

3-15-1984

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### Recommended Citation

Craig B. Pettibone, David J. Agatstein, Edwin S. Bernstein, Marvin H. Morse, and Evan L. Hultman, *The Proposed New Examination for Federal Administrative Law Judge: An Exchange*, 4 J. Nat'l Ass'n Admin. L. Judges. (1984)  
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THE PROPOSED NEW EXAMINATION FOR FEDERAL  
ADMINISTRATIVE LAW JUDGE: AN EXCHANGE

Craig B. Pettibone, Esq.  
Judge David J. Agatstein  
Judge Edwin S. Bernstein  
Judge Marvin H. Morse  
Evan L. Hultman, Esq.

The United States Office of Personnel Management is proposing to change the selection criteria for Federal Administrative Law Judges, and to establish new lists of eligible candidates. The proposed changes will have a substantial impact upon currently eligible candidates, and prospective candidates for the Federal Administrative Judiciary.

As the following discussion makes clear, the proposal has evoked profound interest, and serious concern, among interested groups of Administrative Law Judges, members of the bar, and other affected parties.

The National Association of Administrative Law Judges shares this concern. It has long been the policy of this Association to assist OPM in identifying qualified candidates for Federal Judgeships among state and local ALJs.

In order to appreciate the potential affect of the proposed new examination upon state and local candidates, it is necessary to examine the proposed changes in considerable detail. Accordingly, the following article will present, first, an outline of the proposed changes, prepared by Craig B. Pettibone, Esq., the OPM official currently responsible for Administrative Law Judges; secondly, the more extensive position paper prepared by OPM in support of the new examination; and finally, the response of selected organizations to the proposal as drafted.

OPM has acceded to requests by various organizations to delay implementation of the new examination until 1984. Accordingly, interested members of NAALJ are urged to give this matter immediate attention, and to direct their comments in writing, to the President of the Association, or to the Editor-in-Chief of the Journal.

I

Outline for Proposed Changes in Examination  
for Federal Administrative Law Judge

Craig B. Pettibone, Esq.<sup>1</sup>

- I. Process for revising the examination for Federal Administrative Law Judges (ALJs).
  - A. Receipt o f applications for all Federal ALJ positions suspended March 31, 1983.
  - B. Proposed changes circulated; agency and bar comments will be received and considered.

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<sup>1</sup> Based upon an outline prepared by Craig B. Pettibone, Esq., Assistant Director for Administrative Law Judges, OPM, and presented at the Annual Meeting of the National Association of Administrative Law Judges, Reno, Nevada, October 30, 1983.

- C. New announcement planned for issuance in early 1984.
- D. New rating schedule to be developed, based on first 150 applicants.
- E. Old registers (lists) of eligible candidates to be used throughout fiscal 1984.
- F. This is the current work plan; it is subject to change; OPM will not issue a new examination until it is satisfied with the quality and defensibility of the product.

II. Object and effect of changes in examination.

- A. Make more than simple editorial changes or incremental changes to various parts of the examination, as has been done in past.
- B. Professionally develop and document job-relatedness of new examination to replace 20-30 year old examination.
- C. Base all measuring criteria on job-related knowledges, skills and abilities (KSAs) determined by incumbent ALJs.
- D. Assure that outstanding applicants will be distinguished from more moderately qualified applicants.
- E. Improve quality of applicants certified to agencies.
- F. Defer labor intensive portions of examination — personal reference checking, written demonstration, and panel interview — and their demands on applicants, OPM, ALJs and the private bar until actual vacancies are identified.

III. Minimum qualification requirements similar under old and new examination.

- A. Old exam: 7 years' bar membership and 7 years' experience involving preparation and/or participation in formal hearings.
- B. New exam: 7 years' bar membership and 7 years' experience involving administrative law and/or litigation, plus 2 years' trial experience.
- C. The difference is an increased emphasis on the need for trial experience, but most eligible candidates on old register already have it.
- D. Exact definition of trial experience, as requiring preparation for and/or participation in and/or appeal from, is critical concern.

IV. Evaluation of quality of experience and assignment of tentative rating.

- A. Old exam: tentative rating based on job titles such as judge, trial attorney, or general practitioner, and on responses to personal reference inquiries.
- B. New exam: tentative rating based on experience on the job in such areas as trial, analysis, decision-making, judicial temperament, and writing ability — as described in new supplemental application.
- C. The difference is new supplemental application which measures applicants for job-related KSAs as determined by incumbent ALJs.
- D. Personal reference inquiries would be deferred until agencies requested certificates to fill actual vacancies, at which time OPM would check references identified in required cases listing by mailing new forced-choice questionnaires.
- E. The new supplemental application and related rating schedule becomes the principal measuring tool for ranking the quality of applicants.

V. Written demonstration for applicants who receive passing tentative rating.

- A. Old exam: drafting an ALJ opinion for review by interview panel.
- B. New exam: drafting an ALJ opinion for rating by professional person in accord with scoring syllabus.
- C. The difference is a new scoring syllabus; also, only applicants with highest tentative score would be invited to participate.

VI. Panel interview for applicants who receive tentative passing score.

- A. Old exam: 3 member panel — one OPM person, one ALJ, and one private attorney — reviewed applicant's file, held unstructured interview, and recommended to OPM that tentative rating be affirmed or modified.
- B. New exam: 3 member panel reviews application, holds structured interview, and rates interview in accord with syllabus.
- C. The difference is a structured interview and a new scoring syllabus; also, only applicants with highest tentative score would participate.

VII. Assignment of final rating.

- A. Old exam: OPM reviewed all parts of examination — the tentative rating, the written demonstration, and the panel interview — and generally confirmed panel's affirmation or modification of tentative rating.
- B. New exam: OPM reviews all parts of examination, giving specific weight to each part — the tentative rating, the written rating, the panel rating, and the reference rating.
- C. The difference is a more structured rating process, giving specific weight to each part of the examination.

VIII. Opportunity to reapply for current eligible candidates.

- A. Current eligible candidates will be invited to reapply.
- B. Examining criteria for each portion of examination are being changed to measure applicants' possession of relevant KSAs as determined by incumbent ALJs.
- C. All applicants — both old and new — must have the same opportunity to apply for an ALJ job and must be examined by same examining criteria.
- D. The change in measuring criteria for any one part of the examination, let alone a change in criteria for all parts, would confront us with the same necessity to examine both old and new applicants by the same examining criteria.
- E. Essence of reapplication requirement for current eligibles will be to complete 5 question supplemental application.
- F. Candidates reapplying will not have references checked, or be invited to written demonstration or panel interview, until actual vacancies occur.
- G. Incumbent ALJs reapplying for purpose of promotion to higher grade need not repeat the reference checking, written demonstration, and oral interview parts of the examination.
- H. Incumbent ALJs on register for promotion to higher grade will retain eligibility for noncompetitive transfer with promotion to another agency.

- I. Former ALJs will retain eligibility for noncompetitive reinstatement in any agency.
- J. Non-incumbent ALJs on current registers, and incumbent ALJs on promotion register will continue to be listed on new register in a new reserve category to be used in the event that there are not enough applicants qualified under the new examination to meet hiring needs.

IX. Special qualifications.

- A. Special qualification requirements may be justified if they produce candidates with the required KSAs.
- B. Preferential consideration of applicants with agency specific experience can no longer be justified as essential for successful performance on the job; however, it may still be justified in some cases on the basis that it enhances performance on the job.
- C. Recognition of two years' qualifying experience two pay grades below the grade of the ALJ position applied for, in lieu of one year of qualifying experience one grade below, is a reasonable minimum qualification requirement.

X. Appeals from examination ratings.

- A. Applicants will continue to be able to appeal examination ratings.
- B. ALJ Rating Appeals Panel — consisting of an OPM chairman, two ALJs, or an ALJ and a private practitioner — will continue.
- C. The Assistant Director for ALJs will chair this panel.

XI. Additional Comments.

- A. OPM is continuing to solicit comments concerning the proposed changes in the ALJ examination, and will carefully consider all comments received.
- B. Discussions are being held with representatives of agencies and interested bar groups concerning the proposed changes.
- C. Comments, questions, or requests for meetings to discuss comments should be addressed to Craig Pettibone, Assistant Director for Administrative Law Judges, Staffing Group, U.S. Office of Personnel Management, 1900 E Street, N.W., Washington, D.C. 20415; telephone 202-632-5677.

II

OPM Position Paper  
ALJ Examination Changes  
Summer 1983

A. Summary and Purpose

The Office of Personnel Management (OPM) has set as one of its objectives for February 1983 the revision and reissuance of the Administrative Law Judge (ALJ) competitive examination. The current ALJ Examination Announcement No. 318, issued in October 1979, was originally issued in substantially its present form in 1964 and has been only slightly changed since then. In recent years, however, three agency reports involving

the ALJ legal community have been made on the ALJ examination. These reports recommended several changes. Copies of the recommendations are reproduced in an Appendix (omitted). . . .

OPM's administrative experience with the ALJ examination has also demonstrated that various revisions are needed in the examination announcement and related materials, to clarify and simplify the examination requirements and the procedures for applicants progressing through the four stages of the examination: (1) Review of legal experience, (2) questionnaire assessment of quality of experience, (3) a written demonstration, and (4) a panel interview. . . .

The purpose of this paper is to identify and discuss the kinds of changes which OPM is proposing to make in the ALJ examination. It begins with a discussion of the Methodology for Developing the Revised ALJ Examination, a discussion of General Revisions to the ALJ Examination and a proposed Implementation Plan. Nine specific proposed changes are then discussed in the material which follows. Option 1 is recommended in each case and is incorporated in the attached revised examination materials (omitted).

The proposed new text for the various parts of the ALJ examination <sup>7</sup> may be obtained from OPM <sup>7</sup>. In order to assure fairness to all applicants, actual questions to be asked the applicant at the written demonstration and panel interview are not being circulated for comment and are being kept confidential. Nor will rating schedules for the supplemental application, written demonstration, or panel interview be circulated for comment. . . .

B. Methodology for Developing Revised ALJ Examination

In developing the proposed revisions in the ALJ examination, OALJ and the Staffing Group's test development and staffing experts have relied principally on a content validity approach to ensure job-relatedness. Based upon the job analysis panels described in the Sharon Report,<sup>2</sup> four selection procedures have been used to provide at least two measures of each required and important knowledge, skill and ability (KSA) for a successful ALJ. These procedures are used to measure the qualifications of eligible applicants as follows:

<u>Selection Procedure</u>	<u>Measures</u>
(1) Experience Requirements	Administrative Law and Litigation Experience
(2) Behavioral Consistency Method	Quality and Level of Experience
(3) Work (Written) Sample Test	Analytical and Decision Writing Ability
(4) Panel Interview	Individual and Personal Qualities.

This validity strategy is consistent with the Uniform Guidelines on Employee Selection Procedures, Appendix B to Subpart F, Standards for a Merit System of Personnel Administration, Part 900, Title 5, Code of Federal Regulations.

<sup>2</sup> Validation of the Administrative Law Judge Examination, Personnel Research Report 80-15, issued by OPM (omitted).

### C. General Revisions to ALJ Examination

As in the past, the proposed revised examination would still contain four parts: (1) Experience review; (2) questionnaire assessment of quality of experience; (3) a written demonstration; and, (4) a panel interview. Each of these parts of the examination will be used to measure and evaluate the knowledges, skills and abilities or KSAs required of an ALJ.

