

January 2010

RESULTS-ORIENTED CULTURES

Office of Personnel Management Should Review Administrative Law Judge Program to Improve Hiring and Performance Management





Highlights of [GAO-10-14](#), a report to congressional addressees

Why GAO Did This Study

The Administrative Procedure Act established unique conditions for administrative law judges' (ALJ) hiring and employment to protect their decisional independence. However, the potential for a wave of retirements and other events have focused attention on how ALJs are hired and managed. In response to the Consolidated Appropriations Act of 2008, this report examines, among other things, (1) the process for hiring ALJs and selected agencies' observations of the process; (2) ALJs' retirement eligibility and retirement issues; (3) and agency managers' reported ALJ performance management practices and stakeholders' views of these practices. To address these objectives GAO reviewed relevant statutes, regulations, Office of Personnel Management (OPM) retirement-related data, and other program-related documents, and interviewed officials from OPM, ALJ professional associations, and the two largest federal agencies employing ALJs—the Social Security Administration (SSA) and the Department of Health and Human Services (HHS).

What GAO Recommends

GAO is making recommendations to OPM regarding ALJ hiring and performance management. OPM agreed with the hiring-related recommendation, but disagreed with applying the term "performance management" to ALJs. GAO clarified the statutory basis for its recommendations and retained its recommendations.

[View GAO-10-14 or key components.](#)
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What GAO Found

SSA and HHS officials responsible for hiring new ALJs reported they were satisfied with the quality of the judges hired from OPM's ALJ register of qualified candidates in 2008. Despite their satisfaction with these ALJ candidates, agency officials raised several issues regarding ALJ hiring and offered suggestions to improve the process, including (1) opening the OPM registry to accept new candidates more frequently, (2) giving greater consideration to agency-specific knowledge and experience, and (3) providing additional agency flexibility in meeting the procedural requirements associated with selecting from the three best qualified candidates and awarding veterans' preference. OPM officials reported they are working to address these issues and develop new approaches, where appropriate.

ALJ agencies could experience skill and competency gaps in the ALJ workforce in the near future. As of September 2008, the most currently available data, 51 percent of all ALJs were already eligible to retire. Moreover, by 2013, 78 percent of all ALJs employed as of September 2008 will be eligible to retire, while at 9 of the 25 ALJ agencies, all of the ALJs were eligible to retire. Retiring employees can leave gaps in institutional knowledge and technical skills due, in part, to the time required for new hires to become fully productive. To ensure agencies have talented staff to accomplish their missions, OPM requires agencies to make meaningful progress toward closing skills, knowledge, and competency gaps/deficiencies in all occupations in the agency. Despite the significant proportion of ALJs who were eligible to retire from 2008 to 2013, OPM officials reported that, as of October 2009, they had no record of any federal agency designation of ALJ skill gaps or competency issues. OPM, as ALJ program manager and lead agency in federal human capital management, could use its annual review of federal agencies' human capital accountability plans to assure that ALJ agencies appropriately identify and plan for future ALJ related skill and competency gaps.

To safeguard the independence of ALJ decisionmaking, ALJ agencies are prohibited from rating or tying an ALJ's compensation to their performance. Nevertheless, SSA and HHS officials reported using numerous other practices to manage ALJ performance. ALJ association officials were concerned some SSA performance management practices could affect ALJs' decisional independence. The use of competencies in ALJ performance management might help OPM and ALJ agencies define needed ALJ skills and behaviors, ensure objective and balanced performance discussions between managers and ALJs, and enhance consistency in ALJ performance, while not influencing ALJ compensation. Given its role as ALJ program manager and its expertise in performance management, OPM is well-positioned to lead a review of all agencies' ALJ-related management practices.

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Abbreviations

AALJ	Association of Administrative Law Judges
ABA	American Bar Association
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
Appeals Council	Office of Appellate Operations
CBA	Collective Bargaining Agreement
CPDF	Central Personnel Data File
DAB	Departmental Appeals Board
DDS	Disability Determination Services
FALJC	Federal Administrative Law Judge Conference
FERS	Federal Employment Retirement System
HARP	Human Resources Products & Services Division
HCAAF	Human Capital Assessment and Accountability Framework
HCLMSA	Human Capital Leadership & Merit System Accountability Division
HHS	Department of Health and Human Services
MSPB	Merit Systems Protection Board
NCALJ	National Conference of the Administrative Law Judiciary
ODAR	Office of the Deputy Commissioner for Disability Adjudication and Review
OMHA	Office of Medicare Hearings and Appeals
OPM	Office of Personnel Management
SHRP	Strategic Human Resources Policy Division
SSA	Social Security Administration
SSAB	Social Security Advisory Board
SSI	Social Security Income

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United States Government Accountability Office
Washington, DC 20548

January 15, 2010

Congressional Addressees

Each year, federal administrative law judges (ALJ) adjudicate hundreds of thousands of disputes between federal agencies and private parties relating to such issues as entitlement to benefits, professional licensing, regulations, and contracts. Collectively, their decisions can simultaneously affect a substantial number of Americans and make significant commitments on behalf of the federal government. For example, each year, ALJs at the Social Security Administration (SSA) decide cases that, collectively, commit the federal government to pay out millions of dollars in disability benefits to thousands of Americans. In 2008, 25 federal agencies employed approximately 1,400 ALJs, with SSA employing over three-quarters of all federal ALJs.

For decades, policymakers have debated ALJ hiring and employment issues, in the context of protecting the decisional independence of ALJs and promoting the ability of agencies to effectively and efficiently resolve their cases. Because recent events and trends could affect, in part, the capacity of the ALJ workforce to effectively adjudicate current and future cases in a timely fashion, the importance of addressing these issues has become more pressing.

For example, at the same time that a growing proportion of ALJs was becoming eligible for immediate retirement, the Office of Personnel Management (OPM) was involved in protracted litigation over the manner in which veterans' preference was applied to the rating of applicants for ALJ positions.¹ As a result, OPM was under a series of administrative orders to suspend the use of its list of qualified candidates, referred to as the ALJ register, in hiring new ALJs and to suspend accepting new applications from 1999 to 2003 (except for short periods in 2001).² In 2003, after prevailing in the lawsuit that triggered the administrative order, OPM updated and reopened the ALJ register for use by the agencies but

¹When applying for federal jobs, veterans are entitled, by law, to a veterans' preference of either 5 or 10 additional points to their application scores, depending on whether or not they were disabled or meet other preference requirements.

²*Meeker v. OPM*, 319 F.3d 1368 (3rd Cir. 2003); *cert. denied*, *Azdell v. James*, 540 U.S. 1218 (2004).

generally did not permit new applicants to take the examination.³ From 2003 through 2006, OPM generally did not accept new applications to the register but retained the ALJ register so that the ALJ agencies could hire new ALJs from among the eligible candidates. In October 2007, OPM established a new ALJ register based on a new examination and the previous ALJ register was terminated.⁴ Agencies began hiring from the new register in fiscal year 2008. Meanwhile, the growth in the number of disability cases awaiting disposition at SSA prompted a number of SSA management initiatives aimed at reducing the backlog of these cases as a means of increasing ALJ productivity.

Based on a mandate accompanying the Consolidated Appropriations Act of 2008,⁵ this report examines (1) the process for hiring ALJs and selected agencies' observations on the process; (2) ALJ retirements and retirement eligibility; (3) the reported ALJ management practices at SSA and HHS, and the stakeholders' views of these practices; and (4) the options that have been proposed to improve the management of the ALJ workforce, either within existing authorities or requiring new authorities.

To address these four objectives, we reviewed related statutes, regulations, testimonies, announcements, correspondence, manuals, and other program documentation gathered from OPM, and the two federal agencies employing about 88 percent of ALJs—SSA and the Department of Health and Human Services (HHS). We also obtained testimonies, announcements, correspondence, contracts, guidelines, and other related documentation from the Association of ALJs (AALJ), a union representing ALJs at SSA and HHS; the Federal ALJ Conference (FALJC), a professional association of federal ALJs and ALJ managers; and the American Bar Association's (ABA) National Conference of the Administrative Law Judiciary, a professional association of federal ALJs who are also members of the ABA.⁶ In addition, we interviewed officials from these

³Certain preference eligibles are entitled by law to reopen an examination for which OPM maintains a register. See 5 C.F.R. §332.311.

⁴According to OPM, candidates on the previous register had to take and complete the new ALJ examination in order to be placed on the new ALJ register.

⁵Pub. L. 110-161, 121 Stat. 1844 (2007).

⁶Among the ALJ-related associations, these three associations report the largest membership of federal ALJs and have repeatedly represented the ALJ community in either hearings before Congress or in correspondence with OPM. A description of these associations is provided in appendix I.

agencies and associations. At SSA we interviewed ALJ managers from the Office of Disability Adjudication and Review, who conduct impartial hearings and make decisions on appealed determinations involving retirement, survivors, disability, and supplemental security income benefits. At HHS, we interviewed ALJ managers from the Office of Medicare Hearings and Appeals, who conduct appeal hearings for the Medicare program and who make a new and impartial decision in accordance with the applicable law, and managers from the Departmental Appeals Board, who provide impartial, independent review of disputed decisions in a wide range of HHS programs under more than 60 statutory provisions. Due to ongoing litigation,⁷ we did not collect detailed information regarding OPM's use of its ALJ register in 2007 and 2008. In addition to the research methods described above, we undertook other data collection and analyses to address specific objectives. To review ALJ retirement and retirement eligibility, we analyzed employment data from OPM's Central Personnel Data File (CPDF), which is OPM's human resources reporting system. To identify the proposed options to improve ALJ performance management, we reviewed numerous related legislative proposals and proposals from OPM, SSA, the three associations, and the Social Security Advisory Board.⁸ We selected three proposals because, collectively, they contained the major design features of other more narrowly focused options and compared these three proposals with the current ALJ program features. See appendix I for more information on our scope and methodology.

We conducted this performance audit from September 2008 through January 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe

⁷In 2007, the AALJ and several ALJs filed suit against OPM regarding the final rule published March 20, 2007, which revised the ALJ program. The plaintiffs challenged a provision that would require sitting ALJs to maintain an active bar membership, and also challenged as arbitrary and capricious under the Administrative Procedure Act's rulemaking requirements OPM's issuance of a Qualification Standard for applicants, OPM's notice to federal agencies that a vacancy announcement for ALJ positions would be posted soon, and OPM's imposition of a numerical cutoff for ALJ applications. The litigation was ongoing as of September 2009.

⁸The Social Security Advisory Board is an independent seven-member bipartisan Advisory Board formed to advise the President, the Congress, and the Commissioner of Social Security on matters relating to the Social Security and Supplemental Security Income (SSI) programs.

that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The ALJ position was created by the Administrative Procedure Act of 1946 (APA).⁹ The APA separated the rulemaking functions from administrative adjudication proceedings in federal agencies, and sought to ensure fairness and due process in both. The APA provides for formal hearings in certain cases where a party has been affected by an agency decision or determination.

Typically, ALJs have two primary duties in the administrative adjudication process. The first duty is to preside over the taking of evidence at agency hearings and act as the finder of facts in the proceedings. An ALJ's other main duty is to act as a decision maker by making or recommending an initial determination about the resolution of the dispute. In these regards, ALJs, who are executive branch employees, function much like trial judges in the judicial branch.¹⁰ In general, ALJs hear cases that fall into four different categories: (1) enforcement cases; (2) entitlement cases; (3) regulatory cases; and (4) contract cases. Depending on the rules relevant to the particular issue in dispute, the hearings can be either adversarial, where the parties or their representatives debate evidence and law before the ALJ, or non-adversarial, where the ALJ investigates the facts and develops the arguments both for and against each party.

In fiscal year 2008, the federal government employed 1,436 civilian ALJs at 25 agencies. The ALJ agencies¹¹ are extremely diverse, ranging from components of cabinet-level agencies, such as the U.S. Coast Guard at the Department of Homeland Security, to independent agencies such as SSA, the National Transportation Safety Board and the Securities and Exchange Commission. SSA employed the largest number of federal ALJs with 1,192 ALJs (83 percent of the federal ALJ workforce), distantly followed by HHS, which employed 72 ALJs, about 5 percent of the ALJ workforce. Seventeen ALJ agencies each employed 5 or fewer ALJs.

⁹Pub. L. 79-404, 60 Stat. 237 (1946). When the APA was enacted in 1946, ALJs were called hearing examiners. Congress changed the title to administrative law judges in 1978. Pub. L. 95-251, 82 Stat. 183 (1978).

¹⁰CRS, *Administrative Law Judges: An Overview*, RL34607 (Washington, D.C.: August 5, 2008).

¹¹In this report we refer to federal agencies employing ALJs as ALJ agencies.

OPM and ALJ Agencies Share ALJ Hiring, Pay, and Performance Management Responsibilities

The conditions of employment for ALJs are unique among federal employees. In order to ensure ALJs carry out their duties impartially, the Administrative Procedure Act (APA) stipulates that ALJs are to be independent of their employing agencies in matters of appointment, tenure and compensation. To achieve this objective, the APA assigns responsibilities for the ALJs to three agencies: OPM, the ALJ agency, and the Merit Systems Protection Board (MSPB).

The ALJ agencies are responsible for managing the ALJs they hire. MSPB has a role in disciplining ALJs. Under its authority to issue regulations implementing the APA, the OPM regulations divide the responsibilities for hiring, pay and performance management¹² among OPM, the ALJ agency and the MSPB. Table 1 lists how the major hiring, pay and individual performance management responsibilities are divided between OPM and the ALJ agency.

OPM has a number of responsibilities for ALJs under the statutory framework of the APA. OPM is responsible for administering the exam and creating a register of qualified candidates for ALJ positions.¹³ OPM also has the authority to prescribe regulations regarding (1) various sections of the APA governing ALJs;¹⁴ (2) implementing the section governing the appointment of ALJs;¹⁵ (3) implementing the requirements that ALJs be assigned cases in rotation as so far as is practicable and not perform

¹² According to OPM's performance management guidance, employee performance management in the federal sector generally includes planning work and setting expectations, continually monitoring performance, and developing the capacity to perform (see "Overview," Performance Management (Washington, D.C.: OPM, Dec. 2009), <http://www.opm.gov/performance/overview.asp> (accessed Dec. 11, 2009)). Although the guidance also includes elements of performance management that can not be applied to ALJs, such as rating ALJ performance, there are performance management practices that we discuss later in this report that can in fact be applied. Employee performance refers to the employee's accomplishment of work assignments or responsibilities. GAO has noted that federal agencies can develop effective performance management systems by implementing a selected, generally consistent set of key practices that create a clear linkage—"line of sight"—between individual performance and organizational success and, thereby, transform their cultures to be more results-oriented, customer-focused, and collaborative in nature. See GAO, *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO 03-488 (Washington, D.C.: March 14, 2003).

¹³ 5 U.S.C. § 1104(a)(2).

¹⁴ 5 U.S.C. § 1305.

¹⁵ 5 U.S.C. § 3105.

duties inconsistent with their duties and responsibilities as ALJs;¹⁶ (4) implementing the detail provisions of the APA, which allow details of ALJs to agencies with occasional or temporary needs for ALJs as selected by OPM;¹⁷ (5) regulations excluding ALJs from the definition of employee for the purposes of performance appraisals;¹⁸ and (6) implementing the three levels of basic pay for ALJs and allowing OPM to provide for appointment of an ALJ in the lowest level at an advanced rate where OPM deems it appropriate.¹⁹

Table 1: OPM and ALJ Agencies Share Responsibilities for Managing ALJ Hiring, Pay and Performance Management

ALJ employment responsibilities	OPM	ALJ agency
Hiring		
Examination and selection of qualified ALJ candidates	√	
Maintaining register of qualified ALJ candidates	√	
Provide list of certified candidates to ALJ agencies upon request	√	
Selection and appointment of ALJs at ALJ agency from list of certified candidates		√
Determining the number of ALJ positions at agency		√
ALJ tenure	√	
Appointment of retired annuitants	√	√
Pay		
Establishing the three levels of pay for ALJs, and rates of pay within each level	√	
Assigning each ALJ position at an agency to a pay level	√	
Determining qualifications for appointment to each pay level	√	
Paying an ALJ applicant a higher rate of pay due to prior federal service		√
Paying an ALJ applicant a higher rate of pay due to superior qualifications	√	√
Promoting ALJ to higher pay level	√	√
Placements and temporary assignments		
Noncompetitive placements, e.g., transfers	√	√

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 3344.

¹⁸ 5 U.S.C. § 4301(2)(D).

¹⁹ 5 U.S.C. § 5372.

ALJ employment responsibilities	OPM	ALJ agency
Intra-agency detail or temporary assignment	√	√
Performance management		
Defining permitted management activities	√	
Performance ratings		prohibited
Awards or bonuses		prohibited
Routine management of ALJs		√
Assignment of cases to ALJ, in rotation		√
Ensuring decisional independence	√	√

Source: GAO analyses of USC sections relating to ALJs and OPM March 2007 ALJ regulations.

In the hiring of ALJs, OPM is responsible for examining applicants and certifying qualified candidates, while the ALJ agency is responsible for identifying the number of new ALJs they require and appointing individual ALJs from OPM's list of certified candidates. As required by the APA, OPM sets the three levels of pay for ALJs, determines the qualifications required for appointment to each level, assigns each of the agency's ALJ positions to one of the pay levels, and determines the time-in-service required to advance to a higher pay level. OPM must provide prior approval before an ALJ agency can appoint retired annuitants, pay an ALJ applicant a higher rate of pay due to superior qualifications, promote ALJs to higher pay levels, or execute noncompetitive placements (e.g. transfers), intra-agency details or temporary assignments. Once the ALJ is employed, OPM and the ALJ agency share responsibility for managing the ALJ's performance. For example, OPM defines those management practices that ALJ agencies may not perform, such as issuing performance ratings and awards and the ALJ agency is responsible for day-to-day management. According to its implementing regulation, OPM shares the responsibility with the ALJ agency for ensuring the ALJ's decisional independence.²⁰ The APA divides the responsibility for disciplining of ALJs between the ALJ agency and the MSPB. The APA permits the agencies to take serious disciplinary action²¹ against an ALJ only for good cause as established and determined by the MSPB on the record, after an opportunity for hearing before the board.

