

GAO

Report to the Honorable  
Sander M. Levin, House of  
Representatives

October 1988

# ADMINISTRATIVE LAW JUDGES

## Appointment of Women and Social Security Administration Staff Attorneys



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United States  
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General Government Division

B-186871

October 19, 1988

The Honorable Sander M. Levin  
House of Representatives

Dear Mr. Levin:

This report responds to your request that we determine the progress being made by (1) federal agencies in appointing women to administrative law judge (ALJ) positions and (2) the Office of Personnel Management (OPM) and the Social Security Administration (SSA) in responding to congressional direction contained in 1984 legislation that was aimed at making SSA staff attorneys more competitive for ALJ positions.

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## Background

The ALJ function was created by Congress in 1946 with the passage of the Administrative Procedure Act. In general, ALJs preside at formal hearings to resolve administrative disputes in the federal government. ALJ positions at grade levels GS-15, GS-16, and GS-17 have been established in 30 federal agencies throughout the United States. Unlike most other employees in the civil service, ALJs are not subject to a probationary period and are exempt from agency performance appraisals.

The responsibility for the recruitment, examination, ranking, and certification of applicants for ALJ positions rests with OPM, the central personnel management agency of the federal government. Agencies select and appoint ALJs from registers of qualified applicants maintained by OPM for various geographic areas. Agency selections for ALJ appointments must be made from the top three ranked applicants on an OPM register or by the reinstatement, reassignment, transfer, or promotion of persons who previously received appointments from ALJ registers.

To be included on an ALJ register, an applicant must get a final rating of 70 or greater on an OPM examination which has a scale of 0 to 100 points. An additional 5 or 10 points are added to the final examination ratings of applicants who qualify for veterans' preference. In general, 10 veterans' preference points are granted to persons who were wounded or disabled in military service or are the spouse, widow(er), or mother of a deceased or disabled veteran. Five points are granted to other veterans of wartime or qualifying peacetime service. An agency cannot pass over a veteran to select a nonveteran with an equal or lower final rating unless the agency's objections to the veteran's selection are sustained by OPM.

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The Civil Service Reform Act of 1978 made OPM solely responsible for determining whether applicants possess the necessary qualifications to become ALJs. OPM administers an examination to determine applicant qualifications. The examination consists of an initial review of minimum qualifications, followed by (1) an evaluation of the applicant's legal experience as described on a supplemental qualifications statement, (2) a demonstration of decision-writing ability, (3) a panel interview, and (4) a personal reference inquiry.

At the time of our review (April 1988 to July 1988), the OPM registers consisted of qualified persons who applied for ALJ positions during a period of open competition lasting from mid-June to late August 1984. OPM subsequently held a period of open competition for new ALJ applications from August 1987 to September 1987. As we were completing our review in July 1988, the ALJ Office in OPM was beginning to add the 1987 applicants who had completed all parts of the examination to the ALJ registers. Accordingly, our review was limited to the examination and appointment of applicants from the 1984 competition. Appendix I provides additional information on the objectives, scope, and methodology of our review.

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## Results in Brief

Of nearly 1,000 ALJs employed by the federal government in July 1988, 40 were women. SSA employed about 650 ALJs and hired 84 of the last 94 ALJs appointed from OPM registers as of July 1988. One of the 94 appointees was a woman and two were former SSA staff attorneys.<sup>1</sup>

Male veterans have dominated the ALJ appointments because of veterans' preference rules. Very few female applicants were entitled to veterans' preference points. Female nonveterans from the 1984 competition scored higher, on average, than male veterans on the ALJ examination, but received lower average final ratings after OPM added veterans' preference points to the examination scores as required by law. Male nonveterans, on average, scored the highest on the 1984 examination before the addition of veterans' preference.

Of 23 SSA staff attorneys in grades GS-11, GS-12, and GM-13 who applied for ALJ positions in the 1984 competition, OPM placed 8 on ALJ-

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<sup>1</sup> As we were completing our report, SSA was in the process of filling up to 65 more ALJ positions. According to OPM's ALJ Office in August 1988, two women and two male staff attorneys were among 60 applicants who were verbally offered and accepted appointments to begin work in September 1988.

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qualified registers as of July 1988. All of the SSA staff attorney applicants were employed by SSA's Office of Hearings and Appeals. Two were appointed to GS-15 ALJ positions at SSA. Both were male 10-point veterans.

