

following peer review, 38 U.S.C. 7101A, while no comparable review process applies to ALJs. Nevertheless, ALJs are subject to dismissal for inadequate performance. *See SSA v. Goodman*, 19 M.S.P.R. 321 (1984). The concept of rating judicial performance, particularly an approach involving peer review, is hardly a novel concept. *See, e.g., J. Lubbers, The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 Admin. L.J. Am. U. 589, 606–11 (1994) (citing state and local judicial systems employing such a process). We do not find this distinction between Board members and ALJs to be meaningful with respect to whether Board members should be called “Veterans Law Judges.”

Finally, we can perceive no reason—and none was advanced by the commenters—to conclude that the selection and tenure characteristics associated with ALJs determine whether an individual may be called a judge. As we pointed out in our NPRM, there are within the Federal service “administrative judges” who are subject to the same selection and review criteria as most civil servants. In addition, individuals appointed to the judiciary under Article I of the Constitution—Tax Court judges, judges of the United States Court of Appeals for Veterans Claims—are selected by a political process, have fixed terms, and yet are called “judges.” Finally, Federal District Court Judges and judges of the United States Courts of Appeals are called judges even though they are selected through a political process and have much more job security than ALJs. In sum, we are not persuaded by this argument.

For all these reasons, we find no substance to the commenters’ claims that there is a substantive difference between the decisional independence of ALJs and that of Board members, nor do we believe that it is the characteristics of ALJ selection and tenure that determine whether an individual may be called “judge.” Accordingly, we make no change in the regulation based on those comments.

**5. The statute calls them “members,” not “judges.”**

Some commenters suggest that, because the statute refers to “members” of the Board, VA is barred from using the title “judge.” The commenters provided no authority for this proposition, and we could find none.

We do, however, note that it is not uncommon for members of a statutorily-created board to be defined in regulations as “judges.” *See* 41 U.S.C. 607 (Boards of Contract Appeals) and, *e.g.*, 38 CFR 1.781 (BCA members at VA

“are designated Administrative Judges”) and 7 CFR 24.2 (BCA members at Department of Agriculture are “designated Administrative Judges”); 31 U.S.C. 751 (Personnel Appeals Board at the General Accounting Office) and 4 CFR 28.3 (when designated to preside over a hearing, Board members are titled “administrative judges”); 33 U.S.C. 921 (Benefits Review Board at the Department of Labor) and 20 CFR 801.2(3) & (12) (Board members are “officially entitled” administrative appeals judges); 42 U.S.C. 2241 (Atomic Safety and Licensing Boards) and 10 CFR 1.15 (members of these boards are called “administrative judges”); *cf.* 43 CFR 4.2(a) (members of various appellate boards created by Department of the Interior are “designated Administrative Judges”).

We make no change based on these comments.

**6. Congress failed to enact a measure providing for a similar title.**

One commenter suggested that Congress had “rejected” changing the title of Board member, apparently concluding that such inaction prevented VA from doing so.

In the first place, the Congress did not “reject” the change. Indeed, the only Congressional action of record was adoption by the House of Representatives of a similar provision in the 105th Congress.

In 1998, the House of Representatives passed a bill which, among many other things, would have provided that Board members (other than the Chairman) could also be known as “veterans administrative law judges.” H.R. 4110, 105th Cong. § 407(a); *see* 144 Cong. Rec. H6885 (daily ed. Aug. 3, 1998) (debate on passage of H.R. 4110 as reported by the Committee on Veterans’ Affairs). That provision was never subject to a vote in the Senate. However, along with other provisions in H.R. 4110, § 407(a) was not adopted by the Senate in the compromise leading to the final version of the bill. *See* 144 Cong. Rec. H10374 (daily ed. Oct. 10, 1998) (debate on final passage of H.R. 4110).

Second, it is well-settled that the intent of the legislature is indicated by its action, not by its failure to act. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000) (in case challenging authority of FDA to regulate tobacco, Court would “not rely on Congress’ failure to act—its consideration and rejection of bills that would have given the FDA this authority—” in reaching conclusion that FDA lacked authority); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (failed requests for legislative action do not prove agency did not

already possess authority); *see generally* 73 Am. Jur.2d, Statutes § 84 (2001). In this case, not only was there, at best, a “failure to act” by the Congress with respect to the title of Board members, but, to the extent it did act, part of the Congress—the House—passed the measure.

We make no changes to the regulation based on this comment.

**7. The title “judge” would destroy the non-adversarial nature of the VA appellate process.**

Two commenters objected to the title “judge” because it would adversely affect the informal, non-adversarial nature of VA’s appellate process. In addition to the fact that the commenters offer only their opinions in support of this proposition, it is relevant to note that the 973 administrative law “judges” at SSA—approximately 75% of all federal ALJs—administer justice in “an informal, nonadversary manner.” 20 CFR 404.900(b) (rules relating to SSA administrative review process).

We make no changes based on these comments.

**Administrative Procedure Act**

This final rule concerns agency organization, procedure or practice and is not a substantive rule. Accordingly, it is exempt from the delayed effective date provision of 5 U.S.C. 553.

**Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

**Executive Order 12866**

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

**Regulatory Flexibility Act**

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule only affects members of the Board of Veterans’ Appeals and not small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

**Unfunded Mandates**

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in