²⁰Decisional independence refers to the ability of administrative law judges to exercise independent judgment based on the evidence, free from pressures by the parties or other officials within the agency. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

²¹The disciplinary actions covered are removal, suspension, reduction in grade, reduction in pay, or furlough of 30 days or less.

Policymakers, ALJ agencies, and other stakeholders have been discussing aspects of ALJ management for decades. Over the years, several options have been proposed to change the roles and responsibilities for the administration of the ALJ program. Three of these options are described in more detail later in this report. Over this same timeframe, to help support deliberations on ALJ issues, we have issued more than 10 reports where the focus was either on ALJs at specific agencies or on the federal ALJ program (see list of related GAO products at the end of this report). Most recently, we issued two reports relating to ALJ performance at SSA and the Department of Homeland Security.²²

SSA and HHS Officials Are Satisfied with Recent ALJs Hired from Register, but Officials Believe Their Needs Could Be Better Met with More Hiring Flexibility

In 2007, OPM revised its examination of ALJ applicants by, among other things, revising the minimum qualification requirements, developing a set of competencies,²³ assessing applicants against the competencies, and changing the examination scoring method. According to OPM, in fiscal year 2008, SSA hired 185 ALJs and HHS hired 7 ALJs from the register established as a result of OPM's new ALJ examination.²⁴ SSA officials told us that they are very pleased with the quality of ALJs they hired. HHS officials stated that they are satisfied that the process provided them with highly qualified candidates.

OPM is responsible for scoring the results of the competitive examination and maintaining a register of qualified candidates in rank order of their final scores. According to OPM officials, after the job announcements in 2007 and 2008, it took about 6 months for OPM to complete the examination process and assign the final ratings to qualified applicants.

²²See GAO, *Social Security Disability: Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog*, [GAO-09-398](#) (Washington, D.C.: September 9, 2009) and GAO, *Coast Guard: Administrative Law Judge Program Contains Elements Designed to Foster Judges' Independence and Mariner Protections Assessed Are Being Followed*, [GAO-09-489](#) (Washington, D.C.: June 12, 2009).

²³OPM defines "competency" as a measurable pattern of knowledge, skills, abilities, behaviors, and other characteristics needed to successfully perform work-related tasks. OPM indicated their ALJ competencies applied to both incoming and incumbent ALJs.

²⁴In addition, according to OPM, Department of Labor hired 2 ALJs and Department of Housing and Urban Development hired 1 ALJ from the new register. As of August 4, 2009, the Social Security Administration had hired 143 ALJs and the U.S. Postal Service had hired 1 ALJ from the new register during fiscal year 2009.

The pool of potential ALJ applicants appears to be large because in 2007 and 2008 OPM was able to receive the requested number of applications in only a few days. According to OPM officials, when OPM reopened the ALJ register in 2007, they received the desired number of applications within 1 week of posting an ALJ vacancy announcement. In 2008, OPM received its desired number of applicants within 3 days. In November 2009, OPM opened a new vacancy announcement for ALJ vacancies. It received the requested number of applicants within 2 days.

Upon request, OPM provides ALJ agencies with a certified list, referred to as a certificate, of the highest scoring candidates from the register who are available to serve at the vacancy locations. If agency officials choose to fill a vacant ALJ position with a new ALJ, then the agency must appoint one of the candidates listed on OPM's certificate. The interview and selection processes vary across ALJ agencies, but all agencies must comply with federal law and regulations regarding competitive employment. For example, agencies must comply with the veterans' preference requirement and the "rule of three"—agencies must select from the highest scoring three candidates available to serve in a given location. SSA and HHS officials told us that it took 8 to 15 weeks from the date the agency requested an OPM certificate of candidates until a selected candidate reported to work.

Despite their satisfaction with the quality of the ALJ candidates, SSA and HHS officials stated that the ALJ hiring process should have more flexibility in order for them to appoint candidates that best meet their agency-specific needs. According to SSA officials, OPM uses a one-size-fits-all approach in establishing its register of candidates. SSA officials' reported position was that OPM's ALJ examination of applicants should also weigh the specialized knowledge and skills needed to adjudicate SSA cases such as the ability to manage a large docket because SSA ALJs adjudicate a high volume of cases, and the temperament to work on non-adversarial cases with unrepresented claimants. SSA was also concerned about the process for assessing whether an ALJ candidate on an OPM list of certified candidates was actually suitable for selection and

appointment.²⁵ SSA officials told us that they currently try to assess the specialized abilities and the potential suitability of ALJ candidates through SSA's ALJ interviewing process and investigating the candidates' backgrounds. SSA officials told us that, in their opinion, the process was laborious, and requested that OPM assess the suitability of candidates listed on the certificates provided to agencies. Lastly, SSA raised concerns about the adequacy of the register to meet their hiring needs. Given SSA's plans to hire more than 226 ALJs during fiscal year 2010, SSA officials reported to us their concern that the register would not provide an adequate number of suitable candidates to consider for selection. SSA requested that OPM refresh the register with new candidates as soon as possible and plan to do so, on a regular basis.

The Chief ALJ of HHS's Office of Medicare Hearings and Appeals (OMHA) also noted that OPM's examination process does not provide HHS with candidates who have specialized knowledge important for adjudicating cases in HHS. He thought, for example, that having 3 years of Medicare experience would be an asset for an incoming OMHA ALJ. He suggested that there should be a more flexible process to enable the agency to select candidates who might be a better fit for the agency's work. The Chair of HHS's Departmental Appeals Board did not have specific comments regarding the current hiring process. This board had not had an ALJ vacancy to fill from 2003 through 2008, and thus, had not hired an ALJ from the OPM register in 2007 or 2008.

The OPM official responsible for the competitive examination process reported that OPM experts concluded that having certain specialization or expertise would not produce a better cadre of ALJs. In OPM's view, the most important characteristic that ALJs need is the ability to master lots of facts rather than specialized knowledge. Consideration of any additional flexibility in ALJ hiring must await the conclusion of pending litigation.

²⁵ According to OPM, an employing agency's offer of employment to a candidate is generally made prior to a suitability assessment, and conditioned upon a subsequent determination that the candidate is suitable for federal employment. Agencies are free to request an investigation as soon as a name is forwarded on a certificate. When an agency, acting under delegated authority, determines that a governmentwide debarment by OPM may be appropriate, it must refer the matter to OPM for debarment consideration prior to any proposed suitability action. When suitability concerns arise, agencies may alternatively submit to OPM an "objection" or a request to "pass over" a particular candidate, based upon the criteria set out in the suitability regulations. In June 2009, SSA raised concerns regarding 7 of 400 candidates that had recently been submitted to it on ALJ certificates.

With regard to SSA's interest in assessing the suitability of all ALJ candidates on the register, OPM reported in July 2009 that it was reviewing the documentation SSA provided regarding specific candidates. OPM noted that the suitability review process encompassed both a background investigation and an adjudication, either at the hiring agency or at OPM, depending upon the nature of any issues identified during the investigation. Agencies are required to reimburse OPM for each background investigation it conducts. Although ALJ agencies could request OPM undertake a suitability investigation at any point in the process, selecting officials usually commence the suitability assessment process only when the agency is ready to make a selection because of the expense associated with conducting a proper suitability investigation. OPM indicated that there was no appropriate mechanism whereby OPM could undertake suitability assessments in advance on all the candidates on the ALJ register, and has not received an appropriation to conduct investigations at its own expense.

Regarding SSA's request for a routine refreshment of the ALJ register, OPM indicated that it refreshes its register of ALJ candidates by offering its ALJ examination to new applicants and completing its examination of the applicants. As examining ALJ applicants requires significant assistance of retired and sitting ALJs, OPM does not want to overburden these ALJs by offering the examination too frequently. According to OPM, the ALJ register was most recently refreshed in March 2009. The timing for opening the examination is based on several considerations, such as future hiring needs. OPM regularly queries agencies about their projected ALJ hiring needs and uses the agencies' responses to plan when to re-administer the ALJ examination. As of July 2009, they anticipated they could issue certificates that would provide an ample number of choices from which to select candidates to meet the agencies' reported hiring needs. OPM and SSA officials are addressing the issues SSA raised and, where appropriate, are developing new approaches and solutions.

Agencies Could Experience Skill and Competency Gaps in ALJ Workforce Due to Potential Retirements

ALJ agencies could face skill and competency gaps unless ALJ agencies and OPM take concerted action to assure that, in the face of significant retirement eligibility, the ALJ agencies have developed ALJ hiring and succession plans. As of September 2008, the most current data available, 51 percent of employed ALJs were eligible to retire by the end of 2008. By 2013, 79 percent of ALJs will be eligible for retirement. To put these numbers in perspective, we recently reported that about one-third of the federal workforce on board at the end of fiscal year 2007 will be eligible to retire by 2012.²⁶

The proportion of ALJs who were eligible to retire was not the same at each of the 25 ALJ agencies (see table 2). As of September 2008, at 9 of the 25 ALJ agencies, all of the ALJs were already eligible to retire and at 21 of the agencies half or more of the ALJs were eligible to retire. At 4 of the 25 agencies, less than half of the ALJ workforce was eligible to retire.

