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October 2, 2008

The Honorable Michael J. Astrue  
Commissioner  
Social Security Administration  
6401 Security Blvd.  
Baltimore, MD 21235-0001

RE: Draft Bill on Civil Service Reform Act Amendments (LRM RCS-110-151)

Dear Commissioner Astrue:

On behalf of the American Bar Association, I appreciate the opportunity to comment on your draft proposal to amend the Civil Service Reform Act as it relates to disciplinary actions against administrative law judges. We understand you are currently collecting comments on your draft document from those within the government; our views may give you some guidance as well.

Under the current statute, adverse personnel actions taken against administrative law judges appointed under 5 USC § 3105 are under the control and oversight of the Merit Systems Protection Board (MSPB). 5 USC § 7521(a) provides that:

An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

An Agency that believes a particular administrative law judge should be removed, suspended for a period of time greater than 30 days, reduced in pay grade, reduced in pay step, or furloughed for a period of 30 days or less may apply to the MSPB for such action. The MSPB then pursues the basis for such request and offers the impacted individual the opportunity for a hearing and submission of evidentiary materials for consideration. The MSPB then makes a good cause determination based on all submitted information and imposes an appropriate action. Adverse personnel actions, taken without showing good cause, are allowed in limited situations such as action taken in the interest of national security under 5 USC § 7532, reduction in force under 5 USC § 3502, and violations confirmed by the Office of Special Counsel, under 5 USC § 1215.

5 USC § 7521 exists to ensure that discipline by adverse personnel action is imposed against only those duly-appointed administrative law judges warranting such action. This process ensures that administrative law judges execute their important duties on behalf of the country's public without fear of retribution by an Agency dissatisfied with a judicial determination.

The proposed amendments to 5 USC § 3105 strip the MSPB of its hearing and finding duties under the statute and relegate the MSPB to a review panel of adverse personnel actions imposed by an Agency on an administrative law judge. We believe that this leads to a policy that is inconsistent with the Administrative Procedure Act and the protections of judicial integrity put in place by Congress.

Section (c) of the proposed bill is not acceptable to the ABA for several reasons. Subsection (c)(1) would permit undefined adverse personnel actions by an Agency for indictment, a procedural step that affords neither a hearing nor means of evidence submission to the targeted individual and does not address cases where there is a finding of "not guilty" nor a dismissal of charges prior to a hearing.

Subsection (c)(2) would permit undefined adverse personnel actions by an Agency for indictment or conviction for any misdemeanor, traffic violation, or statute in which any imprisonment is an authorized maximum punishment, notwithstanding an outcome where the charge is dismissed or no imprisonment is imposed after hearing of the evidence. It would also permit undefined adverse personnel action by an Agency for any disbarment or suspension from practice by any governing authority. The subsection does not limit the actions to a finding that the individual violated specific rules of the respective Professional Rules of Responsibility governing the individual's license, but includes simple administrative oversights and errors such as those in which a governing body fails to properly credit payment of annual bar dues or those in which payment of bar dues are misrouted by the U.S. Postal System.

Subsection (c)(3) provides for undefined adverse personnel action by an Agency whenever the individual "showed disrespect to an individual in a protected class." Accusations of disrespect can occur when individuals who disagree with the decision of the presiding administrative law judge seek revenge. Such a broad provision unfairly allows for retaliatory discipline.

Similarly, subsection (c)(4) provides for undefined adverse personnel action by an Agency whenever an individual is "indicted" for a misdemeanor. Such a broad provision includes those cases where a warrant is sworn out in a misdemeanor case, without basis, by a disgruntled Agency employee, case respondent, case claimant/complainant, or a general member of the local community.

We believe that additional capacity to discipline administrative law judges is unnecessary. The current statute permits an Agency to issue letters of instruction or letters of deficiencies in public service to administrative law judges, require

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administrative law judges assigned to the Agency to attend directed training and re-training sessions, establish a standard of conduct expected of administrative law judges, and take prompt action to limit the movements of an administrative law judge within Agency-controlled properties to prevent contact with other employees who may be duly grieved by an administrative law judge. The pace at which an Agency proceeds to the MSPB is controlled by the Agency and can be as short or as long as the Agency decides.

The ABA opposes the current draft bill because it proposes a change that reverses the burden of proving unfitness for judicial duties, strips the MSPB of its hearing and finding duties, and undermines the judicial independence required by the Administrative Procedure Act. As an Agency head, you currently have the authority to proceed promptly to the MSPB with an adverse personnel action, to isolate the targeted administrative law judge while the MSPB action is pending, and to negotiate a non-MSPB voluntary solution for offending actions. If you believe there is a need to amend current law to respond to specific situations, we would appreciate your sharing those specifics with us so that we can better judge whether a statutory amendment is needed and, if so, which approach may be best framed to respond appropriately.

Thank you for considering our comments on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman