

SUMMARY OF THE COMMENTS
TO H. R. 3979

The attached draft letter is directed to Congressman Gary L. Ackerman and concerns H. R. 3979 which, in relevant part, proposes certain changes to the current method by which the salaries of boards of contract appeals members and administrative law judges are established. At the present time, board member salaries are set by statute at the GS-16, -17 and -18 levels. H. R. 3979 would place the power to establish board member salaries in the Office of Personnel Management (OPM).

The Section's letter concerns two aspects of H. R. 3979. First, the legislation does not provide for any increase in board member compensation. Rather, it provides only that GS-16 shall be the minimum salary level for board members. The Section believes that some increase in compensation is needed. Second, by placing the power to establish salaries in the Executive Branch rather than establishing salaries by statute, the legislation threatens the independence of the board members. The board's independence from the Executive Branch was a central concern of the Congress in 1978 when the Contract Disputes Act (41 U. S. C. § 601 et seq.) was passed. In that act, salaries for board members ^{was} ~~was~~ set by statute.

GOVERNMENT CONTRACTS AND LITIGATION SECTION

Committees:

Court and Board Practice
D.C. Procurement



The District of Columbia Bar

DRAFT

The Honorable Rep. Gary L. Ackerman
238 Cannon House, Office Building
Washington, D. C. 20515-3207

Re: H.R. 3979

Dear Congressman Ackerman:

The Section on Government Contracts and Litigation of the District of Columbia Bar considers H.R. 3979 to be of great interest to all of its members, and submits the following comments. The views expressed herein represent only those of the Section on Government Contracts and Litigation and not those of the District of Columbia Bar or of its Board of Governors.

The Section on Government Contracts and Litigation is comprised of more than 1000 members all of whom specialize in the practice of government procurement law. Those members include members of the private bar, federal, state, and local governments and the judiciary. The Section has had a consistent interest in any legislation affecting the compensation and independence of the members of the boards of contract appeals before whom the members of the Section practice.

The Section is encouraged by H. R. 3979. Section 3 of that legislation, concerning "amendments relating to administrative law judges and members of boards of contract appeals," recognizes and attempts to remedy the pay inequities affecting the members of the various federal government boards of contract appeals. Unfortunately, the bill blurs fundamental distinctions between board members and administrative law judges and in so doing fails to assure a much needed pay adjustment for board members, and may serve to eliminate the independence of the boards of contract appeals and their individual members which is a fundamental, statutory

▷ Disclaimer to be inserted as footnote.

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prerequisite for these forums. Under the bill, the compensation of board members may not rise at this time and indeed may be decreased in the future; furthermore, the bill permits the President and Office of Personnel Management (OPM) to set salary levels and thus provides them with the unintended ability to target boards and individual judges so as to affect, in fact or appearance, the independence of their function and the results of their decisions.

Background: The Contract Disputes Act of 1978

Boards of contract appeals existed under the aegis of agency heads for more than thirty years prior to 1978. In 1978, the Contract Disputes Act (41 U.S.C. § 601 et seq.) was enacted to provide a statutory basis for the boards, to provide minimum qualification standards for the selection of board members, and to provide for the compensation of those members.

The potential for Executive Branch intrusion into the functioning of the boards was a specific concern of the Congress in 1978. The Congress recognized that the independence of the boards and their members was a necessary prerequisite to the successful operation of the boards:

"The sections of this bill which set new standards for selection, tenure, and compensation of board members will increase the independence of the boards under this bill. The boards will function with the independence of trial courts. . . ."

H. R. Rep. No. 1556, 95th Cong. 2d Sess. 22 (1978); emphasis added. The legislative history further stated that, "[I]n conducting proceedings and deciding cases [board members] would not be subject to direction and control by procuring agency management authorities." S. Rep. 1119, 95th Cong., 2d Sess. 24 (1978); emphasis added.

To help attract the highly qualified people needed to serve as board members and to help achieve independence for both the boards and their members, the Contract Disputes Act of 1978 further established the pay of board members at the GS-16 level, with the exception of vice-chairmen and chairmen, whose pay was established at the GS-17 and GS-18 levels, respectively. These salaries were then at the top of the Civil Service scale outside of the Executive Levels. Over the years those salaries have not remained comparable to salaries paid members of the Senior Executive Service or members of other tribunals with parallel functions and authority.

The Board Members' Salaries Should Be Increased

H. R. 3979 currently provides that board members' salaries are to be set by the Office of Personnel Management (OPM) at not less than the GS-16 level. As noted above, board member's salaries are already set at the GS-16 level pursuant to the Contract Disputes Act of 1978. Thus, the bill permits OPM to continue board members at their current salaries and will not necessarily result in any increase to the board member's salaries.^{2/}

The Section's views on the need for increased board member salaries were presented in a November 15, 1988 letter from the Section to the Quadrennial Commission. A copy of those comments are attached. While there is no need to repeat those comments, we would emphasize that the smooth and efficient operation of the boards of contract appeals and the disputes process as a whole (of which they are an important part), is a key to the operation of an effective and efficient federal procurement system. Adjudicating multi-million dollar contract disputes requires the recruitment and retention of

^{2/} The bill covers administrative law judges and board members as a single group. Establishing a minimum GS-16 pay level for the group as a whole has the effect of increasing the salaries of administrative law judges, but does not necessarily affect the salaries of the board members. By addressing both administrative law judges and board members as a single group, the bill blurs the distinction in responsibilities of the two categories of "judge." Administrative law judges are distinguishable from board members in terms of selection and duties. For example, decisions of an administrative law judge are reviewable by agency heads, whereas board members issue final decisions subject to review only by the United States Court of Appeals for the Federal Circuit. Similarly, the two types of tribunals are subject to a different standard of appellate review. Finally, the duties of administrative law judges differ from those of board members who function more like judges of the United States Claims Court and the federal bankruptcy courts.

able and qualified board members. The public interest demands it. Increasing the salaries of the board members will help achieve this objective.^{3/}

The Bill Will Undermine The Essential
Independence Of The Boards And Their Members

The independence of the boards and its members is also compromised by the bill by giving OPM the authority to establish the pay of each individual board member. In setting pay, OPM would be empowered to give consideration to the nature and complexity of the individual board member's duties and OPM may be influenced in this process by managers in OPM and officials in the procuring agencies who have obtained favorable or adverse rulings from a board or specific board members. Pay could easily become a method to reward or punish boards and board members; this clearly compromises the independence and integrity of the process. The system could thus be politicized, which is inconsistent with a fundamental purpose of the Contract Disputes Act of 1978 to insure the independence of boards of contract appeals. Further, OPM is a party to protests and appeals before the General Services Administration Board of Contract Appeals, so a direct conflict of interest arises in that context by permitting a litigant to make pay determinations regarding a tribunal before whom it appears. Such a situation fosters suspicion in the public and private bar and dictates that the proposed mechanism for determining pay rates be altered.

^{3/} A number of available measures of such an increase are available. One such measure would be to pay board members on the same schedule applicable to the Senior Executive Service (ES-4, -5, and -6). Providing SES parity would be consistent with the three-tier pay structure established in the Contract Disputes Act (GS-16, -17, and -18). Achieving true SES parity would require some form of recognition in a board members' schedule of the bonuses otherwise paid to members of the SES. Another such measure would be to pay board members based on some fixed percentage of the salary paid the federal judiciary. Since board members function in a judicial capacity, such a measure would also be appropriate. Other potential measures could be identified. Any one of these could be appropriate if it provides for a substantial increase in the compensation of board members.

Conclusion

In the past Congress recognized the need for statutorily established pay rates in the Contract Disputes Act. We recommend that the bill be modified to continue that practice, which has worked well for many years, and establish the much needed enhanced pay rates by statute rather than by members of the Executive Branch. That approach would eliminate the direct Executive Branch oversight of the boards and individual members which is inimical to their independence.

In summary, while the Section applauds the overall purposes of H.R. 3979, the bill serves to undermine the integrity, impartiality and role of the boards and their members and could make significantly more difficult the attraction and retention of experienced, qualified board members. The consequence will be to adversely affect the procurement process, and more directly, the protest and dispute resolution process.

The Section would be pleased to offer additional information or elaborate on the views expressed above, should the Congress desire additional comment.

Sincerely,

Gregory A. Smith, Cochair
Josephine L. Ursini, Cochair