From: perejj@aol.com
To: MSPB
Cc: PERE JARBOE
Subject: Pere Jarboe Contributions to Merit Systems Protection Board (submitted by 11.8.2024)
Date: Friday, November 8, 2024 11:39:45 PM
Attachments: Trump Chief Magistrate of the United States President Trump.pdf
OSC controversy continue over when presidents might be considered above the law but it should be undisputed that the ms of employees in the executive branch never are and from what I see as the head of the ind (1).pdf
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Pere Jarboe Contributions to Merit Systems Protection Board (submitted by 11.8.2024)

1) On November 8, 2024, subscribers to Attorney Peter Brodia's Dewey Publications Newsletter saw the gauntlet laid down - with that the undersigned accept the challenge and offers my observations. Here is Attorney Brodia's observations as of this date - restate it in toto- with a harbinger the Merit Systems Protection Board - by statute has been required to have an Office Chief Administrative Law Judge and (while the words statute is clear - reaching back as far as 1997) the Board has recognized same in regulation. I add that Attorney Brodia stands as an a pilar of service to the federal workforce and applicants thereto, and as a result to "*the public in its entirety*" I shall not leave these comments without some additional observations which should be helpful to the Board and to the public as it steers to the future. Here is what Attorney Brodia offered the public this date:

'On September 9, the Board issued what it styled an interim final rule—a set of regulations, effective October 7, and through November 8 subject to public comment (and review of those comments and possible further revisions). Why the Board could not have followed the usual process and offered proposed regulations, allowed comment, and then issued final regulations, is unclear. As of November 7, three sets of comments have been posted on the Board's FOIA website.

The new regulations eliminate cross-PFRs; modify discovery practices in an effort to depart from the Federal Rules of Civil Procedure (the Board wants to have its very own discovery processes); slightly simplify enforcement procedures; make it wholly **discretionary** on the part of the Board to entertain motions to reopen its decisions; and muddle, or at least fail to clarify, when the Board has jurisdiction to consider appeals from final decisions under labor contract grievance procedures." (my highlight - 'discretion' is a key word for my discussion and contributions to the board at this juncture)

'Some of the discovery changes in the new rules are unworkable or unenforceable, e.g., use of requests for admissions or interrogatories to nonparties. The elimination of the cross-PFR procedure was for the sake of expediency in case processing, without any explanation in the Federal Register notice of how often the process has been used and with what results.

'To its credit, the Board asked for suggestions to improve its practices. Among the comments submitted were that the Board establish an external advisory committee to cut through the Board's customarily insular existence as a small bureaucracy of subject matter experts; that the Board properly treat rulemaking petitions, which it customarily seems to ignore; that the Board eliminate the distinction between precedential and nonprecedential decisions (save for those decisions that are completely insubstantial, other than announcing the essence of the

PFR and a result in a page or so), thereby creating a body of law that is worthy of citation and upon which people can rely; that the Board loosen up and allow AJs to communicate on matters of procedure through email with parties and that AJs convene status conferences immediately after appeals are filed and agency representative identified to explain Board processes to parties who need the explanation, to quickly explore what the real issues are, and as quickly to explore possibilities of settlement; that the MAP program have some limits placed on it to quickly move cases through mediation; and to give the parties more control over discovery. Also suggested was an effort to get OPM to allocate ALJ slots to the Board in which to convert AJs, avoiding possible future tenure issues'

2) This commenter on this November 8 2024 read a number of comments by other contributors this date. even touching likes of SEC v *Jarkesy* and *Loperbright v Commerce* decisions - that having been said longstanding, the Board recognized:

'The starting point for statutory interpretation is the plain language of the statute in question. Consumer Product *Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id*.' *Senior Executives Association, Petitioner v Office of Personnel Management Respondent* 67 M.S.P.R. 643 (1995).

3) The 'Enabling Statute" of an Agency, in this commenter's view, is the engine which makes any Agency operate- for the purposes of the Medicare Judges for instance the statute provides not for 'decisional independence' but rather specifically "Judicial Independence" - and the MMA of December 8, 2003 (HR 1) specifically provides.

Board's Enabling Statute. I highlight but offer a harbinger The Board is not enabled to create an "Agency", nor is it entitled to Contract out what it is enabled to accomplish particularly in the matter of Administrative Law Judges and I do not sense that the Board is enabled to overturn the President's authority- as we shall see the Board seems to feel entitled. I add that the board should not be in a position to delegate any (unless a statute so provides to a separate Agency - the Office of Special Counsel: What is critical is that as attached document, provides - the Board through a "loaned" ALJ from the Coast Guard has divested the 45th President of his Authority over the Executive Branch to include the Board and all of which the Board is enabled.

5 U.S.C. § 1204

§ 1204. Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall--

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.
(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual--
(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and
(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.
(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.
(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by the Board, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.
(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.
(e)(1)(A) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.
(B)(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.
(ii) An order issued under this subparagraph may be enforced in the same manner as provided for under paragraph (2) with respect to any order under subsection (a)(2).
(2)(A) In enforcing compliance with any order under subsection (a)(2), the Board may order

that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.
(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).
(3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.
(f)(1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103, the Board shall review any provision of such rule or regulation--
(A) on its own motion;
(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or
(C) on the filing of a written complaint by the Special Counsel requesting such review.
(2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision--
(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b); or
(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b).
(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.
(4) The Board shall require any agency--
(A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and
(B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.
(g) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.
(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.
(i) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.
(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President

(other than approval required under section 3324 or subchapter VIII of chapter 33).
(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.
(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.
(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(n) The Board may accept and use gifts and donations of property and services to carry out the duties of the Board.

4) 'So all along, in the view of Congress and the President this is what the MSPB is enabled to perform. There is no mention of contracting out the Board's obligations. This commentator observes as long-standing recognized by the Board (Association Senior Executive Employees v OPM. *supra*.) the words are clear with respect to removal any sort of matter involving administrative law judges - - as determined by the Merit Systems Protection Board on a hearing on the record before the board. The Board is without authority to shirk any duty delegated by Congress.

'As the Supreme Court has memorably put the point: “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). cited in *New York v Department of Health and Human Services 414 F.Supp.3d 475* (S.D. N.Y 2019)
'Congress may delegate its spending authority, under the Spending Clause, to an executive agency, and the agency, in turn, may exercise a degree of discretion in deciding how to spend appropriated funds. U.S. Const. art. 1, § 8, cl. 1.

'Spending Clause legislation is much in the nature of a contract. U.S. Const. art. 1, § 8, cl. 1 That is precisely what happened here. HHS has promulgated a Rule that did not respond to any documented problem. The Rule represents a classic solution in search of a problem. *See Nat'l Nutritional Foods Ass'n v. Goyan*, 493 F. Supp. 1044, 1046 (S.D.N.Y. 1980) (“[A] ‘regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.’ ” (quoting City of Chicago v. Fed. Power Comm'n,

458 F.2d 731, 742 (D.C. Cir. 1971))); see also *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("We do, of course, accord deference to a determination by the [agency] that a problem exists within its regulatory domain, but deference is not a blank check."). For this reason alone, the Rule's promulgation was arbitrary and capricious

'For purposes of deciding whether to sever and affirm a portion of an administrative regulation, agency policy is to be made, in the first instance, by the agency itself, not by courts and not by agency counsel' *New York v Department of Health and Human Services* 414 F.Supp.3d 475 (S.D. N.Y 2019)

This is found in the in the Coast Guard ALJ portal. In event I miss it - I invite the Board to enact a standard of ethics conduct - for any ALJ (contract or not) - as I have shown one loaned ALJ called me after I withdrew a case before him and sought my advice regarding a matter he had pending against - the below person who penned the below article - this article - in my view if the Department of Homeland Security has too many Administrative Law Judges - that is a matter that the Secretary of Homeland Security is obligated to take up with Office of Management and Budget - and the Congressional Budget Office. That particular ALJ who sought my advice is now the "Chief Administrative Law Judge of the Security Exchange Commission. As shall be shown MSPB is obligated to perform studies - might I invite the Administrative Law Judge Situation to be a proper subject for same?

Here is Brudzinski's Article (by the way Brudzinski first appointed himself 'as' the ALJ in the matter before me, then he appointed another - the one who provided the attached decision - I have penned a copy of the "agency response - first page for our purposes) - then there was a third. - That this sort of thing (well the pre-verbal bill of goods. As stated in the New York case above ('Spending Clause legislation is much in the nature of a contract. U.S. Const. art. 1, § 8, cl. 1 That is precisely what happened here. [] has promulgated a Rule that did not respond to any documented problem. The Rule represents a classic solution in search of a problem. *See Nat'l Nutritional Foods Ass'n v. Goyan*, 493 F. Supp. 1044, 1046 (S.D.N.Y. 1980)) *I note that at bar* - the problem was created by an (in my view) a contract without any constitutional grounding.

Brudzinski Greater Independence for ALJs plus Cost Savings for Agencies

Administrative Law Judge, U.S. Coast Guard: B.A., University of Maryland; J.D. George Mason University School of Law, Master of Judicial Studies (M.J.S.); University of Nevada - Reno. This article is an excerpted summary based on the author's thesis prepared in partial fulfillment for the Master of Judicial Studies degree at the University of Nevada - Reno, in association with the National Judicial College. The author thanks his thesis committee: Dr. James T. Richardson, Chair, Judicial Studies Program, University of Nevada - Reno; Dr. Malcolm M. Feeley, Professor of Law, University of California, Berkeley; and Hon. Duane R. Harves, former Chief Hearing Examiner, Minnesota Office of Administrative Hearings. A special thanks goes to Dr. Elizabeth Francis of the University of Nevada - Reno.

Greater Independence for ALJs Plus Cost Savings for

Agencies: The Coast Guard Model

By Walter J. Brudzinski*

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The Administrative Procedure Act (APA) identifies federal Administrative Law Judges (ALJs) as agency employees with expertise in the subject matter they adjudicate.'
Their decisional independence is protected by separating them from their agency's investigating and prosecuting functions, and they are accorded protections in hiring, salary, and tenure.2 They function pursuant to the APA and their own agency's rules.
As of June 2009, twenty-nine federal agencies employ 1,413 ALJs with the Social Security Administration employing 1,166, or 82.5% of that total.' The U.S. Office of Personnel Management (OPM) sets the qualifications and administers the selection and employment of ALJs.' Agencies interview and appoint as many ALJs as are necessary to hold hearings required to be conducted in accordance with the APA, selecting from OPM's register of qualified candidates. 6 Of significance to this article, ALJs from one agency may be assigned to hear cases temporarily for other agencies when may be assigned to hear cases temporarily for other agencies when

1. Administrative Procedure Act, 5 U.S.C. §§ 550-559, 701-706, 1305, 3105, 3305, 3344, 4301, 5335, 5372, 7521 (2006).
That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.
Recommendations of the Administrative Conference of the United States (ACUS), 57 Fed. Reg. 61759, 61760 (Dec. 29, 1992). Congress terminated ACUS by Pub. L. No. 104 - 52, 109 Stat. 480 (Nov. 19, 1995). However, the Omnibus Appropriations Act, 2009 authorizes $1.5 million in start up funds for ACUS. See Pub. L. No. 111-8, 123 Stat. 524, 656 (Mar. 11, 2009). See also 5 U.S.C. §§ 554 (a)(2), (d), 556(a)(3), (c) (2006) (referring to the administrative law judge as the "presiding employee").
2. Id. See also 5 C.F.R. §§ 930.201-930.211 (2009).
3. 5 U.S.C. §§ 551-559 (2006).

4. OPM STATUS REPORT ON ALJS BY AGENCY AND LEVEL (June 2009).
5. 5 C.F.R. pt. 337 (2009); 5 C.F.R. §§ 930.201-930.21 (2009).
6. 5 U.S.C. § 3105 (2006)
caseloads warrant and with the approval of OPM.7 To further ensure ALJ decisional independence, agencies may not rate an AU's job performance or grant any monetary, honorary, or incentive pay.8 ALJs are paid out of agency funds, but OPM sets ALJ pay.9 Finally, agencies may remove ALJs "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."' 0

I. ONGOING DEBATE

Despite these protections to ensure decisional independence, AU impartiality has been questioned for decades because the perception is that ALJs, employed by their agencies, cannot be truly independent or impartial." These complaints have led to the notion that ALJs who are not in a separate corps or a centralized hearing panel are biased in favor of the agency simply because they are hired and paid
7. 5 U.S.C. § 3344 (2006); 5 C.F.R. § 930.208 (2009).
8. 5 C.F.R. § 930.206 (2009).
9. 5 C.F.R. § 930.205 (2009).
10. 5 U.S.C. § 7521 (2006); 5 C.F.R. § 930.211 (2009); and 5 C.F.R. §§ 1201.121-1201.148 (2009).
11.
Administrative law judges sometimes have trouble proving their neutrality and independence because the agency for which they work is often directly involved in the cases they handle. Some agencies insist on having administrative judges who once worked for the agency, and such "inbreeding" tends to raise doubts about the judges' independence.
Robert Pear, Administrative Law Judges are Washington's Potent Hybrid, THE N.Y. TIMES, Nov. 23, 1980, at 3. Martin Tolchin, The Nation: In Federal Departments; Are Judge and Agency Too Close for Justice?, THE N.Y. TIMES, Feb. 5, 1989, at 3. See also Antonin Scalia, The ALJ Fiasco - A Reprise, 47 U. CHI. L. REv. 57 (1979). Edward J. Schoenbaum, Improving Public Trust & Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do, 21 J. NAAU 1 (2001). For a more comprehensive discussion of the origin and history of federal administrative law judges see Daniel J. Gifford, Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions, 49 ADMIN. L. REv. 1 (1997).
by the very agency for which they adjudicate cases.12 However, this notion is essentially an appearance issue since the APA ensures that agencies cannot raise or lower AU pay based on decisions or performance.13

The debate has affected state ALJs as well.14 In response, most states and three major cities have moved the AL's function from agencies to central panels of administrative adjudication.' 5 However, similar efforts to establish a totally separate corps of ALJs at the federal level have not been successful.' 6 While the intent was to provide greater independence for ALJs as well as generate significant cost savings, agency concerns over loss of policymaking control and

12. Edward J. Schoenbaum, Improving Public Trust & Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do, 21 J. NAALi 1, 6 (2001).
13. 5 U.S.C. § 5372 (2006); 5 C.F.R. §§ 930.201-211 (2009).
14. See, e.g., Terrance R. Harders, Striking a Balance: Administrative Law Judge Independence and Accountability, 19 J. NAALJ 1 (1999); John W. Hardwicke, The Central Panel Movement, 53 ADMIN. L. REv. 419 (2001).
15. Duane R. Harves, Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota, 65 JUDICATURE 257 (1981). More than half of the states (twenty-seven), plus the cities of New York and Chicago, as well as the District of Columbia have moved the administrative law judge function from the adjudicating agency to a separate agency created solely for the purpose of adjudication. Those separate agencies are referred to as a Central Panel (CHP), Central Hearing Agency (CHA), or Office of Administrative Hearings (OAH). Those states and cities are: Alabama, Alaska, Arizona, California, City of Chicago, Colorado, District of Columbia, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York City, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Texas, Washington, Wisconsin, and Wyoming. National Association of Administrative Law Judiciary, http://www.naalj.org.panel.html (last visited Mar. 22, 2010). The concept of severing hearing functions from departments and agencies and vesting them in a single adjudicative entity is commonly referred to as the creation of a "central panel." Peter L. Plummer, Administrative Law: The State Office of Administrative Hearings and Rules, 85 MICH. BAR J. 18 (2006).
16. For example, between 1983 and 1993, from the 98th to the 103rd Congress, Senator Hugh Heflin introduced six bills to establish a separate corps of federal ALJs known as the "Administrative Law Judge Corps Act." S. 1275, 98th Cong. (1983); S. 673, 99th Cong. (1985); S. 950, 100th Cong. (1987); S. 594, 101st Cong. (1989); S. 826, 102nd Cong. (1991); and S. 486, 103rd Cong. (1993). There have been other initiatives as well but none was enacted into law.
loss of their ALJs' expertise, among other things, prevented any initiatives from being enacted into law.'
The debate on centralizing federal administrative adjudication is ongoing and not likely to be resolved in the near future, at least on a theoretical level.' 8 There are several agencies with ALJs that adjudicate cases for other agencies, but pursuant to agency specific legislation.19 Meanwhile, ALJs continue to suggest improvements in due process administrative adjudication that would further advance independence for ALJs.20 ALJ independence has its limits simply
17. 131 Cong. Rec. S5235 (1985) (statement of Senator Heflin); 139 Cong. Rec. S16567 (daily ed. Nov. 19, 1993) (Letter from Robert B. Reich, Secretary of Labor).
18. Jeffrey S. Lubbers, A Unified Corps of ALis: A Proposal to Test the Idea at the Federal Level, 65 JUDICATURE 266, 275 (1981).
19. The Occupational Safety and Health Review Commission (OSHRC), the Mine Safety and Health Review Commission (MSHRC), and the National Transportation Safety Board (NTSB) are independent agencies that hear cases brought by the Department of Labor (for OSHRC and MSHRC) and the Federal Aviation Administration (for NTSB) respectively. Also,

The Office of Hearings [of the U.S. Department of Transportation] is composed of administrative law judges, who hold hearings under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) ("APA") for the Department's Office of the Secretary (primarily in aviation matters) and the Department's component modal administrations that need formal APA hearings, including the Federal Aviation Administration ("FAA"), Federal Motor Carrier Safety Administration ("FMCSA"), Federal Railroad Administration ("FRA"), Maritime Administration ("MARAD"), National Highway Transportation Safety Administration ("NHTSA"), and the Pipeline and Hazardous Materials Safety Administration ("PHMSA").

U.S. Department of Transportation, http://www.dot.gov/ost/hearings/ (last visited Mar. 8, 2010).

20. For more information, see the American Bar Association's Section of Administrative Law and Practice Report to the President Elect of the United States 2008, entitled "Improving the Administrative Process," which is available at http://www.abanet.org/adminlaw/Report, and the Federal Administrative Law Judges Conference's Report to the President-Elect of the United States, entitled "Advancing the Judicial Independence and Efficiency of the Administrative Judiciary," which is available at http://005754d.netsolhost.com/briefingbook.pdf. However, those improvements do not address ALJs hearing cases from other because "administrative adjudicators are . . . employees whose job it is to help the agency make decisions with respect to individual cases . . 21 And, ALJs are required to follow agency regulations as binding authority. 22

II. PRACTICAL PROBLEMS

Setting up a centralized corps of approximately 1,500 federal ALJs to adjudicate cases for twenty-nine disparate agencies separately staffed with one to 1,166 ALJs can present extraordinary managerial challenges. 23 That is why "a central panel for smaller agencies ... makes sense for several reasons, including the desire to achieve economies of scale. However, this thinking does not apply equally to all agencies and all situations, especially not to a large independent agency [with a large number of ALJs]."24

In 1981, Jeffrey Lubbers suggested a pilot program to test the idea of a federal centralized corps of smaller agencies. 25 He proposed transferring ALJs from seventeen selected agencies having fewer than seven ALJs into a separate corps to adjudicate those agencies or removing Federal Administrative Law Judges from their agencies into a separate corps.

21. See Harves, supra note 15. See also 5 U.S.C. § 554(d) ("the employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title"); see also ATTORNEY GENERAL'S MANUAL ON THE APA § 7(b) (1947) (ALJs must comply with agency policies and procedures).

22. "Administrative [law] judges must follow the agency's legislative rules . . The only true source of their authority is the agency itself, and their judgment must be informed by the agency's [judgment] ... an important distinction between

[ALJs] and Article III judges . . ." James E. Molitemo, The Administrative Judiciary's Independence Myth, 41 WAKE FOREST L. REV. 1191, 1199 (2006) (footnotes omitted).
23. OPM Status Report on ALJs by Agency and Level (June 2009).
24. Robert A. Christianson, Symposium: Modern Ethical Dilemmas for ALJs and Government Lawyers: The Proposal of a Uniform Code of Judicial Conduct for Administrative Law Judges, 11 WIDENER J. PUB. L. 57, 58 (2002).
25. See Lubbers, supra note 18. Mr. Lubbers is currently Professor of Practice in Administrative Law, Washington College of Law, American University. In 1981 he was the senior staff attorney in the Office of the Chairman of the Administrative Conference of the United States.
agencies' cases for a period of five years. 26 His plan required legislation but the efficiencies realized would likely "mute any opposition . .. since adjudication is not as central to the missions of most of these agencies as it is to the others." 27 He also suggested that the entire corps of ALJs could be centralized into separate panels of specialization. 28 These are excellent ideas, but none was enacted into law. That leaves us looking for other methods to test the idea on a small scale without the need for Congressional action.

