementing the current pay system authorized by the Federal Employees Pay Comparability Act of 1990; to add clarifying language; to include OPM and agency responsibilities under the program; to emphasize components of the Administrative Law Judge Program; to organize information into new sections for emphasis and clarity; and to revise the language to improve readability.

We propose in § 930.201, "Coverage," to clarify that administrative law judge positions are in the competitive service, and competitive examining procedures apply. In addition, we propose to move §§ 930.203b, "Title of administrative law judge," and 930.212, "Rotation of administrative law judges," to § 930.201 because this information applies to the general coverage of the Administrative Law Judge Program.

We also propose to add the authorities and responsibilities of OPM and agencies that employ administrative law judges in § 930.201. Currently, the

regulations do not identify these authorities and responsibilities. Although OPM does not employ administrative law judges for the Federal Government, OPM does administer the Administrative Law Judge Program. In § 930.201, we describe OPM's authority and responsibility, according to the APA, as assuring that administrative law judges are independent in matters of appointment, pay, and tenure.

Proposed § 930.201(e)(3) states that OPM has the authority to establish classification and qualification standards for administrative law judge positions. OPM's authority to establish classification standards for administrative law judge positions is 5 U.S.C. 5372(b)(2). Section 104 of Public Law 101-509 removed administrative law judge positions from coverage under 5 U.S.C. 5104 and amended 5 U.S.C. 5372(b)(2) to authorize OPM to classify administrative law judge positions outside the General Schedule. Under 5 U.S.C. 1305, OPM may use its rulemaking authority to implement this classification authority for administrative law judge positions.

OPM's authority to establish administrative law judge qualifications as an adjunct to competitive examination is Civil Service Rule II, 5 CFR 2.1(a), which authorizes OPM "to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations."

The legislative history of 5 U.S.C. 3105, formerly section 11 (1st sentence) of the APA, governing administrative law judge appointments, confirms the clear intent of Congress to give OPM the authority to establish qualification standards for administrative law judges as an adjunct to competitive examination. OPM may utilize its rulemaking authority in 5 U.S.C. 1305 to authorize qualification standards for administrative law judges.

An agency employing administrative law judges is responsible for appointing as many administrative law judges as needed and to assign cases to administrative law judges on a rotational basis so far as practicable.

We propose to move paragraph (c) of the current § 930.201, "Coverage," to

§ 930.203, "Cost of competitive examination." Paragraph (c) discusses the financial responsibility for the Administrative Law Judge Program. By adding paragraph (c) to § 930.203, we are highlighting agencies' responsibility for the cost of the examination. Currently, under 5 U.S.C. 1104(a)(2), agencies employing administrative law judges are required to reimburse OPM for its examining services. Reimbursement is currently based on the agency's relative number of administrative law judge positions as of March 31 of the preceding fiscal year. To ensure an accurate count of administrative law judges, we also propose to change the time period from March 31 of the preceding fiscal year to the current fiscal year. The cost is calculated by OPM and each employing agency is notified of its share.

We propose to remove the definition of "Promotion" from § 930.202, "Definitions." This term uses a common definition throughout the Federal Government and is defined in 5 CFR part 210.102(b)(11). Standardizing definitions of common terms ensures their consistent application. We propose to add and define two significant terms to the regulations and clarify their specific use in this subpart: senior administrative law judge and superior qualifications.

We propose to change the title of § 930.203, "Examination," to "Cost of competitive examination." OPM has great discretion to design and administer competitive examinations (See 5 U.S.C. 1104, 1302, 3301, 3304.) OPM must be able to incorporate advances in the state of the art of examination methodology in the design of each administrative law judge examination. Consequently, OPM proposes to remove the examination scoring process currently published in section 930.203, and to state in § 930.201(e)(1) that use of the examination scoring process published in 5 CFR 337.101(a) is not required in scoring administrative law judge examinations. OPM is proposing a conforming revision in part 337. The current examination covered by OPM Examination Announcement No. 318 is closed and will be replaced by a new administrative law judge examination; therefore, we propose to remove all references to Announcement No. 318 from this subpart. When the new examination is available, OPM will announce the examinations as prescribed in 5 U.S.C. 3330.