The Sharon Report . . . identified KSAs which are required of an ALJ. We have now further synthesized five KSAs which are useful for distinguishing quality of experience and they are identified on page 6 of the proposed revised examination announcement. All four parts of the proposed revised ALJ examination have been revised to measure various KSAs required of an ALJ.

As was the case under the old examination, because of the limited number of ALJ positions for which appointment are needed, the passing grade for each step of this examination will be set at a level that OPM determines will produce an adequate register of eligible candidates for appointment. OPM will determine how many names are needed on the ALJ register and will establish as the passing grade for the examination such numerical final ratings as will result in that number being rated eligible for appointment.

#### (1) Experience Review

The proposed revisions to the examination continue the same seven-year bar membership and formal administrative law and trial experience requirements as listed in the announcement in the past. However, two years of trial experience would be specifically required rather than allowed as an alternative to formal administrative law experience.

Also, as in the past, applicants would be required to be members of the bar and duly licensed to practice law. In addition, for the first time, applicants would be required to explain any citations for breach of professional ethics or unprofessional conduct.

The Sharon Report found that there is a close relationship between the job and the KSAs of the required experience listed in the announcement. Therefore, an applicant will continue to be reviewed for meeting the same minimum experience requirements as have been listed in the announcement.

The quality of an applicant's experience in terms of the KSAs required of an ALJ would no longer be measured under this step of the examination and the old lengthy rating schedule with three quality levels for rating the applicant's experience before specific administrative bodies or courts, would no longer be used. The quality of an applicant's experience can be better measured with the supplemental application under step two as explained below.

An experience qualification standard would be developed for each grade level of ALJ position. To determine their reliability, these standards would be tried out by separate groups of ALJs on a number of applicants to determine that they are reliable. A numerical score would be assigned to applicants who meet minimum experience requirements.

#### (2) Questionnaire Assessment of Quality of Experience

The proposed revisions to the examination would eliminate the Qualifications Inquiry Questionnaire or voucher form sent in the past to 15 to 20 of the applicant's peers.

It would substitute a new questionnaire in the form of a supplemental application to be completed by the applicant and verified by a small number of his or her peers.

The Sharon Report found that the Qualification Inquiry did not measure all of the KSAs found to be required of an ALJ. The proposed new supplemental application questionnaire will measure those KSAs which are useful for determining quality of experience. In the new supplemental application, applicants would be asked to identify specific achievements which indicate that they have the KSAs required to perform five basic activities typical of an ALJ which encompass the KSAs. The applicants would also be asked to identify someone familiar with their experience and qualifications who could verify their achievements. The agency selecting official would conduct such verification in reviewing a certificate of eligibles. If discrepancies are found, the agency would report the information to OPM for appropriate action and could formally object to an eligible if the agency believed the candidate was no longer eligible for the position.

Benchmark achievements would be derived from initial applicant and peer responses to the revised examination and the credit value of these benchmarks for each grade level of ALJ position would be determined by incumbent ALJs, with assistance from private attorneys who appear before them. The benchmarks would be used for assigning a numerical score and developing a rating schedule for each grade level. Separate groups of incumbent ALJs and practicing attorneys would apply the benchmark achievements in the rating schedule to a number of applicants' supplemental applications in order to determine that these benchmarks are reliable.

In addition, OPM would check reliability of the benchmarks by asking several persons identified as references in the initial applications and supplemental applications to also complete the supplemental application and describe the applicant's experiences and achievements. Separate groups of ALJs and attorneys would also be asked to use the benchmarks in the new rating schedule to rate such persons' responses to the supplemental application. For the rating schedule to work as it should, the ratings of the applicant by each group of his or her own responses to the supplemental application and by the responses of other reference persons to the supplemental application should be consistent.

This methodology, called Behavioral Approach, is based upon research evidence which shows that people's behavior is consistent over time. Therefore, one way to predict future work performance is to assess the quality and level of past work behavior which required substantially the same type and level of KSAs.

### (3) Written Demonstration

The proposed revisions to the examination would continue to require applicants who pass the first two stages of the examination to provide a written demonstration of their ability to write the kind of opinion which an ALJ is required to write.

The Sharon Report found that the written demonstration was an essential part of the examination for measuring two KSAs: (i) the ability to write clearly, concisely, and convincingly; and (ii) the ability to articulate, organize, and render decisions effectively. The Sharon Report further recommended that the written demonstration be given a separate numerical score in order to increase its total weight.

Accordingly, written guidelines have been prepared for the written demonstration. Also, new cases have been developed for the applicant to analyze and write an opinion on. A scoring syllabus has been prepared for the new cases to enable OALJ to evaluate written demonstrations on a consistent basis and, for the first time, assign a numerical score to each applicant. The syllabi will be tried out by a separate group of ALJs on



a number of applicants' written demonstrations to determine that they are reliable. The written demonstration of an applicant would no longer be submitted to the panel members who conduct his or her panel interview for discussion at the interview, and panel members would no longer be asked to evaluate the written demonstration.

#### (4) Panel Interview

The proposed revisions to the examination would continue to require applicants who pass the first two stages of the examination to appear for a panel interview by a panel composed of an ALJ, a private attorney, and an employee of OPM who chairs the panel. The Sharon Report found a need for a more structured and uniform interview process with hypothetical questions related to the KSAs required of an ALJ such as (i) judicial temperament; (ii) oral communication; (iii) decision-making; and (iv) case analysis. The Sharon Report further recommended that the panel interview be scored separately from the rest of the examination rather than be used only to modify the numerical ratings of OPM examiners.

Accordingly, interview guidelines and hypothetical questions have been developed for panel members to use in conducting panel interviews and a rating schedule has been developed for assigning a numerical score on a scale of up to 20 points to each applicant. The hypothetical questions and rating schedule would be tried out by separate groups of ALJs on a number of initial applicants and the results compared to determine that they are reliable. In addition, a training program would be developed for panel members.

#### (5) Final Rating

The numerical score assigned to applicants for each of the four parts of the examination would be weighted and combined into a final, composite score on a scale of 0 to 100. The weight to be given each part of the examination and the passing score for eligibility will be determined by OPM after the reliability of the rating schedules for each part has been determined.

### D. Implementation Plan for Revised Examination

OPM plans to issue the revised examination announcement /in 1984/ and solicit applications under it from current eligibles, bar associations, agencies and other interested parties.

The new applications would be reviewed as they are received for meeting the experience requirements of the examination. Once a good sample of applications has been received, benchmark achievements would be derived from actual applicant responses to the supplemental application and the credit value of these benchmarks would be determined by incumbent ALJs and attorneys who appear before them. The credit values for the benchmarks would then be made into a rating schedule for the supplemental application. Such initial applications would similarly be used with separate groups of ALJs and practicing attorneys to verify reliability of the scoring syllabi for the written demonstration and the rating schedule for the panel interview. . . .

/A/pplicants under the new examination who meet the minimum experience requirements and who receive a passing grade (as determined by OPM) on the supplemental application would be assigned a basic numerical score and notified that they have successfully completed the first two stages of the examination. They would then be invited to participate in a written demonstration and a panel interview. . . . The results of the written demonstrations and panel interviews would be combined with the basic rating. Finally, OPM should be able to issue a new register of eligible candidates. . . .

Until the new register under the new examination is issued, OPM will maintain the existing register under the old examination for use as necessary in agency hiring.

OPM has an ample supply of qualified candidates on the register to meet anticipated limited agency hiring needs. There are approximately 235 eligibles on the GS-15 register and 370 eligibles on the GS-16 register. In addition, OALJ is currently processing an additional 150 applicants and expects to add about half of them to the register by September 30, 1983.

Once the new register is issued, OPM would close the old register. No names would be automatically transferred to the new register. All eligibles under the old examination would have to reapply to compete under the terms and conditions of the new examination. They would not, however, have to resubmit previously submitted qualifications on a SF 171. They would simply need to update their experience since they applied for their rating under the old examination with a SF 172, and complete the supplemental application. In some cases, where the applicant took the written demonstration in the last year or two, it will be possible to rescore such applicant's prior written demonstration with the new scoring syllabus, and avoid requiring the applicant to retake the written demonstration. All applicants rated ineligible under the old examination could also reapply and compete under the new examination.

Applicants who receive an ineligible rating under the new examination may refile no sooner than one year after the date on which they filed in this examination. Applicants who receive an eligible rating under the new examination could refile for a new rating no sooner than two years after the date on which notified of the previous eligible rating. They would be required to retake and pass all four parts of the examination in order to obtain a rating.

After soliciting new applications . . . and with the issuance of the new register . . . , OPM would periodically announce future periods of open competition for soliciting additional applications under the new examination as agency hiring needs warrant it.

#### E. Specific Proposed Changes

##### 1. Editorial Revisions

ISSUE: Should clarifying editorial revisions be made in the ALJ Examination Announcement?

BACKGROUND: OPM's administrative experience with the ALJ examination clearly demonstrates that many applicants do not understand basic experience qualification requirements and the procedures for progressing through the various stages of the examination. The typical application filed with OPM does not contain sufficient information for OPM to reach a conclusion concerning the applicant's basic experience qualifications and follow-up correspondence and telephone calls are routinely necessary. Once OPM obtains sufficient information to determine whether or not the applicant possesses the required basic legal experience, it frequently finds that applicants have numerous questions and misunderstandings about remaining stages of the examination — the questionnaire, the written demonstration and the oral interview. These questions and misunderstandings lead to unnecessary appeals from examination ratings. Further guidance appears to be needed for applicants at each stage of the examination. . . .

##### OPTIONS:

(1) Revise and reissue examination announcement to answer questions which have been raised concerning examination requirements and procedures.<sup>3</sup>

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<sup>3</sup> This recommended change is non-controversial. Accordingly, the other possible "options" are omitted.

## 2. Definition of Qualifying and Specialized Experience

ISSUE: Should definition of qualifying legal experience and specialized administrative law or trial experience be modified?

BACKGROUND: The basic requirement for all grade levels of seven years' bar membership and seven years' qualifying legal experience in administrative law and litigation involving preparation for or participation in formal hearings before Governmental bodies, in trials before courts of general jurisdiction, or in appeals therefrom, has not been questioned by agencies or the ALJ legal community. It is viewed as a minimal experience requirement. The LaMacchia Report<sup>4</sup> found that present experience requirements were generally acceptable. The Sharon Report found that legal experience was indicative of knowledges, skills and abilities required for an ALJ and that the seven year requirement was a reasonable one which should be retained.

The Burnett Report<sup>5</sup> recommended that non-qualifying experience should be limited to investigator, rating specialist, claims reviewer, insurance adjustor, conferee, state unemployment insurance supervisor, moderator or clerk of court, officer of any court not of record, and contract officer. The report further recommended that experience as an adjudicator, arbitrator, mediator, teacher or professor, hearing officer in informal or conference proceedings, or legal consultant should not be automatically excluded as non-qualifying experience, but should be considered as qualifying experience on a discretionary basis.

The Sharon Report further recommended that the specialized experience requirement of two years of administrative law or trial practice should be changed to a requirement of simply two years of trial experience. The report found that two years of trial (courtroom) experience appears to be essential in developing and demonstrating almost all the knowledges and abilities required for an ALJ. Many ALJs have indicated to OPM that they find that trial experience is one of the best possible experiences an ALJ can have.