III. COAST GUARD ALJs

Since the mid-1990s, Coast Guard ALJs have been adjudicating cases for other agencies on a reimbursable basis.2 9 The Office of Chief Administrative Law Judge did not seek to test the idea of centralized administrative adjudication but simply needed to maintain a sufficient number of ALJs in major port cities throughout the United States to respond to cycles of surges in Coast Guard cases that needed adjudication. During periods when there were fewer Coast Guard cases to adjudicate, its ALJs heard cases from other agencies. 30

Coast Guard ALJs adjudicate primarily merchant mariner license, document, and certificate suspensions and revocations. 1 Its ALJs have varied in number and have been located in major port cities such as Boston, New York, Norfolk, Jacksonville, New Orleans, St. Louis, Houston, Long Beach, San Francisco, and Seattle. The Chief Judge sits in Washington, D.C. Although the number of licensed
26. Id.
27. Id. at 276.
28. Id.
29. Interview with Joseph N. Ingolia, Coast Guard Chief Administrative Law Judge in Washington, D.C. (Mar. 11, 2008).
30. Id
31. 46 U.S.C. §§ 7701-7705 (2006); 33 C.F.R. pt. 20 (2009); 46 C.F.R. pt. 5 (2009). Merchant Mariners' Licenses, Documents, Certificates of Registry, among others, are now referred to as Credentials. 74 Fed. Reg. 11196, 11216 (proposed Mar. 16, 2009) (now codified at 46 C.F.R. § 10.107(b)). Coast Guard ALJs also hear Class II Civil Penalties assessed under subsection 311(b) of the Federal Water Pollution control Act (33 U.S.C. § 1321(b)(6)) and Class II civil penalties assessed under section 109 of the comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9609(b)).
merchant mariners has remained at approximately 200,000, the

number of Coast Guard Administrative Law Judges dropped from a high of sixteen in 1981 to six in 1999 due to a decrease in the number of cases referred for hearing and new procedural rules which greatly decreased the necessity for in-person hearings. 32

As the number of Coast Guard cases gradually decreased, there were periodic surges and contractions in the number of cases referred for hearing as the result of the agency's shifting priorities.33 This presented both a problem and an opportunity for the Chief Administrative Law Judge. With each contraction in the number of cases, there was an obligation to adjust the number of ALJs downward.34 Conversely, with each surge in the number of cases, more ALJs were needed, but it was not practicable to hire additional ALJs and bring them up to speed only to have the surge be short lived. And obtaining ALJs from other agencies on a temporary basis was also not practicable because the time required for a new ALJ to learn Coast Guard law and procedure would exceed the time required for additional ALJ services. Therefore, maintaining a sufficient number of permanent ALJs necessary to meet surges in major port cities where the Coast Guard had traditionally initiated most suspension and revocation cases was the best choice. 35

During times when the Coast Guard was referring fewer cases for adjudication, the Office of Chief Administrative Law Judge would respond favorably to requests for ALJs to assist other agencies with cases needing adjudication. 36 The first wave of new cases came from the National Oceanic and Atmospheric Administration (NOAA), which needed help in adjudicating its commercial fisheries enforcement cases. NOAA's sole ALJ had retired, thereby creating a temporary need for adjudicative services that Coast Guard ALJs provided initially through the ALJ temporary loan program under 5

32. Office of Chief Administrative Law Judge Records. There are now six ALJs plus one Chief Administrative Law Judge authorized for New York, NY; Baltimore, MD; Washington, D.C.; New Orleans, LA; Houston, TX; Alameda, CA; and Seattle, WA.

33. Interview with Ingolia, supra note 29.

34. Id.

35. Id.

3 6. Id.

U.S.C. § 3344 (2006) and 5 C.F.R. § 930.208 (2006).3 Coast Guard ALJs were able to learn quickly the agency's substantive law and procedural rules to adjudicate these enforcement civil penalty cases.38 Formal, extensive ALJ training was not required. This arrangement proved satisfactory to both agencies and was eventually made permanent through legislation and Memorandum of Agreement (MOA) wherein Coast Guard ALJs continue to adjudicate NOAA cases on a reimbursable basis.3 1 When there are changes in the laws or regulations, NOAA provides appropriate training to Coast Guard ALJs.40

Shortly thereafter, the Department of Commerce's Bureau of Export Administration, now called the Bureau of Industry and Security, 41 entered into an MOA with the Coast Guard Office of

Chief Administrative Law Judge to have its Export Administration Act enforcement cases heard on a reimbursable basis by Coast Guard Administrative Law Judges, with OPM's approval.42 As with NOAA

37. When OPM discontinued this temporary arrangement, NOAA hired an ALJ. After legislation passed allowing Coast Guard ALJs to hear NOAA cases, the Coast Guard hired the NOAA ALJ. Office of Chief Administrative Law Judge Records; Interview with George Jordan, Coast Guard Director of Judicial Administration in Washington, D.C. (Mar. 11, 2008).

38. Most of NOAA's cases referred to Coast Guard ALJs are brought under the Magnuson-Stevens Fishery Conservation and Management Act. 16 U.S.C. §§ 1801 etseq.

39. National Sea Grant College Program Reauthorization Act, § 10, Pub. L. 105-160, 112 Stat. 21, 27 (Mar. 6, 1998) (codified at 15 U.S.C. § 1541):

> [n]otwithstanding section 559 of title 5, with respect to any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration, all adjudicatory functions which are required by chapter 5 of title 5 to be performed by an Administrative Law Judge may be performed by the United States Coast Guard on a reimbursable basis.

40. Training or briefings from other agencies, if necessary, are provided during Coast Guard ALJs' annual training conferences.

41. Through an internal organizational order, the Department of Commerce changed the name of Bureau of Export Administration to Bureau of Industry and Security, 67 Fed. Reg. 20630 (Apr. 26, 2002).

42. Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420 (2000) (hereinafter, the Act). From August 21, 1994 through November 12, 2000, the Act cases, Coast Guard ALJs were able to learn quickly the agency's substantive law and procedural rules to adjudicate these enforcement civil penalty cases, obviating the necessity of additional formal training.

After the September 11, 2001 attacks, the number of Coast Guard cases decreased once again due to the Coast Guard's greater emphasis on port safety and security. 43 Meanwhile, Congress created the Transportation Security Administration (TSA).4 Originally under the Department of Transportation, TSA assumed the day-today federal security screening operations for passenger, air cargo, and facility security. In 2002, Congress created the Department of Homeland Security (DHS), and both TSA and the Coast Guard were transferred to that new agency.45

Shortly thereafter, the Coast Guard Office of Chief Administrative Law Judge entered into a Memorandum of Agreement with TSA wherein Coast Guard Administrative Law Judges agreed to adjudicate TSA civil penalty cases on a reimbursable basis, similar to NOAA and BIS.46 TSA currently refers fewer cases for adjudication because it now has resources in place to pursue settlement prior to referral.

Pursuant to OPM's request, the Coast Guard Office of Chief Administrative Law Judge agreed to provide adjudicative services on a reimbursable basis to the Office of Special Master, Department of

Justice, to adjudicate Victim Compensation Fund claims arising frowas in lapse. During that period, the President, through Executive Order 12924,
which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 C.F.R. pt. 397 (2001)), continued the regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (2000)) (IEEPA). On November 13, 2000, the Act was reauthorized and it remained in effect through August 20, 2001. Executive Order 13222 of August 17, 2001 (3 C.F.R. pt. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 7, 2003 (68 Fed. Reg. 47833, Aug. 11, 2003), continues the regulations in effect under IEEPA. 15 C.F.R. pt. 700-774.
43. This policy provided that only cases in which the Coast Guard Investigating Officers sought revocation of a merchant mariner's credentials would be taken to hearing; otherwise, they would be disposed of through settlement unless impracticable. Interview with Jordan, supra note 37.
44. Aviation and Transportation and Security Act, Pub. L. 107-71, 115 Stat. 579 (Nov. 19, 2001).
45. Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).
46. 49 C.F.R. pt. 1515 (2009).

the September 11, 2001 attacks. This arrangement was temporary and involved only one Coast Guard ALJ who heard cases in New York City from the summer of 2003 to the end of the program in June 2004.47
In 2004, per MOA between the Coast Guard and Customs and Border Protection (CBP), Coast Guard ALJs began hearing customs brokers' license suspension and revocation cases with OPM approval.48 CBP did not request that Coast Guard ALJs undergo any formal training and, so far, has referred only a few cases for adjudication.
In 2006, the Coast Guard ALJs assumed duties as fact finders for the hydroelectric dam licensing renewal process administered by the Federal Energy Regulatory Commission (FERC) through NOAA's National Marine Fisheries Service (NMFS). 4 9 Because the substantive law and procedural rules were new, NMFS provided the initial training to Coast Guard ALJs and legal support staff. So far, two cases have been referred to the Office of Chief Administrative Law Judge for resolution.

47. The Air Transportation Safety and Systems Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001), established the September 1Ith Victim Compensation Fund of 2001. According to the Final Report of the Special Master, 2004, the Fund distributed over $7.049 billion to survivors of 2,880 persons killed in the September 11th attacks and $1.053 billion to 2,680 individuals who were injured in the attacks or in the rescue efforts conducted thereafter. The average award for families of victims killed in the attacks exceeded $2 million and the average award for injured victims was nearly $400,000. For details on how the claims adjudication hearing procedure worked, see Notice of Inquiry and Advance Notice of Proposed Rulemaking 66 Fed. Reg. 55, 901 (Nov. 5, 2001); Interim Final Rule with Request for Comments, 66 Fed. Reg. 66274-01 (Dec. 21, 2001); Final

Rule, 67 Fed. Reg. 11233 (Mar. 13, 2002).
48. 19 C.F.R. pt. 111, Subpart D (1998).
49. On August 8, 2005, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, was enacted. Section 241 of that Act amends sections 18 and 4(e) of the Federal Power Act, 16 U.S.C. Chapter 12. Section 241 provides parties a right to an expedited ninety day trial-type hearing before an AU on disputed issues of material fact concerning prescriptions or conditions proposed for licensing renewals in hydroelectric dam projects. See 50 C.F.R. pt. 221 (2008). ALJs from the Department of Interior (43 C.F.R. pt. 45) as well as the Department of Agriculture (7 C.F.R. pt. 1, Subpart 0 (2009)) also serve as fact-finders for prescriptions concerning subject matter within the jurisdiction of their respective agencies