A lengthy description of the administrative law judge examination and its procedures is contained in the existing § 930.203 of this subpart. The

method by which examinations are conducted and administered is subject to periodic changes; therefore, removing these procedures from the regulations will provide OPM with the flexibility to adopt such changes, as appropriate. We propose to remove the detailed language describing internal examining and program processes and procedures from the regulations, such as the language concerning periodic open competition, minimum qualifications, supplemental qualifications, participation in examination procedures, final rating, preparation of certificates, and appeal of rating. The appropriate mechanism to address this type of information is the vacancy announcement. This information is prescribed in 5 U.S.C. 3330 and 5 CFR 300.104(b), 330.102(b) and 330.707, and is required in all vacancy announcements. As appropriate, OPM will continue to work with employing agencies to review the Administrative Law Judge Program for effectiveness and efficiency consistent with statutory requirements.

We propose to redesignate § 930.203a, "Appointment," as § 930.204, "Appointments and conditions of employment." We also propose to move paragraphs (b), (c), and (e) of § 930.203a, "Appointment," and §§ 930.204, "Promotion," 930.205, "Reassignment," 930.206, "Transfer," and 930.207, "Reinstatement," to section 930.204. The purpose is to highlight the prohibition of a probationary period for administrative law judges and to consolidate the various types of appointments under one section. With the consolidation, we propose to remove the internal examining processes and procedures involved in appointing an individual to an administrative law judge position; revise the language to clarify that agencies must obtain OPM's approval before making any promotion, transfer, reinstatement, reassignment, pay adjustments or senior administrative law judge appointments to an administrative law judge position; and include information related to the type of appointment and tenure group. Because provisions of the Ramspeck Act formerly codified at 5 U.S.C. 3304(c) were repealed by Public Law 104-65 on December 19, 1997, we are removing paragraph (d) of section 930.203a which involves the appointment of legislative and judicial employees to an administrative law judge position. These individuals now must compete with other outside candidates and meet the qualification and examination requirements for an administrative law judge position.

We propose to remove § 930.208, "Restoration" from this regulation. Part

353 of title 5, Code of Federal Regulations, governs the restoration of an employee to duty after military service or recovering from compensable injury, also applies to restoration to an administrative law judge position.

Currently, the administrative law judge regulations contain two terms, "absolute status" and "career absolute appointment," that are not defined in either the United States Code or Code of Federal Regulations. We propose to remove these terms from the regulations and replace them with terms used in the competitive service, "competitive status" and "career appointment." To be a career employee in the competitive service, an employee must serve 3 years of substantially continuous creditable service and is subject to a 1-year probationary period. However, § 315.201(c), "Exceptions from service requirement," includes an exception from the 3-year service requirement when an appointment to a position is required by law to be filled on a permanent basis. The APA provides administrative law judges protection from improper influences and ensures independence when carrying out their duties by conferring competitive status at the time of appointment. Therefore, the requirements for probationary and career-conditional periods do not apply to administrative law judges. An administrative law judge appointment confers competitive status, places the employee in tenure group I, and does not require a probationary period.

Currently § 930.203a(c)(3), "Appointment of incumbents of newly classified administrative law judge positions," addresses the appointment of employees whose positions are classified as an administrative law judge position on the basis of legislation, Executive order, or decision of the court. An agency has 6 months after the classification to recommend to OPM the appointment of an administrative law judge. We propose to delete the 6-month requirement and rely on the terms of the legislation, Executive order, or court decision for any time frames for appointments. Paragraph (c)(4) of the current regulations states that in an emergency situation OPM may authorize a conditional appointment of an employee to an administrative law judge position pending final decision on the employee's eligibility for career appointment. We propose to delete this provision because it is inconsistent with the intent of the APA that administrative law judges serve without condition.

