

April 16, 2018

COMMENTS OF KENT BARNETT AND RUSSELL WHEELER RE APRIL 4 DRAFT OF PROPOSED RECOMMENDATION OF ADJUDICATION COMMITTEE, 2018, VIZ., ITEMS 9, 11 AND 13.

We regret that previously scheduled commitments make it impossible for either of us to attend the April 19 Adjudication Committee meeting. One or both of us may be able to call in briefly at the outset of the meeting.

Item 9 We suggest, at line 110, inserting “explicit” before “relevant”.

We suggest revising text at line 110 by replacing the comma after “factors” with a period, then inserting “Regardless of the factors, agencies should ensure that the consideration of appropriate factors does not intrude upon the judge’s decisional independence. Explicit relevant factors include. . .

We would prefer ending item 9 after “demeanor,” although we would pick up some of item 9’s recommendation in item 11.

Item 11 On line 121, after functions.”, we suggest inserting “Apart from particular cases, any determination of whether an administrative judge has exhibited a clear disregard of or pattern of non-adherence to applicable rules, procedures, precedents or policy should be made by a panel of other full-time adjudicators within the agency, not by a political appointee.”

Item 13 Consider rewriting this item as follows: “Agencies should consider, to the extent practicable, ~~making~~ using substantive, written rules to embody policies and procedures that governing the selection, oversight, evaluation, and removal of administrative judges or that otherwise bear on their independence. To the extent permissible, such substantive, written rules should be available to the public. Agencies should avoid embodying policies and procedures in custom, internal guidance, and standard usage, which are often opaque and uneven in their application.”

We have no preference, pro or con, as to the marginal question posed about item 9.

As to the two questions posed about item 12: (a) we agree that agencies should explain the meaning of the statutory standards that they apply to adjudicators, and (b) have no preference concerning probationary periods.