Table 2: Majority of ALJs Eligible to Retire at 21 of 25 ALJ Agencies by the End of Fiscal Year 2008

	Federal agencies employing ALJs	Number of ALJs employed	Number eligible to retire	Percentage of agency's ALJs eligible to retire ^a
1	Social Security Administration	1,192	598	50
2	Department of Health and Human Services ^b	72	19	26
3	Department of Labor	41	21	51
4	National Labor Relations Board	40	34	85
5	Department of Energy	15	9	60
6	Occupational Safety & Health Review Commission	11	8	73
7	Department of Interior	10	5	50
8	Federal Mine Safety and Health Review Commission	9	6	67
9	Department of Homeland Security	5	3	60
10	U.S. International Trade Commission	5	4	80
11	Federal Labor Relations Authority	4	1	25
12	Environmental Protection Agency	4	3	75

²⁶For more information, see GAO, *Older Workers: Enhanced Communication among Federal Agencies Could Improve Strategies for Hiring and Retaining Experienced Workers*, [GAO-09-206](#) (Washington, D.C.: February 24, 2009).

Federal agencies employing ALJs		Number of ALJs employed	Number eligible to retire	Percentage of agency's ALJs eligible to retire ^a
13	Securities and Exchange Commission	4	4	100
14	National Transportation Safety Board	4	4	100
15	Department of Agriculture	3	3	100
16	Department of Justice	3	2	67
17	Department of Transportation	3	3	100
18	Commodity Futures Trading Commission	2	2	100
19	Federal Communications Commission	2	2	100
20	Department of Housing and Urban Development	2	1	50
21	Department of Education	1	1	100
22	Federal Trade Commission	1	0	0
23	Federal Maritime Commission	1	1	100
24	Small Business Administration	1	1	100
25	Department of the Treasury	1	0	0
Total		1,436	735	51

Source: GAO analysis of OPM Central Personnel Data File for Fiscal Year 2008.

^aRounded to the nearest percentage.

^bThe ALJ statistics for HHS are for Office of the Secretary, which includes the Office of Medicare Hearings and Appeals and the Departmental Appeals Board and employed 71 ALJs, and the Food and Drug Administration, which employed 1 ALJ.

Administrative law judges are typically older and have served the public longer than other federal employees. For example, as of fiscal year 2008, these ALJs were, on average, about 61 years old and had about 21 years of federal service. In contrast, as of 2005, the average age of the federal workforce governmentwide was about 46 with about 15 years of service.

Despite the widespread retirement eligibility of the ALJ workforce, most ALJs do not retire immediately upon becoming eligible to retire. In 2007, about 72 percent of administrative law judges were still in the federal workforce more than 5 years after their eligibility date. Overall, the ALJ program has experienced a low annual retirement rate, ranging from 2 to 5 percent from 2002 through 2006, which was about the same as the total federal workforce, which we noted is younger and generally has fewer years of service.

ALJ retirements could significantly affect agencies' adjudication capacities in two ways. First, retirements could significantly affect those agencies employing a small ALJ workforce. For the 15 agencies employing fewer than 5 ALJs, one retirement represents a loss of 25 percent or more of their ALJ capacity, at least temporarily. Secondly, ALJ retirements could also have a more pronounced effect at those agencies facing increasing case workloads because the agency would be losing experienced ALJs at a time when demand for their services is increasing. For example, in 2008, SSA hearing offices received nearly 590,000 claims, an increase of about 6 percent from 2006. In March 2009, the SSA Commissioner projected that, due to the economic downturn, SSA would receive approximately 50,000 more hearing requests in fiscal year 2009 than in fiscal year 2008. HHS's Office of Medicare Hearings and Appeals has also experienced an increasing workload in recent years. In January 2009, the HHS Inspector General reported that, from July 2006 to May 2008, the office's caseload increased 37 percent to over 28,000 cases, while the number of cases with the 90-day decision requirement more than tripled, from 6,079 to 20,720 cases.

Although it appears there are abundant candidates to fill vacant positions, we have reported that retiring employees can leave gaps in institutional knowledge and technical skills. These gaps can arise because, among other reasons, it can take several months for new hires to become fully productive. For example, at SSA, it takes 1 to 2 months to train a new ALJ, plus an additional 9 months of on-the-job experience, before SSA considers a new ALJ to be fully productive.

While actual ALJ retirements lag eligibility by several years, the agencies cannot rely on either the low ALJ retirement rate or the lag between eligibility and retirement to remain constant. According to OPM, although demographic factors such as age and years of service can help predict time of retirement, other factors that are not available are likely to have a much larger impact on retirement decisions. Such factors include familial situations, illness, caretaker status, children in college, the cost of tuition for their children, and others. The lack of data for some of these factors may limit the accuracy of retirement forecasts.

OPM is the lead agency in guiding federal human capital management at executive branch agencies. To assess federal agencies' human capital management, OPM established the Human Capital Assessment and Accountability Framework (HCAAF). One of the assessment standards relates to ensuring agencies have the talented staff that their mission requires. To meet this standard, OPM requires agencies to make

meaningful progress toward closing skills, knowledge, and competency gaps in all occupations used in the agency. Furthermore, the standard requires the agencies particularly to close skills, knowledge, and competency gaps in mission-critical occupations.²⁷ For example, SSA's Fiscal Year 2009-2011 Strategic Human Capital Plan, SSA identified ALJs as a mission-critical occupation and developed a set of ALJ-specific competencies to guide its ALJ recruitment, retention, and workforce development initiatives. Despite the significant proportion of ALJs who were eligible to retire between 2008 and 2013, OPM officials told us that, as of October 2009, they had no record or knowledge of any federal agency designation of ALJ skill gaps or competency issues.

Agencies Manage ALJs without the Use of Performance Ratings or Competencies

SSA and HHS Use Numerous Practices Other Than Performance Ratings to Manage ALJ Performance

Performance management systems can be powerful tools in helping an agency achieve its mission and ensuring employees are working toward common ends. Performance management systems should help employees understand their responsibilities and how their day-to-day work contributes to meeting their agency's strategic goals as well as providing a mechanism for giving employees candid, specific feedback on how well they are meeting their performance expectations. According to OPM's performance management guidance, employee performance management in the federal sector generally includes planning work and setting expectations, continually monitoring performance, developing the capacity to perform, periodically rating performance in a summary fashion, and rewarding good performance. However, in order to ensure that an ALJ is not unduly influenced by his or her employing agency, renders impartial decisions, and appears impartial, the APA and OPM regulations do not permit the employing agency to rate or tie an ALJ's compensation to the ALJ's performance.

²⁷ Mission-critical occupations can be identified as mission-critical across the federal government or for a specific agency.

Nevertheless, SSA and HHS managers reported that they employed a variety of practices other than ratings to directly and indirectly manage ALJ performance. An example of the variety in management practices is observed at HHS. There, the Chief ALJ of the Office of Medicare Hearings and Appeals (OMHA), a large hearing office, assigned more staff management responsibilities to his ALJs than the Chair of the Departmental Appeals Board (DAB), a smaller hearing office, assigned to her ALJs. At HHS's OMHA, which employed 65 ALJs at the end of fiscal year 2008, ALJs directly supervised their legal teams, attorney, paralegal specialist and legal assistant. In contrast, at HHS's DAB, which employed 6 ALJs at the end of fiscal year 2008, the ALJs did not supervise support staff.

Agency managers and ALJs described the ALJs' performance as significantly influenced by the hearing office performance, although the degree of dependency varies by ALJ agency.²⁸ Within this context, agency managers reported using a wide variety of practices to either directly influence ALJ performance, or to indirectly influence ALJ performance by addressing hearing office performance. The practices focused on such areas as hearing office management and staffing, case management, quantity and quality of adjudications, tools to expedite adjudication, workplace privileges, and progressive discipline. We did not assess the extent to which various practices were used at SSA and HHS, nor their effectiveness or appropriateness.

²⁸The hearing office at the ALJ agency provides the organizational, logistical and administrative support needed for the ALJ to conduct the on-the-record hearings. These hearings are complex processes due, in part, to the numerous steps and people involved in processing a claim. For a detailed description of generic ALJ duties and responsibilities see Internet edition of Morell E. Mullins, *Manual for ALJ*, University of Arkansas (Little Rock, Ark., 2001), http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE_WORKS/MALJ_NAVIGATION.HTM (accessed Feb. 19, 2009).

Table 3: Examples of SSA or HHS Reported Management Practices Used to Directly and Indirectly Affect ALJ Performance

Direct management practices	Example
Coaching	Holding informal discussions, encouraging peer competition, providing formal executive coaching
Workplace privileges	Approving requests for flexi-place, training
Training	Providing ALJs with training on case management and adjudication
Quality	Setting goals and measures, routinely reviewing of decisions, tracking measures, providing feedback and training to ALJs
Quantity/productivity	Setting goals and measures, tracking measures, providing feedback, feedback and training to ALJs
ALJ conduct	Tracking and responding to complaints regarding ALJ conduct
Progressive discipline	Providing counseling, issuing letters of reprimand, filing a case with the MSPB
Indirect management practices	
Hearing office management	Hearing office manager supervising support staff; assigning support staff to various ALJs
Staffing	Employing sufficient number of ALJs and support staff to meet caseload demands
Training	Providing managers with regular training on managing caseload, ALJs and support staff
Case management	Setting case processing benchmarks, developing expedited procedures
Use of tools to expedite case processing	Using of electronic document processing, standardizing of process steps, using video or teleconferencing

Source: GAO analyses of ALJ-related documents from SSA, HHS, OPM, AALJ, ABA, and FALJC, and interviews with these agency and association officials.