OPM believes opportunities for women and SSA staff attorneys becoming ALJs are improving because more women, fewer veterans, and more SSA staff attorneys applied in 1987 than 1984. On the other hand, OPM expects keen competition for a relatively few available ALJ positions. According to OPM, factors such as veterans' preference and the below average scores of the 1987 SSA staff attorney applicants on OPM's evaluation of their legal experience will continue to hinder the competitive status of women and SSA staff attorneys.

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## Examination and Appointment of Female Applicants Governmentwide

The 1984 competition resulted in 809 applications for ALJ positions; 95 (12 percent) of the applicants were women. As of July 1988, agencies appointed 94 of the applicants to ALJ positions. The sex and veteran status of the 94 appointees were as follows: 84 male veterans, 9 male non-veterans, and 1 female nonveteran.

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## Appointment Experience of Eligible Female Applicants

Of the 94 ALJ appointments since the 1984 examination, 12 women were certified to agencies as eligible for proposed ALJ positions a total of 21 times, as of July 1988 (some applicants were certified for positions in more than one agency). The ALJ Office summarized the results of these referrals as follows:

- One woman applicant for a GS-16 ALJ position was put on seven different eligibility certificates with a 93.34 score (ranked 18th on the Washington, D.C., register) but was not reached on any certificate because no applicants for the positions were selected with scores lower than 95.
- Congress did not fund 42 GS-14 ALJ positions for which the Health Care Financing Administration (HCFA) requested OPM certificates; eight women had been certified for these positions.
- Three of the women certified to HCFA were also among 73 applicants certified for up to 25 GS-15 positions at SSA in August 1987, but they declined further consideration before the selections were made.
- Three women were among 99 applicants certified in January 1988 for up to 30 GS-15 positions at SSA. In May 1988, SSA selected one of these women applicants, and she accepted the position.

The Assistant Director for OPM's ALJ Office said that in recent years competition has been very keen among ALJ applicants because of the large number of applicants for a relatively small number of vacant ALJ positions. He said that in this environment the competitive status of female applicants is hindered by the application of veterans' preference rules. He also said that female applicants, more so than male applicants, tended to limit their geographic availability to their areas of residence, but that this factor was not as great as veterans' preference.

### Examination Experience of Applicants by Sex and Veterans' Status

Of the 809 applicants in the 1984 competition, OPM had fully examined 515 as of June 1988. An OPM analysis showed that the average scores for female nonveteran applicants were higher than the average scores for male veterans and lower than the average scores for male nonveterans. As shown in table 1, however, when adjusted for veterans' preference, male veteran applicants achieved the highest overall mean final rating.

**Table 1: Mean Scores of Fully Examined 1984 Applicants** (As of June 1988)

	Maximum possible score	Veterans <sup>a</sup>		Nonveterans	
		Male	Female	Male	Female
(Number of applicants)		(263)		(199)	(52)
1. Supplemental qualifications statement	25	18.76		19.40	19.17
2. Written demonstration	100	64.05		69.24	69.08
3. Panel interview	20	14.97		15.32	14.98
4. Personal reference inquiry	20	11.97		12.71	12.62
Combined 4-part weighted score	100	85.00		87.09	86.46
<b>Final rating, adjusted 5 or 10 points for veterans' preference</b>	<b>110</b>	<b>90.86</b>		<b>87.09</b>	<b>86.46</b>

<sup>a</sup>One female veteran applicant was included in OPM's analysis. To preserve the confidentiality of individual applicants, her score is not shown.

### Effect of Veterans' Preference on Female ALJ Applicants

Our review of an OPM register of eligible ALJ applicants for GS-15 and GS-16 positions in the Washington, D.C. area<sup>2</sup> showed how the veterans' preference rules can affect the competitive status of female ALJ applicants. Of the top 100 applicants on the register, 7 were 10-point veterans, 54 were 5-point veterans, and 39 were nonveterans.

<sup>2</sup>ALJ registers recognize the geographic preferences of applicants for positions in 102 specific locations in 10 regions of the United States and the Washington, D.C., area. We reviewed an April 12, 1988, register for applicants in the Washington, D.C. area only.

There were 10 women among the 100 top-rated applicants on this register; all were nonveterans and appeared on the register in the following rank order: 18th, 36th, 44th, 48th, 49th, 59th, 61st, 65th, 85th, and 94th. If veterans' preference were excluded from consideration, these 10 women would move up an average of 31 positions on the register to the following ranks respectively: 6th, 10th, 16th, 19th, 21st, 28th, 29th, 30th, 42nd, and 46th.

Overall, this register ranked by final score 263 eligible applicants for positions in the Washington, D.C., area; 233 (89 percent) were men, and 30 (11 percent) were women. Only one woman (ranked 262nd) was a veteran.