The function of an administrative law judge is to prepare for and preside at formal hearings in accordance with the

APA. Administrative law judges must be held to a high standard of conduct so that the integrity and independence of the administrative judiciary can be maintained. Similar to the attorneys employed by the Federal Government who are required to maintain an "active" status to practice law, administrative law judges are expected to meet professional licensing requirements as attorneys. Presently, an applicant who wishes to be an administrative law judge must have been duly licensed and authorized to practice law as an attorney 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. We propose to clarify that a professional license requirement continues as a condition of employment for any individual serving as an administrative law judge. A professional license to practice law is required while serving as an administrative law judge. This requirement applies to eligibles on the Administrative Law Judge register, incumbent administrative law judges, former administrative law judges applying for reinstatement or reemployment, and retired administrative law judges applying under the Senior Administrative Law Judge Program. An administrative law judge must maintain an "active" status 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. In lieu of maintaining an "active" status to practice law, judicial status is acceptable 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.

For clarity, we propose to redesignate § 930.210, "Pay" as section 930.205, "Administrative law judge pay system."

We propose to delete paragraphs (j) through (m) of current § 930.210, which contain instructions for converting GS employees to the administrative law judge pay system on the first day of the first pay period beginning on or after February 10, 1991. Because all administrative law judges have been converted to the current pay system, these paragraphs are obsolete.

Currently, with OPM approval, an agency may pay a higher minimum rate to a candidate with superior qualifications who is appointed from an OPM certificate of eligibles to an

administrative law judge position at level AL-3. Under § 930.205(f)(2), we propose to expand coverage under this authority to include an administrative law judge applicant with superior qualifications as well as a former administrative law judge with superior qualifications who is eligible for reinstatement.

We propose to add a new paragraph (i) to § 930.205 (as redesignated) to clarify that an agency may reduce the pay level or rate of basic pay of an administrative law judge for good cause either after the Merit Systems Protection Board orders the action, as provided in § 930.211 (as redesignated), or if agreed upon by the administrative law judge and with OPM's approval.

We propose to redesignate the existing § 930.211 as § 930.206, "Performance rating and awards," and to move paragraph (b) of existing § 930.210, "Pay," to § 930.206. This change consolidates the information on performance rating and awards into one section.

We propose to redesignate § 930.209 as § 930.207, and to change its title from "Detail and assignment to other duties" to "Details and assignments to other duties within the same agency." The new title emphasizes the movement of an administrative law judge within the agency.

We propose to redesignate § 930.213, "Use of administrative law judges on detail from other agencies," as § 930.208, "Administrative law judge loan program—detail to other agencies." The title change echoes the term commonly used by the administrative law judge community for the process of detailing administrative law judges to other agencies. We also propose to clarify OPM's current practice of detailing an administrative law judge for a period within the current fiscal year with the possibility of an extension into the next fiscal year. OPM approves extensions on a case-by-case basis. Section 930.208 gives agencies the flexibility to meet unusual work circumstances requiring an administrative law judge to stay beyond the initial 1-year period.

We propose to redesignate § 930.216, "Temporary reemployment: senior administrative law judges," as § 930.209, "Senior administrative law judge program," to echo the term commonly used by the administrative law judge community for the process of employing retired administrative law judges. The title distinguishes this program from the loan program described in § 930.208 (as redesignated). We also are clarifying the employment limitation for reemployed

administrative law judges to be either a specified period not to exceed 1 year or such periods as may be necessary to conduct and complete the hearing of one or more specified cases.

We propose to redesignate § 930.215, "Reduction in force," as § 930.210. At the present time, agencies are allowed to fill vacant positions only through the OPM priority referral list. We propose to add a hiring flexibility allowing agencies to fill their vacant administrative law judge positions by reassigning administrative law judges within their workforce. This flexibility allows agencies to manage their administrative law judge workforce by providing the flexibility to make reassignments within their agency and will assure that adversely affected administrative law judges retain priority when the agency seeks to fill from outside its workforce. OPM will continue to retain the authority to grant exceptions to the order of selection.

We propose to redesignate § 930.214, "Actions against administrative law judges," as § 930.211. We also propose to revise this section to improve clarity and readability. This section continues to recognize that administrative law judge applicants and appointees, like other applicants and appointees to the competitive service, are subject to suitability investigations and determinations.

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

To assist readers in comparing OPM's proposed rule to 5 CFR part 930, subpart B with the regulation as it is currently published, we have prepared the following derivation table.

