



Billing Code: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD-2017-OS-0017]

U.S. Court of Appeals for the Armed Forces Proposed Rules Changes

ACTION: Notice of Availability of Proposed Changes to the Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces.

SUMMARY: This notice announces the following proposed changes to Rules 3A(a) and 21(a) of the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces. Although these rules of practice and procedure fall within the Administrative Procedure Act's exemptions for notice and comment, the Department, as a matter of policy, has decided to make these changes available for public review and comment before they are implemented.

DATES: Comments on the proposed changes must be received by [INSERT 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. .

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.

- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09B, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: William A. DeCicco, Clerk of the Court, telephone (202) 761-1448.

Dated: April 27, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Rule 3A(a):

Rule 3A(a) – SENIOR JUDGES – currently reads:

With the Senior Judge's consent, and at the request of the Chief Judge, a Senior Judge may perform judicial duties with the Court if an active Judge of the Court is disabled or has recused himself or if there is a vacancy in an active judgeship on the Court. For the periods of time when performing judicial duties

with the Court, a Senior Judge shall receive the same pay, per diem, and travel allowances as an active Judge; and the receipt of pay shall be in lieu of receipt of retired pay or annuity with respect to these same periods. The periods of performance of judicial duties by a Senior Judge shall be certified by the Chief Judge and recorded by the Clerk of the Court. The Clerk of the Court shall notify the appropriate official to make timely payments of pay and allowances with respect to periods of time when a Senior Judge is performing judicial duties with the Court and shall notify the Department of Defense Military Retirement Fund to make appropriate adjustments in the Senior Judge's retired pay or annuity. See Article 142(e)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 942(e)(2).

The proposed change to Rule 3A(a) would read:

With the Senior Judge's consent, and at the request of the Chief Judge, a Senior Judge may perform judicial duties with the Court if an active Judge of the Court is disabled or has recused himself or if there is a vacancy in an active judgeship on the Court. For the periods of time when performing judicial duties with the Court, a Senior Judge shall receive the same pay, per diem, and travel allowances as an active Judge. The periods of performance of judicial duties shall be certified by the Chief Judge and reported to the Court Executive who shall take

appropriate steps so that the Senior Judge is paid in accordance with Article 142(e)(2), UCMJ.

Comment: The Fiscal Year 2017 National Defense Authorization Act (NDAA) amended Article 142(e)(2), UCMJ, involving the pay of a senior judge who performs judicial duties with the Court. Before the amendment was passed, retired judges had their annuities suspended while performing judicial duties and were paid as active service judges. The NDAA's amendment provides that instead of stopping the senior judge's annuity, the senior judge would continue to receive the annuity in full and also receive additional pay equal to the difference between the daily equivalent of the annual rate of pay provided for a judge of the Court and the daily equivalent of the retired pay of the senior judge under Article 145, UCMJ. Accordingly, Rule 3A(a) needs to be amended to comply with current law.

Rule 21(a):

Rule 21(a) – Supplement to Petition for Grant of Review – currently reads:

Review on petition for grant of review requires a showing of good cause. Good cause must be shown by the appellant in the supplement to the petition, which shall state with particularity the error(s) claimed to be materially prejudicial to the substantial rights of the appellant. See Article 59(a), UCMJ, 10 U.S.C. § 859(a).

The proposed change to Rule 21(a) would read:

Review on petition for grant of review requires a showing of good cause. Good cause should be shown by the appellant in the supplement to the petition, which shall state with particularity the error(s) claimed to be materially prejudicial to the substantial rights of the appellant. See Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Comment: The language in the current rule that “good cause must be shown” by the appellant in the supplement has led to some litigation as to whether there is a jurisdictional requirement to raise issues, and that supplements that do not include any specific errors should be dismissed for want of jurisdiction. The Court has rejected this view when it has been raised. Amending the rule to reflect that “good cause should be shown” is the proper way to read the rule in light of Rule 21(e) which provides that when no specific errors are included in the supplement to the petition, the Court will nevertheless review the petition. Reading Rule 21(a) as mandatory would be inconsistent with Rule 21(e) and render the latter provision meaningless. The amended rule is consistent with prevailing judicial decisions and removes any confusion as to how to reconcile the subsections (a) and (e).