



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Recruitment and Selection of Administrative Law Judges

Committee on Adjudication

Committee on Administration and Management

Proposed Recommendation for Committee | April 26, 2019

1 The Administrative Procedure Act (APA) requires that hearings conducted under its main
2 adjudication provisions¹ (sometimes known as “formal” hearings)² be presided over either by the
3 agency itself, by “one or more members of the body which comprises the agency,” or by
4 “administrative law judges (ALJs) appointed under” 5 U.S.C. § 3105.³ Section 3105, in turn,
5 authorizes “[e]ach agency” to “appoint as many ALJs as are necessary for proceedings required
6 to be conducted in accordance” with those provisions.⁴

7 The process for appointing new ALJs recently changed as a result of Executive Order
8 (EO) 13,843.⁵ Until that order was issued, agencies could hire a new ALJ only from a
9 certificate of qualified applicants (that is, a list of applicants eligible for hire) prepared by the
10 Office of Personnel Management (OPM). Each certificate generally had three applicants selected
11 from a much larger register of applicants OPM deemed “qualified.” The “list of three,” as it was
12 known, consisted of the three highest-scoring applicants based upon, among other things, an

¹ 5 U.S.C. §§ 554, 556–57.

² See JACOB A. STEIN & GLENN A. MITCHELL, ADMINISTRATIVE LAW § 31.01 (Matthew Bender & Co. 2018). Recommendation 2016-4 and the associated report refer to the adjudications conducted pursuant to the main adjudicative provisions of the Administrative Procedure Act as “Type A” adjudications. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016); Michael Asimow, Adjudication Outside The Administrative Procedure Act 2 (Mar. 24, 2016) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/adjudication-outside-administrative-procedure-act-updated-draft-report>.

³ 5 U.S.C. § 556.

⁴ *Id.* § 3105.

⁵ Exec. Order 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

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13 OPM-administered and developed examination and panel interview process, as well as veterans'
14 status.⁶

15 EO 13,843 placed ALJs in what is known as the “excepted service.”⁷ As a result,
16 agencies now hire new ALJs directly—that is, without OPM’s involvement—generally using
17 whatever selection criteria and procedures they deem appropriate. EO 13,843 was justified on
18 two grounds. The first was the need to “mitigate” the concern that, after the Supreme Court’s
19 2018 decision in *Lucia v. Securities and Exchange Commission*,⁸ the OPM-administered process
20 might unduly circumscribe an agency’s head’s discretionary hiring authority under the
21 Appointments Clause.⁹ *Lucia* held that the SEC’s ALJs were officers under the Constitution’s
22 Appointment’s clause, with the result being that—assuming that the SEC’s ALJs are inferior
23 rather than principal officers¹⁰—they must be appointed directly by the Commission itself as the
24 head of a department rather than, as was being done, by SEC staff.¹¹ The second justification was
25 the need to give “agencies greater ability and discretion to assess critical qualities in ALJ
26 candidates . . . and [such candidates’] ability to meet the particular needs of the agency.”¹²

27 Although EO 13,843 identifies desirable qualities for ALJs, such as appropriate
28 temperament, legal acumen, impartiality, and the ability to communicate their decisions, it
29 explicitly leaves it to each agency to determine its own selection criteria (except that it requires
30 that all ALJs be licensed attorneys). This recommendation does not address the substantive

⁶ See Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, 5, (Dec. 10, 1992). Qualified veterans received extra points that “had an extremely large impact, given the small range in unadjusted scores.” *Id.* The veterans’ preference also operated at the point agencies selected off the “list of three” by requiring an agency to select a veteran with the same or a lower score as a non-veteran. *Id.* As the Administrative Conference noted in 1992, “application of the veterans’ preference has almost always been determinative in the ALJ selection system.” *Id.*

⁷ “[T]he ‘excepted service’ consists of those civil service positions which are not in the competitive service or the Senior Executive Service.” 5 U.S.C. § 2103.

⁸ 138 S. Ct. 2044 (2018).

⁹ See Exec. Order 13,843, *supra* note 5, § 1.

¹⁰ The *Lucia* majority did not decide whether the Securities and Exchange Commission’s (SEC) Administrative Law Judges (ALJs) are principal or inferior officers but did note that “[b]oth the Government and *Lucia* view the SEC’s ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them.” *Lucia*, 138 S. Ct. at 2051 n.3.

¹¹ See *generally id.* This recommendation takes no position on constitutional questions.

¹² Exec. Order 13,843, *supra* note 5, § 1.



