

**TESTIMONY OF  
KEVIN DUGAN  
VICE PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES**

**BEFORE  
THE SUBCOMMITTEE ON CIVIL SERVICE  
AND AGENCY REORGANIZATION  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES**

**FEBRUARY 4, 2004**

Chairwoman Davis and Members of the Subcommittee:

I am Kevin Dugan, vice-president of the Association of Administrative Law Judges. I serve as an Administrative Law Judge in the Office of Hearings and Appeals of the Social Security Administration in Charlotte, North Carolina.<sup>1</sup> The Association of Administrative Law Judges represents the professional interests and concerns of the approximately 1,000 administrative law judges in the Social Security Administration. These adjudicatory officers constitute the vast majority of ALJs in the federal government and represent the largest constituency of ALJs in any federal department or agency.

On behalf of the Administrative Law Judge community and the ALJ- related associations that join in support of my testimony<sup>2</sup>, let me extend our appreciation, Chairwoman Davis, for today's hearing in focusing upon additional federal human resource management tools to meet the challenges of the 21<sup>st</sup> century.

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<sup>1</sup> This statement is presented in my personal capacity as an officer of the Association of Administrative Law Judges and does not necessarily reflect the official view or position of the Social Security Administration.

<sup>2</sup> My testimony is endorsed by the Association of Hearing Office Chief Administrative Law Judges, Federal Administrative Law Judge Conference, The Forum of United States Administrative Law Judges and the Judiciary Division of the Federal Bar Association.

My association and all other federal ALJ groups strongly support your legislation, H.R. 3737, which would address the ALJ pay compression problem that diminishes the capacity of the federal government to recruit and retain the finest candidates and incumbents in the administrative law judiciary. The legislation would increase the minimum and maximum rates of basic pay for administrative law judges and continue the availability of annual locality pay increases for ALJs equivalent to those provided to General Schedule employees. This legislation represents a reasonable approach toward the ALJ pay compression problem by moderately raising the pay cap, yet retaining the same general framework that confers discretion upon the President to provide annual pay adjustments to ALJs consistent with those given to employees under the General Schedule.

Before further addressing the bill's merits, let me briefly describe the size and nature of the federal government's administrative law judiciary, as well as the importance of the adjudicative work it performs. The federal government currently employs approximately 1300 administrative law judges in nearly 30 federal departments and agencies. They hear and decide cases under federal statutes that require adjudicatory hearings governed by the procedures of the federal Administrative Procedure Act of 1946. All ALJs conduct trial-type hearings. In fact, the Supreme Court has declared that federal administrative law judges are functionally similar to federal trial judges.<sup>3</sup>

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<sup>3</sup> Butz v. Economou, 438 U.S. 478 (1978); Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) ; Rhode Island Dept. of Environmental Management v. U.S., 304 F.3d 31(1st Cir.(R.I.), 2002) (finding that like ALJs at the FMC, Department of Labor ALJs are functionally equivalent to Federal District Court judges); Mullen v. Bowen, 800 F.2d 535, (6th Cir.,1986) (finding that a Social Security ALJ is entitled to deference, while the Social Security Appeals Council is not).

The impact of the actions and decisions of ALJs is considerable. They adjudicate cases involving a range of significant and diverse regulatory matters, involving antitrust, banking practices, commodity futures, education grants, environmental degradation, food and drug safety, housing violations, interstate and retail pricing of electricity, oil, and natural gas utilities, immigration law, international trade, labor, mine safety, occupational workplace conditions, postal rates, telecommunications licensing, and unfair labor practices. The cases heard and decided by ALJs may involve millions, even billions, of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs also adjudicate hundreds of thousands of cases each year determining personal entitlement to black lung, Social Security and disability benefits. These cases, more personal in nature, are of considerable and equal importance to the millions of Americans involved. For many, it is their first and only contact with the adjudicatory authority of the federal government.

Under the Administrative Procedure Act, administrative law judges are hired by their respective agencies on a merit basis to ensure fair and impartial on-the-record hearings. They are selected from a register of candidates maintained by the Office of Personnel Management, after submission of a lengthy and detailed application which demonstrates at least seven years of qualifying experience, the taking of written and oral examinations, and a review of their references.

