



## **Recommendation 92-7**

### **The Federal Administrative Judiciary**

(Adopted December 10, 1992)

---

#### **PREAMBLE**

At the request of the Office of Personnel Management, the Administrative Conference undertook a study of a series of issues relating to the roles of Federal administrative law judges (ALJs) and non-ALJ adjudicators, or administrative judges (AJs),<sup>1</sup> as they have evolved over the last several decades. The study addressed a number of different issues, including those relating to selection and evaluation of ALJs and AJs, the relationship of ALJs and AJs to their employing agencies, including the appropriate level of "independence" of such decision makers, and under what circumstances each type of decision maker should be used. Many of these issues are controversial, and the Conference has heard strong arguments from those with differing views.

The Administrative Conference takes as its starting point in considering the role of the Federal administrative judiciary the role created for "hearing examiners," now redesignated as "administrative law judges," in the Administrative Procedure Act in 1946.<sup>2</sup> That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

The need for impartial factfinders in administrative adjudications is evident. To ensure the acceptability of the process, some degree of adjudicator independence is necessary in those

---

<sup>1</sup> "The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

<sup>2</sup> In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69-9, 1 CFR 305.69-9 (part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede part A of Recommendation 69-9.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

adjudications involving some kind of hearing.<sup>3</sup> The legitimacy of an adjudicatory process also depends on the consistency of its results and its efficiency.

ALJs possess a degree of independence that dates back to the enactment of the APA and is governed by the APA and related statutes. The APA provides that certain separations of functions must be observed to protect the ALJ from improper pressures from agency investigators and prosecutors. ALJs are selected through a special process overseen by OPM. Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also exempt from the performance appraisal requirements applicable to almost all other Federal employees under the Civil Service Reform Act.

While the number of ALJs in the Federal government has leveled off in the last decade, and has actually decreased outside of the Social Security Administration, some agencies have been making increased use of AJs. The amount of functional independence accorded to AJs varies with the particular agency and type of adjudication; however, AJs generally lack the statutory protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals, and several major groups of AJs regulatory undergo such appraisals by the agencies for which they work. In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and, according to the Conference's survey, do not perceive themselves as significantly more subject to agency pressure than do ALJs.

The Conference's general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

---

<sup>3</sup> The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Use of ALJs and AJs

There is no apparent rationale undergirding current congressional or agency decisions on the use of ALJs or non-ALJs in particular types of cases. Congress seems to make such choices on an ad hoc basis. Moreover, it is quite clear that similar types of determinations made in different agencies are being made by different types of decision makers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs; at the Department of Veterans Affairs, AJs adjudicate similar types of cases. Moreover, in some contexts, non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases.

The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings.

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA as well as the selection criteria designed to ensure the highest quality adjudicators, are of particular value in situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations),<sup>4</sup> or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

---

<sup>4</sup> Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Another factor to consider is whether the procedures established by statute or by rule for cases heard and decided are, or would be, substantially equivalent to APA formal hearings. In such cases, the additional uniformity that would derive from making the cases formally subject to 5 U.S.C. §§554, 556, and 557 would argue in favor of ALJs.

ALJs are required to be lawyers. Some AJs who decide cases are not lawyers, but have other needed specialized expertise. For example, certain adjudicators at the Nuclear Regulatory Commission are physicists or engineers who participate on multi-member boards. In determining whether it is appropriate to use ALJs in particular types of cases, Congress should consider whether the benefits of using ALJs are outweighed by the benefits of having other expertise brought to bear. It should also consider whether lawyers serving with nonlawyers on decision panels should be ALJs.

A final consideration, particularly in the context of considering conversion of existing AJ positions to ALJ positions, is the extent to which the current adjudicators closely approximate ALJs in their decisional independence, the criteria for their selection, or their compensation and experience levels. If existing AJs are functioning well and do not approach parity with ALJs on these criteria, there may be no need to make the conversion. On the other hand, if they closely match ALJs on these factors, uniformity interests may weigh in favor of conversion.

Although none of these factors is necessarily intended to be determinative, the more that these factors weigh in favor of ALJ status for the decision maker, the more appropriate it is for Congress to mandate such status. It should be noted, however, that these recommendations are not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

In situations where Congress does convert AJ positions to ALJ positions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on "supergrade" positions, which included ALJs, this oversight role served a purpose. Those limits no longer exist, and it is no longer necessary for OPM to participate in this process. Agencies should be free, within their normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **ALJ Selection**

The selection process for ALJs has been administered by OPM (and its predecessor agency) since 1946. OPM develops the criteria for selection, accepts applications for the register of eligibles, and rates the applicants on the basis of their experience as described in a lengthy statement prepared by the applicant, a personal reference inquiry, a written demonstration of decision-writing ability, and a panel interview. The scores from this process determine an applicant's rank on the register of eligibles. Because OPM has historically considered ALJs as being in the competitive service, OPM follows the statutory requirements for filling vacancies. Thus, OPM rates and ranks eligibles on a scale from 70 to 100, and when an agency seek to fill a vacancy, OPM certifies the top three names on the register to that agency. In practice, only applicants with scores from 85 to 100 have been certified.