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31 hiring criteria that agencies will employ in selecting among ALJ candidates, though it does
32 recommend that agencies publish the minimum qualifications and selection criteria for ALJ
33 positions. The selection criteria that an agency considers adopting might include things such as
34 litigation experience, experience as an adjudicator, experience in dispute resolution, experience
35 with the subject-matter that comprises the agency’s caseload, specialized technical skills,
36 experience with case management systems, demonstrated legal research and legal writing skills,
37 a dedicated work ethic, and strong leadership and communications skills.

38 Each agency will have to decide not only which selection criteria will apply, but also
39 which will be mandatory and which will be only desirable or preferred. Of course, agencies will
40 also need to ensure compliance with generally applicable legal requirements, including those
41 relating to equal employment opportunity and veterans preference.

42 The EO also allows each agency to design its own selection procedures. Each agency
43 must now decide which of its officials will be involved in the selection process, how the process
44 will be structured, how vacancies will be announced and otherwise communicated to potential
45 appointees, whether the agency will require writing samples or some other evaluation of written
46 work, and whether the agency will institute an examination of some sort.

47 This recommendation is built upon the view that there is no “one size fits all” procedure
48 for appointing ALJs.¹³ Each agency will have to construct a system that is best suited to the
49 particular agency’s needs, including the nature of the proceedings the ALJs will preside over, the
50 size of the agency’s caseload, the substance of the statutes, and rules involved in the proceedings.

RECOMMENDATION

Recruitment

- 51 1. To ensure the widest possible awareness of their ALJ vacancies, agencies should
52 announce their ALJ vacancies on their own websites, USAJOBS, or other websites that

Commented [ATW1]: This language is meant to address issues that were highlighted in portions of what were ¶4 and ¶6 of the previous version of this recommendation

¹³ See generally Jack M. Beermann and Jennifer L. Mascott, Federal Agency ALJ Hiring After Lucia And Executive Order 13,843 (Mar. 28, 2019) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-research-report-federal-agency-alj-hiring-after-lucia-and-executive-order-13843>. This report is based in part upon interviews with officials at agencies employing the vast majority of federal agency ALJs.



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53 might reach potential ALJ applicants. Agencies that desire or require prior subject-matter,
54 adjudicative, and/or litigation experience should also reach out to lawyers who practice in
55 the field and/or those with prior experience as an adjudicator. Each agency should
56 determine how long to keep the application period open based on its experience with
57 achieving an optimal volume of applications.

Formulation and Public Announcement of Hiring Criteria

58 2. Agencies should formulate and publish minimum qualifications and selection criteria for
59 ALJ hiring. Those qualifications and criteria should include those factors specified in
60 Executive Order 13,843 and qualifications the agency deems important for service as an
61 ALJ in the particular agency. The notice should distinguish between mandatory and
62 desirable criteria. ~~These agency-specific criteria may include litigation experience,~~
63 ~~experience as an adjudicator, experience in dispute resolution, experience with the~~
64 ~~subject matter that comprises the agency's caseload, specialized technical skills,~~
65 ~~experience with case management systems, demonstrated legal research and legal writing~~
66 ~~skills, a dedicated work ethic, and strong leadership and communication skills.~~ When
67 constructing guidelines and processes for the hiring of ALJs, agencies should be mindful
68 of the importance of the appearance of impartiality and the independence and neutrality
69 of ALJs.

Selection Panels and Writing Samples

70
71 3. Agencies should develop policies to review and assess ALJ applications. Agencies might
72 wish to consider including among these policies the development of screening panels to
73 select which applicants to interview, interview panels to select which applicants to
74 recommend for appointment, or both kinds of panels. Such panels could include internal
75 reviewers only or both internal and external reviewers, and could include overlapping
76 members among the two types of panels or could include entirely different members.
77 Agencies might also wish to consider including among these policies procedures to
78 evaluate applicants' writing samples. Such writing samples could be submitted with the

Commented [ATW2]: Note to Committee: ACUS's Office of the Chairman recommends that the following language be removed from the recommendation and relocated to the Preamble (see additions to penultimate paragraph of Preamble above) As approved by the Council, the scope of the project explicitly excludes analysis of the substantive hiring criteria for ALJs. It is fine to provide some illustrative examples of factors agencies may consider as "selection criteria," which have been included in the Preamble, but we would advise against including this language in the recommendation text

Commented [EHP3]: This proposed new ¶3 would replace what were ¶¶9–10 of the previous version of this recommendation

Commented [ATW4R3]: ¶3 is inspired by ¶ 6 of the 11/29/18 HHS ALJ Appointment Process memorandum



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79 applicants' initial applications, as part of a second round of submissions for applicants
80 who meet the agencies' qualifications expectations, and/or as part of a proctored writing
81 assignment in connection with an interview.