



## **Recommendation 68-6**

### **Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency**

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(Adopted December 10-11, 1968)

#### **Recommendation**

1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.

2. Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:

(a) *Intermediate appellate boards.* (1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:

(A) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience and competence to perform review functions,

(B) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

(C) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(D) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the initial decision.



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(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review by the agency within such time and in such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such applications for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has been afforded no opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for reconsideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(b) *Discretionary review of decisions of presiding officers.* (1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing that:

(A) A prejudicial procedural error was committed in the conduct of the proceeding, or

(B) The initial decision embodies



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(i) A finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide,

(ii) A legal conclusion which is erroneous, or

(iii) An exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

### **Citations:**

38 FR 19783 (July 23, 1973)

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1 ACUS 20