The direct practices reported are common to managing the performance of all federal employees. For example, SSA and HHS ALJ managers reported providing informal feedback and coaching. The indirect practices reported addressed aspects of the hearing process that were not directly under the control of the ALJ. For example, one indirect approach was to improve the efficiency of case processing by using electronic document processing, standardizing process procedures, and tele- and videoconferencing.

ALJ Stakeholders Raised No Concerns about HHS Practices, but Are Concerned with SSA's Use of Productivity Goals

ALJ agency managers and officials from ALJ-related associations expressed differing views regarding current performance management practices. Managers at HHS's OMHA and DAB thought that statutory and regulatory deadlines were helpful in managing ALJ productivity. The Chief ALJ for OMHA thought that their most significant performance management problem was having enough resources to meet the demands of their work. He felt there were sufficient safeguards in place to effectively manage the performance of his supervisory ALJs, while avoiding interference in the ALJs' decision making. The Chair of HHS's Departmental Appeals Board found she could effectively manage the ALJs' performance by engaging them in improving the hearing process. Yet, while each thought either a performance rating or award could be a useful management tool in certain situations, if available, they reported they were able to manage effectively without such tools. AALJ and FALJC did not raise concerns about specific ALJ management practices at either HHS office.

At SSA, however, ALJ performance management was of much greater concern among ALJ stakeholders, especially pertaining to ALJ productivity.²⁹ In 2007, in order to help SSA reduce its disability hearing backlog, the Chief ALJ requested the ALJs to manage their dockets in such a way that they would be able to issue 500-700 legally sufficient decisions each year. As of July 2009, SSA reported that the request had been an effective tool, among several others, in helping to raise ALJ productivity.³⁰ Officials from the AALJ and FALJC questioned the use of a productivity goal as a major tool to manage ALJ performance for several reasons, including their view that SSA had not conducted a systematic study to validate the appropriateness of the numerical range of cases in the goal.³¹ According to AALJ, FALJC, and ABA officials, SSA's emphasis on productivity is detrimental to maintaining or improving other important dimensions of ALJ performance, such as the quality of ALJ decision making. In addition, AALJ and the Social Security Advisory Board raised

²⁹The contention over ALJ productivity at SSA has been ongoing for over three decades. GAO has written several reports related to this issue, most recently GAO, *Social Security Disability: Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog*, [GAO-09-398](#) (Washington, D.C.: September 9, 2009).

³⁰For fuller description of SSA ALJ productivity and its measurement, see [GAO-09-398](#).

³¹SSA had conducted a study prior to setting a previous ALJ productivity goal, in response to a GAO recommendation in GAO, *Social Security: Many Administrative Law Judges Oppose Productivity Initiatives*, [GAO/T-HRD-90-39](#) (Washington, D.C.: June 13, 1990).

concerns that the agency's emphasis on ALJ productivity may result in unintended consequences. For example, the AALJ and the Social Security Advisory Board noted an increase in the number of favorable decisions. The Advisory Board found that as the number of decisions increases, the percentage of favorable decisions tend to increase. The AALJ and the Social Security Advisory Board expressed concern because rendering a decision favorable to a party appealing an agency determination requires less ALJ time than rendering an unfavorable decision. SSA's emphasis on ALJ productivity may lead to more favorable decisions and result in increasing long-term costs to the federal government.³² The Social Security Advisory Board suggested SSA monitor the correlation between the number of decisions and the number of favorable decisions. In contrast, SSA reported in December 2009 that the rate of favorable decisions (allowance rate) had not changed significantly from fiscal year 2001 through the first quarter of fiscal year 2010.

Competencies Provide a Fuller Picture of Performance

We have reported that high-performing organizations both in the United States and abroad have applied, among other strategies, a set of competencies in their employee performance management to provide a fuller picture of performance. Importantly, we found that systematically applying competencies to guide employee performance management had several advantages beyond using competencies to rate or reward individual performance. These advantages include helping managers to structure their performance discussions, enhancing consistency in performance, and ensuring an objective, balanced review of all the areas significant to the performance of the individual. Lastly, we have reported that high-performing organizations that actively involve employees and stakeholders in developing the performance management systems and provide ongoing training on the systems help increase their employees' understanding and ownership of the organizational goals and objectives.³³

OPM and SSA have developed competencies to support other aspects of ALJ employment. As noted earlier, OPM uses a set of competencies in its

³²In 2006, a study calculated that the value of federal spending for the average Disability Insurance awardee was more than \$245,000. This average cost per awardee translated into about \$204 billion in annual federal costs for the 832,000 new awards made during the 2005. See D. Autor and M. Duggan, "The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding," *The Journal of Economic Perspectives*, Vol. 20, No. 3, Summer 2006, pp. 71-96.

³³See [GAO-03-488](#).

examination of ALJ applicants, while SSA uses a set of ALJ competencies to assist in their workforce planning. However, OPM has not established performance competencies to guide ALJ agencies in their day-to-day management of ALJs. As noted earlier, APA and OPM regulations prohibit ALJ agencies from issuing performance ratings and awards to ALJs. Yet, recently, the ALJ associations urged OPM to implement a particular set of performance standards. Particularly, in 2006, the presidents of several ALJ-related associations, including AALJ and FALJC, urged OPM to support codifying into law or regulation ABA's Model Code of Judicial Conduct as a standard for satisfactory ALJ conduct and performance to which ALJs must adhere. That same year, the ABA stated that they believed ALJs should be subject to, and accountable under, appropriate ethical standards adapted from its Model Code of Judicial Conduct.³⁴ We did not assess the appropriateness or relative strengths of these different sets of competencies or standards.

The use of competencies might also help OPM and the ALJ agencies to ensure the ALJs' decisional independence, a responsibility unique to ALJ management and which OPM and the ALJ agency share. Even though the competencies may not be used to influence compensation, a set of validated competencies would help managers and ALJs to define the skills and supporting behaviors that ALJs need to effectively contribute to organizational results, and thereby a shared framework for discussing employee performance and management practices. Moreover, a set of validated competencies would also help ensure objective and balanced discussions between managers and ALJs regarding performance, and enhance the consistency of ALJ performance. Furthermore, OPM has expertise in providing performance management consulting to federal agencies.

Without the systematic application of standards or competencies and other safeguards to employee performance management, contention over managing performance, such as at SSA, can arise and persist. For example, we have previously reported on the use of performance standards related to the quality and quantity of ALJ decisions to evaluate ALJ performance, first recommending their use in 1978.³⁵ In 1990, we noted that the lack of a study to support SSA's use of an ALJ performance goal (case dispositions

³⁴The most recent version of ABA's Model Code of Judicial Conduct was published in 2007.

³⁵See GAO, *Administrative Law Process: Better Management Is Needed*, FPCD-78-25 (Washington, D.C.: May 15, 1978).

per month) led to long-standing conflict between SSA and its ALJs.³⁶ In setting its ALJ productivity expectation in October 2007, SSA officials indicated that they relied on recent historical ALJ productivity data, rather than conducting a systematic study. Officials from AALJ reported to us that SSA did not consult with them prior to issuing their ALJ productivity goal in October 2007. As noted earlier, the conflict between SSA and its ALJs over SSA's use of an ALJ productivity goal continues into its third decade.

Several Options Have Been Proposed to Revamp ALJ Program Management

Over the last 25 years, several statutory options have been proposed to change the employment and management of ALJs. The options have addressed to varying degrees several key issues, such as which federal agency manages the ALJ program, which agency employs ALJs, whether ALJs receive a performance appraisal, the purpose of the appraisal, and so forth. In this section, we summarize three statutory options which have been proposed, without assessing the strengths and weaknesses of each proposal. We selected these three proposals because, collectively, these proposals contained the major design features of other more narrowly focused options.

Table 4: Summary of Key Features of Current Program and Proposed Options

	Current program features	ALJ Corps H.R. 1802 (1995)	ALJ Conference H.R.5177 (2000)	Social Security Advisory Board (2006)
Management of the ALJ Program				
Program Manager	OPM	Corps Chief ALJ and council	Conference Chief ALJ	OPM
Require a dedicated office to manage the program	No	Yes	Yes	
Organization selecting candidates from applicants	OPM	OPM	Conference	SSA and OPM
Organization appointing candidate to ALJ	ALJ agency	Corps council	Conference	ALJ agency
Terms and conditions of ALJ employment				
Career or term appointment for Chief ALJ	Career	5-year term	5-year term	
Appointment of ALJs	Career	Career	Career	

³⁶See GAO, *Social Security: Many Administrative Law Judges Oppose Productivity Initiatives*, [GAO/HRD-90-15](#) (Washington, D.C.: December 7, 1989).