Through another MOA, Coast Guard Administrative Law Judges are now adjudicating within-agency reviews/appeals from applicants denied Transportation Workers Identification Credentials (TWIC) and Hazardous Material Endorsements (HME) by the Transportation Security Administration.5 0 There have been a few hearings but most of these cases are adjudicated "on the record" without the need for an in-person hearing.
In 2009, the Office of Chief Administrative Law Judge entered into an MOA with the DHS Office of General Counsel which provides that Coast Guard ALJs will adjudicate cases for all DHS headquarters, offices, and any DHS component on a reimbursable basis. This agreement supersedes the TSA and CBP agreements. The DHS and its agencies still enter into inter/intra-agency agreements that incorporate the main Memorandum of Agreement, detail accounting data for billing purposes, and provide any further specifics of the work requested.
Most cases from requesting agencies referred to Coast Guard ALJs for adjudication eventually settle. Of those that go to hearing, very few have been remanded and none has been reversed so far. The requesting agencies have provided training to Coast Guard ALJs as needed. All requesting agencies require that Coast Guard ALJs apply the agency's substantive law and procedural rules. Cases are appealed pursuant to the agencies' rules for final agency action.
IV. AGREEMENTS WITH REQUESTING AGENCIES
The MOAs referred to above typically provide that the requesting agencies agree to forward hearing requests and associated documents to the Coast Guard ALJ Docketing Center in Baltimore, Maryland, provide adequate copies of prior ALJ decisions and appellate cases, and inform the Coast Guard Office of Chief Administrative Law Judge when ALJ decisions are appealed. The requesting agencies

50. Final Rule, Request for Comments, Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License, 72 Fed. Reg. 3492, 3499, 3500, (proposed Jan. 25, 2007) (codified at 49 C.F.R. § 1515.11 (2007)).
51. Memorandum of Agreement between DHS Office of General Counsel and USCG Office of Chief Administrative Law Judge (Apr. 14, 2009).

may also agree to advise and/or provide training to Coast Guard ALJs upon changes in the law or regulations.
The Coast Guard Office of Chief Administrative Law Judge agrees to control and docket each assigned case in accordance with the requesting agency's appropriate procedural regulations; enter the case information into a database system; maintain accurate paper files; track the status of the cases; inform the parties of the presiding ALJ; forward the case files to the assigned ALJ; render decisions and forward the same to the parties and the agency; provide prescribed periodic billing statements; issue monthly case status reports; and forward closed case files to the agency, among other things. 52
Of course, the requesting agency also agrees to reimburse the Coast Guard (servicing agency) for the costs of adjudication. All MOAs provide that Coast Guard ALJs shall follow the procedural rules and case law of the requesting agency. However, the DHS MOA provides that in the absence of any specified procedural regulations on the part of a DHS component, the Coast Guard's procedural rules in Part 20 of the Code of Federal Regulations may be used; finally, the MOAs provide that they will remain in effect unless terminated by either party, upon appropriate notice.53
The separate inter/intra-agency agreements (sometimes called reimbursable agreements) are based on the MOAs and are entered into each year between the requesting agency and the Coast Guard Office of Chief Administrative Law Judge. These agreements address specific requirements for billing and accounting data such as personnel, travel, and court reporting costs, as well as administrative expenses.54
Agency personnel with whom the Office of Chief Administrative Law Judge's management team negotiates and manages agreements for adjudicative services are separated and function apart from personnel involved in the prosecutorial, investigative, and appellate functions.

52. Id.
53. Id.
54. Memoranda of Agreement and inter/intra-agency agreements or reimbursable agreements are authorized under 31 U.S.C. § 1535 and the particular agency's statutory and regulatory authority for transferring funds.

V. AGENCY POLICYMAKING AND EXPERTISE

Since Coast Guard ALJs must follow the requesting agency's laws and regulations, the MOAs may require the requesting agency to provide briefings or training. Regardless, requesting agencies have always responded favorably to the Office of Chief Administrative Law Judge's infrequent requests for training on specific matters concerning the agency's laws or regulations.
Training for Coast Guard ALJs occurs on an as-needed basis, usually once per year, with all ALJs meeting over a period from two to four

days. Most of the training is devoted to Coast Guard suspension and revocation law, with the remainder of the training time devoted to other agencies.

Coast Guard ALJs apply a variety of substantive laws and procedural regulations to a mix of cases from various agencies. As Mr. Lubbers said, "there is no reason why administrative law judges . . . should not be able to preside over a mix of cases as varied as federal district or state court judges . . ." 55 The experience of Coast Guard ALJs adjudicating cases for other agencies is consistent with this opinion. While there have been occasional remands or partial remands, the author is unaware of any reversals by the requesting agencies.56

VI. INDEPENDENCE

When Coast Guard ALJs adjudicate cases for other agencies, they are identified as "Administrative Law Judge" or as "Administrative Law Judge, U.S. Coast Guard," not as the Administrative Law Judge of the other agency. Titles, per se, may trigger a fear in the respondent that the trier of fact is part of the agency that investigates and prosecutes the action and is, therefore, presumptively biased. These signs and symbols are the first indicators to respondents that the person adjudicating their case is not part of the same agency that

55. Lubbers, supra note 18 at 275.

56. As an adjudicator of adversarial cases referred by the requesting agencies, it would not be appropriate for the author to comment on whether the requesting agencies are satisfied with this arrangement. Coast Guard ALJs achieve a greater sense of independence and requesting agencies achieve cost savings while maintaining policy making control

is bringing the action against them, thereby promoting an appearance of independence.

Another sign and symbol is the ALJ Docketing Center which serves as the "clerk of the court" for all cases that Coast Guard ALJs adjudicate. Agencies forward cases to be adjudicated to the Docketing Center for docketing and ALJ assignment. Upon completion, the Docketing Center returns the case file to the agency. In addition to the requesting agency benefiting by having Coast Guard ALJs adjudicate its cases, Coast Guard ALJs also benefit by adjudicating a variety of cases, thereby providing a greater sense of professionalism and intellectual stimulation. It also reinforces the independence provided by the APA because Coast Guard ALJs are further separated from the agencies for which they are adjudicating cases.

VII. COST SAVINGS

The cost-benefit to the requesting agencies is savings realized by not having to employ ALJs. For example, NOAA brings commercial fisheries enforcement cases throughout the United States. It would not be cost effective for NOAA to maintain full-time ALJs in major fishing port cities because its case adjudication history would not

support such high levels of ALJ staffing. By using Coast Guard ALJs located in the same regions where NOAA initiates its cases, NOAA can take advantage of economies of scale by utilizing an existing ALJ infrastructure, complete with centralized docketing center, attorneys, administrative staff, and ALJs disbursed throughout the United States.

The yearly budget for the entire Coast Guard Office of Chief Administrative Law Judge is approximately $4 million, with $3 million devoted to salaries and the remainder to operations and rents. Other costs, such as computer and personnel support, as well as some office spaces, are part of Coast Guard general funding.57 Estimates based on historical caseloads reflect that costs to establish an ALJ office at NOAA would be approximately $1 million annually and for TSA, approximately $2.5 million annually. 8 The costs for one ALJ

57. Office of Chief Administrative Law Judge Records.
58. Id.

office with two attorneys/law clerks and two paralegal specialists is estimated at $600,000 to $620,000 per year in salary and $100,000 to $150,000 in expenses. For two ALJs and a five person staff of three attorneys and two paralegal/administrative staff, the salary cost is just under $1 million.5 9

According to cost figures compiled by the Coast Guard Office of Chief Administrative Law Judge, for every year Coast Guard ALJs adjudicate cases for other agencies, those agencies individually save from approximately $1 million to $2.5 million in ALJ staffing costs, less reimbursement.6 o Based on $196,000 in reimbursement costs charged back to NOAA in fiscal year 2008, NOAA's savings still came to $804,000 for commercial fisheries enforcement adjudication. Counting reimbursement costs in the amount of $3,300 for NMFS/FERC which was also charged back to NOAA, the total net savings for NOAA in fiscal year 2008 amounted to $800,700.61

Fiscal year 2008 reimbursable costs to BIS were $45,700.62 Assuming BIS maintained at least one ALJ and staff as described above, its costs would amount to approximately $1 million per year. By having Coast Guard ALJs adjudicate BIS cases, that agency saved approximately $954,300.63

Based on a $2.5 million estimate for TSA to maintain ALJs and staff to handle their caseload, reimbursement costs for TSA civil penalty cases were $110,512 for fiscal year 2 0 0 8 .6 Coast Guard ALJs recently started adjudicating TWIC and HME cases and the reimbursement costs for those cases was $22,800. TSA's fiscal 2008 net savings realized by having Coast Guard ALJs adjudicate all of

59. Id. These costs assume no computer resources.
60. According to Coast Guard Office of Chief Administrative Law Judge

Records, reimbursements include salaries and employer's contributions for paralegal specialists, attorneys, and judges. Reimbursements also include travel expenses but do not cover the costs of office space and supplies, computer systems, and other fixed costs associated with an agency establishing and maintaining its own Office of Administrative Law Judges. The Coast Guard assumes those fixed costs.
61. Coast Guard Office of Chief Administrative Law Judge Records.
62. Id
63. Id
64. Id

their cases is approximately $2.4 million for their civil penalty cases as well as for their TWIC and HME cases.6 5
When agencies settle cases prior to referring them to the ALJ Docketing Center, the agency is able to achieve further cost savings and efficiencies because no ALJ resources are triggered. All agencies for which Coast Guard ALJs adjudicate cases attempt to settle cases as early in the process as practicable to save time and costs.
VIII. RECOMMENDATIONS AND CONCLUSIONS
In the absence of further Congressional action on centralizing administrative adjudication, the Coast Guard ALJ model shows that on a smaller scale, a servicing agency's ALJs can achieve greater independence. More importantly to the requesting agency, it can achieve significant cost savings and still retain policymaking control. Coast Guard ALJs apply a wide variety of substantive law and procedural rules in adjudicating diverse cases, giving further credence to Mr. Lubbers' claim that "there is no reason why administrative law judges . . . should not be able to preside over a mix of cases as varied as federal district or state court judges." 66 Presiding over a mix of cases has resulted not only in a small, flexible panel of ALJs capable of responding to surges in its own agency's cases, but also a highly responsive court capable of meeting the APA due process adjudication needs of other federal agencies without ALJs.
Other agencies with smaller groups of ALJs may want to consider following this approach. In addition to providing greater independence for the servicing agency's ALJs and cost savings for the requesting agencies, it has the added benefits of broadening the ALJs' experience and improving job satisfaction.

On January 31, 2018, working down thru a list of a number of multi-member agencies, then Judge Kavanaugh made note of the MSPB accordingly:

'Multi-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members. The multi-member structure thereby reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect individual

liberty.

