

FALJC PRESENTATION 201709

11 Month saga of the FDA OALJ

20141219 TO 20150202

USAJOB FDA-ALJ-1288222-KH

(This may have been the second announcement for the same position)

20150723

OPM approved transfer of Judge Goodwin from DOT to FDA on 20150723.

OPM approved transfer of Judge Booker from OHMA to FDA about the same time.

20150807

On August 7, 2015 Judge Goodwin received the official offer from FDA, signed it and returned it the same day.

Judge Booker received the official offer from FDA about the same time.

20150908

Judges Booker and Goodwin were sworn in by Acting Commissioner of FDA.

The ALJ office (OALJ) was staffed by two detailed Regulatory Attorneys with no prior litigation experience and two administrative staff assistants who had never worked in a judicial office.

20150910

In “A Message from the Acting Commissioner”, FDA was informed “...Two ALJs, Judge Richard Goodwin and Judge Tom Booker started with FDA on Tuesday, September 8th...”

20151001

OALJ began receiving cases at the rate of about 100 per week.

There was no case management system.

Cases were docketed in FDMA which does not allow sorting of cases.

Judges Booker and Goodwin manually docketed, diaried and calendared all cases received by OALJ.

20161209

Judges Booker and Goodwin met with the Acting Commissioner of FDA and the Commissioner appointee to discuss how OALJ was progressing.

201601

In late January 2016 OALJ was due to lose most of the OALJ detailees.

We were lead to believe we would have use of a GS-15 attorney-advisor and several paralegals from HHS to assist with the FDA docket upon losing our detailees.

20160208

Judge Booker published his decision in *Orton Motor Co., d/b/a Orton's Bagley*, FDA-2015-H-3414. CTP disagreed with the decision and appealed it.

The Department Appeals Board (DAB) remanded the case to Judge Booker in *JOMIMI'S, INC., D/B/A GIT-N-GO 2*, DAB No. 2691 (2016), on April 29, 2016. Judge Booker was mostly reversed.

The case is currently on appeal to the U.S. Circuit Court.

20160218

FDA ALJ office stopped receiving cases from CTP (we discovered this subsequently on March 11, 2016).

On or about February 8, 2016 Judge Booker and Judge Goodwin had approximately 1880 cases on their combined dockets.

20160311

In a meeting with W. Matthew Warren (Director, Office of Scientific Integrity, Office of the Chief Scientist, Office of the Commissioner, FDA) to discuss staffing with members of HR, Judge Goodwin was going over the OALJ workload when Mr. Warren stated that CTP disagreed with our decision in *Orton* and the FDA ALJ office would no longer be getting any new cases until *Orton* was resolved on appeal. Judge Goodwin asked Mr. Warren if he realized this could be years if *Orton* went to the federal courts and Mr. Warren said yes.

We were also informed the GS-15 and several paralegals were no longer available.

20160322

Judge Booker issued a decision in *Jomimi's, Inc., d/b/a Git-N-Go 2*, addressing in part the Center for Tobacco Product's (CTP) refusal to comply with a prior order to show cause and other orders of Judge Booker.

The Department Appeals Board remanded the case (*JOMIMI'S, INC., D/B/A GIT-N-GO 2*, DAB No. 2691 (April 29, 2016)) and addressed issues in the case. Judge Booker was primarily affirmed.

Judge Booker subsequently issued an *ORDER OF DEFAULT JUDGMENT DOCKET* in response to the remand, *Jomimi's, Inc., d/b/a Git-N-Go*, FDA-2015-H-3506.

20160328

Mr. Warren executed an Interagency Agreement (IAA) between FDA and HHS for HHS to adjudicate FDA cases.

The FDA ALJs were unaware of the IAA.

The IAA was finalized on April 20, 2016.

20160329

Judge Goodwin issued an opinion in *Family Dollar Stores of Florida, Inc. d/b/a Family Dollar Store 7779*, FDA-2015-H-3505 addressing ‘service of process’ and other issues. The case was appealed and remanded by the DAB in *FAMILY DOLLAR STORES OF FLORIDA, INC. D/B/A...*, DAB No. 2706 (2016), May 25, 2016. The case was eventually settled and ‘closed’. Judge Goodwin was affirmed in part and reversed in part.

20160406

Judge Goodwin issued an opinion in *T and M United Corporation d/b/a BP Shop*, FDA-2015-H-3507, covering most of the same issues as *Family Dollar Stores of Florida, Inc. d/b/a Family Dollar Store*. The case was appealed and remanded by the DAB in *T AND M UNITED CORPORATION D/B/A BP SHOP*, DAB No. 2705 (May 24, 2016). The case was eventually settled and ‘closed’. Judge Goodwin was affirmed in part and reversed in part.