The Veterans' Preference Act, which has historically applied to most civil service hiring, is applicable to selection of administrative law judges. As applied, veterans deemed qualified for the preference are awarded an extra 5 points, and disabled veterans are awarded an extra 10 points in their scores. These extra points have had an extremely large impact, given the small range in unadjusted scores. In addition, under current law, agencies may not pass over a veteran to hire a nonveteran with the same or lower score on the certificate. As a consequence, application of the veterans' preference has almost always been determinative in the ALJ selection system.

There has been concern about the ALJ selection process, arising from the determinative impact of veterans' preference and the very limited selection options available to agencies. In fact, most agencies in recent years have found ways to circumvent this process somewhat, primarily by hiring laterally from other agency ALJ offices, or (in those few agencies that hire substantial numbers of ALJs) by waiting until there are numerous slots to fill at one time, thus entitling them to a larger certificate of eligibles from OPM.

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

for specific positions from a pool of representative applicants. The Conference recognizes the general policy of veterans' preference in Federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the Federal civilian workforce. But, in view of the conflict between this policy and the valid need of Federal agencies to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends Congress abolish veterans' preference in the particular and limited context of ALJ selection.<sup>5</sup> In that connection, it should be noted that in 1978, Congress created a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other Federal judicial position.

The Conference's recommendation on the selection of ALJs would leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants). OPM is urged to ensure that all applicants placed on the register are in fact qualified to fulfill the responsibilities of being an ALJ.

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.<sup>6</sup>

In addition, if, following review of the highest-ranked 50 percent, an agency needed to review additional names to find a suitable candidate, it could request an additional certificate from OPM. Such an exception should be invoked rarely, and only upon a showing of exceptional circumstances.

The Conference recognizes that any limitation on the number of qualified candidates on the certificate, including the "top three" limitation now in place, might be criticized as arbitrary. By recommending the highest-ranked 50 percent of the applicants OPM has determined to be

---

<sup>5</sup> The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69-9, 1 CFR 305.69-9 ¶ A(4) (1988).

<sup>6</sup> In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so agencies would have the ability to hire any qualified applicant on the certificate.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

qualified, the Conference is attempting to balance two factors. The Conference recognizes the agencies' strong interest in having a substantially larger pool of qualified candidates from which to select ALJs who meet their varying criteria and needs. It also recognizes the importance of ensuring that such a pool is highly qualified, as measured by a uniform objective rating system. The Conference believes that its recommendation provides a reasonable balance of these factors. It provides a pool large enough that agencies should be able to find candidates for ALJ positions who satisfy their varying and specific needs. At the same time, OPM estimates the top 50 percent of the register corresponds to those applicants with scores of 85 or better out of 100.

Agencies would also have access to a computerized database that would contain the complete application files of individual applicants on their certificate, including numerical ratings, geographical or agency preferences, particular kinds of experience, and veteran status. This database would allow agencies the option to narrow the list of qualified applicants and focus on those whom they would like to consider further. For example, an agency could search for all candidates willing to relocate to New York City, who spoke Spanish, and had ratings in the top 20 percent.

To ensure that the register contains a broad range of qualified applicants, the Conference also recommends that OPM and hiring agencies expand recruitment of women and minority applicants for ALJ positions. In addition, because questions have been raised about OPM's current method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends OPM review its rating criteria to determine whether they are appropriate.

For much of the last decade, the register has been closed, thus precluding newly interested applicants from being considered for ALJ positions. Although OPM deferred reopening the register pending the outcome of the Conference's consideration and recommendations, it has announced the register will be reopened in the spring of 1993. While the Conference's recommendations would significantly affect the ALJ selection process, the impact would come mostly at the end of the process, after OPM has evaluated and rated the new applicants. This procedure is likely to be a time-consuming one, given the expected large influx of applicants. Therefore, the Conference supports reopening the application process, so that OPM can begin rating the candidates now, even though the recommended changes in the later stages have not yet been implemented. This way, when and if those changes are in place, the updated register will be readily available. It should be noted, however, the Conference is also recommending



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

OPM review some of its rating criteria, which would need to be done before it begins rating new applicants.