### Conflict Between Veterans' Preference and Equal Employment Opportunity

The conflict between veterans' preference and equal employment opportunity is not a new issue. In a 1977 report,<sup>3</sup> we noted that the policy of giving unlimited lifetime employment preference to veterans conflicted with the policy of equal employment opportunity for all federal job applicants and that veterans' preference was a particular deterrent to women because few of them were veterans. Since our report, Congress has exempted Senior Executive Service (SES) positions<sup>4</sup> from the application of veterans' preference requirements.

Two pending bills aimed at establishing an independent ALJ corps (S. 950 and H.R. 2726) each contain a provision that would moderate the effect of veterans' preference on nonveterans applying for ALJ positions. The provision would permit ALJ vacancies to be filled from among the five highest ranked eligibles on OPM certificates, instead of the highest three. Any of the highest five could be selected without regard to the provisions of 5 U.S.C. 3318, which allows agencies to pass over a veteran only with the concurrence of OPM.

<sup>3</sup>Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity (GAO/FPCD-77-61, Sept. 29, 1977).

<sup>4</sup>SES covers executive branch employees who, before the formation of SES, were classified at the GS-16, GS-17, and GS-18 levels and Executive Schedule political appointees at levels IV and V who do not require Senate confirmation. Of the total number of ALJ positions in the federal government in July 1988, nearly 700 were at the GS-15 level; over 300 were at the GS-16 level; 15 chief ALJ positions were at the GS-17 level; and 1 chief ALJ position was at the GS-18 level.

## Examination and Appointment of SSA Staff Attorneys

Before fiscal year 1975, ALJs in the Office of Hearings and Appeals (OHA) of SSA functioned with little or no professional support. In response to an increasing work load, OHA began in August 1975 to appoint staff attorneys to 2-year terms to, among other things, help its ALJs do research and prepare decisions on Social Security and Medicare cases. Two years later in 1977, staff attorney positions in grades GS-9, GS-11, and GS-12 were established on a permanent basis. In 1983, supervisory staff attorney positions at the GS/GM-13 level were established to plan, coordinate, and evaluate the work of staff attorneys and other professional support staff. As of June 1988, OHA employed 417 staff attorneys (330 GS-12s, 40 GS-11s, and 47 GS-9s) and 96 supervisory staff attorneys (GM-13s) in SSA's 132 hearing offices and 10 regional offices.<sup>5</sup>

## Efforts to Help SSA Staff Attorneys Compete for ALJ Positions

Before May 1984, one of the minimum qualifications for ALJ positions was the requirement that applicants have at least 1 year of qualifying experience at or comparable to the GS-14 level. OHA staff attorneys could not meet this requirement because their positions were classified below that level. At the request of SSA, OPM in May 1984 made the minimum ALJ qualification requirement less strict by allowing applicants for GS-15 ALJ positions to qualify with 2 years of government attorney experience at a level of difficulty and responsibility characteristic of at least a GS-13. GS-14 experience is unnecessary to meet minimum qualification requirements.

In October 1984, Congress directed the Secretary of Health and Human Services (HHS) to submit a report to two congressional committees on actions the Secretary had taken "to establish positions which enable staff attorneys to gain the qualifying experience and quality of experience necessary to compete for the position of administrative judge" (Section 13 of the Social Security Disability Benefits Reform Act of 1984, Public Law 98-460). The resulting HHS report, dated March 6, 1985, noted OPM's May 1984 revision of the minimum ALJ qualification requirements and indicated that, with the revision, 82 GM-13 supervisory staff attorneys employed at that time could eventually compete for ALJ positions.

Reports accompanying the 1984 legislation indicate that Congress considered requiring that GS-13 and GS-14 SSA staff attorney positions be established to permit those attorneys to qualify for GS-15 ALJ positions,

<sup>5</sup>OHA officials said information on SSA staff attorney positions by grade in earlier years was not available.



but chose not to do so after OPM made the revision to the ALJ qualifications criteria.<sup>6</sup> Nonetheless, the conference report said: "The conferees expect that, if necessary, the Secretary will establish positions which enable staff attorneys to gain the qualifying experience and quality of experience necessary to compete for ALJ positions."