Both the Sharon Report and the ALJs, however, recognized that imposing a two-year trial experience requirement may appear to exclude from consideration as ALJs staff attorneys who write opinions and act as special assistants, but who rarely participate in a trial. This concern may be mitigated, though, by broadly defining specialized trial experience to include preparation and presentation or hearing of formal cases before Governmental regulatory bodies, or courts, or appeals therefrom. It can also be mitigated by permitting the applicant to continue to accomplish his/her two years of specialized trial experience over a period of several years.

If this recent period of specialized experience were extended from the last seven prior to application to the last ten years, as recommended by the Burnett Report, staff attorneys and others should have sufficient opportunity to obtain the required two years of trial experience. Also extending the recency of specialized experience requirement would help exceptionally talented people who have taken administrative, management, or teaching positions for a few years to qualify as an ALJ.

### OPTIONS:

(1)(a) Maintain requirement of seven years' bar membership and seven years' qualifying legal experience; (b) allow discretionary consideration of adjudicator, arbitrator,

<sup>4</sup> Report on the Committee on Study of the Utilization of Administrative Law Judges, U.S. Civil Service Commission, July 30, 1974 (unpublished).

<sup>5</sup> Final Report of the Advisory Committee on Administrative Law Judges, U.S. Civil Service Commission, February 14, 1978 (unpublished).

mediator, teacher or professor, hearing officer in informal or conference proceedings; and (c) require that two years of specialized trial experience be performed within last ten years prior to application.

(2) Make no changes in the experience requirements of the examination.

(3) Implement portions of option one.

**IMPACT:** Option 1 would impose slightly greater experience requirements on applicants than does the present examination by instituting a trial experience requirement apart from an administrative law requirement. However, trial experience would be now broadly defined to permit staff attorneys who are not frequently participating in formal agency or courtroom hearings to obtain the required experience over a ten-year period. Option 1 would also require the applicant to submit a statement verifying bar membership and explaining any citations for breach of professional ethics or unprofessional conduct. Option 2 would continue to permit applicants to qualify by showing two years of administrative law experience and no trial experience. The Sharon Report and the practical experience of the ALJs indicate that ALJs without trial experience have more difficulty getting up to speed as an ALJ than does one with trial experience. Option 3 would permit choosing one or more but not all of the three portions of Option 1.

**RECOMMENDATION:** Approval of Option 1 is recommended — maintaining seven-year legal experience requirement, allowing discretionary consideration of related legal work, and requiring two years of trial experience.

### 3. Special Qualifications/Selective Certification

**ISSUE:** Should priority consideration be given to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before Federal regulatory bodies?

**BACKGROUND:** In filling ALJ positions in certain Federal regulatory bodies, priority consideration has been given to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before those bodies. An applicant has been required to demonstrate that the two years of experience in a particular administrative law speciality has been obtained within seven years immediately preceding the date of application.

The LaMacchia Report noted that certain American Bar Association officials believe the specialized experience required by certain agencies exclude the private practitioners on the basis of needless requirements for such experience which is readily obtainable after employment. The Burnett Report recommended that the practice of selective certification be abandoned upon removal of ALJs from the coverage of the Veterans Preference Act. The Sharon Report recommended that the practice of selective certification should be continued only at those agencies that can justify, by a job analysis, that the specialized experience is a necessary prerequisite to function effectively on the job.

The Burnett Report also recommended that the abandonment of selective certification as it has been practiced in the ALJ examination should be linked to removal of the ALJs from the provisions of the Veterans Preference Act, and its specific requirement that the appointing agency select for appointment to each vacancy the highest three eligibles on the certificate. The report recommended that agencies be permitted to hire from the highest three eligibles on the register. The LaMacchia Report similarly recommended that the rule of three be changed to a rule of ten or fifteen. Both reports concluded that the continued application of such requirements has the effect of interfering with the agencies in their effort to select ALJs of the highest caliber, solely on the

basis of merit, as professionally evaluated in the ALJ examination.

President Jimmy Carter submitted general legislation to the Congress in 1978 which would have had the effect of removing ALJs from the provisions of the Veterans Preference Act, but such legislation failed enactment. No similar legislation is currently under consideration and it does not appear that there is currently any general interest in any modification of the provisions of the Veterans Preference Act.

**OPTIONS:**

(1) Modify selective certification to eliminate it as a matter of routine practice, but to permit agencies to use it where they can justify it by job analysis.

(2) Continue existing selective certification practice.

(3) Abandon selective certification altogether.

**IMPACT:** Option 1 modifies selective certification practice to put the emphasis on selection from the normal register of eligibles, except where that procedure fails to produce qualified candidates which meet the agencies' special hiring needs which are justified by job analysis. Option 2 continues formal selective certification by those agencies which wish to continue the practice. Option 3 would eliminate all selective certification.

Staff attorney or trial attorney experience with or before an agency employing ALJs is indeed among the best qualifying experience an applicant under the ALJ examination can have. The new supplemental application is designed to measure such qualifying experience on a consistent basis from one agency to another. In theory, an applicant who is found to possess the requisite knowledges, skills and abilities of an ALJ will be able to learn the specific subject matter for whatever agency he or she might serve as an ALJ. All other OPM examinations already examine applicants for job-related knowledges, skills and abilities and specifically prohibit selective certification based on prior experience with the employing agency. Accordingly, it should not be necessary to continue selective certification in the ALJ examination.

**RECOMMENDATION:** Approval of Option 1 is recommended — modification of selective certification to permit it only after normal certificate fails to produce qualified candidates for the agency's hiring need.

#### 4. Case Listing Requirement

**ISSUE:** Can the case listing requirement be simplified for both submission by the applicant and review by OPM?

**BACKGROUND:** The current examination requires an applicant to document that he or she has the required two years of specialized administrative law or trial experience by listing a sufficient number of administrative law cases in which he or she has participated or court cases which he or she has prepared and tried, or heard, to demonstrate 400 workdays of specialized experience within seven-year period immediately preceding the date of the application under the proposed revised examination. The applicant must also demonstrate one year or 200 days' experience at the next highest grade level to that for which he/she is applying.

Many applicants, particularly those who are Judges or ALJs, complain that the case listing requirement is a nuisance to comply with because they handle a large number of cases over a two year period. Even if they have a list of cases, they often still have to review case files to compile the details about each case which OPM requires, including dates, issues, name of court, and names of hearing officer, co-counsel and opposing counsel.

The case listing requirement is also a chore for OPM to deal with and verify that 400 workdays of specialized experience are appropriately documented.

The names of hearing officers, co-counsel and opposing counsel, however, are presently used by OPM to identify names and addresses of at least 20 individuals having personal knowledge of the applicant's qualifications. OPM selects a number of these individuals to send Qualifications Inquiry (voucher) forms to, and uses the responses to give the applicant a basic rating on whether he or she possesses the knowledges and abilities required of an ALJ.

Coupled with the case listing requirement is a requirement that the applicant submit details of two of the cases which the applicant considers to reflect the highest level of qualifying experience. These details include: The precise nature and extent of participation; full statement of issues involved; outline of arguments made; summary of technical, economic, or other data presented, including sources; and copies of briefs and memoranda of law.

#### OPTIONS:

(1) Continue the case listing requirement for the number of days spent on each case and the names of hearing officers, co-counsel, and opposing counsel in each case; and require the applicant to provide a copy of his/her most significant or highest level brief or decision rather than providing specific details about the two most important cases.

(2) End the case listing requirement with identification of the principal participants.

IMPACT: Option 1 would continue the burden on the applicant of compiling a case listing with dates, issues, name of court, and names of hearing officers, co-counsel, and opposing counsel, and of providing details of two important cases. It would also continue the volume of materials which OPM must review with each applicant. However, it would obtain necessary information for measuring specialized experience and cross checking references. Option 2 would alleviate the burden of listing and cases, identifying peers with each case. However, OPM would lose its tool for measuring two years' trial experience and one year's highest level experience. More importantly, it would lose names of key fellow attorneys with whom to verify achievements claimed by the applicant in the supplemental application. The burden on the applicant for completing the case listing can be reduced somewhat by asking only for representative cases when the applicant's experience involved a large number of similar cases of short duration.

Some sort of specific measuring stick continues to be needed to measure the two years' specialized trial experience and one year's highest level qualifying experience requirements to enable OPM to measure applicants equally. The two year and one year periods are not continuous periods of service, but are a quantum of experience over a multi-year period. In addition, a copy of a brief or decision prepared at the highest level of an applicant's qualifying experience would help OPM evaluate the applicant's highest level of qualifying experience.

Also, in order to verify the applicant's response to the supplemental application, it is helpful to ask the applicant to name as many as possible of the principal participants in the cases identified in the case listing. The principal participants include (1) presiding officer/judge, (2) co-counsel, (3) opposing counsel (if any), and (4) counsel appearing in the case (if the applicant served in a hearing officer/judicial position). If applicants were required to cite the cases in their case listing in their responses to the supplemental application, the participants in these cases could be asked to verify the applicant's claimed experience and achievements in the supplemental application. If any experience or achievements claimed by the applicant cannot be verified, then OPM may modify the applicant's score or rate him/her ineligible.

RECOMMENDATION: Approval of Option 1 is recommended — continue the case listing requirement as a necessary part of the ALJ examination.

## 5. Quality of Experience

ISSUE: Should a new supplemental application questionnaire be substituted for the Qualifications Inquiry Questionnaire or personal reference voucher form which has been used in the ALJ examination in the past to evaluate quality of experience?

BACKGROUND: The ALJ Qualifications Inquiry or voucher questionnaire has been used in the past to ask an applicant's peers to evaluate the quality of the applicant's experience in terms of the extent to which the applicant possessed certain knowledges, skills and abilities which are required of a successful ALJ.

The Sharon Report found that the voucher questionnaire evaluated ten such knowledges, skills and abilities, including: (1) Knowledge and application of rules of evidence and trial procedure; (2) ability to understand, interpret, and apply law; (3) ability to analyze, synthesize, and evaluate evidence and find facts; (4) ability to write clearly, concisely, and convincingly; (5) ability to elicit facts; (6) ability to question and examine witnesses, including cross-examination; (7) ability to preside at and control conferences, hearings or meetings; (8) ability to make independent decisions in a fair and impartial manner; (9) ability to promptly make decisions; and, (10) knowledge of administrative procedure.

However, the Sharon Report also found that there were seven other key knowledges, skills and abilities required of an ALJ which were not evaluated by the voucher questionnaire, including: (1) experiential knowledge of rules of evidence and procedure; (2) ability to apply procedural and evidentiary rules; (3) ability to determine and analyze effectively; (4) ability to orally express oneself concisely and clearly; (5) ability to manage case load; (6) ability to assimilate technical subject matter; and, (7) ability to work effectively with others.

A revised questionnaire needs to be devised to more fully evaluate the quality of an applicant's experience in terms of the knowledges, skills and abilities required of an ALJ.

Sending the Qualifications Inquiry forms to some 20 of the applicant's peers has produced considerable consternation among applicants, ALJs and OPM staff. The responses were easily manipulated by the respondents rotely responding that the applicant was "outstanding" in every way. The person asked to complete the questionnaire is not given a standard against which to rate the applicant. Some attorneys hesitated to apply for the ALJ examination to avoid signaling a large number of their peers that they were job hunting months before a rating would be issued or a job offer made by an agency. Subjective negative responses were often hotly disputed by the applicant, particularly where the respondents requested confidentiality. Overall, the responses were overwhelmingly supportive of the applicant and rarely provided a basis for distinguishing a well-qualified applicant from others less well-qualified.