20160415

Judges Booker and Goodwin received an email from Mr. Warren stating in part:

Due to the high volume of administrative cases generated by CTP’s Retailer Inspection Program and the backlog of cases pending on your dockets, the agency has decided to resume filing all of CTP’s cases with the DAB for assignment to ALJs in CRD. In an effort to ensure efficient processing and timely management of these cases, CTP will continue to file all such cases with CRD until both of you have reduced your dockets to a manageable number of cases, at which time you may both let me know that your docket and staff are at a level enabling you to begin setting ripe matters for hearing. At that point, insofar as practicable, the cases will be assigned on a rotational basis among the two of you and the CRD ALJs who have been assigned to such cases. FDA will routinely evaluate the levels of cases pending with each ALJ and determine the number of cases to be assigned to the ALJs in the rotation so that the cases can be decided on a timely basis.

20160504

Judges Booker and Goodwin received a *Memorandum of Expectations* from The Commissioner of Food and Drugs, by his delegate, Walter Harris, Deputy Commissioner for Operations instructing the ALJs in part:

...(ALJs are) generally required to defer to the agency’s reasonable interpretation of the statutory and regulatory provisions within its purview...
... scheduling orders issued by the FDA Administrative Law Judges must set forth dates for discovery, prehearing conferences, hearings, and filing post-hearing briefs...
...The FDA Administrative Law Judges, their Attorney-Advisors, and other staff are expected to comply with all applicable codes of professional conduct, including the Code of Judicial Conduct and the Rules of Professional Responsibility issued by the states in which the Administrative Law Judges and/or the Attorney-Advisors are licensed to practice law...

20160525

In an email from Mr. Warren FDA ALJs were directed – among other things – to attend training on the Federal Food, Drug, and Cosmetic Act (FD&C Act) and the Departmental Appeals Board's (DAB's) Automated Case Tracking System (ACTS) (the inward-facing aspect of the DAB's e-filing system).

We subsequently discovered, as FDA employees, FDA ALJs we were not authorized to use either system nor did FDA ALJs have passwords to access the systems.

20160804

In a telephone call with the Acting Chief of Staff, Natale Zimmer, and W. Matthew Warren, Judge Goodwin was advised the 'experiment' of having an ALJ office had not worked out, FDA was closing the ALJ office at FDA and Judge Goodwin was offered a transfer to HHS DAB where he could work from the FDA campus, HHS downtown, or work remotely from Fresno.

Judge Booker was in the process of transferring to OMHA at the time.

20180805

Judge Goodwin accepted FDA's offer to transfer to HHS and work remotely from Fresno.

20160808

OPM distributed the following email:

Dear Chief Administrative Law Judge/Designee -

We received a request from the Departmental Appeals Board (DAB), HHS for a Senior Administrative Law Judge (ALJ) to assist with DAB's workload imbalances. The Senior ALJ will adjudicate cases arising under the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776-1858 (2009). DAB has a need for a Senior ALJ in Washington, DC or remotely from Richmond, VA.

Before we can issue an agency a list of retired ALJs, our regulations require us to canvas incumbent ALJs regarding their availability to hear the cases. Do you have any judges that would be available to hear these cases on a loan basis? If you or any judges would be interested, please contact me by COB. Friday, August 12, 2016.

Thanks!

*Juanita H. Love
Program Manager
Administrative Law Judge Program Office*

20160815

Judge Goodwin sent this email to the Acting COS (the person Judge Goodwin talked to on Aug 4):

*From: Goodwin, Richard [mailto:Richard.Goodwin@fda.hhs.gov]
Sent: Monday, August 15, 2016 8:10 AM
To: Zimmer, Natale
Cc: Goodwin, Richard; Judge Goodwin
Subject: FW: To confirm our phone call...*

Natale

I just returned to the office after attending the A.B.A. conference and am still getting my thoughts together.

To restate the obvious, it is my understanding that F.D.A. has decided to close the Office of Administrative Law Judges which is the reason for our conference call of August 4 and the email below.

Rg

Judge Goodwin never received an acknowledgement or reply.

201608

Judge Booker transferred to OMHA in Seattle, WA.

20160913

FDA ALJ decisions uploaded to website.
<http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm20081861.htm>

Shortly thereafter website was shutdown.

20161127

Judge Goodwin transferred to HHS.

The cases Judge Goodwin had worked on at FDA were subsequently reassigned to Judge Goodwin.

Judge Booker's cases were distributed among the other ALJs.