	Current program features	ALJ Corps H.R. 1802 (1995)	ALJ Conference H.R.5177 (2000)	Social Security Advisory Board (2006)
Organization setting the ALJs' pay and compensation	OPM	OPM	Conference	OPM
ALJs eligibility for bonus or award for non-judicial duties	No			Yes
Management of ALJs				
Organization assigning ALJ to agency	ALJ agency and OPM	Corps council	Conference and assigned agency	Agency Chief ALJ
Organization managing ALJs' daily work	ALJ agency	Corps division Chief ALJs	Agency Chief ALJ	Agency Chief ALJ
Organization establishing rules of judicial practice	ALJ agency	Corps council	Conference Chief ALJ	Agency Chief ALJ
Use of a judicial code of conduct for performance standards	No	Yes	Yes	
MSPB determines good cause before employing agency takes adverse action	Yes	Yes	Yes	Yes
Organization carrying out adverse disciplinary actions	ALJ agency	Corps council	Conference	Agency Chief ALJ
ALJ-specific performance or conduct standards established	No	Yes	Yes	Yes
Performance appraisals permitted	No			Yes

Source: GAO analyses of legislation and Social Security Advisory Board 2006 report.

Note: a blank cell means the description of the proposed option did not address this specific program feature.

ALJ Corps Option

The ALJ Corps option was proposed repeatedly in Congress between 1983 and 1995.³⁷ The 1995 version of the legislation was intended to ensure the impartial resolution of cases by changing the APA in order to establish an independent corps of ALJs within the executive branch of government. The corps would organize ALJs into divisions of practice areas; each led by a supervisory division chief ALJ who would serve as a liaison between the division and the agency that required ALJ services. The head of the ALJ Corps, the Chief ALJ, would be a presidential appointee with Senate confirmation. The Chief ALJ and the division chief ALJs would serve on the Corps Council. This body and a Complaint Resolutions Board would review complaints against ALJs. The council would have the authority to take disciplinary action against ALJs if MSPB determined there was "good

³⁷Most recent proposed legislation was the *Reorganization of the Federal Administrative Judiciary Act*, H.R. 1802, 104th Congress (1st Sess. 1995).

cause.” The legislation did not provide additional details regarding ALJ performance management.

A major difference between the ALJ Corps option and the current system is that ALJs would no longer be employed by the agency whose cases they are hearing. Instead, they would be employed by the corps. The Corps Council and the division chief ALJs would assign ALJs to the agencies, manage their workload, establish a code of conduct and establish the rules of the judicial practice. OPM’s role would be limited to selecting candidates from among job applicants and maintaining the register of qualified candidates. This legislation passed the Senate in 1993, but was not considered for a vote by the House of Representatives.

ALJ Conference Option

The ALJ Conference option was proposed in the House of Representatives in May of 1998 and September of 2000.³⁸ The 2000 version of the legislative proposal changes the APA in order to create the ALJ Conference of the United States to, among other objectives, “promote efficiency, productivity, and the improvement of administrative functions, [and] to enhance public service and public trust in the administrative resolution of disputes.” The conference would be led by a Chief ALJ who would be a presidential appointee with Senate confirmation and who could serve a maximum of two 5-year terms. Unlike the ALJ Corps option, this option proposed to eliminate OPM’s ALJ program responsibilities. This proposed legislation was not considered for a vote by the House or the Senate.

The major difference between the ALJ Conference option and the current system is that all of OPM’s current program responsibilities, such as the applicant examination and maintaining a register of qualified candidates, would be transferred to the ALJ Conference. The legislation would also allow the Chief ALJ to adopt and issue rules of judicial conduct for ALJs as long as those rules were consistent with the ABA’s Model Code of Judicial Conduct for ALJs. The rules of conduct would provide for a voluntary alternative dispute resolution process conducted at the request of the ALJ. The legislation did not provide additional details regarding managing ALJ performance.

³⁸Most recent proposed legislation was the *Administrative Law Judge Conference of the United States Act*, H.R. 5177, 106th Congress (2nd Sess. 2000).

Social Security Advisory Board Option

The latest proposed option came from the Social Security Advisory Board in 2006.³⁹ The board's option suggested making statutory changes to allow for case processing guidelines and rating of ALJs. The intended purpose of the board's suggestions was to increase accountability in the hearing process, and, according to board officials, provide useful information to ALJs and management. To protect against any interference with their decisional independence, this option would have the agency establish a system to investigate allegations from ALJs of such interference and to take appropriate action. OPM would have oversight responsibility for this activity and could review the agency's response to allegations and recommend further action. ALJs would also continue to have the other protections for decisional independence that are provided by statute: their pay would be set in accordance with OPM guidelines and the agency must provide an ALJ an opportunity for a hearing before the Merit Systems Protection Board and their establishment of good cause before taking any adverse action against the ALJ.

The major difference between the Advisory Board's option and the current system is that the board's option allows the ALJ agency, through the agency's Chief ALJ, to conduct performance appraisals for ALJs. These reviews would consider ALJ performance relative to such criteria as case processing guidelines, judicial comportment and demeanor, and adherence to law, regulation, and binding agency policy. The guidelines would be set in collaboration with the ALJs' union, agency members, and others. The reviews would not include a numerical rating or ranking or determine pay, but would provide feedback on performance to assist ALJs in improving themselves and their general discipline. According to Advisory Board officials, the board recommendation would not affect ALJs' pay.

To date, these three proposed options have not progressed to consideration by both houses of Congress.

Conclusions

Officials from SSA, the largest ALJ employer, told us they were satisfied with the quality of their 2008 ALJ candidates, as did officials from HHS's Office of Medicare Hearings and Appeals, the next largest employer of

³⁹Social Security Advisory Board, *Improving the Social Security Administration's Hearing Process* (Washington, D.C., September 2006). The Board's report also included recommendations to improve performance in the absence of an ALJ performance appraisal system.

ALJs. However, these officials told us that, in their opinion, there should be more flexibility in the ALJ hiring process in order to better meet their needs. OPM is responsible for the examination of ALJ applicants and the certification of qualified ALJ candidates, the first phase in the ALJ hiring process. ALJ agencies must select their new ALJs from an OPM certificate of qualified candidates. Beyond these two largest ALJ employers, which were the focus of our work, OPM could benefit from collecting the views from ALJ agencies employing smaller numbers of ALJs about the new hiring process and the potential need for additional flexibilities. As the federal agency authorized to administer the governmentwide ALJ program, including prescribing hiring regulations, OPM could help ALJ agencies develop strategies to address any concerns, either within the existing hiring process or by revising the process.

To ensure federal agencies have talented staff, OPM requires agencies to make meaningful progress toward closing skills, knowledge, and competency gaps/deficiencies in all occupations used in the agency. A review of the ALJs' retirement eligibility raises concerns about potential vulnerabilities in the future ALJ workforce. Given the high percentage of retirement-eligible ALJs across the federal government, the ALJ workforce is vulnerable to knowledge and skill gaps. Yet despite this vulnerability and OPM's human capital management standard, OPM officials reported they had no record or knowledge of any federal agency designation of ALJ skill gaps or competency issues. OPM is well-positioned through its role as the ALJ program manager and its annual review of federal agencies' human capital accountability plans to assure that ALJ agencies appropriately identify and plan for future ALJ-related skill and competency gaps. The identification of such gaps will enable OPM to provide ALJ agencies with necessary guidance, tools, and technical assistance to address agency ALJ workforce gaps. In addition, OPM can take a comprehensive view of the risks that retirements pose to the capacity of the ALJ workforce, and lead programwide initiatives, if necessary, to identify, minimize, and mitigate potential skill gaps.

Given the many practices reportedly used to manage ALJ performance, the concerns raised by the ALJ-related associations regarding SSA emphasis on ALJ productivity, and the ALJ agency's need to balance meeting its organizational goals with ensuring the ALJ's decisional independence, OPM should review the state of ALJ performance management across all ALJ agencies. OPM is well-positioned to lead in reviewing the agencies' ALJ-related management practices because it is the only federal agency with the statutory authority to investigate the entire ALJ program and, by regulation, defines those management practices that ALJ agencies may not

perform. Moreover, OPM and the ALJ agency share responsibility for managing the ALJ's performance. Such a review could (1) identify the practices currently used to manage ALJ performance, (2) collect the views of ALJ managers and ALJs regarding effective ALJ performance management, (3) determine if the ALJ performance concerns raised at SSA are shared by ALJ managers across all ALJ agencies, or if such concerns are limited to a few ALJ agencies, and (4) ensure current practices do not infringe on ALJ decisional independence. If OPM and/or the ALJ agencies determine that the current ALJ performance management needs programwide or agency-level improvement, these agencies could develop agreed-upon competencies, using existing agency and professional competencies as starting points. While the agreed-upon competencies could not be used to influence ALJ compensation, they could help improve ALJ performance management by defining the skills and supporting behaviors that ALJs need to effectively contribute to organizational results, ensuring objective and balanced discussions between managers and ALJs regarding performance, and enhancing consistency of ALJ performance.