As a result, OPM staff has been called upon to defend numerous rating decisions based upon responses to the Qualifications Inquiry which the applicant objected to. Ineligible applicants, and eligible applicants given a low score, routinely request copies of the forms returned under the Freedom of Information Act. Confidential responses to the inquiries cannot be satisfactorily explained to the applicant.

The Sharon Report recommended that the time and cost required to process the reference vouchers can be significantly reduced by simply averaging the evaluations of different

witnesses rather than continuing the weighted averaging which gives greater weight to supervisors and less weight to opposing counsel. The report also recommended that attempts should be made to revise the voucher to eliminate excessively favorable ratings and variations among raters due to extraneous factors such as raters using different standards.

**OPTIONS:**

(1) Eliminate the Qualifications Inquiry form and develop a new questionnaire in the form of a supplemental application to measure quality of experience.

(2) Continue to use the Qualifications Inquiry form as it is.

(3) Continue to use the Qualifications Inquiry form, but develop a standard for the rater to use and mathematically average responses.

**IMPACT:** Option 1 would eliminate the use of a controversial form which sometimes produces rating decisions which are difficult for OPM to defend. It would substitute a new supplemental application in which the applicant would identify his or her achievements which indicate the extent to which he or she possesses the five knowledges, skills and abilities or KSAs required for successful performance as an ALJ which have been determined to be useful for distinguishing quality of experience. The five KSAs are: (1) knowledge of rules of evidence and trial procedure, (2) analytical ability, (3) decision-making ability, (4) oral communications ability, and (5) writing ability.

Option 2 would continue the use of the controversial form as in the past, making it difficult for OPM to defend its negative rating decisions. Option 3 offers a promise of more uniform responses to the questionnaire against a standard and simpler evaluation of the responses, but does not deal with the basic problem that the responses can be rigged by simply responding "outstanding." Nor does it eliminate the controversial provision for permitting confidential response.

Substitution of a new supplemental application questionnaire for the old voucher questionnaire as recommended under Option 1 requires the development of a new rating schedule for the questionnaire used to measure the quality of the applicant's experience and the extent to which he or she possesses the knowledges, skills and abilities required of an ALJ. Quality of experience would no longer be arbitrarily measured by assigning a numerical rating based on the applicant's experience before a particular administrative body or court. The experience review would only be used to determine whether minimum experience requirements were met.

Completion of the supplemental application would be a new burden for the applicant to complete and OPM to review. However, neither the applicant nor OPM would have to deal with extensive case histories and vouchering requirements under the proposed examination.

In order to verify the reliability of the new rating schedule for the supplemental application, separate groups of ALJs and practicing attorneys would be asked to use it to rate an initial group of applicants. In addition, OPM would ask several persons identified as references in the initial applications and supplemental applications to also complete the supplemental application and describe the applicant's experience and achievements. Separate groups of ALJs and practicing attorneys would also be asked to use the new rating schedule to rate such persons' responses to the supplemental application. For the rating schedule to work as it should, the ratings of the applicant by each group of his or her own responses to the supplemental application and by the responses of other reference persons to the supplemental application should be consistent.



Once the reliability of the rating schedule has been so verified, it would be relied on by OPM to rate applicants on the supplemental application and OPM would no longer ask personal references identified in the application and supplemental application to verify the applicant's claimed experience and achievements. Any further verification with references would also be left to the agency selecting official when an eligible applicant is certified to an agency for consideration for appointment as an ALJ. Research by behavioral psychologists has indicated that most people are honest in completing their employment applications and that there is little need to verify their claimed experience and achievements. A final check by the selecting official is required, of course, to guard against any false or misleading claims by the applicant and to allow for adjustment of an applicant's score if necessary.

The eliminating of OPM routinely checking with 10 to 20 personal references for all applicants would save OPM a great deal of processing work in the ALJ examination. It will also avoid OPM unnecessarily stirring up such references long in advance of possible employment consideration by an agency. Research by behavioral psychologists has indicated that responses by personal references identified in an employment application tend to be biased in favor of the applicant. Also, candid negative comments are rarely provided by personal references unless confidentiality is offered; however, such confidentiality is often challenged by the applicants.

If the new supplemental application and rating schedule work as planned, it should be possible for OPM to measure the same knowledges, skills and abilities required of an ALJ as were formerly measured by the checking with personal references. In other words, just as the old personal reference checking or vouching used to measure the extent to which the applicant possessed (1) knowledge of rules of evidence and trial procedures, (2) analytical ability, (3) decision making ability, (4) oral communications and judicial temperament, and (5) writing ability, the new supplemental application will measure the same things. Not only will it measure the same things, it will do so without doing it through personal reference check which has engendered problems and complaints for the ALJ examination.

**RECOMMENDATION:** Approval of Option 1 is recommended — eliminating the old voucher questionnaire and developing a new supplemental application questionnaire to evaluate the quality of the applicant's experience.

#### 6. Continuation of the Written Demonstration

**ISSUE:** Should the written demonstration be continued?

**BACKGROUND:** The Sharon Report found that the written demonstration was an essential part of the examination for measuring two KSAs: (i) The ability to write clearly, concisely and convincingly; and, (ii) the ability to articulate, organize and render decisions effectively. The Sharon Report further recommended that the written demonstration be given a separate numerical score in order to increase its total weight.

Development of new cases with scoring syllabi would make it possible to continue the written demonstration and give a separate numerical score. The reliability of the new scoring syllabi would be verified by asking separate groups of ALJs and practicing attorneys to apply them to the same batch of written demonstrations.

Also, development of broader guidance than now exists on the purpose and procedures for the written demonstration would avoid recurring questions which OPM has received from applicants and staff.

It is possible that the supplemental application, and the rating schedule to be developed for it, will so clearly identify the applicant's achievements with regard to writing and rendering decisions that the continuation of the written demonstration may no longer be necessary. However, until this can be demonstrated with experience, it appears to be premature to propose that the written demonstration no longer be required.

OPTIONS:

(1) Prepare new cases with a scoring syllabus for assigning up to 20 points and issue written guidelines concerning the objectives and conduct of the written demonstration. Also, permit applicant to make advance arrangements with OPM field staff which administers the written examination to bring a typewriter and type the written demonstration where possible.

(2) Stop requiring the written demonstration.

IMPACT: Option 1, preparation of new cases with scoring syllabus and issuance of written guidelines for the written demonstration, would assure that written demonstrations are conducted uniformly for all applicants. Professor Robert Park of George Washington University's Law Center has already prepared four new cases with scoring syllabi. Permitting the applicant to type the written demonstration will make it easier to review and score. A number of applicants have asked to type the written demonstration and observed that they were permitted to type the bar and law school examinations. Option 2, discontinuing the written demonstration would focus the effort to measure writing ability on the new supplemental application and rating schedule therefore.

RECOMMENDATION: Approval of Option 1 is recommended — issuance of written guidelines concerning the objectives and conduct of the written demonstration.

7. Continuation of the Panel Interview

ISSUE: Should the Panel Interview be continued?

BACKGROUND: The Sharon Report found a need for a more structured and uniform interview process with hypothetical, job-related questions. It also recommended that panel members should receive training in interviewing techniques. The Sharon Report found that specific references or questions with regard to other parts of the examination (e.g., the written demonstration, in which the applicant may have competed in perhaps several weeks previous) tended to test the applicant's memory skills rather than those skills considered in the interview. In addition, experience has shown that panelists' familiarity with the applicant's written demonstration and rating sheet (which includes the applicant's tentative score) tends to influence the panelists' impression of the applicant prior to the interview, causing a halo effect during the interview process.

Other than a brief explanation given in the examination announcement, no written guidelines are being used to explain the objectives of the panel interview and the procedures for conducting it. This leads to occasional misunderstandings by OPM field staff conducting the panel interview and by the applicants themselves.

Panel members have been given little written guidance and no training. Panels have occasionally gotten involved in assessing the applicant's technical legal knowledge and/or debated whether the applicant's response to the written demonstration was legally correct. The objective of the panel interview was intended to be to evaluate, by means of a panel of authorities in the law and personnel selection, an applicant's abilities to deal with people, to communicate orally, to make decisions, and to analyze and evaluate situations. Panel members were also expected to evaluate the

applicant's written demonstration and his/her ability to write well. The panel interview was not intended to evaluate an applicant's technical, legal knowledge.

**OPTIONS:**

(1) Issue written guidelines and training materials concerning the objectives and conduct of the panel interview, and issue hypothetical, job-related questions for panel members to use; also issue a scoring syllabus.

(2) Stop requiring the panel interview.

**IMPACT:** Option 1 would provide written guidelines and training materials concerning the objectives and conduct of the panel interview. It would also provide panel members with hypothetical, job-related questions. A numerical score would be assigned separately from other parts of the examination. Consequently, none of the panelists would receive any indication of the applicant's scores in other parts of the examination, nor will they receive a copy of the written demonstration. Instead, a structured interview with a series of job-related hypothetical questions would be developed to assess how applicants will deal with actual situations on the job.

The hypothetical questions and rating schedule would be used for several initial applicants by separate panels of ALJs and practicing attorneys to determine that they are reliable.

Training would be provided to the Panel Chairperson and other panelists, although the Chairperson would receive more extensive training than the other panelists. The Chairperson would receive approximately four (4) hours of training which would include the viewing of a taped "typical" panel interview, and participating in a "mock" panel interview which would be critiqued by himself/herself and other potential Chairpersons. The film would be prepared by OPM with OPM staff playing the parts of the individuals on screen. Suggestions and guidance would also be given for conducting the panel interview. Training of the headquarters Chairpersons would be conducted by OALJ staff. Where possible, OALJ staff will arrange meetings with OPM regional offices to oversee the training. If such meetings can not be arranged, close telephone contact between OALJ and OPM regional staffs would be provided.

All panelists would receive an information paper regarding the Panel Interview process.

Option 2, discontinuing the Panel Interview would focus the effort to measure individual and personal qualities on the paper review with the supplemental application and its rating schedule; however, such qualities are better measured face to face in an interview situation than in a paper review.

**RECOMMENDATION:** Approval of Option 1 is recommended — issuance of written guidelines and hypothetical questions for the Panel Interview.

## **8. The Rating Process**

**ISSUE:** Should a new rating process be developed?

**BACKGROUND:** The rating process used to develop a basic rating under the ALJ examination in the past has been based on the peer group responses to the voucher questions and an evaluation of the applicant's experience. Point values were assigned to the peer groups response to each question concerning the extent to which the applicant possessed the knowledges, skills and abilities required for a successful ALJ. Total points for the peer group responses ranged up to 40.

In addition, an experience rating score of 50, 55 or 60 points was assigned to the applicant depending on the qualifying experience before a particular administrative body or court. The basic rating was then based on a scale of 100.

No numerical score was developed for either the written demonstration or the panel interview. The panel members were simply instructed to review the applicant's written demonstration and his or her performance at the interview, and to adjust the applicant's basic rating upward or downward as appeared to be warranted. The panel members were asked to provide a full and detailed statement in support of their recommendation. The basic rating, as and if adjusted, then became the final rating.

The Sharon Report recommended that the written demonstration should be graded by qualified persons and it should be assigned a greater weight and a separate numerical score. It further recommended that ratings of the panel members should be justified using narrative comments focusing on the essential knowledges, skills and abilities for an ALJ. The Sharon Report also recommended that the panel interview be scored separately from the rest of the examination rather than used only to modify the numerical ratings of OPM examiners.