'In other words, the heads of executive agencies are accountable to and checked by the President; and the heads of independent agencies, although not accountable to or checked by the President, are at least accountable to and checked by their fellow commissioners or board members. No independent agency exercising substantial executive authority has ever been headed by a single person.

Until now

The (Consumer Finance Protection Board) CFPB may pursue enforcement actions in federal court, as well as before administrative law judges. The agency may issue subpoenas requesting documents or testimony in connection with those enforcement actions. See id. §§ 5562-5564. The CFPB may adjudicate disputes. And the CFPB may impose a wide range of legal and equitable relief, including restitution, disgorgement, money damages, injunctions, and civil monetary penalties. Id. § 5565(a)(2).

All of that massive power is ultimately lodged in one person—the Director of the CFPB—who is not supervised, directed, or removable at will by the President.

Because the Director acts alone and without Presidential supervision or direction, and because the CFPB wields broad authority over the U.S. economy, the Director enjoys significantly more unilateral power than any single member of any other independent agency. By "unilateral power," I mean power that is not checked by the President or by other commissioners or board members

As a single-Director independent agency exercising substantial executive authority, the CFPB is the first of its kind and an historical anomaly. Until this point in U.S. history, independent agencies exercising substantial executive authority have all been multi-member commissions or boards. A sample list includes:
…
• Merit Systems Protection Board (1978).
...
...

PHH v Consumer Financial Protection Bureau 881 F.3d 75, (D.C.Cir., 2018) Judge Kavanaugh dissenting.

...'
Karen Lecraft Henderson, Circuit Judge's dissent PHH v CFTB, id. also warrants attention:

....

By at least some accounts, for instance, the CFPB under its first Director hired all but exclusively from one political party, deliberately weeding out applicants from other parties and the banking industry. Todd Zywicki, The Consumer Financial Protection Bureau: Savior or Menace?, 81 Geo. Wash. L. Rev. 856, 877, 895 (2013) (asserting that agency hired staffers and "true believers" from one political party); Ronald L. Rubin, The Tragic Downfall of the Consumer Financial Protection Bureau, Nat'l Rev., Dec. 21, 2016 (alleging, from insider's perspective, that agency used "screening techniques"), perma.cc/VR9F-TWHQ; cf. Bill

McMorris, 100% of CFPB Donations Went to Democrats, Wash. Free Beacon, Nov. 23, 2016 (reporting that, during 2016 Presidential election, CFPB employees made more than 300 donations totaling about $50,000, all of which went to candidates of one party), perma.cc/6JVQ-RRRQ.

PHH V Consumer Financial Protection Bureau 881 F.3d 75, D.C.Cir., 2018 abrogated by Seila Law v. Consumer Financial Protection Bureau, 140 S.Ct. 2183 (2020).

“Executive agency” is … defined in section 105 of Title 5 as ““an Executive department, a Government corporation, [or] an independent establishment.” 5 U.S.C. § 105. “Executive department” is then defined to include the Department of Health and Human Services. 5 U.S.C. § 101. *Thomas D. Muldowney v. Department of Health and Human Services*, 1990 WL 55108, U.S. District Court, E.D. Penn (1990).

The above decision likely stands for the proposition that in the case of matters before involving Fed Sector Title VII the respective Secretary is deemed to be the Named Respondent-Defendant - in light of the decisions of which other commentators have invited to the Board's Attention - I suggest that matters involving "inferior officers" list the respective Department head as the Respondent or for that matter Petitioner - terms such as Social Security Administration have become somewhat without meaning - and you shall see from what I have hand written as portion of "Agency Response' - have been utliized not only to create an illusory "agency" - illusory only not enough for glow of "gaslight"

Friend of the Court Peter Brodia has offered invited the Board to take attention to the matter of Board Administrative Law Judges.

The board had no gap-fill with respect to Administrative Law Judges - that said the Board has long recognized its obligations in enabling statute - but further through the Federal Register:

62 Fed. Reg. 49589
Tuesday, September 23, 1997, pages 49589 - 49904
Merit Systems Protection Board: Rules and Regulations: Board Organization: [FR DOC # 97-25301
Subpart B—Offices of the Board
Authority: 5 U.S.C. 1204 (h) and (j).
5 CFR § 1200.10
§1200.10 Staff organization and functions.
(a) The Board's headquarters staff is organized into the following offices and divisions:
AGENCY: Merit Systems Protection Board.
ACTION: Final rule.
SUMMARY: The Merit Systems Protection Board is amending its organization and functions statement to reflect changes in the Board's headquarters organization and assignment of functions. These changes have been made to further streamline the Board's headquarters operations, enabling the agency to continue performing its functions effectively at the reduced budget and staffing levels expected through fiscal year 2000.
EFFECTIVE DATE: September 23, 1997.
FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653-7200.
SUPPLEMENTARY INFORMATION: In response to the second phase of the

Administration's Reinventing Government initiative (REGO II), the Chairman of the Merit Systems Protection Board appointed a REGO II Task Force to review all Board operations and to make recommendations for changes in organization, functions, and procedures that would enable the agency to continue performing its functions effectively at the reduced budget and staffing levels expected through fiscal year 2000. In response to the recommendations of the Task Force, certain organizational and functional changes have been effected. This amendment to 5 CFR part 1200 reflects the following changes:

The Office of the Administrative Law Judge and Regional Operations has been separated into two offices, the **Office of the Administrative Law Judge** and the Office of Regional Operations.

The Administrative Law Judge will continue to hear all Special Counsel complaints for disciplinary action, including Hatch Act cases, and proposed actions against administrative law judges. The Administrative Law Judge will also hear other assigned cases.

The Office of Regional Operations will manage the adjudicatory and administrative functions of the MSPB regional and field offices. References to the number of such offices have been removed.

The responsibility for preparing proposed decisions for the Board in original jurisdiction cases has been reassigned from the Office of the General Counsel to the Office of Appeals Counsel. As a result, most processing of cases that are decided by the 3-member Board is now centralized in the Office of Appeals Counsel. The Office of the General Counsel remains responsible for preparing proposed decisions for the Board in cases that the Board assigns.

Most of the Board's information services have been consolidated in the Office of the Clerk of the Board. Requests for non-case related information from the White House, Congress, and the media will continue to be handled by the Office of the General Counsel, and requests for information concerning the Board's studies will continue to be handled by the Office of Policy and Evaluation.

The Office of Planning and Resource Management Services has been abolished, and its three divisions now report to the Chairman through the Chief of Staff.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1200

Organization and functions (Government agencies).

Accordingly, the Board amends 5 CFR part 1200 as follows:

PART 1200—[AMENDED]

5 CFR § 1200.10

Subpart B—Offices of the Board, consisting of §1200.10, is revised to read as follows:

Subpart B—Offices of the Board

Authority: 5 U.S.C. 1204 (h) and (j).

5 CFR § 1200.10

§1200.10 Staff organization and functions.

(a) The Board's headquarters staff is organized into the following offices and divisions:

(1) Office of Regional Operations.

(2) Office of the Administrative Law Judge.

(3) Office of Appeals Counsel.

(4) Office of the Clerk of the Board.

(5) Office of the General Counsel.

(6) Office of Policy and Evaluation.

(7) Office of Equal Employment Opportunity.

(8) Financial and Administrative Management Division.

(9) Human Resources Management Division.

(10) Information Resources Management Division.

(b) The principal functions of the Board's headquarters offices are as follows:
(1) Office of Regional Operations. The Director, Office of Regional Operations, manages the adjudicatory and administrative functions of the MSPB regional and field offices.
(2) Office of the Administrative Law Judge. The Administrative Law Judge hears Hatch Act cases, disciplinary action complaints brought by the Special Counsel, actions against administrative law judges, appeals of actions taken against MSPB employees, and other cases that the Board assigns.
(3) Office of Appeals Counsel. The Director, Office of Appeals Counsel, prepares proposed decisions that recommend appropriate action by the Board in petition for review cases, original jurisdiction cases, and other cases assigned by the Board.
(4) Office of the Clerk of the Board. The Clerk of the Board enters petitions for review and other headquarters cases onto the Board's docket and monitors their processing. The Clerk of the Board also does the following:
(i) Serves as the Board's public information center, including providing information on the status of cases, distributing copies of Board decisions and publications, and operating the Board's Library and on-line information services;
(ii) Manages the Board's records, reports, legal research, and correspondence control programs; and
(iii) Answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters, and answers other requests for information *49590 except those for which the Office of the General Counsel or the Office of Policy and Evaluation is responsible.
(5) Office of the General Counsel. The General Counsel provides legal advice to the Board and its headquarters and regional offices; represents the Board in court proceedings; prepares proposed decisions for the Board in cases that the Board assigns; coordinates legislative policy and performs legislative liaison; responds to requests for non-case related information from the White House, Congress, and the media; and plans and directs audits and investigations.

I invite the Board to engage in a viable Follow the Rules Act procedures. The Board recognized that provision in an Annual Report - but I have not been able to find any follow-up.

I invite the Board - to consider a study and consider and take further action regarding the Elijiah Cummings Anti-Discrimination Act 2020 - under the Act Agencies are required to post and follow-up and report what the result is with respect to Responsible Management Officials (RMOS) - continually following through. This does not mean to put it in a office intranet - letting the violation disappear after 90 days. - my view is that want of Department Head-Follow-thru may be an indeed creating more RMO activity and creating emerging practice - this is an example that must not be met. I note that the methodology of the Veterans Administration - outlining action- follow-thru - etc results in a public excel spread-sheet. Is of the lines that Congress envisioned as a lasting tribute to Maryland's Congressman - I venture that those who do not follow-up - become RMOS indeed "influencers" of enablers of new generations of "RMOS" - that is a smack in the face to the entire federal workforce as well as applicants and becomes a hinderance to the accomplishment of the good which the act was designed to provide. Assume one sees "training" as the sole action provided as a result- is that not what all employees no matter the level are to be afforded as a public member is not training an enticement to enter public service?