Recommendations for Executive Action

Given OPM's statutory authority for administering the ALJ program, we recommend the Director of OPM take the following five actions related to hiring and managing the performance of ALJs in order to (1) identify opportunities for continuous improvement of the ALJ hiring process, (2) identify and address potential competency gaps, and (3) identify opportunities for improved performance management practices while maintaining ALJs' decisional independence:

- After current hiring related litigation is resolved, solicit ALJ agencies' feedback on the new examination process and determine whether additional agency flexibilities are needed in the ALJ hiring process.
- Assure ALJ agencies have identified the extent to which their ALJ workforce is vulnerable to knowledge and skill gaps and addressed these gaps in their annual human capital plans, if appropriate. OPM should assist agencies by providing guidance, tools and technical assistance to enable agencies to identify and address any skill or competency gaps in its ALJ workforce.

Moreover, consistent with the need for ALJ decisional independence, lead a program-wide review with ALJ stakeholders of ALJ performance management options. This review should:

- Determine the degree to which current practices are meeting the goals of the ALJ agencies and ensuring ALJs' decisional independence.

-
- Consider the use of competencies in ALJ performance management while not influencing ALJ compensation.
 - Consider the development and distribution of programwide guidance for ALJ performance management and the involvement of ALJs and stakeholders in the development of such guidance in order to gain employee and management ownership of performance management systems.

Agency and Third-Party Comments and Our Evaluation

We provided a draft of this report to the Secretary of HHS, the Commissioner of SSA, and the Director of OPM for review and comment. The Acting Assistant Secretary for Legislation of HHS and the Commissioner of SSA provided technical comments which we incorporated as appropriate. The Director of OPM responded with written comments, which we have reprinted in appendix II. Consistent with our protocols, we provided a summary of the performance management section of the draft report to the officials from AALJ, the ALJ union, ABA, and FALJC for their comments. They also offered technical comments which we incorporated as appropriate. Collectively, they thought the report's discussion of performance management was helpful and appreciated the effort made to ensure their views were presented accurately. Additionally, SSAB provided technical comments on our presentation of their results and ALJ option from their 2006 report, which we incorporated as appropriate.

OPM said it agreed with our recommendation that OPM consult with agencies prior to designing the next examination and was already planning to do so. Additionally, OPM expressed concern about the report's focus on "performance management" a term OPM does not normally apply to ALJs. In OPM's view, the term performance management, as defined in its regulations, is the effective use of performance appraisals, which are not used with ALJs. In OPM's opinion, "tying the discussion in the report to a concept applied to employees who may be evaluated and provided with awards is somewhat confusing and could lead to unintended consequences in terms of agencies' interactions with their ALJs." OPM also commented that the report appeared to assume that OPM's role in ALJ management was "well established and not subject to dispute." Although OPM indicated that it was open to considering our "suggestions for the greater involvement of OPM in the management of ALJs," OPM thought we should "tie that discussion to the statutory framework that actually applies to ALJs and indicate how it believes OPM could become more involved, within that framework."

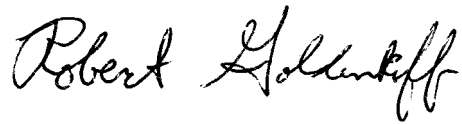
Our report notes that, as described by OPM guidance, performance management in the federal sector includes planning work and setting expectations, continually monitoring performance, developing the capacity to perform, periodically rating performance in a summary fashion, and rewarding good performance. Our report recognizes that, in accordance with APA and OPM regulations, ALJs are excluded from performance appraisals and awards. Nevertheless, other performance management practices are available to agencies to manage ALJ performance and agency managers reported to us that they are using such practices. As stated in our report, OPM could help employing agencies use these other practices to improve ALJ performance management, while helping both OPM and the ALJ agency ensure the ALJs' decisional independence.

Additionally, statutory provisions authorize OPM to prescribe regulations governing nearly all aspects of ALJ employment (the exception being that the Merit Systems Protection Board is responsible for discipline or removal of ALJs). Further, OPM is the only agency in the federal government with authority to issue regulations on ALJ employment. OPM's authority to prescribe regulations includes the authority to "implement, interpret or prescribe law or policy..."⁴⁰ For these reasons, we believe OPM has the authority to take a more active role in the management of the ALJ program, and that it should do so. OPM also provided technical comments which we incorporated, as appropriate.

We are sending copies of this report to the congressional committees with jurisdiction over HHS and its activities; the Secretary of HHS; and the Director of OMB. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

⁴⁰ 5 U.S.C. § 552.

If you have any questions about this report, please contact me at (202) 512-2757. Key contributors to this report are listed in appendix VI. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report.

A handwritten signature in black ink, reading "Robert N. Goldenkoff". The signature is written in a cursive style with a large, stylized "R" and "G".

Robert N. Goldenkoff
Director, Strategic Issues

List of Congressional Addressees

The Honorable Tom Harkin
Chairman
The Honorable William Thad Cochran
Ranking Member
Subcommittee on Labor, Health and Human Services, Education,
and Related Agencies
Committee on Appropriations
United States Senate

The Honorable David R. Obey
Chairman
The Honorable Todd Tiahrt
Ranking Member
Subcommittee on Labor, Health and Human Services, Education,
and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable George V. Voinovich
Ranking Member
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Richard J. Durbin
United States Senate

The Honorable John S. Tanner
Chairman
Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Appendix I: Objectives, Scope, and Methodology

Based on a mandate accompanying the Consolidated Appropriations Act of 2008,¹ this report examines: (1) the process for hiring administrative law judges (ALJ) and selected agencies' observations on the process; (2) the level of retirement and retirement eligibility for ALJs; (3) the reported ALJ management practices at the Social Security Administration (SSA) and the Department of Health and Human Services (HHS), and the stakeholders' views of these practices; and (4) the options that have been proposed to improve the management of the ALJ workforce, either within existing authorities or requiring new authorities.

We focused our data collection on the ALJ hiring process since 2007 and reported performance management practices as described by agency and association officials. As noted earlier, due to ongoing litigation, we did not collect detailed information regarding Office of Personnel Management's (OPM) use of its ALJ register in the 2007 and 2008 hiring.

To address these four objectives, we reviewed related legal documentation, program documentation gathered from OPM, the two federal agencies employing about 88 percent of ALJs—SSA and HHS—and three major professional associations for ALJs: the Association of ALJs, the Federal ALJ Conference, and the American Bar Association's National Conference of the Administrative Law Judiciary. We also conducted interviews with key officials from each of these organizations to gather information regarding each objective.

Descriptions of ALJ Organizations Providing Hiring and Performance Information

Office of Personnel Management

The following provides a brief description of each of the ALJ-related organizations providing hiring and performance information for this report.

OPM has managed the ALJ program since the agency was created in 1979. The ALJ program was managed through an Office of Administrative Law Judges until OPM disbanded the office in 2003. OPM divided the program responsibilities among OPM units, as follows:

- General Counsel serves as the initial contact for ALJ issues

¹Pub. L. 110-161.

SSA Office of the Deputy
Commissioner for Disability
Adjudication and Review

- Strategic Human Resources Policy (SHRP) Division has the lead for ALJ policy and regulations.
- Human Resources Products & Services (HARP) Division generates the ALJ examination, ranking, and register.
- Human Capital Leadership & Merit System Accountability (HCLMSA) Division handles the ongoing interaction with agencies and identifies their needs. They have the day-to-day agency liaison responsibility.

SSA administers two disability programs—Disability Insurance and Supplemental Security Income—that provide cash benefits to claimants who believe that they can no longer work because of severe physical or mental impairments. SSA’s Office of the Deputy Commissioner for Disability Adjudication and Review (ODAR) oversees the adjudication of those cases where disability claimants appeal the agency determinations of their benefits. The ODAR consists of the Office of the Chief Administrative Law Judge—the principal consultant and advisor to the Deputy Commissioner on all matters concerning the ALJ hearing function; Office of Appellate Operations (Appeals Council)—the final level of administrative review under the Administrative Procedure Act for disability claims; and the Office of Management which provides administrative support for all related management and office automation activities. According to OPM data, as of September 2008, SSA employed 1,192 ALJs. These ALJs were supervised by the Chief Administrative Law Judge, Deputy Chief ALJ, Regional ALJs, and Hearing Office ALJs.

HHS’s Office of Medicare
Hearings and Appeals

HHS’s Office of Medicare Hearings and Appeals (OMHA) was created in July 2005 when the responsibility for conducting appeals of Medicare benefit determinations transferred from SSA to HHS, Office of the Secretary. The Office of Medicare Hearings and Appeals (OMHA) is under the direction of the Chief Administrative Law Judge, who reports directly to Secretary of HHS. The Office’s ALJs issue decisions to appeals of agency determinations regarding Medicare claims brought under Parts A, B, C, and D of Title XVIII of the Social Security Act. Claimants who are dissatisfied with an ALJ decision can seek a further review and decision from the Medicare Appeals Council. In January 2009, the office employed 65 ALJs, including the Chief ALJ, 4 managing ALJs, and 60 supervisory ALJs.

HHS Departmental Appeals
Board

HHS’s Departmental Appeals Board (DAB), a component within the Office of the Secretary, is responsible for (1) reviewing certain disputes between grantees and constituent agencies of the department; (2) adjudicating certain civil remedies cases pursuant to delegations from the Secretary; and (3) performing other review, adjudication, and mediation services as

assigned. The board's ALJs hear and decide civil remedies cases and other cases as assigned. These cases include (1) sanctions against persons and entities associated with participation as a provider in federally funded health care programs or as an employee, contractor, or other fiscal relationship with the department; (2) contract abuses; and (3) termination of federal funding for alleged civil rights violations. In January 2009, the Board Chair reported she supervised five ALJs and one retired ALJ annuitant.