The existing rating process has become increasingly subject to criticism by applicants, ALJs, agencies and other interested parties. Applicants complain that the rating of qualifying experience discriminates between Federal and non-Federal applicants. Applicants frequently dispute an ineligible or low rating based on OPM's review of their qualifying experience. Applicants who are rated low or ineligible on the questionnaire review commonly request a copy under the Freedom of Information Act and dispute the assignment of points for every question. Applicants nearly always dispute any change in their basic rating which may be made by the interview panel. Various complaints have been leveled by applicants in recent years charging that the rating schedule is discriminatory on the basis of race, sex or age.

The entire existing rating process was developed before the ALJ examination validation study done by Dr. Sharon and needs to be revised consistent with that study. That study validated that the four parts of the examination were fundamentally asking the right questions about necessary knowledges, skills and abilities, but indicated a need to change and improve the rating schedule. The existing rating process was also developed before the 1978 promulgation of the Uniform Guidelines on Employee Selection Procedures, Appendix B to Subpart F, Standards for a Merit System of Personnel Administration, Part 900, Title 5, Code of Federal Regulations. The rating schedule needs to be validated for consistency with those guidelines.

#### OPTIONS:

(1) Revise the existing rating process and issue a new rating schedule which assigns a numerical score for experience and for quality, and develop scoring syllabi or rating schedules for assigning numerical scores for the written demonstration and the panel interview; weights for each part of the examination would be assigned after reliability of new rating schedules has been determined.

(2) Continue the existing rating process without change — up to 60 points for experience, up to 40 points for qualification inquiries and 1-2 point adjustments for the written and oral parts of the examination.

(3) Modify the existing rating process by adopting a new rating scheme only for the questionnaire or a modified questionnaire.

IMPACT: Option 1 would complete the ALJ examination validation work begun by Dr. Sharon and produce a rating process which is based on a well documented job analysis and

professional assessment of applicants in terms of achievements they have which indicate that they possess the knowledges, skills and abilities which have been determined to be a valid content of the job of an ALJ. Therefore, the rating process under Option 1 would be consistent with the Uniform Guidelines on Employee Selection Procedures.

Option 2, continuing the existing examination rating process, would continue the growing risk that one day an applicant will persuade a Federal court that the ALJ examination is improperly discriminatory and not consistent with the Uniform Guidelines on Employee Selection Procedures. Option 3, modifying the rating of the questionnaire, would substantially comply with the Uniform Guidelines, but would not assign a numerical rating to the written demonstration or panel interview. This would leave more discretion for OPM in adjusting the final score, but OPM would continue to be challenged for not providing a structure for adjusting the basic rating for the questionnaire.

**RECOMMENDATION:** Approval of Option 1 is recommended — revise the existing rating process, assign minimal qualifications requirements for experience, and develop scoring syllabi for assigning a numerical rating for the questionnaire, written demonstration and panel interview.

## 9. Appeal/Reconsideration

**ISSUE:** Should rating appeals procedures be modified?

**BACKGROUND:** Administrative experience with applicant appeals from ineligible ratings or low ratings indicates that some change is warranted in appeal procedures. Approximately one-third of the applicants appeal to the ALJ Rating Appeals Panel for reversal of ineligible ratings or increase of their ratings. The appeals are ardently presented, but only a handful of applicants succeed on appeal in obtaining a change in their rating.

Many of the appellants simply do not fully understand the qualification requirements and the current rating schedule. Many appeals are overly lengthy, are not clear or to the point, and needlessly question the interpretation of the announcement itself. Many of the appellants do not understand what procedures should be followed for filing appeals and addressing relevant issues.

### **OPTIONS:**

(1) Include an explanation of the right of and procedures for reconsideration of a rating in the examination announcement and designate the Assistant Director for Administrative Law Judges as the responsible official for deciding such requests.

(2) Continue to notify applicants of their appeal right and procedures therefore with the notice of an ineligible rating, and continue to designate an OPM official other than the Assistant Director for Administrative Law Judges as Chairman of the ALJ Rating Appeals Panel.

(3) Include an explanation of the right of and procedures for appeal of a rating in the examination announcement, but continue to designate an OPM official other than the Assistant Director for Administrative Law Judges as Chairman of the ALJ Rating Appeals Panel.

**IMPACT:** Option 1 would clarify for applicants their right to and procedures for appealing an examination rating, and would also provide more simply for reconsideration right rather than a more formal appeal right. For all other OPM competitive examination, rating decisions are similarly subject to a simple reconsideration right rather than a formal appeal right. It would also simplify appeals processing by consolidating it in

OALJ. Option 2 would continue the present process for notifying applicants of appeal rights and procedures and continue to decide appeals outside OALJ. Option 3 proposes a middle ground of notifying all applicants about appeal rights and procedures in the examination announcement, but continuing to process appeals outside of OALJ.

Under Option 1, the revised announcement would more clearly explain the qualification requirements for obtaining an eligible rating for appointment as an ALJ. Also, a new questionnaire and a new rating schedule would be established based on a job analysis which determined what knowledges, skills and abilities are required of an ALJ. The old, lengthy rating schedule for experience, the old rating schedule for the questionnaire, and the old questionnaire would be discontinued. These changes should mean that the entire ALJ examination process should be better understood and that there should be fewer questions for applicants to raise on appeal.

With these kinds of changes in the new examination, the only specific changes which should be needed in appeals procedures should be to include a brief explanation of the applicant's appeal right and procedure for making an appeal in the examination announcement. With the anticipated simplification of and reduction in the number of appeals, it should also be possible to substitute a simpler reconsideration right before OALJ, rather than a more formal appeal right to an independent ALJ Rating Appeals Panel. Henceforth, under the new examination, it is proposed that the Assistant Director for Administrative Law Judges, rather than another OPM official, will simply process reconsideration requests rather than offer an appeal to the ALJ Rating Appeals Panel. He would not involve himself in making case-by-case initial rating decisions in order to maintain objectivity in deciding appeals. For the time being, he would continue to utilize two incumbent ALJs as the part of a three-member panel to decide reconsideration requests. If the appeals under the new examination go as smoothly as hoped, it may be desirable to recommend the formal termination of such an appeals panel in the future and provide more simply for a reconsideration right to the Assistant Director.

RECOMMENDATION: Approval of Option 1 is recommended — including notice of appeal or reconsideration rights and procedures in examination announcement and designating Assistant Director for Administrative Law Judges as responsible official.

III

#### Replies to the Proposed Changes

- A. Reply of Judge David J. Agatstein, National Association of Administrative Law Judges, to Craig B. Pettibone, Esq., United States Office of Personnel Management, dated September 16, 1983.

Thank you for the opportunity to comment on the proposed new examination for Administrative Law Judge.

This Association (which comprises, perhaps, the largest single pool of potential applicants for the position of ALJ) takes great interest in the examination. I received the proposal only last week and, for this reason, it has not yet been studied by our Board of Governors. . . . Accordingly, I respectfully request that you defer implementation of the new examination until you have had the opportunity to exchange views with the members of our Board in Reno.

Although I would prefer to withhold comment, pending study by the Board, the apparent exigency of the situation impels me to the following observations. . . .

First, while the proposal reflects awareness of some of the more serious defects in the present examination (an extremely laborious application process, the inhibiting

effect of subjecting candidates to Qualification Inquiry Questionnaires, the arbitrariness of the job title criteria, the tendency of the examination to promote agency inbreeding, etc.) it does not, in my view, adequately focus on the basic problem: determining the most qualified candidates.

No one would seriously question the wisdom of a requirement that applicants have adequate, relevant experience as a prerequisite to appointment. However, specific criteria for length of experience, recency of experience, and the precise nature of the experience are very much open to doubt. At this time, I will address only the last issue.

The purpose of the examination is to determine whether the candidate is able, at the time of certification, to discharge the duties of an Administrative Law Judge. Certainly, the substitution of five specific areas of knowledge, skill and ability for the job description test represents an advance in this direction. However, a candidate may well possess each of the KSAs without having had the opportunity in prior employment to adequately demonstrate each. Knowledge, skills and ability may be accurately, fairly and conveniently determined by appropriate written demonstrations and oral presentations.

Examinations of present ability are ubiquitous in the academic and legal worlds, and in State Civil Service systems. Neither the exemption of ALJs from performance evaluations, nor the requirement of validating the examination selection procedures, militate in any way against the adoption of procedures to test such ability, notwithstanding a candidate's prior employment history. Accordingly, I urge that prior experience be retained as a threshold requirement only, with zero examination weight, and that the entire test score be determined by appropriate written and oral demonstrations.

Second, with respect to the Specific Proposed Changes, I would note the following: . . .

Definition of Qualifying and Specialized Experience - If I correctly understand Option 1, it is proposed that the ability of a candidate to satisfy the two-year requirement of specialized experience by appropriate work in administrative law is to be eliminated, in favor of two years of experience in judicial trials, with administrative law to be considered on a discretionary basis. If such be the intent, I am resolutely opposed.

This Association worked long and hard to convince OPM that the position of New York State Unemployment Insurance ALJ meets the highest experience requirement of the present examination. We demonstrated that New York Unemployment Insurance hearings, which are adversarial, on-the-record proceedings, surrounded by the full panoply of Due Process and procedural rules, which result in a binding, written decision by the Administrative Law Judge, subject only to review by the Appeal Board and, thence, by an intermediate Appellate Court, are virtually indistinguishable from and in some ways more formal than, many Federal ALJ positions, and provide the best possible experience for the position of Federal Administrative Law Judge. This Association has urged that similar recognition be accorded to other comparable state administrative proceedings, which OPM has undertaken to do on a case-by-case basis.

I am greatly concerned that a substantial majority of State ALJs and hearing officers, who have held their positions for ten years or more, and who are among the best qualified candidates for the position of Federal ALJ, will be excluded from consideration under this proposal. I strongly believe that such proposal is not in the public interest, and will not result in an available pool of the best qualified candidates. I am confident that Option 1 will not find approval in this Association, nor among state administrative hearing officers generally, nor among members of the state administrative law bars.

Special Qualifications - Selective Certification - I endorse the elimination of selective certification except in cases in which it is justifiable by job analysis (Option 1).

Case Listing Requirement - The summary thoroughly demonstrates the near-impossibility of documenting 400 workdays devoted to conducting hearings which average two hours in length. Your suggestion that only representative cases be requested in such situations is obviously meritorious.

It should be observed that the laudatory proposal to eliminate Qualification Inquiry Questionnaire renders moot much of the discussion of the impact of the various options. However, I have no serious objection to the continuation of a limited case listing requirement.

Quality of Experience - As noted in the summary, many of the objections to the Qualification Inquiry Questionnaire also apply to the proposed supplemental application questionnaire. Since I believe that OPM, being impartial, is best qualified to judge the knowledge, skills and abilities of candidates, and since I believe that any communication of job-seeking activities is a major deterrent for many potential candidates, I propose that the Qualification Inquiry Questionnaire be eliminated, and that supplemental questionnaires be sent only to present supervisors and former employers, unless the candidate has, for ten years, been self-employed.

Written Demonstrations, Panel Interviews and the Rating Process - As discussed above, I believe that expanded, written demonstrations and panel interviews should constitute the whole of the actual examination. . . .

Finally, I urge continuation of the existing register, with the addition of candidates certified under the new examination procedures. As noted, qualification under the present examination was a Herculean burden for all candidates. There can be no doubt that candidates now on the register are qualified for the position of ALJ. They should not be subjected to a further ordeal. Speaking for myself, I would not want to impose upon those persons who completed a Qualification Inquiry Questionnaire the additional annoyance of answering a supplemental application questionnaire, as is presently contemplated for the requalification of candidates on the existing register.

