



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Judges

Committee on Adjudication

Proposed Recommendation for Committee | April 19, 2018

1 In Recommendation 2016-4,¹ the Administrative Conference offered best practices for
2 structuring the increasing number of ~~legally required~~ **available oral** evidentiary hearings in
3 administrative adjudications not subject to the adjudication provisions of the Administrative
4 Procedure Act (APA).² Those hearings are usually not presided over by administrative law
5 judges (ALJs) appointed under 5 U.S.C. § 3105,³ but instead by agency employees often known

Commented [DS1]: Note for Committee:
Recommendation 2016-4 applies to adjudication that, in its words, “consists of legally required evidentiary hearings that are not regulated by the APA’s adjudication provisions.” “Legally available oral evidentiary hearings” is the type of hearings addressed by the consultants’ (Kent and Russell) report, but it is not identical to Recommendation 2016-4’s “Type B” adjudication because it does not embrace hearings for which parties cannot seek oral (as opposed to written) hearings.

¹ Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

² See 5 U.S.C. §§ 554, 556–557.

³ If an external statute requires an adjudication “on the record after opportunity for an agency hearing,” the formal adjudication provisions of the APA apply. 5 U.S.C. § 554(a). The presiding official in an APA hearing must be an ALJ (or “the agency” or “one or more members of the body which comprises the agency”). *Id.* § 556(b). “In the absence of a statute requiring formal APA adjudication, agencies have broad discretion to fashion their own adjudicatory procedures.” Matthew Lee Winer et al., Office of the Chairman, Admin. Conf. of the U.S., *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program 6* (March 31, 2014), <https://acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal>. Agencies generally use their discretion to appoint administrative judges to preside over non-APA hearings, rather than ALJs. *Id.* On the circumstances under which Congress may consider converting certain administrative judge positions to ALJ positions, see Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, ¶ I.A, 57 Fed. Reg. 61,760 (Dec. 29, 1992).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

6 as “administrative judges”⁴ (although they often go by any number of other names).⁵ This
7 Recommendation addresses an important subject not addressed by Recommendation 2016-4: the
8 selection, oversight, evaluation, discipline, and removal of administrative judges.⁶ [For purposes](#)
9 [of this Recommendation, all adjudicators who are neither ALJs nor agency heads are referred to](#)
10 [as “administrative judges.”](#)

11 In contrast to hearings over which ALJs preside, which are regulated by the adjudication
12 provisions of the APA, hearings over which administrative judges preside do not share a uniform
13 statutory framework. Instead, they are governed by procedures, norms, and practices specific to
14 each administrative judge’s employing agency and relevant governing statutes.⁷ Administrative
15 judges oversee enforcement, benefits, licensing, and other classes of hearings situated within a
16 wide variety of substantive areas. Hearings may be adversarial or inquisitorial, and may involve

⁴ [Administrative judges far outnumber the approximately 2,000 ALJs in federal service. See Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 17 \(Feb. 14, 2018\) \(draft report to the Admin. Conf. of the U.S.\), <https://acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal> \[hereinafter Barnett et al.\] \(accounting for 10,831 administrative judges among fifty-three agencies and components of agencies\). The report underlying this Recommendation determined that agencies collectively employ 10,831 administrative judges. See Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 17 \(Feb. 14, 2018\) \(draft report to the Admin. Conf. of the U.S.\) \[hereinafter Barnett et al.\], <https://acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal>. Given the immense variety of administrative judges and the hearings over which they preside, it is difficult to identify and obtain reliable data on administrative judges. The authors of the report solicited information on administrative judges and non-APA adjudicative hearings through a survey delivered to sixty-four federal agencies and components within agencies. The 10,831 figure offered by the report is based on data obtained from thirty agencies and components. \(Fifty-three entities responded in total.\) *Id.* at 16–17. Many agencies that employ administrative judges did not participate in the study. The actual number of federal administrative judges is, therefore, almost certainly larger.](#)

⁵ Titles used by agencies that employ administrative judges include “Hearing Officer,” “Immigration Judge,” “Veterans Law Judge,” “Administrative Patent Judge,” and “Administrative Appeals Judge.” “Administrative Judge” is also an official title held by some non-ALJ adjudicators.