Association of Administrative
Law Judges

The Association of Administrative Law Judges (AALJ) is a professional union representing the ALJs employed at SSA and HHS's DAB. The AALJ has a collective bargaining agreement (CBA) with SSA which is in effect until 2010, and has had an interim CBA with HHS' DAB since 2003. As of March 2009, according to the union president, the AALJ represented about 1,100 of the approximately 1,400 federal administrative law judges, or over 78 percent of ALJs in the federal workforce.

Federal Administrative Law
Judges Conference

The Federal Administrative Law Judges Conference (FALJC) is a voluntary professional association of federal administrative law judges who perform judicial functions within the executive branch of the government. FALJC was organized over 60 years ago. In 2008, FALJC reported that its membership includes judges from virtually every federal agency that employs administrative law judges. As of March 2009, FALJC officials reported there were 174 members (136 are active ALJs and 38 are retired ALJs) that included management-level ALJs and line ALJs.

American Bar Association's
Judicial Division and National
Conference of Administrative
Law Judiciary

The American Bar Association's (ABA) Judicial Division represents judges who are members of ABA. As of March 2009, according to association officials, the Judicial Division had over 3,200 members. The division is comprised of six conferences: five judicial conferences and one lawyer conference. Federal ALJs formed what is now the National Conference of the Administrative Law Judiciary (NCALJ), as one of the Judicial Division's six conferences, in 1971. According to association officials, both federal and state ALJs can be members of the NCALJ, and, as of March 2009, the NCALJ had 233 members. According to an ABA official, there may be federal ALJs who are ABA members who are not also members of the Judicial Division or NCALJ since membership in these ABA suborganizations is voluntary.

ALJ Retirement-Eligibility
and Retirement Rates

To describe demographic data relating to the retirement eligibility of the ALJs, we analyzed employment data from OPM's human resource reporting system, Central Personnel Data File (CPDF) for the federal

agencies employing ALJs. We used the pay plan code to identify and analyze ALJ data in OPM's CPDF. We analyzed data on age, years in federal service, retirement eligibility, projected retirement rates, new hires, and similar characteristics of the ALJs. For most of the groupings, we examined the data from 1991 through 2008 and projected retirement eligibility through 2013.

To determine the percentage of ALJs eligible to retire, we examined the fiscal year in which an employed ALJ is first eligible for voluntary (optional) retirement with an unreduced annuity. For example, employees under the Federal Employment Retirement System (FERS) are eligible to retire with reduced annuities at any age from 55 to 62 with 10 years of service or less. The penalty for FERS employees retiring from age 55 to 61 with less than 20 years of service is that their annuity is reduced 5 percent for every year they are under age 62. We considered the penalty for retiring with less than 20 years under age 62 a disincentive and therefore did not include this methodology in the definition of "eligible to retire." By including FERS employees that were eligible to retire on reduced annuity in the definition of eligible to retire inflates the percentage of ALJs eligible to retire. Thus, eligible to retire is defined as "eligible to retire with an unreduced annuity." Moreover, we did not include temporary and term employees when calculating retirement eligibility because again, doing so inflates the percentage of employees that are eligible to retire in any given year. We defined age at the time the retirement action data was recorded; and the years of federal service was the effective date of service computation date as of September 30 of each CPDF file year. New hires data sets were created by comparing the employee identification numbers of the ALJs in the current year to that of the previous year. Any ALJ new to the data set in an analysis year was categorized as a new hire.

For the purposes of our report, we did not independently verify these data for the years we reviewed; however, in a 1998 report, we found that governmentwide data from CPDF for key variables in this study (agency, age, retirement plan, pay plan used to identify ALJs, and type of personnel action that identified new hires) were 97 percent accurate or better.² Since our 1998 report, we have monitored OPM's reporting requirements and data checks used to assure that CPDF data are reliable. We also reviewed OPM reports which note exceptions to OPM's reporting requirements.

²GAO, *OPM's Central Personnel Data File: Data Appear Sufficiently Reliable to Meet Most Customer Needs*, [GAO/GGD-98-199](#) (Washington, DC: Sept. 30, 1998).

In addition, to assess the reliability of data specifically used in the ALJ analyses we performed a variety of checks on the CPDF data to ensure they were complete, valid, and consistent with the OPM Guide to Personnel Data Standards. Although there were minor differences between agency reported numbers of ALJs and CPDF data, these differences would not change the findings of this report. Because the OPM CPDF data quality processes have not substantially changed since the cited 1998 GAO report, our monitoring of CPDF data, and the specific checks we performed on the ALJ data prior to our analyses, we conclude that CPDF data for the years covered in this report are sufficiently reliable for our purposes.

Identifying ALJ Performance Management Practices

To identify ALJ performance management practices and stakeholder views of these practices, we interviewed agency and association officials and reviewed prior reports and testimonies from OPM, SSA, SSAB, and HHS. We reviewed previous audits on ALJs conducted by GAO, and HHS's and SSA's Inspectors General. We also reviewed position papers and testimonies from a number of ALJ professional associations, AALJ, FALJC, and ABA. We also reviewed these documents to identify the factors affecting hearing office and ALJ performance. Given the scope of our data collection, it is not clear the extent to which the views offered by the officials from these agencies or ALJ-related associations are shared across all ALJ agencies or ALJs. We did not assess the extent to which various practices were used at SSA and HHS, nor their effectiveness or appropriateness.

Contemporaneously with this study, another GAO team was conducting an analysis of SSA's plan for reducing the hearings level backlog and preventing its recurrence, titled Summary of Initiatives to Eliminate the SSA Hearings Backlog.³ This team conducted site visits to the National Hearing Center in Falls Church, Virginia and to three SSA regional offices—Atlanta, Georgia; Chicago, Illinois; and Seattle, Washington—to identify the factors contributing to, among other things, the agency's hearings backlog. During these site visits, they interviewed a variety of staff, including Hearing Office Directors, ALJs, attorneys, and support staff. They also interviewed officials from three regional ODAR offices, two state Disability Determination Services (DDS) offices, one program

³See GAO, *Social Security Disability: Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog*, [GAO-09-398](#) (Washington, D.C.: September 9, 2009).

service center, one SSA field office, and related professional associations. We collated from these interviews those responses germane to ALJ hiring and performance and added them to those comments obtained directly through this engagement.

Identifying Proposed Options

To identify the proposed options to improve ALJ performance management, we reviewed those options that had been proposed to Congress over the last 30 years. We drew on information collected through interviews, and our review of related reports, legislation and proposals from OPM, SSA, HHS, the three associations, and the Social Security Advisory Board (SSAB). Given the scope of our data collection, it is not clear if the concerns that prompted the proposals are shared across all ALJ agencies or ALJs. We selected the ALJ Corps, ALJ Conference and SSAB options because, collectively, they contained the major design features of other more narrowly focused options. We did not assess the relative strengths or weaknesses of these proposed options.

Appendix II: Comments from the Office of Personnel Management



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

DEC 8 2009

Mr. Robert Goldenkoff,
Director, Strategic Issues
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Goldenkoff:

Thank you for the opportunity to review and comment on *Results-Oriented Cultures: Office of Personnel Management Should Review Administrative Law Judges Program to Improve Hiring and Performance Management* (GAO-10-14).

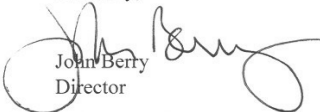
The Office of Personnel Management appreciates GAO's interest in seeking ways to improve the ALJ program. Some of the suggestions you have expressed, especially the advisability of consulting with agencies prior to designing the next examination, are ideas with which we agree and which we were already planning to follow. In addition, we are grateful that GAO recognizes aspects of the program that seem to be operating well and has taken the time to grasp and tackle complex issues such as the interaction of the separate assessment and suitability processes.

We have some concern about the extensive focus upon "performance management," which, as we have noted in our discussions, is a term of art not normally applied to ALJs. The term "performance management," as our regulations use it, incorporates, as a central focus, the effective use of performance appraisals – a tool that may *not* be used (pursuant to the Administrative Procedures Act) with respect to Administrative Law Judges. Tying the discussion in the report to a concept applied to employees who may be evaluated and provided with awards is somewhat confusing and could lead to unintended consequences in terms of agencies' interactions with their ALJs.

The draft report appears to assume that OPM's role in ALJ management is well-established and not subject to dispute. Although we are open to considering GAO suggestions for the greater involvement of OPM in the management of ALJs, we believe that GAO should tie that discussion to the statutory framework that actually applies to ALJs and indicate how it believes OPM could become more involved, within that framework.

Thank you again, for your consideration of our thoughts. We have attached our specific comments with this letter.

Sincerely,


John Berry
Director

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Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

Robert N. Goldenkoff, (202) 512-2757 or goldenkoffr@gao.gov

Staff Acknowledgments

In addition to the contact named above, William Doherty, Assistant Director; Patricia Farrell Donahue, analyst-in-charge; Sara Daleski; Sharon Hogan; Sabrina Streagle; Gregory Wilmoth; Melanie Papasian; and William Trancucci made key contributions to this report.

Related GAO Products

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