B. Reply of Judge Edwin S. Bernstein, President, Federal Administrative Law Judges Conference, to Craig B. Pettibone, Esq., Office of Personnel Management, dated October 17, 1983.

The Federal Administrative Law Judges Conference (FALJC) appreciates the opportunity to comment on OPM's proposed administrative law judge examination changes. . . .

While the enclosed "FALJC commentary" contains our detailed position concerning certain aspects of OPM's proposal, I take this opportunity to summarize our position concerning your proposed examination changes. . . .

It is our belief that the current examination is generally a good one which has produced the overwhelming majority of sitting administrative law judges. Nevertheless, we concur that some changes are desirable. However, we believe that there are four major changes included in your proposal which we oppose in their present form. Those principal objections are to the following: (1) the requirement for requalification of persons currently on the register by virtue of the present examination process; (2) the elimination of the qualification inquiries or "vouchers" to verify the quality of experience of applicants; (3) the failure to set forth a rating schedule by which future applicants will be judged; and (4) the elimination of an independent appeals mechanism for applicants. On the positive side, FALJC supports your proposal to score the written demonstration pursuant to a syllabus and to score the oral interview. . . .



I can not express too strongly . . . our desire that you not adopt a new examination text until a further opportunity is provided for FALJC and others to review your draft as it develops in light of the various proposals that you receive . . .

FALJ COMMENTARY ON OALJ DOCUMENT, "ALJ EXAMINATION CHANGES,  
SUMMER 1983"<sup>6</sup>

Requalification

The prospect that eligibles now on the registers will need to compete again under the new examination is devastating in its virtually universal impact. Those among our members who serve at GS-15 are understandably outraged at the inequity inherent in being required to submit again to the application process. Understandably also, eligibles throughout the country who have never served as federal administrative law judges will be substantially prejudiced by the step you propose. It is no easy task for a practitioner or judge to lay aside work-a-day responsibilities and commitments for the time it takes to put together and process an application. Nor are the extensive new requirements in the supplemental qualifications statement (proposed Standard Form 1170) a welcome distraction.

To require requalification is a breach of faith with those who have undergone a lengthy and trying experience. FALJC is unaware that any advisory or study committee or prior administration at the Civil Service Commission or OPM had advocated or supported a requirement for requalification as a concomitant of revision of the examination. We are unaware also of any suggestion that the current examination has failed to produce a sufficient number of credible eligibles. Since the purpose is to refine and strengthen but not to discredit the previous process by which a generation of eligibles have attained the register, we see no justification for requiring recertification.

The prospect of requalification is of concern also in the face of uncertainty concerning grade determining classification initiatives underway at OPM. Apprehension concerning requalification is particularly understandable in context of ambiguity inherent in the undeveloped nature of the rating schedule at this point in time.

Moreover, there is no compulsion in law to remove eligibles, either by virtue of the Veterans Preference Act or otherwise. Notwithstanding absence of any legal requirement, OPM may persist in the removal option as the perceived consequence of the extensive nature of the proposed changes. Our response is that the case is not made, either with respect to the discrimination guidelines or otherwise, for changes as extensive as you propose. We recommend that you reduce the scope of contemplated changes to the point where you can accommodate improvements to the examination sufficiently modest to protect current eligibles.

The prospect of requalification is particularly troublesome so long as administrative law judges occupy more than a single GS grade. For example, in context of RIFs it is little comfort to judges reached in RIF to be told that they may competitively compete for ALJ positions at their former grade since under 5 C.F.R. 930.206 they may be confronted with the requirement to establish eligibility in accordance with current examination requirements. The same would appear to confront persons who seek reinstatement under 5 C.F.R. 930.207(a). A current eligible on the GS-16 register who is an incumbent GS-15 administrative law judge and who stays out of your prospective compulsory recompetition would be excluded from arms' length competition for a prospective GS-16

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<sup>6</sup> Judge Marvin H. Morse chaired the Ad Hoc Committee which drafted this commentary.

opening since the OPM certificate of eligibles would omit that judge's name. Such judge could, at best, only obtain appointment if he or she should happen to have an inside track for the appointment noncompetitively.

You suggest in your August 31, 1983 memorandum to chief administrative law judges and personnel directors that you "... are open to continuing to allow incumbent GS-15 ALJs who have established eligibility ... [at GS-16] ... to transfer non-competitively with a promotion to GS-16 ALJ positions ...". At a minimum, however, to assure incumbent and former administrative law judges that prospective changes in the examination will not impair the ability they now have to obtain appointment by transfer or reinstatement, sections 206 and 207 of Title 5, Code of Federal Regulations (CFR), should be amended to delete the requirement that such persons must establish eligibility in accordance with revised examinations. Judges occupying GS-15 positions who are on the GS-16 register and former judges who once occupied GS-16 administrative law judge positions (and who were not removed under 5 USC 7521) should be able to obtain appointments by promotion and/or reinstatement by virtue of their prior incumbency without the need to meet changed eligibility requirements.

#### Questionnaire Assessment of Quality of Experience

Although there is substantial agreement that the present qualification inquiry forms (vouchers) are less than ideal, we are unaware of any legal requirement, by the courts, OPM's General Counsel, by any other legal authority, or by any commentator, which requires or even suggests that an improved version, or even the present version, is either indefensible or unsuitable. The case is simply not made, in either the documents you have provided or in our discussions with you, for substitution of the vouchers by the cumbersome supplemental qualifications statement which you propose. It may be conceded that applicants often are distressed by the voucher process. But your plan to deliberately not obtain representative third party commentary about an applicant's suitability substantially disables OPM from fulfilling its responsibility in providing an adequate supply of the best qualified candidates for selection as administrative law judges.

There has been no showing (and no evidence of serious apprehension of a showing), that the present examination fails to satisfy the Uniform Guidelines for Employee Selection Procedures contained in 5 CFR, Part 900. If any component of the examination including, for example, the rating schedule, ought to be improved to better meet the Guidelines that improvement ought to proceed, without, however, compelling concurrent and substantial overhaul of the examination.

It would be preferable to strengthen the present voucher process by covering in those knowledges, skills and abilities such as Dr. Sharon's study suggested ought to be included, perhaps to go to the forced choice form of questionnaire as has been counter-nanced by OPM's own experts and, to satisfy a significant source of criticism, to eliminate the option of confidentiality on the part of the person providing the evaluation.

You express the concern that vouchers may be skewed in favor of applicants by "witnesses" who are knowledgeable (meanwhile disadvantaging applicants in the case of "witnesses" who are less sophisticated). Certainly OPM can provide instructions on revised voucher forms to explain carefully what is expected of "witnesses" upon assigning ratings, and to explain the statistical significance of particular arrays of ratings.

It is important also that vouchers be sent to a relatively large number of people, e.g., at least twenty. By obtaining a significant number of "witness" evaluations and providing improved instructions, the potential for skewing evaluations will be reduced. In this respect, we disagree strongly with your proposal to eliminate the

case listing requirement. That elimination would have the effect of reducing the number of references to be checked. Also, you have suggested that only those people referenced in the applicant's two most important cases would be contacted. Here again, the reduction in the number of vouchers would seriously reduce the likelihood of obtaining truly objective appraisals.

We urge you most strongly to retain not only the concept of vouchers, by whatever mode is utilized, but to maintain OPM's role in implementation of its non-delegable examination responsibilities, 5 U.S.C. 1104(a)(2), by itself determining the quality of experience. Instead, as we understand the proposal, OPM will check an applicant's responses to the so-called supplemental qualifications statement only during the period that OPM is establishing and checking the reliability of benchmarks as a predicate for developing a new rating schedule. After that period, unless and until an applicant is considered for appointment by an employing agency from a certificate of eligibles after having successfully attained the register there would be no effort at probing self-serving statements contained in the application, including the supplemental qualifications statement.

The widespread respect which courts have expressed for the administrative law judge selection process can only be jeopardized by introduction of a process which omits any substantial opportunity for checking the bona fides of an applicant's submission, his or her behavioral characteristics and demonstrated or potential judicial temperament (other than as may appear during the one hour panel interview). The role of the administrative law judge is too important, and the function too visible, to rely on the assumption that most applicants tell the truth. The test is not alone of truthfulness but of predisposition, attitude and similar considerations.

If OPM were to perform the verification task that you intend to assign to the employing agencies at the time they receive certification of eligibles, the function performed would be too little too late. That defect is compounded where it is delegated. Not only is the statutory injunction breached, and verification likely to be abortive, but the proposal creates the opportunity for an agency to manipulate the appointment process in the guise of verification, and will destroy the integrity of the register.

#### The Rating Schedule

It is simply not possible for us to gauge the means, quantitatively or qualitatively, by which your undeveloped scoring methodology, which you ask us to accept on faith, will distinguish one candidate from another with respect to qualifying for either the GS-15 or GS-16 register or both. These concerns compel us to insist that you develop a mechanism to insure that present eligibles be retained on the registers.

You ask us to concur in an examination the operation of which will depend upon a rating schedule which will only be devised concurrently with implementation of the new examination. Whatever difficulty you may perceive in developing rating schedules before implementing a new examination methodology does not justify OPM in asking the agencies and associations to make informed judgments concerning — to acquiesce in — the prospective desirability of a substitute examination process absent an opportunity to assess the rating schedule on which such a substitute depends for its validity.

It is essential that any applicant who is to be rated on the basis of a new examination be scored at least in substantial part on the basis of the prior methodology until a new methodology is adopted, including a fully developed rating schedule. At least as important is the need for us as well as the applicant to be aware of the methodology used by OALJ in the rating process. The current rating schedule was made public in 1980 and we do not understand why you propose that the new one will be kept confidential.

You ask us to assist you in developing a rating schedule but you apparently intend not to make available the rating schedule which results from that assistance.

Pending adoption of a new rating schedule, OPM might construct a model by which to obtain hypothetical scoring modalities while continuing to score applicants in accord with the present regimen. Moreover, we do not understand that you are prevented from effecting incremental changes to improve and strengthen the present rating schedule. We understand that amendments to rating schedules have been made from time to time during recent years, and we would suggest that the process of improving the merit selection system of administrative law judge can and should proceed on a structured and step-by-step basis.

### Appeals

The revised Announcement contemplates substitution of reconsideration in OALJ for the independent appeals mechanism now in place. It is our understanding that, in one form or another, failed applicants for the administrative law judge registers were provided access to an impartial decisionmaker within the CSC/OPM outside OALJ for many years prior to the Civil Service Reform Act and subsequently. We do not doubt the good intentions of the incumbent director of OALJ to process reconsiderations in a context in which he intends not to participate directly in the initial processing of applications. However, those intentions belie the consistent history of all his predecessors in that office so far as we understand.

OALJ staffing patterns, even at best, at a time when OALJ enjoyed a substantially larger professional staff than today, required the head of the office to participate in the flow of applications. Even if the assistant director could isolate himself from participation in scoring applications, however, the elimination of a traditional appeal mechanism providing procedural due process to applicants is a backward step, totally unwarranted. At the very least, the proposed arrangement lacks the appearance of independent decisionmaking in accordance with due process, a critical requirement for a process of rating qualifications of candidates for judicial office.

FALJC stands ready to provide judges from its ranks to staff an appeals mechanism at no direct cost to OPM. Other than staff cost we perceive no reason for OPM to back off from its commitment to an independent appeal, a commitment reiterated as recently as last year by amendment to Subpart 930 of Title 5, CFR.