⁶ [Paragraph 7 of this Recommendation incorporates Recommendation 2016-4’s guidance on disqualification for decision-maker bias. See Recommendation 2016-4, *supra* note 1, ¶ 5.](#)

[This Recommendation does not address topics associated with the selection, oversight, evaluation, discipline, and removal of administrative judges that are addressed in Recommendation 2016-4, such as limitations on ex parte communications and separation of functions prohibitions. See Recommendation 2016-4, *supra* note 1, ¶¶ 2–4.](#)

⁷ All adjudication proceedings are also subject to baseline requirements imposed by the APA at 5 U.S.C. §§ 555 (addressing “ancillary matters”) and 558 (relating to licensing) and constitutional due process.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

17 disputes between private parties or between private parties and the federal government. Hearings
18 outside the APA also contrast widely in their procedural complexity, ranging from those that are
19 similar in formality and procedure to APA hearings to those that are procedurally minimal and
20 informal.⁸

21 Just as no common statutory framework governs evidentiary hearings outside the APA,
22 no common framework governs the selection, oversight, evaluation, discipline, and removal of
23 administrative judges. In contrast, all ALJs are subject to the policies and procedures prescribed
24 by the APA and regulations of the Office of Personnel Management. These policies and
25 procedures are largely designed to promote ALJ independence. Among other things, they
26 establish a merit-based system for selecting ALJs, prohibit ALJs from engaging in investigation
27 or prosecution or from reporting to officials with such duties, limit the ability of ALJs to engage
28 in ex parte communications, and exempt ALJs from performance appraisals and bonus
29 eligibility.⁹ In addition, ALJs may only be removed or disciplined “for good cause established
30 and determined by the Merit Systems Protection Board.”¹⁰ Administrative judges, however, are
31 subject to the policies and customs of their employing agencies and many of the laws and
32 regulations governing the employment of all federal civil servants.¹¹ Because the nature and
33 procedural complexity of hearings outside the APA vary across and even within individual
34 agencies, the policies and procedures pertaining to the selection, oversight, evaluation, discipline,
35 and removal of administrative judges are necessarily diverse.

Commented [DS2]: Note for Committee: This sentence and the corresponding footnote require revision subject to input from OPM.

⁸ Recommendation 2016-4, *supra* note 1; *see also* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 7-9 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

⁹ *See* 5 U.S.C. §§ 554(d), 556(b), 557(d)(1); 5 C.F.R. §§ 930.206(a)-(b).

¹⁰ 5 U.S.C. § 7521(a).

¹¹ Most administrative judges are hired under agencies' more flexible authority to hire attorneys under “Schedule A” hiring authority. [Clarification from OPM; focus on hiring discretion; explain schedules] Schedule A employees are not subject to the appointment, compensation, and classification rules in title 5 of the U.S. Code. [Too broad] Congress bestowed significant discretion on agencies to set their own qualification requirements for Schedule A positions. [See Note for Committee above.]



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

36 While the Administrative Conference does not believe it is possible or desirable to
37 recommend uniform policies or practices governing the selection, oversight, evaluation,
38 discipline, and removal of administrative judges, it does believe that agencies should consider
39 the policies and practices employed by other agencies, federal and state judicial systems,¹² and
40 the ALJ system with respect to these and related matters when designing or evaluating
41 adjudication programs. This Recommendation identifies practices that may promote (1)
42 ~~transparency and clarity, as well as~~ the objectives of competence, integrity, impartiality, and the
43 degree of independence¹³ appropriate for a system in which decision-making and policy-making
44 authority ultimately lies in the agency head; and (2) clarity and transparency with respect to the
45 policies and practices governing the selection, oversight, evaluation, discipline, and removal of
46 administrative judges.