**DERIVATION TABLE FOR 5 CFR 930  
SUBPART B**

New section	Old 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 (9).	New.
930.201(f)(1) and (2)	New.
930.201(f)(2)(i) .....	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).

DERIVATION TABLE FOR 5 CFR 930  
SUBPART B—Continued

New section	Old section
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).
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).
930.205 .....	930.210.
930.205(f)(2) .....	930.210(g)(2).
930.205(i) .....	New.
	930.210(j) through (m) (Removed).
930.206 .....	New title.
930.206(a) .....	930.211.
930.206(b) .....	930.210(b).
930.207 .....	930.209.
930.208 .....	930.213.
930.209 .....	930.216.
930.210 .....	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 proposing to amend 5 CFR parts 337 and 930 as follows:

**PART 337—EXAMINING SYSTEM**

1. The authority citation for part 337 continues to read as follows:

**Authority:** 5 U.S.C. 1104(a) (2), 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.

**Subpart A—General Provisions**

2. Revise § 337.101(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.

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**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)(2), 1302(a), 1305, 3105, 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 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. 1104(a)(2), 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 in Federal agencies;

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

(5) 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;

(6) 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;

(7) 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;

(8) Maintain and administer the administrative law judge priority referral program; and

(9) Comply with 5 U.S.C. 1305 for purposes of sections 3105, 3344, 4301(2)(D) and 5372 of title 5 U.S.C. and the provisions of section 5335(a)(B) of 5 U.S.C. that relate to administrative law judges.

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

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

(2) Responsibility for:

(i) Assigning an administrative law judge to cases in rotation so far as is practicable;

(ii) Obtaining OPM's approval before making any promotion, transfer, detail in excess of 120 days, reinstatement, reassignment, or restoration appointments to an administrative law judge position, employment of senior administrative law judges, or pay adjustments as required under § 930.205; and

(iii) Ensuring the independence of the administrative law judge.

#### § 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 position to another administrative law judge position without change in civil service or pay status.

*Removal* means the involuntary separation of an administrative law judge from employment as an administrative law judge or employment with an agency.

*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.

*Superior qualifications* means an appointment made at a rate above the minimum rate based on such qualifications that may include, but are not restricted to, experience practicing law before the hiring agency; experience practicing before another forum in a field of law relevant to the hiring agency; outstanding reputation among others in a field of law relevant to the hiring agency; or special skills that will meet a demonstrated need of the hiring agency.

#### § 930.203 Cost of competitive examination.

Each agency employing administrative law judges must reimburse OPM for the cost of developing, examining, and administering the administrative law judge examinations. 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.

(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 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 of non-administrative law judge positions*. Except as provided for 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 subpart, 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 has served under 5 U.S.C. 3105, meets the qualification requirements, and has passed either the current or immediately preceding administrative law judge examination.

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

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

(a) OPM assigns each administrative law judge position in one of the three grades or 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 first 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 placed 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-week period as long as it does not exceed 2 weeks per year for each 52 weeks of service. However, absence due to uniformed 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 a 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 rates for those levels.

(i) An employing agency may reduce the level or rate of basic pay of an administrative law judge under § 930.211 or if the administrative law judge voluntarily consents in writing to the reduction and with prior OPM approval.

#### **§ 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 award or financial incentives under 5 U.S.C. 4502, 4503, or 4504 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 case(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) Suitability requirements in 5 CFR parts 5 and 731.

(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 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 subgroups 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, 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 previously indicated as acceptable.

(3) With OPM's prior approval, 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 through any of the following methods:

(i) OPM's administrative law judge priority referral list;

(ii) Reassignment from within the agency; or

(iii) Competitive examining, promotion, transfer, or reinstatement procedures; provided that the proposed candidate possesses experience and qualifications superior to an available displaced administrative law judge(s) 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 conditions 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 parts 5 and 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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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 35

[Docket No. PRM-35-18]

#### Peter G. Crane; Receipt of Petition for Rulemaking

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; Notice of receipt.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking filed by Peter G. Crane (petitioner). The petition has been docketed by the NRC and has been assigned Docket No. PRM-35-18. The petitioner is requesting that the NRC amend the regulation that governs medical use of byproduct material concerning release of individuals who have been treated with radio pharmaceuticals. The petitioner believes that this regulation is defective on legal and policy grounds. The petitioner requests that the patient release rule be partially revoked to not allow patients to be released from radioactive isolation with more than the equivalent of 30 millicuries of radioactive iodine I-131 in their bodies.