### Compliance with APA Rulemaking

To keep faith with practitioners and judges whose career planning has included the administrative law judge option and to maximize the opportunity to obtain informed commentary while encouraging the sustained support of the legal community generally, OPM should promulgate the revised Announcement by notice and comment rulemaking. We are unaware of any reason to revise the Announcement without full opportunity for such public comment.

### Supplemental Qualifications Statement

In view of our position with respect to the vouchers, we feel that the supplemental qualifications statement is an unnecessary addition to the examination. Also, the statement currently proposed by OPM would not provide a reliable measure of an individual's overall knowledges, skills and abilities. This is particularly true for applicants with high volume litigation experience. The isolation of one or two experiences to illustrate one's knowledge, for example, of the rules of evidence, or the ability to communicate and analyze, would not provide a meaningful picture of the applicant.

The entire body of accomplishment as a trial (or appellate) counsel or decisionmaker evidences the points you seek (except in the unusual circumstance where a court may have criticized counsel or a judge for ineptitude). A narrative, accompanied by illustrative pleadings, providing in-depth statements concerning two cases, as under the present Announcement, remains more instructive as a basis for determining qualifications than will be responses to the artificially constrained supplemental qualifications statement.

#### Written Demonstration

FALJC supports introduction of a discrete score for the written demonstration and welcomes introduction of syllabi as a means of strengthening confidence in uniformity in scoring. We share the view as expressed in the Sharon report that the written exercise must be graded by qualified personnel. Despite the availability of a syllabus, the grader of any written demonstration must be a person familiar not only with the text materials but with the broader implications of the legal issues which reasonably arise from the scenario presented. We are concerned whether OPM intends to make available to the examination process that quality of examiner that the written demonstration requires if it is to be assigned a significant separate numerical score.

#### Panel Interview

As with the written demonstration, FALJC supports the effort to achieve an independent score for the results of the oral interview. We express the reservation that the instructions to the panelists and the mandatory use of hypothetical problems not be so limiting on discretion of the panelists as to preclude them from inquiring on their own initiative into the desired traits and abilities of the applicants. We do not understand why the panelists should be precluded from inquiring with respect to the applicants' handling of the written demonstration material and we recommend that the written demonstration be included within the discretionary agenda of the interview panel.

#### The Revised Announcement

Comments, in addition to those above, are prompted by text of the pending revised Announcement No 318, contained as an Appendix to the 'ALJ Examination Changes, Summer 1983,' as transmitted by OALJ's memo of July 26, 1983.

#### Requirement for Experience in Courts of General Jurisdiction

All references to qualifying experience as arising from courts of general jurisdiction should be deleted. Elimination of any distinctions between experience in one or another particular type of court is consistent with moving away from evaluation of experience under the present rating schedule on the basis of courts on which a particular applicant may have served.

Elimination of the dichotomy between general and special courts is consistent also with the reality that the same subject matter may be cognizable in a general jurisdiction court in one state and a special jurisdiction court in another. The traditional distinction denied to the program experienced practitioners and judges who have performed significant legal work in courts of special jurisdiction. In removing this anomaly it will be helpful also to eliminate the requirement that experience must have been obtained in or before "courts of record" a term which harks back centuries and which provides no credible basis on which to distinguish among applicants. All references in the revised Announcement should be to courts only and not to courts of general (or other) jurisdiction or to "courts of record."

#### Qualifying Experience as Administrative Practice or Court Practice

In seeking to equalize experience so as to avoid unreasonable discriminations among applicants it is suggested that the experience requirement be stated in terms of

experience obtained in administrative law on the one hand and, on the other hand, other qualifying experience; that the formal cases which provide the qualifying experience in the case of administrative practice be identified as those involving governmental "administrative proceedings" in lieu of "regulatory bodies" as appears in both the present Announcement and in the pending revision. The phrase "regulatory bodies" is unduly limiting and fails to recognize that the overwhelming volume of administrative practice is outside of the traditional "regulatory agencies." Similarly the definition of "formal" cases as being those "in substantial accord with" the APA appears to preclude as qualifying experience professional work performed in or before state agencies. It is recommended that the phrase be rewritten to provide, at the end of III B. 1. text the phrase (substituting a comma for the period) "or similar state or local statute or other law."

Wherever the distinction appears between administrative law experience and litigation, we think it would be more meaningful and consistent with the thrust of improvements in the examination to distinguish instead between administrative proceedings and judicial proceedings since what is sought in either case is experience in litigation, including appellate litigation.

#### Trial Experience

Your initial proposal to require two years of trial experience is excellent and would clearly improve the examination. Subsequently, however, you have indicated a willingness to eliminate this requirement and merely consider this experience in the grading process by giving extra points for quality recognition. The latter option is, in effect, no change from the existing system.

We agree with the conclusion of the Sharon Report that two years of trial (courtroom) experience is essential to the development of most of the KSAs required for an administrative law judge. Obviously, the opinion-writing function represents only a portion of the judge's duties. Before reaching that stage of the proceedings, the judge must make a good record, and this can only be accomplished by a person who is thoroughly familiar with the entire process of litigation. For example, the judge must control and facilitate the gathering of evidence by appropriate rulings on discovery and other pre-trial motions. It is fundamental in these situations that the judge fully understand and appreciate the problems of trial attorneys before the judge can fairly rule upon their motions. The appearance of unfairness at any point taints the entire proceeding.

Trial experience provides an essential wealth of knowledge from which the judge can draw at the hearing. In this regard, an experiential knowledge of the rules of procedure and evidence is necessary to assure a good record. This knowledge can only be acquired by the actual participation in many trials. This is so because each trial is a separate learning experience which builds upon the knowledge previously acquired. Accordingly, we recommend retention of the two year trial experience requirement. We also accept as reasonable your suggestion that such experience must have been performed within the last 10 years prior to the application.

#### Selective Certification

We note that you recommend option 1 which merely modifies "selective certification to eliminate it as a matter of routine practice but . . . permit/s/ agencies to use it where they can justify it by job analysis." However, in your "RECOMMENDATION" you go further by stating that selective certification will be permitted "only after normal certificate fails to produce qualified candidates for the agency's hiring need." FALJC endorses the language in your "RECOMMENDATION" . . . so that the agency would be required to establish that the normal certificate did not produce qualified candidates before selective certification would be permitted.

C. Reply of Evan L. Hultman, President, Federal Bar Association, to Honorable Donald J. Devine, Director, Office of Personnel Management, dated October 3, 1983.

The Federal Bar Association is vitally interested in the well being of career attorneys in the federal service. In this respect, we share your concern for the continued vitality and validity of the selection process for the administrative judiciary.

Precisely because of our concern, however, we earnestly ask your intervention to prevent OPM's Office of Administrative Law Judges (OALJ) from acting precipitously to effect changes in the examination for administrative law judges. . . .

We are unaware of any compulsion to effect changes as rapidly as OALJ intends, and we have no confidence that responsible improvement can be accomplished without both opportunity for fuller dialogue and the development of a rating schedule prior to implementation of any significant changes to the present examination.

For these reasons, the National Council of the Federal Bar Association at its annual meeting on September 24, 1983, adopted / a resolution opposing any substantial changes in the administrative law judge examination, absent a prior opportunity for detailed comment and dialogue, and opposing abolition of existing registers <sup>7</sup>. We remain totally unconvinced . . . of the need to eliminate eligibles now on the registers.

D. Reply to Judge David J. Agatstein, National Association of Administrative Law Judges, from Craig B. Pettibone, Esq., Office of Personnel Management.

Last summer I wrote your organization and a number of others seeking your comments on proposed revisions in the examination for Administrative Law Judges (ALJs). Based on the comments received since then, and based on discussions with many interested people, my office has made a number of changes and clarifications in the proposed revisions. I believe that these changes and clarifications substantially meet concerns which were expressed about the original proposal.

The objectives of the draft, revised examination announcement are as follows:

- 1) To professionally develop a new examination, by OPM test development experts working with incumbent Administrative Law Judges and private practitioners knowledgeable about Administrative Law Judge work, to enhance OPM's ability to distinguish outstanding applicants.
- 2) To base measuring criteria in the new examination on job-related knowledge, skills and abilities determined by job analysis among incumbent Administrative Law Judges.
- 3) To continue to require seven years of experience in preparing for, participating in and/or reviewing formal hearings or trials involving administrative law and/or litigation at the Federal, state or local level.
- 4) To develop a new supplemental qualifications statement to evaluate an applicant's achievements in such areas as trial procedure, analytical ability, decision-making ability, judicial temperament, and writing ability.
- 5) To develop a new, more effective personal reference inquiry form for evaluating an applicant's judicial temperament and qualifications.
- 6) To strengthen the written demonstration and panel interview stages of the examination by providing structured questions and scoring procedures.

- 7) To defer the labor intensive portions of the examination — the reference inquiries, the written demonstration and the panel interview — until Administrative Law Judge positions become vacant or are anticipated to become vacant in specific geographic areas where applicants have indicated they are available.
- 8) To minimize reapplication burden for prior eligible applicants by generally limiting reapplication to the completion of the written application and supplemental qualifications statement, and maintaining prior eligible applicants who do not reapply on the register as a reserve (1) to use if additional applicants are needed and (2) to use for noncompetitive reinstatement of former Administrative Law Judges or noncompetitive transfer with promotion of incumbent Administrative Law Judges.
- 9) To seek the best qualified applicants, nationwide, without regard to race, religion, age, color, national origin, sex, political affiliations, or any other non-merit factor.

#### Analysis of Changes the Office of Personnel Management Has Made in Proposed Administrative Law Judge Examination Announcement

In developing the proposed Administrative Law Judge (ALJ) examination announcement, a number of concerns were raised with the Office of Personnel Management (OPM) by agencies, bar associations and other interested parties. This revised, proposed examination announcement differs from the proposed announcement circulated last summer in the ways described below.

##### 1) Supplemental Qualifications Statement and Rating Schedule

- \* OPM proposed to develop a new supplemental qualifications statement and a rating schedule for evaluating it and assigning a basic rating to applicants. The new rating schedule would assess the extent to which applicants' experience in formal hearing work has given them the knowledge, skills, and abilities which have been found through job analysis among incumbent ALJs to be essential for successful performance on the job. The old rating schedule simply assessed the extent to which applicants had experience in specifically listed jobs involved in the formal hearing process and made no evaluation of the particular experience applicants had in those jobs. The new supplemental application and rating schedule would rate applicants on such key knowledge, skills and abilities as (1) knowledge of rules of evidence and trial procedure, (2) analytical ability, (3) decision-making ability, (4) oral communications and judicial temperament, and (5) writing ability.
- \* Agency comments generally recognized the proposed supplemental qualifications statement and rating schedule as reliable and often used tools by personnel managers in screening for candidates for professional positions. ALJs and bar organizations were unfamiliar with such a measuring tool and expressed some skepticism about whether it would be useful.
- \* OPM is continuing to develop a new supplemental qualifications statement and rating schedule for evaluating it. This part of the examination is expected to do a better job than the old examination of evaluating the quality of applicants' experience and distinguishing the better qualified applicants. OPM has revised the examination announcement to explain more clearly the role of the supplemental application and related rating schedule. The supplemental qualifications statement itself will also be edited to make it clear that applicants are to describe the whole of their experience and not just a few isolated examples.