How ALJs are paid has evolved over time. Prior to 1990, Federal administrative law judges were classified in the General Schedule as GS-15, GS-16, GS-17 or GS-18. In 1990, the Federal Employee Comparability Act removed General Schedule coverage of ALJs and established a professional pay system modeled upon the Senior Executive Service. Basic pay

levels were tied to specific percentages of Level-IV under the Executive Schedule and the maximum basic pay was set at 100% of Executive Level IV pay.

Because of the statutory linkage of the Executive Schedule to Congressional pay, administrative law judges failed to receive annual cost-of-living adjustments for four straight years, from 1994-97 when Congress refrained from giving itself a pay raise. The pay of ALJs accordingly fell considerably behind that of other Federal employees during the 1990's. This prompted Congress in 1999 to enact legislation (P.L. 106-97) providing the President the authority to provide annual pay adjustments to ALJs, similar to that already accorded the Senior Executive Service, and to adjust Administrative Law Judge salaries within a broadband range of 65% to 100% of Executive Level IV pay.

Under current law, ALJ basic pay ranges between a minimum of 65% of EL IV (adjusted to approximately 66.6% by OPM) and 100% of EL IV (see Chart A). Entry-level pay is at the minimum level. Only five Chief Judges are paid at AL-1, the equivalent of EL IV. Approximately 30 Chief and Deputy Chief Judges are paid at AL-2, about 97% of EL IV. The pay of all other judges ranges between the entry level of AL3-A to the AL3-F level, with the largest number paid at AL-3F (92.1% of EL IV). The Administrative Procedure Act prohibits the payment of performance bonuses and awards to all ALJs in order to ensure their decisional independence.

Despite the 1999 legislation providing ALJ parity with the General Schedule, administrative law judge salaries have not been restored to a point comparable to their prior standing within the General Schedule in 1991.

In addition to basic pay, administrative law judges are currently eligible to receive locality pay, which is capped at the pay for Executive Level III (currently \$144,600). At present,

the pay of all AL-1 ALJs (chief judges at major agencies), AL-2 (deputy chief judges at major agencies and chief judges at other agencies), and AL-3F administrative law judges in nine<sup>4</sup> of the 32 localities designated by the President's Pay Agent (including the "Rest of United States" category) are capped at this figure. This represents the total maximum pay that an ALJ may receive because ALJs properly are prohibited by law and regulation from receiving any merit-based performance bonuses.

Each year that Executive Level III pay does not advance at the same pace as that of the General Schedule, more administrative law judges become capped at the Executive Level III pay. Indeed, the pay of AL-3F administrative law judges in nine other localities are within 2% of the Executive Level III pay cap,<sup>5</sup> and that of AL-3F administrative law judges in all localities are within 5% of the cap.

As a result of these pay compression problems, the federal government is at a distinct competitive disadvantage in recruiting competent, experienced private and federal sector attorneys into the federal administrative law judiciary. It is well-recognized that the pay for federal administrative law judges has not kept pace with salaries in the private sector. More startling, basic pay for administrative law judges has not even kept pace with the basic pay of senior government attorneys. The basic pay of GS15/step 10 attorneys exceeds that of entry level administrative law judges by over 24% (\$21,846). Even the basic pay of a GS14/step 7 Federal attorney (\$90,610) exceeds that of the entry-level administrative law judge. Moreover,

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<sup>4</sup> Boston, Chicago, Denver, Detroit, Hartford, Houston, Los Angeles, New York and San Francisco.

<sup>5</sup> Miami, Minneapolis, Philadelphia, Portland (Oregon), Sacramento, San Diego, Seattle and Washington, D.C.

this does not take into consideration that government attorneys are statutorily eligible for merit bonuses which increase their pay.