Before I provide what a copy of the Board's overturning of Presidential Authority - I provide a slice from longstanding Department of Land Management decision (Dept of Interior) which provides support - that the Board - no Executive, No Agency Head has authority to provide (short of Congress providing specific) delegation of its discretion to a lessor - employee or

even Inferior Officer to do the Principal Officer's duty as delegated by Congress. I will also attach a Copy of a recent article from both Army Times and the Federal Executive Demonstrating that the Special Counsel (OSC) has exceeded his authority as delegated by congress and has advocated positions National Defense - as well as taken it upon himself to advance an article in a Federal Executive (both these are commercial publications - which the first sentence of the later smacks spite of the Supreme Court July 1, 2024 decision regarding our President Elect. - the Board has no authority to delegate any authority to him - and for good cause should not. but here is as stated the extract from Public Lands decision:

That the Secretary of the Interior may by appropriate regulation delegate to supervisory officers the power vested in him under section 169 of the Revised Statutes of the United States to make temporary or emergency appointments of persons for duty in the field, subject, however, to later confirmation thereof by the Secretary of the Interior.
Such appointment is not complete until approved by the Secretary. If subsequently approved it has validity from the date of the tentative appointment. The employee may be placed on duty but should not be paid until the appointment shall have become absolute by approval.
In the case of United States v. Wickersham (201 U. S. 390), the claimant was a clerk in the office of the United States Surveyor General in Boise, Idaho. He was suspended by the Surveyor General, and the court held that the suspension was without authority of law and that he was entitled to pay covering the period of his suspension. At page 399 the court said:
**3 Where an officer is wrongfully suspended by one having no authority to make such an order,
he ought to be, and is, entitled to the compensation provided by law during such suspension. Throop on Public Officers, Par. 407; Emmitt v. Mayor &c. of New York, 128 N. Y. 117. This was the view entertained by the Court of Claims in deciding Lellmann's case, 37 C. Cl. 128, on the authority of which the case at bar was decided by that court. We think the ruling was correct. The case reported in 26 Comp. Dec. 444 also involved an employee of this department. He was superintendent of an Indian school, who was suspended by the Commissioner of Indian Affairs. He was later restored, and the question was whether he was entitled to pay covering the period of suspension. The following is quoted from that decision:

I am not aware of any existing law vesting authority in the Commissioner of Indian Affairs to suspend an employee or officer of the Indian Service. As a general rule, when it is sought to exercise any official power or function explicit authority must be found in the law. 25 Op. Atty. Gen., 98. The power to appoint and remove being discretionary in character by the head of a department, they can not be delegated. 21 id., 356.
….
Congress has in numerous instances authorized officials below the grade of members of the Cabinet to appoint employees, and the courts have recognized no constitutional objection to such legislation. United States v. Germaine (99 U. S. 508); Burnap v. United States (252 U. S. 512; 10 Comp. Dec. 577); Auffmordt v. Hedden (137 U. S. 310).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

)
Office of Medicare Hearings and Appeals,)
Department of Health and Human Services,)

v.
Agency,)
)
)

Docket No. CB-7521-18-0009-T-1
ALJ Curtis E. Renoe

Pere Jarboe,
Administrative Law Judge, Date May 29, 2018

AGENCY'S OBJECTION TO RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

On May 14, 2018, Judge Pere Jarboe (Respondent) filed a "Motion for Tribunal to Grant Partial Summary Judgment Holding that Chief Magistrate of the United States, President Donald J. Trump, Jr. is the Medicare Judge's Second Level Supervisor and that the Secretary of Health and Human Service is the Medicare Judges' First Level Supervisor."

The Agency received this motion via United States Mail on May 17, 2018. On May 18, 2018, Judge Pere Jarboe filed "Respondent's Motion for Partial Summary Judgment that this Tribunal hold that all documentation before it in the January 18,2018 'Agency File' and otherwise be removed as such documentation before it in the January 18,2018 'Agency File' and otherwise be removed as such documentation amounts to documentation generated in violation of the Privacy Act .... "The Agency received this motion via United States Mail on May 21, 2018. Pursuant to the Merit System Protection Board's regulation found at 5 C.F.R. § 1201.55(b), the Agency now objects to both of these motions, as well as any such summary judgment motions Respondent files in the future.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

PERE J. JARBOE,
Respondent.

DOCKET NUMBER
CB-7521-18-0009-T-1

DATE: June 8, 2018

ORDER DENYING RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT NUMBERS 1 AND 2

On May 14, 2018, Judge Pere J. Jarboe (Respondent) filed a "Motion for Tribunal to Grant Partial Summary Judgment Holding that Chief Magistrate of the United States, President Donald J. Trump, Jr. is the Medicare Judge's Second Level Supervisor and that the Secretary of Health and Human Service is the Medicare Judges' First Level Supervisor . . . ." (Motion Number 1). Respondent followed Motion Number 1 with a second motion for partial summary judgment on May 18, 2018, which he titled: "Respondent's Motion for Partial Summary Judgment that this Tribunal hold that all documentation before it in the January 18, 2018 'Agency File' and otherwise be removed as such documentation amounts to documentation generated in violation of the Privacy Act . . . ." (Motion Number 2). On May 29, 2018, counsel for the Office of Medicare Hearings and Appeals, Department of Health and Human Services (OMHA or Agency) filed a response to Respondent's motions. For the reasons set forth below, Respondent's Motions Numbers 1 and 2 are **DENIED**.

Motion Number 1

Motion Number 1 essentially objects to OMHA Deputy Chief Judge Brian Haring's authority to sign the Complaint in this case. Respondent argues that his legal supervisors are: (1) the current Secretary of Health and Human Services, Alex M. Azar II, and (2) the current President of the United States. Respondent also asserts that as an Administrative Law Judge (ALJ), he is not subject to removal efforts by anyone but his two claimed supervisors (Motion Number 1 at 1, citing Public Law 108-173-Dec. 8, 2003). Judge Jarboe argues that any efforts not authorized by his two supervisors are unlawful because OMHA ALJs are not to report to, or be supervised by, any other officer of the Agency than the Secretary.[1]

The Agency counters that Deputy Judge Haring has the properly delegated authority to institute and manage disciplinary actions against OMHA's ALJs, as he had been given that authority by OMHA's Chief Administrative Law Judge Nancy Griswold, who had properly received her authority from the Secretary's delegation. Response at 4.

Having reviewed the parties' respective positions on this subject, I find the factual and legal bases for Respondent's contentions highly questionable at best. Nothing in the record before me indicates that Deputy Chief Judge Haring lacked proper authority to sign the Complaint against Judge Jarboe in this action, and I will not find

---

[1] While Respondent also raised various others issues and sources of claimed support for his argument, e.g., citation to other MSPB matters (Motion Number 1 at page 3, 6); a delegation of authority for personnel administration and management from 1997 (id. at 5); arguments about the alleged then-probationary status of Deputy Judge Haring (id. at 7-12), the substance of the Motion centers on this delegation issue and asserted lack of authority for issuing the Complaint. See Motion Number 1 at note 3.

so based on the arguments presented in Motion Number 1. Indeed, the Agency's citation to explicit delegations of authority contained in the record run counter to any such assertions by Respondent. Furthermore, under general standards of summary judgment, such judgment is only appropriate where no genuine issue of material fact exists on the question under consideration. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Here, such issues of genuine material fact exist with respect to Respondent's contentions, and summary judgment is inappropriate.

Motion Number 2

Respondent's Motion Number 2 asks that all documentation in the "Agency File" as of January 18, 2018 and otherwise be removed due to a Privacy Act Violation and that the undersigned retain jurisdiction to ensure that all information pertaining to Respondent in Agency records without proper Congressional or Executive authority be stricken from the Federal record. Various bases are asserted for this requested relief, including, but not limited to: alleged violations falling under the Privacy Act, collection of data without a Privacy Act Assessment or adequate System of Record Notice (SORN), and violations by OMHA's Privacy Officer.[2]

Agency counsel responded by denying that the Agency needed to publish any SORNs to make use of any exhibits attached to the Complaint as they consist of documents from Respondent's electronic personnel folder, declarations form Agency employees, complaints filed by litigants regarding Respondent's hearings and decisions,

---

[2] Respondent also asks that I order the Agency to let its Privacy Officer know of the ability to intervene in this case. Motion Number 2 at 2-3. As for this latter request, no basis exists for this individual to intervene in this matter under 5 C.F.R. § 1201.34.

peer review documents, and a redacted copy of an employee performance plan. Agency Response at 5. Additionally, Agency counsel asserts that this tribunal does not have jurisdiction over Privacy Act claims. Id., *citing* Calhoon v. Dept. of Treasury, 90 M.S.P.R. 375, ¶ 15 (2001). Finally, the Agency's Response argues that because genuine issues of material fact exist on Respondent's claims, summary judgment is inappropriate. Id. at 6.

In evaluating Motion Number 2, I reiterate a point from the Order Denying Respondent's Motion to Dismiss: these proceedings are conducted under the limited authority and jurisdiction of the MSPB. Respondent attempts in his various motions to have me correct certain alleged violations of law or more generally complaints and issues he has with the Agency. However, 5 U.S.C § 7701 limits the scope of the MSPB's jurisdiction as follows:

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.

Here, I am addressing a complaint filed by Respondent's employing agency seeking to obtain a Board ruling of "good cause" for his removal as an ALJ under 5 U.S.C. § 7521. The focus of these proceedings centers on this issue and this issue alone. Respondent is free to assert his defenses to such Agency efforts, but this is not the proper forum for Respondent to seek redress or correction of issues not falling within the scope of MSPB jurisdiction.

The law is quite clear on this subject. Because the MSPB has limited jurisdiction, a party seeking any kind of relief must generally point toward a statute, rule or regulation that gives the Board jurisdiction to address the claim or concern. The Board cannot

broaden its jurisdiction no matter the nature or extent of the claimed injustice by a party. See Serrao v. Merit Systems Protection Bd., 95 F.3d 1569 (Fed. Cir. 1996) (the Board's jurisdiction is not plenary and only can address those issues properly before it); Preece v. Dept. of Army, 50 MSPR 222, 226 (1991) ("The Board does not have jurisdiction over all actions that are alleged to be incorrect."); Hipona v.Dept. of Army, 39 MSPR 522 (1989); see also 5 C.F.R. § 1201.1-3 (providing a list of nonexclusive subject matter jurisdiction).

Agency counsel correctly points out that the Board does not have jurisdiction over Privacy Act claims, which form the central basis of Respondent's Motion Number 2. Respondent seeks relief that I cannot provide. Respondent is free to make whatever evidentiary objections he may have about the Agency's exhibits it may seek to rely upon at hearing, but the specific claims about the alleged violations contained in Motion Number 2 are not cognizable in this forum. Finally, even were such claims and requested relief to be so, Motion Number 2 fails to establish that any such asserted material facts are undisputed. Summary judgment would not be warranted in any event.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED THAT: Respondent's Motion for Partial Summary Judgment Number 1 and Motion for Partial Summary Judgment Number 2 are **DENIED**.