**DATES:** Submit comments by March 6, 2006. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

**ADDRESSES:** You may submit comments by any one of the following methods. Please include the following number (PRM-35-18) in the subject line of your comments. Comments on petitions submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including personal information such as social security numbers and birth dates in your submission.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Rulemaking and Adjudications staff.

E-mail comments to: [SECY@nrc.gov](mailto:SECY@nrc.gov). If you do not receive a reply e-mail

confirming that we have received your comments, contact us directly at (301) 415-1966. You may also submit comments via the NRC's rulemaking Web site at <http://ruleforum.llnl.gov>. Address comments about our rulemaking Web site to Carol Gallagher, (301) 415-5905; (e-mail [cag@nrc.gov](mailto:cag@nrc.gov)). Comments can also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>.

Hand deliver comments to 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Publicly available documents related to this petition may be viewed electronically on the public computers located at the NRC Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at <http://ruleforum.llnl.gov>.

Publicly available documents created or received at the NRC after November 1, 1999 are also available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to [pdr@nrc.gov](mailto:pdr@nrc.gov).

For a copy of the petition, write to Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

#### FOR FURTHER INFORMATION CONTACT:

Michael T. Lesar, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-415-7163 or Toll-Free: 1-800-368-5642 or E-mail: [MTL@NRC.Gov](mailto:MTL@NRC.Gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The NRC has received a petition for rulemaking dated September 2, 2005, submitted by Peter G. Crane (petitioner) entitled "Re: Petition for Partial Revocation of the Patient Release Criteria Rule." The petitioner is an

attorney who was formerly employed in the NRC's Office of the General Counsel from 1975 until his retirement from the NRC in 1999. The petitioner requests that the NRC amend 10 CFR part 35, "Medical Use of Byproduct Material." Specifically, the petitioner requests that the 1997 amendment to 10 CFR 35.75, "Release of Individuals Containing Radiopharmaceuticals or Permanent Implants" (62 FR 4120; January 29, 1997 (Patient Release Criteria Rule)), be partially revoked.

The petitioner believes the Patient Release Criteria Rule is defective on both legal and policy grounds. The petitioner recommends that 10 CFR 35.75 be amended to prohibit the release of patients from radioactive isolation with more than the equivalent of 30 millicuries of radioactive iodine-131 (I-131) in their systems. The NRC has determined that the petition meets the threshold sufficiency requirements for a petition for rulemaking under 10 CFR 2.802. The petition has been docketed as PRM-35-18. The NRC is soliciting public comment on the petition for rulemaking.

#### Discussion of the Petition

The NRC amended its patient release criteria in 10 CFR Part 35 in 1997 to allow the release of patients from licensee control who had been administered unsealed by product material if the total dose equivalent to any other individual from exposure to the released individual is not likely to exceed 5 mSv. (0.5rem). Prior to that time, NRC regulations required the hospitalization of patients with the equivalent of 30 millicuries or more of radioactive iodine 131 (I-131) in their systems, a dose which the petitioner believes is consistent with the International Basic Safety Standards on radiation protection.

The petitioner objects to the release of patients with more than the equivalent of 30 millicuries of I-131 in their systems. The petitioner clarifies that his objection to the patient release criteria rule is based on both legal and policy grounds. On legal grounds, the petitioner asserts that the 1997 rulemaking was "a sham" in that it was "legally tainted" by collusion between the NRC staff and a petitioner. Specifically, the petitioner asserts that a former member of NRC's Advisory Committee on the Medical Uses of Isotopes (ACMUI) who submitted a petition for rulemaking in 1991 requesting the patient release criteria rule, submitted the petition at the NRC staff's request with NRC staff assistance, in violation of NRC regulations.