

March 4, 2005

Honorable Gordon England  
Secretary of the Navy  
1000 Navy Pentagon  
Washington, D.C. 20350-1000

Re: Proposed National Security Personnel System-Proposed Regulations

Dear Secretary England:

In behalf of the Defense Administrative Judges Professional Association, we want to make known our views on DoD's proposed rules for classification and pay banding under the National Security Personnel System (NSPS) covering its newly designed regulations developed under the Congressional authority granted in 5 U.S.C. Sec. 9902 *et seq.* We take this opportunity offered by the 30-day comment period to propose that the DoD's classification and pay banding system provide senior level status for DoD's administrative judges assigned to the Defense Office of Hearings and Appeals (DOHA).

We believe the benefits of extending senior level status to DOHA's judges would be considerable for both our judges and the public who relies on us for upholding due process and fairness. Senior level status for our judges would permit compensation comparable to what judges are now receiving across the federal spectrum of administrative judicial practice. But even more important, senior level will help to advance respect and dignity for our judges who are called upon every day to dispense important decisions covering security clearances, health care, and special education: all core missions of DoD. We hope that through our comments on DoD's proposed pay banding regulations herein we can persuade you and the general counsel of the merits of our request.

Administrative judges (AJs) with DOHA hold due process hearings concerning security clearance applications and revocations, TRICARE-related hearings, and hearings covering special education cases arising under the Individuals with Disabilities Education Act (IDEA). We conduct administrative hearings as challenging and demanding as those performed by our judicial colleagues throughout the Federal Government. Last year, for example, DOHA judges issued over 1000 DoD final decisions covering security clearances for DoD contractors and hundreds of recommended decisions involving the clearance suitability of DoD military and

civilian personnel based in the U.S. and overseas, as well as our decisions in complex TRICARE and special education cases.

The classification structure, pay banding and classifying process outlined in 5 C.F.R. Secs. 9901.211-213 for establishing career groups and appropriate pay bands for such groups emphasizes such factors as mission/function, nature of the work, pay progression patterns and other characteristics germane to the group (such as, *e.g.*, comparisons of DOHA AJ missions, functions, and qualifications with other administrative judge groups). NSPS' classification structure underscores the principle "that equal pay should be provided for work of equal value" (5 C.F.R. Sec. 9901.201). We believe there should be enough flexibility in the new compensatory framework to accommodate senior level status for our DOHA administrative judges. What we seek is a correction of what has been an unfortunate oversight.

To keep up with the increased demands and responsibilities placed on our administrative judges, DOHA has added new judges over the past few years, while maintaining diversity and quality. The professional experience of our judges represents an extensive cross-section of experienced professionals. Most of our judges have prior judge advocate training. Some have served as chief military judges with the various services. Some have been general counsels with departments and agencies within DoD. Some have backgrounds as prosecutors, college professors, state administrative judges and defense counsel. Others come from private practice. All of our judges meet the requirements of high productivity and special training expected of individuals chosen to join the ranks of senior level.

We formed our association in 2000 to pursue professional goals vital to the fulfillment of our assigned responsibilities for conducting due process hearings in the areas of our designated jurisdiction. A principal goal of our Association of Judges has been the elevation of our status to the senior level, which most of our administrative judge counterparts throughout the Federal Government (to include DoD's own Armed Service Board of Contract Appeals) already enjoy.

To assist you in your considering our senior level request, here is a little historical backdrop on our prior efforts to gain senior level status. Following the enactment of the Federal Employees Pay Comparability Act of 1990 (FEPCA), which was designed to establish new salary scales and qualifications for senior level positions within an agency (*see* 5 U.S. C. Sec. 5376 (b)(1)), several of us were approved by the Director, DOHA (endorsed by the Deputy General Counsel for Legal, the late Michael Sterlacci) to undertake a detailed comparability study of the qualifications, missions, and procedures utilized by administrative judges throughout the Federal Government (ours included). The Interior Department's (DoI) AJ corps. had undertaken a similar study months previous; their efforts produced a successful elevation of DoI's AJs to senior status in the 1991 time frame. Our study was reviewed by WHS between 1993 and 1994. After completing the review, WHS' Director (the late Doc Cooke) passed favorably upon our work and missions (finding "it appears that the Administrative Judges meet the definition for inclusion as SLs"), but declined approval of our judges for senior level status for two assigned reasons: downsizing and the absence of a confirmed DoD general counsel at the time.

As matters stand today, we are one of only two remaining major administrative judge groups who do not currently enjoy senior level status, the Merit System Protection Board being the other. You may know, too, that DoD opposed previous legislative efforts to grandfather our judges into a proposed Administrative Law Judge Corps through what was characterized in 1996 as the Corp bill (H.R. 1802, 104<sup>th</sup> Congress). DoD's written opposition focused on two central themes: the undesirability of surrendering control over important security clearance decisions to outside ALJs and the risk of dilution of the recognized skills and experience of DOHA's well-trained AJs in security suitability matters. DoD's written opposition notes "Past history has shown that it is our Administrative Judges' expertise and experience that yields the greatest efficiency" and emphasizes the quality of the AJs' "well reasoned, solidly supported decisions."

Should you wish to see the WHS Director's memorandum of August 2, 1994 and/or DoD's H.R. 1802 opposition letter from its general counsel of September 10, 1996, both are available upon request. Each in its own way provides key support for our AJs gaining senior level status.

Securing senior level status for our judges has been a principal goal and focal point of our judges' association and is consistent with the professional enhancement objectives expressed in our organization's charter and by-laws. To be sure, our judges' association's charter and by-laws were modeled after those used by the other administrative judge professional associations throughout the Federal Government with the approvals of their respective departments and OPM. Similar to the other professional associations, we are not a union organized under U.S. labor laws to engage in collective bargaining, but rather a professional judges association. Still, DoD (for reasons unclear) declined to recognize our association, or agree to enter into a consultative relationship with us.

So, in addition to considering senior level status for our judges, we seek approval anew of our association's standing in light of its mission and the approvals other judges associations with comparable charters and by-laws have received from OPM and their departments.

We appreciate your consideration of our request and look forward to consulting with you and OGC on this issue.

Sincerely yours,

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President, Defense Administrative  
Judges Professional Association

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