### SSA Staff Attorney Appointment and Examination Experience

OPM data show that few OHA staff attorneys who applied in 1984 have successfully competed for available ALJ positions. The appointment and examination experience, as of July 1988, of 23 OHA staff attorneys (including supervisory staff attorneys) who applied for ALJ positions during the 1984 open period (19 males and 4 females) was as follows:

- Two staff attorneys were appointed to GS-15 ALJ positions in SSA; both were male and 10-point veterans in grade GS-12 with final examination ratings, adjusted for veterans' preference, of 98.43 and 90.52.
- Six other staff attorneys (5 males and 1 female) completed the entire examination and were placed on OPM registers with final ratings, adjusted for veterans' preference, ranging from 90.52 to 80.92, but were not appointed. These applicants were all veterans, four in grade GM-13 and two in grade GS-12.
- Of the remaining 15 staff attorneys or supervisory staff attorneys who were not appointed, 1 male had not yet completed the entire examination, 11 (8 males and 3 females) had projected maximum ratings<sup>7</sup> of 85.24 or below based on their scores from the first part of the examination and thus were not asked to complete the remaining parts of the

<sup>6</sup>A letter from the OPM director to the SSA acting commissioner in May 1984 said the OPM criteria change made this proposed statutory requirement unnecessary. The appropriateness of making the criteria change, which was requested by SSA, was earlier questioned by OPM's staffing group. They told the former OPM director that permitting a two-grade promotion at these grade levels, rather than a one-grade promotion based on certain minimum experience requirements in a particular grade, is done rarely in the civil service. In addition, they said that two-grade promotions are generally accomplished as part of a developmental program requiring formal classroom and on-the-job training.

<sup>7</sup>After the first part of the examination is scored, OPM assumes each applicant scores a perfect score on the remaining three parts of the examination and then applies a weighting formula to get a combined weighted score. Veterans' preference points, if applicable, are then added to the combined weighted score to form the projected maximum rating, according to the ALJ Office.

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examination,<sup>8</sup> and 3 other male applicants were considered by the ALJ Office not to meet minimum qualification requirements.

According to OPM, four other applicants in 1984 were former SSA staff attorneys who were in other positions at the GS/GM-14 level. One of these (a 10-point veteran) was appointed to a GS-15 position in SSA. The other three were not fully examined since they did not receive high enough projected maximum ratings based on their scores from the first part of the examination.

OHA staff attorneys have requested that they be given extra credit under the ALJ examination for their subject matter expertise in social security law. OPM disagreed with this request on the basis that a particular kind of substantive legal experience is not an essential requirement for becoming an ALJ. According to the Assistant Director of OPM's ALJ Office, to give OHA staff attorneys extra credit, SSA would have to justify to OPM by means of a current job analysis that specialized experience is an important factor for successful ALJ performance. An OPM job analysis made in 1979 among incumbent ALJs, most of whom were employed in SSA, found no justification for basing ALJ selections on their experience in social security or other particular programs, according to the OPM Assistant Director. An OHA official said the office was considering preparing another job analysis since he believed circumstances had changed since OPM's analysis.

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## OPM and SSA Initiatives Since 1984

OPM has taken several actions to assist OHA staff attorneys to compete for ALJ positions. The major action, as previously noted, was reducing the minimum ALJ qualification criteria in May 1984. Another OPM action was the detailing of OPM's Deputy Assistant Director for ALJs to SSA in early 1986 to assist in two projects: (1) the initiation of an employee development program in OHA to help its staff attorneys gain qualifying experience to make them more competitive for ALJ positions and (2) the development of a guide and videotape on the qualification requirements for ALJ positions to be used for recruitment purposes. At that time, OPM

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<sup>8</sup>All applicants with projected maximum ratings above 85.24 were asked to complete the 1984 examination, according to the ALJ Office. According to OPM's rules, OPM fully examines as many of the applicants with the highest scores on the first part of the examination, augmented by veterans' preference if applicable, as are needed to meet anticipated agency hiring needs. OHA officials told us they question whether veterans' preference should be considered at this early stage in the process. The Assistant Director of OPM's ALJ Office told us that it was an OPM policy decision to consider veterans' preference at this stage (before the actual final rating) and nonveterans are not being penalized because all applicants receive the maximum possible score on the last three parts of the examination in their projected ratings.

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believed the experience and achievements of SSA staff attorneys to be insufficient for examination scores high enough for certifying to agencies for appointment. Through these projects, OPM's Deputy Assistant Director for ALJs provided SSA specific recommendations for giving its staff attorneys broader experience to enable them to score higher on the ALJ examination, particularly the supplemental qualifications part.