Given the current federal salary landscape, mid-level government attorneys are more inclined to pursue a position in the Senior Executive Service than the administrative law judiciary as a career choice. Recruitment of the most senior career-level government attorneys to serve as administrative law judges will likely become more difficult because of recent changes to the Senior Executive pay system, which raised the pay cap for SES members to \$157,000. In comparison, the highest base pay for administrative law judges – accorded to only a relative handful of chief administrative law judges at major departments and agencies -- currently stands at \$136,000. The greatest number of ALJs are capped at the AL-3F base pay level, at \$125,300. Thus, it is unlikely that an attorney in the Senior Executive Service would seek to become an administrative law judge. Federal attorney disinterest in the pursuit of entry into the ALJ ranks is only likely to increase, as higher pay under expanding pay-for-performance coverage becomes available. As noted previously, ALJs are necessarily prohibited by law and regulation from receiving merit-based performance compensation to protect their judicial independence.

The impact of pay upon the recruitment patterns of administrative law judges during the past several years has been clouded by the unavailability of qualified ALJ candidates through the OPM-maintained register of candidates. The *Azdell* litigation, now pending before the Supreme Court on writ of *certiorari*, contests the validity of scoring methods used by OPM in its maintenance of the register. The litigation has precluded agencies from hiring new ALJs from the register, making it difficult to reach definitive judgments about recruitment patterns. Nonetheless, anecdotal evidence suggests that the quality of ALJ candidates has declined,

presumptively in large part to due to pay concerns by qualified attorneys over joining the ALJ ranks.

Administrative law judges who assisted the Office of Personnel Management in scoring the written examinations of the last group of applicants found that many of the candidates were not capable of performing the tasks required of administrative law judges. Moreover, under the prior scoring formula, the Office of Personnel Management chose not to exclude anyone, so these applicants are included in the large number of names currently on the administrative law judge Register.

In an October 30, 2001, letter to President Bush, Federal Energy Regulatory Chairman Pat Wood described the problem facing the agency's recruitment and retention of able administrative law judges:

“[W]e are having difficulty attracting and retaining the high quality of Administrative Law Judges that we need to handle our challenging caseload. [I urge you to] broaden the basic compensation for [administrative law judges] to eliminate pay compression so we can retain our most experienced judges (most of whom are eligible for retirement) and enable us to attract the best and brightest senior attorneys as new judges.”

H.R. 3737 would respond to the pay compression problem faced by all government departments and agencies employing administrative law judges by revising the minimum and maximum levels of pay payable to ALJs (see Chart B). It would establish the minimum entry-level of basic pay at 65% of EL III and maximum basic pay at EL III. Within this range, Chief Judges at major agencies would be paid at the maximum of EL III, Chief Judges at other agencies and Deputy Chief Judges at major agencies would be paid at about 97.4% of EL III, and the most senior ALJ would be paid at about 92.1% of EL III. Entry level ALJs would receive about 66.5% of EL III. The availability of locality pay adjustments also would be assured. In

view of the benefits and reasonableness of this approach, we urge the Subcommittee to approve H.R. 3737 as soon as possible.

This concludes my statement. Once again, Madame Chair, on behalf of the administrative law judge community, thank you for your continued interest and support. I am available to answer any questions you may have.

**CHART A**

## 2004 Administrative Law Judge Pay Schedule

AL	Basic Pay
1	\$136,000
2	\$132,400
3F	\$125,300
3E	\$118,300
3D	\$111,400
3C	\$104,400
3B	\$ 97,400
3A	\$ 90,500

Established by under E.O. 13322 (December 30, 2003)

**CHART B**

HR 3737 would establish the following levels of ALJ basic pay, assuming linkage of the current percentages to the Executive Schedule, as established by the Office of Personnel Management.

AL	CURRENT PAY	PAY UNDER HR 3737	DIFFERENCE
1	\$136,000	\$144,600	\$8,600
2	\$132,400	\$140,900	\$8,500
3F	\$125,300	\$133,200	\$7,900
3E	\$118,300	\$125,900	\$7,600
3D	\$118,600	\$111,400	\$7,200
3C	\$111,100	\$104,400	\$6,700
3B	\$ 97,400	\$103,600	\$6,200
3A	\$ 90,500	\$ 96,200	\$5,700