RECOMMENDATION

Selection

- 47 1. When practicable and permitted by law, agencies should consider using merit selection
48 panels or commissions, such as those used by some state governments to advise those
49 who select judges and by the federal courts to advise in the selection of United States
50 bankruptcy and magistrate judges, to select or recommend administrative judges for
51 positions whose principal duties are adjudicative.
- 52 2. Agencies that use such panels or commissions should establish rules and requirements for
53 membership on them and identify categories of individuals who are eligible to serve on

¹² See, e.g., 28 U.S.C. § 455(b) (prescribing the conditions for which justices and judges of the United States must disqualify themselves); *id.* § 631(b)(5) (directing the Judicial Conference of the United States to promulgate regulations that provide for the establishment of merit selection panels to advise in the selection of federal magistrate judges); JUD. CONF. OF THE U.S., REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES ch. 3 (authorizing the use of merit selection panels to advise in the selection of bankruptcy judges); see also Barnett et al., *supra* note 4, at 61–62 (remarking on the use of state and federal merit selection panels and commissions to advise in the selection of some state judges and federal bankruptcy and magistrate judges).

¹³ “Impartiality” relates to the adjudicator’s ability to issue fair, neutral decisions. See Barnett et al., *supra* note 4, at 1–2 n.3.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 54 them. Panel membership could consist of one or more of the following categories of
55 individuals:
- 56 a. current or former administrative judges from within or outside the agency;
 - 57 b. other federal employees with relevant expertise from within or outside the
58 agency; and
 - 59 c. if legally permissible, representatives of parties with experience in the agency's
60 adjudicatory proceedings.
- 61 3. Agencies should identify the duties and responsibilities of merit selection panels and
62 determine whether panels will offer recommendations to an appointing authority or make
63 final selection decisions.¹⁴
- 64 4. Merit selection panels and agencies should base their recommendations or selections on
65 criteria set by the agency that take into account the specific responsibilities for each
66 administrative judge position. Such criteria could include factors used by merit selection
67 panels to advise in the selection of United States bankruptcy and magistrate judges, as
68 well as other relevant factors, such as:
- 69 a. professional credentials, including experience and education;
 - 70 b. diversity of background and experience;
 - 71 c. subject-matter expertise;
 - 72 d. litigation or adjudication experience;
 - 73 e. professional reputation, as ascertained by references;
 - 74 f. organizational and time-management skills;
 - 75 g. case-management abilities;
 - 76 h. temperament;

¹⁴ A merit selection panel's ability to select administrative judges may be contingent on the outcome in *Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *petition for en banc review denied*, 868 F.3d 1021 (D.C. Cir. 2017), *cert. granted*, 138 S.Ct. 736 (Jan. 12, 2018) (concerning whether ALJs of the Securities and Exchange Commission are "officers of the United States" within the meaning of the Constitution's Appointments Clause). If the Supreme Court in *Lucia* determines that ALJs are "inferior officers" under the Appointments Clause, ALJs will be required to be appointed by the "heads of departments." See U.S. CONST. art. II, § 2, cl. 2. If such a holding is applied to administrative judges who perform duties that are sufficiently analogous to those performed by ALJs, merit selection panels would be prohibited from making final selection decisions regarding such positions.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 77 i. decisiveness;
78 j. ethics and integrity; and
79 k. analytical and writing ability.

Physical Separation

- 80 5. To the extent feasible, agencies should physically separate administrative judges from
81 other agency personnel to maintain appropriate levels of independence and
82 impartiality. Physical separation occurs when administrative judges' offices and other
83 agency employees' offices, respectively, are located in different physical spaces, even if
84 such spaces are located in the same building or premises.

Use of Fulltime Administrative Judges

- 85 6. To the extent feasible, agencies should consider assigning all adjudicative functions to
86 fulltime administrative judges, rather than to administrative judges who also have
87 significant non-adjudicative duties. Occasional cross-over of duties may be appropriate to
88 meet agency objectives, including professional development.

Disqualification

7. Agencies should consider establishing explicit standards that identify the grounds for which administrative judges shall be disqualified from a hearing. Such standards should provide that administrative judges shall be disqualified when any of the following bases for disqualification in [paragraph 5](#) of Recommendation 2016-4 is shown: improper financial or other personal interest in a decision, personal animus against a party or group to which that party belongs, or prejudgment of the adjudicative facts at issue in the proceeding. In addition to these bases, circumstances in which administrative judges shall be disqualified could include the following situations drawn from 28 U.S.C. § 455(b), which prescribes the ~~conditions for~~ [circumstances under](#) which justices and judges of the United States must disqualify themselves:



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 89 a. when an administrative judge has personal knowledge of disputed evidentiary
90 facts concerning the proceeding;
- 91 b. when an administrative judge served as an attorney in the matter in controversy
92 when in private practice, or an attorney with whom the administrative judge
93 previously practiced law served during such association as an attorney
94 concerning the matter, or the administrative judge or such attorney has been a
95 material witness concerning the matter; and
- 96 c. when an administrative judge:
- 97 i. is a party to the proceeding, or an officer, director, or trustee of a
98 party;
- 99 ii. is acting as a representative in the proceeding;
- 100 iii. has an interest that could be substantially affected by the outcome of
101 the proceeding [note: 28 U.S.C. § 455(b)'s standard is very stringent
102 and not consistent with OGE's requirements]; or
- 103 iv. is likely to be a material witness in the proceeding.
- 104 8. Agencies should establish procedures that explain when and how parties may seek an
105 administrative judge's disqualification and how agencies and administrative judges
106 should resolve such claims.

Performance

- 107 9. Evaluations of administrative judges' performance and eligibility for bonuses should be
108 based on relevant factors, including the following factors derived, in part, from
109 Recommendation 92-7: case processing guidelines; appropriate case volume goals and
110 requirements; judicial comportment and demeanor; adherence to governing ethical
111 requirements; ~~and~~ the existence, if any, of a clear disregard of or pattern of non-
112 adherence to properly articulated and disseminated rules, procedures, precedents, and

Commented [DS3]: Note for Committee: This recommendation requires revision. An OGE representative will participate remotely during the meeting.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

other agency policy; and all other relevant considerations.⁴⁵ Maintaining administrative judges' independence and impartiality does not preclude the articulation of appropriate performance norms or efforts to secure adherence to previously announced standards and policies.⁴⁶

- 10. In the instance of administrative judges who perform both adjudicative and non-adjudicative functions, the criteria agencies use to evaluate administrative judges' performance and eligibility for bonuses should distinguish between the two functions.
- ~~11.~~ Agencies should not consider the outcomes of particular cases when evaluating administrative judges' performance of adjudicative functions.

Removal and Other Adverse Actions

- ~~11.~~ Agencies should articulate any internal procedures or requirements not required by applicable governing law that they apply in removal and other adverse actions against administrative judges.

Transparency

- ~~12.~~ Agencies should, to the extent practicable, make policies and procedures governing the selection, oversight, evaluation, discipline, and removal of administrative judges available to the public.

⁴⁵ Cf. Recommendation 92-7, *supra* note 63, ¶ III.B.3 (recommending that chief administrative law judges (ALJs) "be given authority to . . . [c]onduct regular ALJ performance reviews based on relevant factors").

⁴⁶ Cf. Admin. Conf. of the U.S., Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, ¶ A.1, 43 Fed. Reg. 27508 (June 26, 1978) (explaining that "[m]aintaining the . . . decisional independence [of the Social Security Administration's ALJs] does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies").

Commented [DS4]: Note for Committee: Two chapters of the U.S. Code authorize agencies to bring performance-based actions against non-SES and non-ALJ employees: Chapters 43 and 75. Agencies are permitted to bring performance-based actions under either chapter.

While the chapters share many similarities, they also differ in several important respects. For example, Chapter 43 authorizes agencies to "reduce in grade or remove an employee for *unacceptable performance*" (emphasis added). 5 U.S.C. § 4303(a). Chapter 75, on the other hand, authorizes agencies to "take an action . . . against an employee *only for such cause as will promote the efficiency of the service*" (emphasis added). *Id.* § 7513(a). In addition, among other things, both chapters impose different burdens of proof on the agency. (Adverse actions must be supported by substantial evidence under Chapter 43 and a preponderance of the evidence under Chapter 75.) The MSPB has a number of informative resources that explain the adverse action process. *See, e.g.,* MSPB, *Adverse Actions: A Compilation of Articles* (2016), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1361510&version=1366861&application=ACROBAT>.

Should there be a recommendation that suggests agencies explain under what circumstances removal and other adverse actions against administrative judges are brought under Chapter 43 or Chapter 75?

Commented [DS5]: Note for Committee: Should there be a recommendation(s) concerning probationary periods?