OPM and OHA officials said that they planned to consult further on ways in which OHA staff attorneys can take on more difficult assignments of the kind which will make it possible for them to earn higher scores on the ALJ examination and thus be more competitive with applicants from other agencies and areas of law whose experience is typically characteristic of grade levels GS-14 and above. OHA officials also said that a major reorganization of its hearing process, effective August 8, 1988, created 16 GM-14 positions which would give staff attorneys some "bridge" positions to an ALJ position. They acknowledged, however, that (1) OHA has limited opportunities to provide its staff attorneys the type of work experience, such as trial experience, that OPM requires for high scores on the ALJ examination; and (2) the creation of 16 GM-14 positions will afford few of the more than 500 OHA staff attorneys competitive opportunities.

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## Prospects for 1987 Applicants

At the time of our review, the ALJ Office was completing the examination for the highest ranking 1987 applicants based on their scores from the supplemental qualifications part of the examination and the addition of veterans' preference points, if applicable. The ALJ Office began adding 1987 applicants to the registers of eligible ALJ applicants early in July 1988.

Because more women, fewer veterans, and more SSA staff attorneys applied during the 1987 competition than the 1984 competition, the Assistant Director of OPM's ALJ Office believes the opportunities for women and SSA staff attorneys becoming ALJs are improving. He said that OPM has actively recruited women applicants and 189 (23 percent) of the 840 applications received in 1987 were from women, compared to 95 (12 percent) of the 809 applications received in 1984. He also said that 240 (29 percent) of the 1987 applicants were veterans, compared to 330 (41 percent) of the 1984 applicants. Further, he noted that a number of the 1987 female applicants appear to be very highly qualified

and should receive high enough ratings when they complete the examination process to be certified to agencies for consideration for appointment. As shown in table 2, the number of OHA staff attorney applications in 1987 more than quadrupled from the 1984 competition.

**Table 2: ALJ Applications From OHA Staff Attorneys**

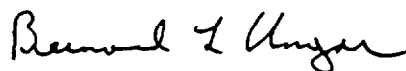
Grade level	Number of applications	
	1984	1987
GS/GM-13	12	61
GS-12	10	45
GS-11	1	1
<b>Total</b>	<b>23</b>	<b>107</b>

The Assistant Director of the ALJ Office also said that the keen competition expected for a relatively few available positions and the continued existence of factors weighing against their appointment will limit the prospects for women and SSA staff attorneys. In general, these factors are that 77 percent of the 1987 applicants are male, many of whom are veterans; and SSA staff attorneys were assigned below average scores on the first part of the examination which was a result, according to the ALJ Office, of their work having less scope, complexity, and impact than the work of many other applicants.

We discussed the report with OPM and SSA officials, who generally agreed with the facts presented and clarified some technical matters. SSA officials also thought that the OPM scoring of SSA staff attorneys did not adequately reflect the complexity of their work.

As arranged with your office, we plan no further distribution until 5 days from the date of this report unless you publicly announce its contents earlier. At that time, we will send copies to the Secretary of HHS, Director of OPM, Commissioner of Social Security, and to others upon request.

Sincerely yours,



Bernard L. Ungar  
Associate Director

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# Objectives, Scope, and Methodology

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Our objectives were to determine the progress of (1) federal agencies in appointing women to ALJ positions and (2) OPM and SSA in responding to congressional direction contained in 1984 legislation that was aimed at making SSA staff attorneys more competitive for ALJ positions. To accomplish these objectives, we reviewed and discussed with OPM officials data developed by OPM's Office of ALJs on the examination and appointment experience of women and SSA staff attorneys from the 1984 open competition. We did not verify the OPM data. We also reviewed OPM's ALJ regulations and application requirements for ALJ appointments. In addition, we reviewed OPM records describing actions it has taken to improve the chances of SSA staff attorneys competing for GS-15 ALJ positions.

We limited our review to the examination and appointment of women and SSA staff attorneys from OPM's registers of eligible ALJ applicants, which is the source of initial ALJ appointments. ALJs may also be appointed through promotions, transfers, or reinstatements, but we did not examine these kinds of appointments in our review. All of the SSA staff attorney applicants were employed by SSA's Office of Hearings and Appeals (OHA).

We also discussed with OHA officials, including the OHA Deputy Associate Commissioner, our summary of OPM data on the examination and appointment progress of women and SSA staff attorneys and discussed with them steps OHA has taken, or plans to take, to help its staff attorneys compete for ALJ positions. Several OHA staff attorneys shared with us information dealing with their specific situations. We considered the information they provided in reviewing the progress of women and SSA staff attorney appointments to ALJ positions, but we did not examine the merits of individual cases. We did our work between April 1988 and July 1988 in accordance with generally accepted government auditing standards.

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