## 2) Trial Experience Requirement

- \* OPM proposed to not only continue a seven-year requirement of experience in preparation for, participation in, and/or review of formal hearings or trials involving administrative law and/or litigation, but to also require two years of actual trial experience within the last ten years for both administrative law and litigation experience. The old examination required actual trial experience only for litigation experience.
- \* ALJs supported the proposal to require trial experience, but without a recency requirement. Other commenters objected that the proposed trial experience requirement for administrative law experience was too stringent and would unnecessarily exclude attorneys with administrative law experience who would otherwise qualify. Commenters agreed, however, that trial experience enhances performance on the job as an ALJ.
- \* OPM has modified this proposal to delete a specific minimum qualification requirement for two years of actual trial experience within the last ten years for both administrative law and litigation experience. This change broadens the minimum qualifying experience somewhat for attorneys with litigation experience, and at the same time avoids narrowing the minimum experience requirements for attorneys with administrative law experience who would otherwise qualify. In specific recognition of the value of trial experience, OPM will give specific weight in the basic rating schedule, panel interview, and personal reference inquiry portions of the examination to actual trial experience of applicants. In this way trial experience will be a significant part of the basis for every applicant's rating. Thus, experience as opinion writing staff attorneys or as reviewing attorneys in formal hearings would continue to constitute minimum qualifying experience, but attorneys with such experience who also had hearing room or court room trial experience would receive recognition for such experience in their rating.

## 3) Personal Reference Inquiries

- \* OPM proposed to stop sending personal reference inquiries to persons having personal knowledge of the applicant's qualifications and to leave it up to the appointing agency to make personal reference inquiries. A numerical score would no longer have been assigned to applicants for this part of the examination. OPM proposed to make this change because personnel research indicates that reference givers often demonstrate excessive leniency or bias.
- \* Commenters objected that such a change in the examination would make it very difficult for OPM to adequately measure the vitally important qualification of judicial temperament. Commenters stated that an important dimension of judicial temperament is the observations peers make of the applicant in action on the job and in the hearing room or court room. Concern was also expressed that since attorneys are skilled advocates, some applicants might appear to be better qualified on paper than they really were. In addition, concern was expressed that if OPM were to leave reference checking up to the appointing agency, the nonmerit considerations could enter into the selection process.
- \* OPM has modified this proposal to continue, itself, to send out personal reference inquiries, before applicants are assigned a final rating and referred to agencies for consideration for appointment. However, to limit the paperwork involved in collecting reference inquiries and disclosing copies thereof to applicants, OPM will make reference inquiries only as part of the final rating process as explained in Item 6 below and confidentiality will no longer be offered to respondents. Such

deferring of the reference inquiries also avoids premature disclosure to applicants' peers that they are seeking an ALJ position. A new personal reference inquiry form is being developed to ask the reference giver to choose from a group of behavioral descriptions those which best describe an applicant. This forced-choice format will limit the excessive leniency or bias often demonstrated by reference givers. A numerical score will continue to be assigned to applicants for this part of the examination. Finally, to avoid any appearance of improper performance evaluation, supervisors of incumbent ALJs will no longer be asked to complete reference inquiries on incumbent ALJs who apply for an examination rating for the purpose of establishing eligibility for promotion to a higher grade.

#### 4) Level of Experience

- \* OPM proposed to require that all applicants have had one year of qualifying experience of a level of difficulty and responsibility characteristic of the next lower grade in the Federal service to the grade of ALJ position applied for. Under the old examination announcement, applicants could substitute two years of qualifying experience at the GS-14 grade level in qualifying for a GS-16 ALJ position.
- \* Some commenters objected that elimination of the rule permitting substitution of two years of qualifying experience at the GS-14 grade level for applicants to qualify for GS-16 ALJ positions would arbitrarily exclude qualified GS-14 attorneys who worked with ALJs in various Federal agencies which offered few, if any, GS-15 attorney positions. Other commenters also asked that the substitution rule be extended to permit applicants to substitute two years of qualifying experience at the GS-13 grade level in qualifying for GS-15 ALJ positions, particularly in SSA. Several commenters expressed concern that two years of qualifying experience two grades below the grade of the position applied for does not provide applicants with the same knowledge, skills and abilities as one year of qualifying experience one grade level below the grade applied for.
- \* OPM has not modified this proposal. The qualification requirement of one year of qualifying experience characteristic of the grade level below the grade of the position applied for is a universal one in the Federal service and a persuasive case has not been made that an exception is warranted for ALJ positions.

#### 5) Selective Certification

- \* OPM proposed limiting the past general usage of selective certification — the practice of giving preferential consideration in agency hiring requests to applicants with agency-specific experience before other applicants are considered. OPM proposed to permit the practice to continue only where the hiring agency could justify it with a job analysis showing that such agency-specific experience was essential to successful performance on the job.
- \* Commenters generally agreed that the practice of selective certification was not necessary to provide qualified applicants and should not be continued. However, NLRB urged that such a practice be continued. Officials of the Federal Energy Regulatory Commission, the Civil Aeronautics Board, and the U.S. Coast Guard also indicated that their agencies would like to see the practice continued.
- \* OPM has concluded that selective certification can no longer be justified. However, OPM has modified this proposal to permit continued use — at agency request — of non-exclusive preferential consideration of applicants with agency-specific experience where the agency can justify with a job analysis that such experience enhances performance on the job. Applicants with agency-specific experience would have their final rating modified to include specific recognition of such experience. Such quality ranking of applicants with agency-specific experience among other

qualified applicants is permitted under general OPM examining guidance for all positions. Agency requests for such quality ranking will be carefully reviewed and discussed with representatives of the bar.

#### 6) Rating Process

- \* OPM proposed to set the passing grade for each part of the ALJ examination at a level which OPM determined would produce an adequate register of eligible candidates for appointment. OPM proposed to determine how many names were needed on the ALJ register and to establish as the passing grade for the examination such numerical score as would result in a sufficient number of eligible appointments.
- \* Commenters objected that OPM was, in effect, setting a moving target as the passing score for the examination. Commenters also objected that OPM was not offering to process all minimally qualified applicants through all parts of the examination as had been its practice under the old examination and that agencies would manipulate available vacancies to reach favorite candidates.
- \* OPM has modified this proposal to make it clear that all applicants who are found to meet the minimum qualifying experience requirements will have a basic rating assigned to their application for the achievements claimed in their supplemental qualifications statement, and a fixed minimum score which will not float will be set for this rating. Attainment of a basic rating will represent a substantial accomplishment, which will represent the penultimate stage of the examination in advance of anticipation hiring needs.

Applicants will be asked to indicate their geographic availability for each grade level of ALJ position when they are assigned a basic rating, rather than when they are assigned a final rating as in the past. Of those applicants who are assigned a basic rating, only as many of the highest ranking applicants as are anticipated to be needed to meet the hiring needs of Federal agencies in various geographic locations will be invited to participate in the subsequent parts of the rating process: the written demonstration, the panel interview, and the personal reference inquiries. OPM will invite to the latter parts of the examination as many applicants with a basic rating as could be reached on a given certificate of final eligibles, assuming such applicants might pass and earn the maximum possible score on each latter parts of the examination including veteran preference if applicable. Generally, only a very few applicants will be invited to participate in these parts of the rating process. This procedure avoids burdening applicants, ALJs, private attorneys, and OPM, with these labor intensive parts of the examination in the absence of reasonably anticipated vacancies. Examination of minimally qualified applicants who limit their geographic availability to areas where positions are not available is a waste of resources.

Agency ability to manipulate geographic availability of vacancies to force OPM to examine and certify favorite applicants is limited because the names of applicants and their scores are confidential. Also, agencies must establish a bonafide vacancy before they may receive a certificate of eligibles for a particular vacancy.

A final rating, with a maximum potential score of 100, excluding veteran preference points, will be assigned as a composite of the basic rating and the numerical scores assigned for the written demonstration, panel interview and personal reference inquiries. The basic rating will be determined on the basis of approximately equal weights for each of the five required knowledge, skills and abilities, except that approximately equal weight will also be given for agency specific qualifications which an agency may have justified. The basic rating will compose approximately 40% of the final rating, while the written demonstration,

panel interview and personal reference inquiries will compose approximately 20% each of the final rating.

#### 7) Reapplication

- \* OPM proposed to require currently eligible applicants under the old examination announcement to reapply under the new examination, or their names would be removed from the register.
- \* Commenters objected to a general reapplication requirement and removal of current eligibles from the register of eligible applicants. Concern was expressed that qualified applicants would not want to go through the burden of reapplication. Concern was also expressed that the proposed announcement made no mention of whether or not former ALJs and incumbent ALJs would retain noncompetitive reinstatement or transfer with promotion eligibility which, under OPM regulations, is conditioned on their continuing to meet current examination requirements.
- \* OPM has modified this proposal to minimize the reapplication burden for current eligible applicants who wish to reapply. Also, currently eligible applicants who are former or incumbent ALJs would retain their eligibility for noncompetitive reinstatement or transfer with promotion without having to reapply. A new reserve category will be established on the register for listing without rank the names of those who do not reapply. Applicants in the reserve category will be utilized as a resource for inviting new applications under the new examination. Former ALJs in this reserve category will retain their eligibility for noncompetitive reinstatement to an ALJ position without having to reapply under the new examination. Incumbent ALJs in this reserve category will retain their eligibility for non-competitive transfer to another agency with promotion to a higher grade level position without having to reapply under the new examination. Current eligibles who want to maintain eligibility for competitive selection from OPM certificates of eligibles will still need to reapply, but they will be invited to participate in the labor intensive portions of the examination — the written demonstration, panel interview, and personal reference inquiries — only to the extent that there are reasonably anticipated vacancies to be filled in geographic areas for which they have indicated they are available. Also, information provided OPM in a previous application may be referenced and need not be provided again. Further, applicants who took the written demonstration during the last two years responded to case situations which OPM will continue to use and which can be reevaluated under the new scoring guidelines. Therefore, the burden of reapplication is generally reduced to simply completing a new application and the new supplemental qualifications statement. Also, former ALJs and incumbent ALJs who are currently eligible need not reapply at all. OPM will send all currently eligible applicants a copy of the new Examination Announcement and will explain the reapplication situation to them.

#### 8) Appeal of Rating Decisions

- \* OPM proposed to substitute a simpler reconsideration right before the Office of Administrative Law Judges, in place of the formal appeal right to the ALJ Rating Appeals Panel which has been offered in the past. Initially, OPM proposed to make the Assistant Director for ALJs chairman of the ALJ Rating Appeals Panel. At a latter date, OPM proposed to terminate the appeals panel and provide only for a reconsideration right to the Assistant Director.
- \* Commenters objected that the proposed reconsideration process under the same official who heads the office which makes the rating decisions would lack the appropriate appearance of independence necessary to assure that rating decisions were made strictly on a competitive basis free of non-merit factors. In order to

assure the integrity of the rating process, comments urged that a formal appeal panel be continued.

- \* OPM has modified this proposal to continue to provide for a formal right of appeal to the ALJ Rating Appeals Panel. A practicing attorney and an ALJ who have had no prior involvement with the application will continue to serve on the panel. So long as the use of such an appeal panel is continued, the rating appeals process will have the necessary appearance and substance of independent review. The Assistant Director for ALJs would still be designated as chairman of the appeals panel, but with the stipulation that such person would not be directly involved in individual rating decisions before an appeal is filed. The Assistant Director for ALJs will give appropriate deference to the professional judgment of the other two panel members concerning the applicant's qualifications.

\* \* \*