Hon. Curtis E. Renoe
Administrative Law Judge

DONE AND DATED ON THIS 8TH
DAY OF JUNE, 2018

ALAMEDA, CALIFORNIA

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

U.S. Mail	Pere J. Jarboe 2008 Peggy Stewart Way Annapolis, MD 21401
Electronic	Gina Nicole Rozman Department of Health and Human Services Office of the General Counsel, Region V 233 N. Michigan Avenue, Suite 700 Chicago, IL 60601
Electronic	Jacqueline Zydeck Department of Health and Human Services Office of the General Counsel, Region V 233 N. Michigan Avenue, Suite 700 Chicago, IL 60601

June 8, 2018
(Date)

Dinh Chung
Case Management Specialist

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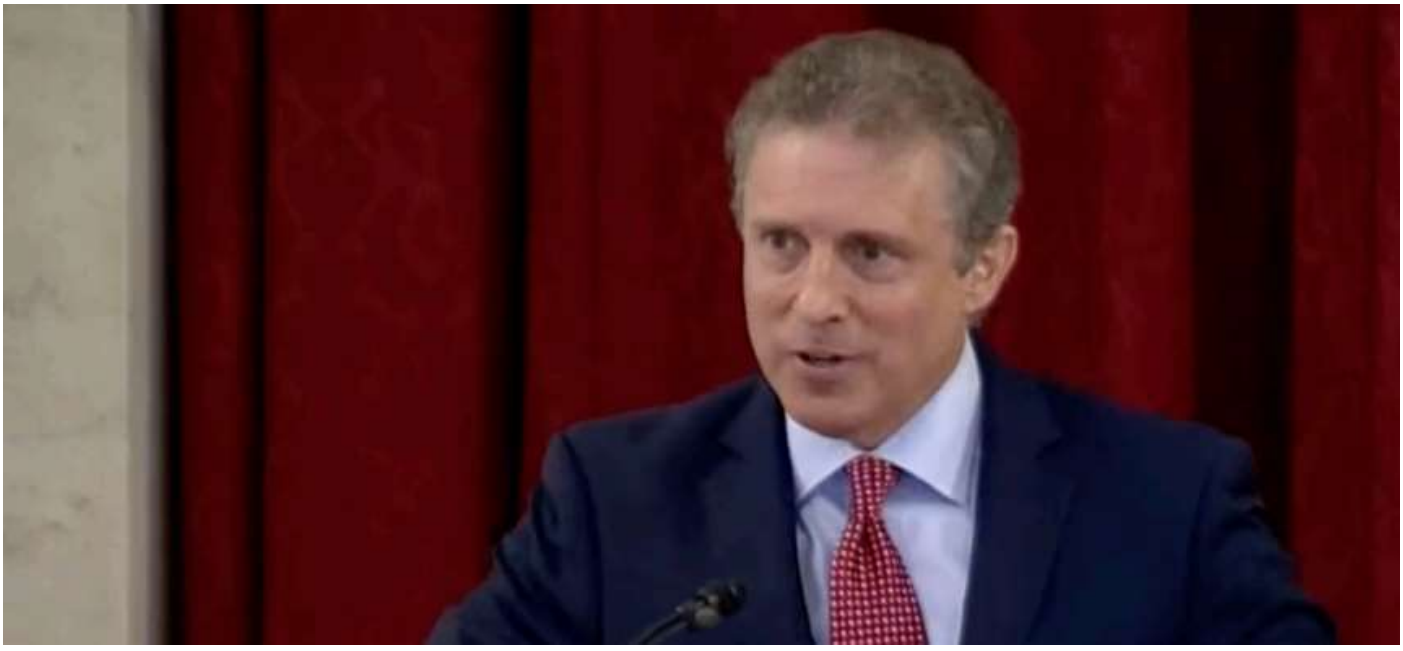

Hampton Dellinger, shown here in June 2024, leads the Office of Special Counsel. SCREENGRAB BY GOVEXEC/C-SPAN2

Management

Transparency and urgency are needed to deter agency misconduct and protect federal workers

COMMENTARY | The head of the Office of Special Counsel, the agency that investigates allegations of government misconduct, has a proposal.

HAMPTON DELLINGER | AUGUST 30, 2024

WHISTLEBLOWERS TRANSPARENCY

The controversy will continue over when presidents might be considered above the law. But it should be undisputed that the millions of employees in the executive branch never are. And from what I see as the head of the independent agency designated by Congress to protect them, they don't want to be.

Instead, what government workers and lawmakers count on is a cycle of accountability and protection: federal employees should be hired based on merit, report wrongdoing when they see it, and be safeguarded from retaliation when they blow the whistle on misconduct.

The agency I lead, the Office of Special Counsel, helps police the cycle. Federal workers come to OSC with allegations of government misconduct and, if we determine there is a "substantial likelihood" that the disclosure indicates lawbreaking or certain other wrongdoing, then I ask the agency in question to investigate and report back. My colleagues and I assess the report, provide the whistleblower a chance to comment, and share it and our take with the president, Congress, and the public.

Here's the problem: a process Congress envisioned taking a couple of months is too often taking years.

Today, I am proposing a new policy where, with the consent of the whistleblowers who first flagged the possible misconduct, we will provide public notice about the allegations being investigated.

Specifically, OSC would post summaries of whistleblower allegations where my colleagues and I have made a "substantial likelihood" of agency wrongdoing determination. These summaries would be for open matters where I await final agency reports detailing their findings and fixes.

And we propose doing something similar on the employee protection side. When OSC sees evidence indicating that whistleblower retaliation or some other prohibited personnel practice has occurred, and the agency is not timely and reasonably responding to the injured employee, we would say something quickly and publicly whenever the wronged worker agrees.

These proposals for greater transparency and urgency may be new but they are intended to fulfill directives from Capitol Hill. When it comes to "substantial likelihood" of wrongdoing investigations, the expectation Congress enshrined in the law is that agency heads will issue findings within 60 days after receiving a referral from OSC. My agency would not post a summary of an allegation until then. If an agency asks for more time before issuing the required report, OSC will agree when reasonable. But the summary of the allegation will be available to all while my agency and the public waits. That's because I think people have a right to know what might be going wrong inside the government they pay for and be assured that serious allegations are being taken seriously and investigated expeditiously.

When it comes to redressing retaliation, discrimination, nepotism, and other acts that violate the merit-based and positive work environments federal employees are guaranteed, Congress has made clear it wants my office to focus on getting any inflicted harm undone as quickly as possible. The legal term used is "corrective action" and the phrase is mentioned no less than 20 different times in the statute OSC helps enforce.

So before posting a summary of the workplace misconduct, OSC would give agencies a short window of time to agree to correct unlawful actions. But if a quick resolution fails, OSC is ready to make public a summary of its view that it appears a federal worker has been unlawfully mistreated.

And in cases where OSC believes an agency may be in the process of a wrongful employment decision, – firing or suspending a whistleblower for example – we want the agency to hold off (in legal terms, stay the action) until my office can make a final determination as to whether the adverse consequence is justifiable or, instead, retaliatory. If an agency doesn't heed our advice and we have to ask the Merit Systems Protection Board to step in, I want to start making our legal briefs public at the same time we file them with MSPB.

While I hope summaries can be posted in most if not all ongoing matters where OSC believes agency misconduct or employee mistreatment may have occurred, there could be situations where it would be against the whistleblower's interest or the public interest to say anything publicly until the matter is resolved. If that's the case, my office will do everything in its power to bring the case to a fast conclusion so that details on what the outcome was, and why, can be safely revealed.

While the steps proposed here will shine a light on other agencies, OSC will provide more visibility into our own operations. My colleagues and I are finding ways to make our policies and protocols more transparent and we'll be posting them in the weeks ahead at www.osc.gov. One practice that will be explained is why OSC is now insisting that agency heads personally review and sign their reports to my agency or, at a minimum, provide a clear statement that they are aware of and agree with the findings.

proposal OSC will put into official effect.

The question of when presidents can be criminally prosecuted should not be confused with the obligation of federal agencies to follow the rules. Congress and common sense tell us the same thing: when you execute the law as a government employee, you must follow the law. When that doesn't happen, I believe the fix should occur as soon as possible. And the process should be as public as possible. These goals – greater transparency and faster accountability – are the catalysts for this proposal.

Hampton Dellinger heads the Office of Special Counsel. He was confirmed by the Senate to a five-year term earlier this year.

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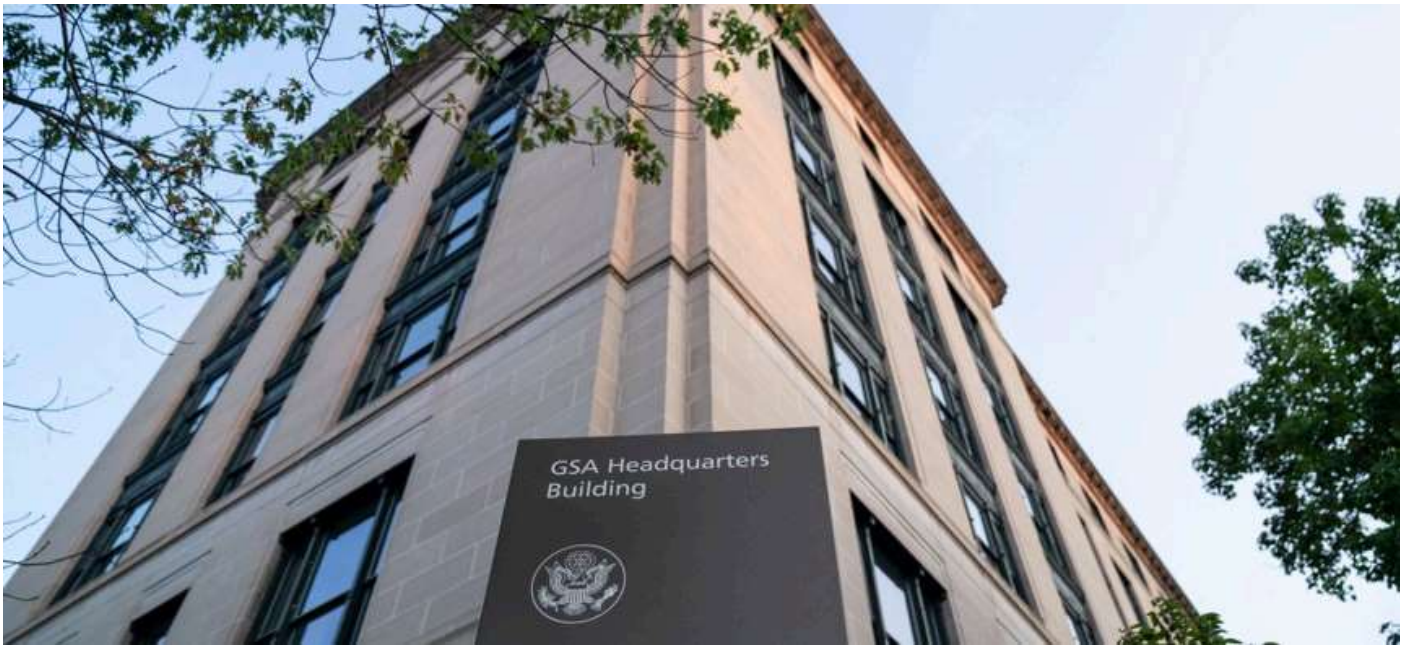

As of November 2023, GSA's Public Buildings Service had not addressed, or developed plans to address, more than 5,000 health and safety risks at federal buildings within the 30-day regulation-required deadline. KENT NISHIMURA / GETTY IMAGES

Management

Government Executive

fire, safety and health risk conditions in federal buildings

After a complaint to GSA's inspector general that the agency was violating employee health and safety regulations, auditors found a database of unresolved risk issues at federal buildings across the nation that dated back a decade.

CARTEN CORDELL | AUGUST 29, 2024

GSA INSPECTORS GENERAL

The General Services Administration's federal real estate arm has a 10-year-old backlog of unresolved occupational health and safety, and fire risk conditions at public buildings across the country, its inspector general has found.

Following a June 2023 hotline complaint to the OIG that alleged GSA was in violation of Occupational Safety and Health Administration regulations on employee health and safety, the watchdog conducted an assessment to address the complaint, ultimately receiving a database of 35,955 actionable, open risk conditions from GSA component, the Public Buildings Service, from as far back as Oct. 1, 2013.

"The same data shows that there are more than 5,000 open risk conditions that were not corrected or did not have an abatement plan in place within the 30-day period required by Occupational Safety and Health Administration (OSHA) regulations," the OIG assessment said. "To protect building occupants and federal property, unsafe or hazardous risk conditions in GSA-managed assets should be addressed in a timely manner."

The assessment describes open risk conditions as anything that is a potential danger to people in and around GSA-managed assets, including "a lack of required signage, obstructions in the way of fire exits, or the presence of hazardous materials," and the backlog found these conditions at nearly 2,000 GSA assets nationwide.

PBS' Southeast Sunbelt region had the most open risk conditions in the database, with nearly 13,000 tallied across 207 buildings or leased spaces. The National Capital region came second with more than 5,800 open risk conditions across 420 affected assets, followed by the Mid-Atlantic and New England regions.

Two of the most serious open risk conditions cited in the OIG memorandum were a high fire risk at the Charles E. Chamberlain Federal Building and U.S. Post Office in Lansing, Michigan, where a March 2017 protection survey recommended a complete sprinkler system installation that had still not been fulfilled by Nov. 22, 2023.

At One White Flint North in Bethesda, Maryland — which includes the Nuclear Regulatory Commission headquarters — a May 2019 safety survey found falling stone from the building's façade that posed an "immediate and potentially imminent danger to employees and the public," but remained unresolved as of Nov. 22, 2023.

"PBS's Facilities Risk Management Division Director told us that each PBS region reviews the status of: (1) its open risk conditions and (2) abatement plan development throughout the year," the memorandum said. "In addition, they stated that these statuses are also analyzed yearly by the Facilities Risk Management Division. However, as described above, PBS's own data shows that tens of thousands of open risk conditions exist across GSA-managed assets nationwide."

In response to the OIG, PBS commissioner Elliot Doomes said the agency agreed with the findings and would continue to prioritize funding to help close open risk conditions.

Regarding the risk conditions that remain unabated beyond the 30-day OSHA requirement, Doomes said new functionality in PBS' database has allowed the agency to better track abatement issues, alongside employee performance requirements tied to 1,300 staff.

The memorandum follows an OIG report last month that PBS officials in Detroit did not respond quickly to address water quality issues that included potentially harmful levels of lead, copper and Legionella bacteria at a federal building, leading tenant agencies to take their own steps to protect employees.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

PERE J. JARBOE,
Respondent.

DOCKET NUMBER
CB-7521-18-0009-T-1

DATE: June 8, 2018

ORDER DENYING RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT NUMBERS 1 AND 2

On May 14, 2018, Judge Pere J. Jarboe (Respondent) filed a "Motion for Tribunal to Grant Partial Summary Judgment Holding that Chief Magistrate of the United States, President Donald J. Trump, Jr. is the Medicare Judge's Second Level Supervisor and that the Secretary of Health and Human Service is the Medicare Judges' First Level Supervisor . . . ." (Motion Number 1). Respondent followed Motion Number 1 with a second motion for partial summary judgment on May 18, 2018, which he titled: "Respondent's Motion for Partial Summary Judgment that this Tribunal hold that all documentation before it in the January 18, 2018 'Agency File' and otherwise be removed as such documentation amounts to documentation generated in violation of the Privacy Act . . . ." (Motion Number 2). On May 29, 2018, counsel for the Office of Medicare Hearings and Appeals, Department of Health and Human Services (OMHA or Agency) filed a response to Respondent's motions. For the reasons set forth below, Respondent's Motions Numbers 1 and 2 are **DENIED**.

Motion Number 1

Motion Number 1 essentially objects to OMHA Deputy Chief Judge Brian Haring's authority to sign the Complaint in this case. Respondent argues that his legal supervisors are: (1) the current Secretary of Health and Human Services, Alex M. Azar II, and (2) the current President of the United States. Respondent also asserts that as an Administrative Law Judge (ALJ), he is not subject to removal efforts by anyone but his two claimed supervisors (Motion Number 1 at 1, citing Public Law 108-173-Dec. 8, 2003). Judge Jarboe argues that any efforts not authorized by his two supervisors are unlawful because OMHA ALJs are not to report to, or be supervised by, any other officer of the Agency than the Secretary.[1]

The Agency counters that Deputy Judge Haring has the properly delegated authority to institute and manage disciplinary actions against OMHA's ALJs, as he had been given that authority by OMHA's Chief Administrative Law Judge Nancy Griswold, who had properly received her authority from the Secretary's delegation. Response at 4.

Having reviewed the parties' respective positions on this subject, I find the factual and legal bases for Respondent's contentions highly questionable at best. Nothing in the record before me indicates that Deputy Chief Judge Haring lacked proper authority to sign the Complaint against Judge Jarboe in this action, and I will not find

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[1] While Respondent also raised various others issues and sources of claimed support for his argument, e.g., citation to other MSPB matters (Motion Number 1 at page 3, 6); a delegation of authority for personnel administration and management from 1997 (id. at 5); arguments about the alleged then-probationary status of Deputy Judge Haring (id. at 7-12), the substance of the Motion centers on this delegation issue and asserted lack of authority for issuing the Complaint. See Motion Number 1 at note 3.

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Motion Number 2

Respondent's Motion Number 2 asks that all documentation in the "Agency File" as of January 18, 2018 and otherwise be removed due to a Privacy Act Violation and that the undersigned retain jurisdiction to ensure that all information pertaining to Respondent in Agency records without proper Congressional or Executive authority be stricken from the Federal record. Various bases are asserted for this requested relief, including, but not limited to: alleged violations falling under the Privacy Act, collection of data without a Privacy Act Assessment or adequate System of Record Notice (SORN), and violations by OMHA's Privacy Officer.[2]

Agency counsel responded by denying that the Agency needed to publish any SORNs to make use of any exhibits attached to the Complaint as they consist of documents from Respondent's electronic personnel folder, declarations form Agency employees, complaints filed by litigants regarding Respondent's hearings and decisions,

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[2] Respondent also asks that I order the Agency to let its Privacy Officer know of the ability to intervene in this case. Motion Number 2 at 2-3. As for this latter request, no basis exists for this individual to intervene in this matter under 5 C.F.R. § 1201.34.

peer review documents, and a redacted copy of an employee performance plan. Agency Response at 5. Additionally, Agency counsel asserts that this tribunal does not have jurisdiction over Privacy Act claims. Id., *citing* Calhoon v. Dept. of Treasury, 90 M.S.P.R. 375, ¶ 15 (2001). Finally, the Agency's Response argues that because genuine issues of material fact exist on Respondent's claims, summary judgment is inappropriate. Id. at 6.

In evaluating Motion Number 2, I reiterate a point from the Order Denying Respondent's Motion to Dismiss: these proceedings are conducted under the limited authority and jurisdiction of the MSPB. Respondent attempts in his various motions to have me correct certain alleged violations of law or more generally complaints and issues he has with the Agency. However, 5 U.S.C § 7701 limits the scope of the MSPB's jurisdiction as follows:

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.

Here, I am addressing a complaint filed by Respondent's employing agency seeking to obtain a Board ruling of "good cause" for his removal as an ALJ under 5 U.S.C. § 7521. The focus of these proceedings centers on this issue and this issue alone. Respondent is free to assert his defenses to such Agency efforts, but this is not the proper forum for Respondent to seek redress or correction of issues not falling within the scope of MSPB jurisdiction.

The law is quite clear on this subject. Because the MSPB has limited jurisdiction, a party seeking any kind of relief must generally point toward a statute, rule or regulation that gives the Board jurisdiction to address the claim or concern. The Board cannot

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Agency counsel correctly points out that the Board does not have jurisdiction over Privacy Act claims, which form the central basis of Respondent's Motion Number 2. Respondent seeks relief that I cannot provide. Respondent is free to make whatever evidentiary objections he may have about the Agency's exhibits it may seek to rely upon at hearing, but the specific claims about the alleged violations contained in Motion Number 2 are not cognizable in this forum. Finally, even were such claims and requested relief to be so, Motion Number 2 fails to establish that any such asserted material facts are undisputed. Summary judgment would not be warranted in any event.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED THAT: Respondent's Motion for Partial Summary Judgment Number 1 and Motion for Partial Summary Judgment Number 2 are **DENIED**.

Hon. Curtis E. Renoe
Administrative Law Judge

DONE AND DATED ON THIS 8TH
DAY OF JUNE, 2018

ALAMEDA, CALIFORNIA

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

U.S. Mail	Pere J. Jarboe 2008 Peggy Stewart Way Annapolis, MD 21401
Electronic	Gina Nicole Rozman Department of Health and Human Services Office of the General Counsel, Region V 233 N. Michigan Avenue, Suite 700 Chicago, IL 60601
Electronic	Jacqueline Zydeck Department of Health and Human Services Office of the General Counsel, Region V 233 N. Michigan Avenue, Suite 700 Chicago, IL 60601

June 8, 2018
(Date)

Dinh Chung
Case Management Specialist