OPM has indicated that it has a planned program to expand recruitment of women and minority applicants for the register. The Conference both encourages OPM to give such a program a high priority, and recommends OPM and the hiring agencies take steps in particular to recruit among minority bar associations and other institutions with large numbers of minorities or women.

The Conference's view is that implementing these recommendations will provide agencies the opportunity to select ALJs from a broad range of highly qualified candidates and to hire the best applicants from a representative register.

### **ALJ Evaluation and Discipline**

At present, ALJs, virtually alone among Federal employees, are statutorily exempt from any performance appraisal. Although agencies may seek removal or discipline of ALJs "for good cause" by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ. For example, agency actions premised on low productivity have never been successful before the Board.

The Conference recognizes the importance of independence for ALJs. Their role under the APA as independent fact finders requires they be protected from pressure in making their decisions. There can be a tension, however, between this independence and the agency's role as final policymaker, including the need for consistency of result and political accountability. Moreover, agencies have a legitimate interest in being able to manage their employees, including ALJs, in order to ensure the adjudicatory system is an efficient and fair one.

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time goals,<sup>7</sup> would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review.

---

<sup>7</sup> See Conference Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR 305.86-7 (1992), at ¶2.





## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of non-adherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.<sup>8</sup>

Conversely, ALJs should also have a mechanism for dealing with legitimate concerns about improper agency infringement of, or interference with, their decisional independence. Under the Conference's recommendation, each agency employing ALJs should set up a system for receiving and investigating allegations of such activity by agency management officials and, where warranted, referring them to the appropriate authorities for action.<sup>9</sup> OPM would have oversight responsibility, and could, upon request by an ALJ or at its own discretion, review an agency's response to such allegations, and recommend appropriate further action.

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling programs designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.<sup>10</sup>

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.<sup>11</sup> While there is no known evidence that such a problem is widespread, the Conference's view is it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends agencies publicize the existence

---

<sup>8</sup> Many states now use performance reviews for their state court judges and ALJs. The performance of Federal magistrate-judges is evaluated as a condition of reappointment. Even some Federal courts are beginning to experiment with evaluation of judges' performance.

<sup>9</sup> Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.

<sup>10</sup> See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

<sup>11</sup> See, e.g., U.S. GAO, *Social Security: Racial Difference in Disability Decisions Warrants Further Investigation*, GAO/HRD-92-56 (April 1992). Cf. Ninth Circuit, *Gender Bias Task Force, Preliminary Report (Discussion Draft)* (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs, thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

The Conference also recommends proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decision making in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only one ALJ. So long as this is the case, the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

### **Policy Articulation**

As discussed, the APA model of agency decision making is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires granting ALJs independence as fact finders, but it also must ensure agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decision,<sup>12</sup> or other appropriate practices, such as proper use of policy statements.<sup>13</sup> Such policy statements must be properly disseminated.

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts the judge finds in an individual case.

---

<sup>12</sup> See Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89-8 (1992) ¶1 at n. 2.

<sup>13</sup> See Conference Recommendation 92-2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92-2.



## The Concept of an ALJ Corps

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).<sup>14</sup>

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of such proposals; others are inconsistent with them. The Conference concluded there is no basis at this time for structural changes more extensive than those proposed here.

## Recommendation

### I. Congressionally Mandated Use of ALJs and AJs<sup>15</sup>

A. When Congress considers new or existing programs that involve agency on-the-record adjudications, it should seek to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, by providing for the use of administrative law judges (ALJs) in all appropriate circumstances.<sup>16</sup> To further this goal, Congress should consider converting certain existing administrative judge (AJ) positions<sup>17</sup> to ALJ positions. In determining the appropriateness of converting existing AJ positions to ALJ status and of requiring the use of ALJs in particular types of new adjudications, Congress should consider the following factors, if present, as indicia to weigh in favor of requiring ALJ status:

---

<sup>14</sup> See S. 826 and H.R. 3910, 102d Cong.

<sup>15</sup> The recommendations in this Part I are interdependent with those of Parts II and III urging improvements in the selection and evaluation processes for ALJs.

<sup>16</sup> This recommendation is not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

<sup>17</sup> The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The cases to be heard and decided are likely to involve:
    - a. Substantial impact on personal liberties or freedom;
    - b. Orders that carry with them a finding of criminal-like culpability;
    - c. Imposition of sanctions with substantial economic effect; or
    - d. Determination of discrimination under civil rights or other analogous laws.
  2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.
  3. The deciders in such cases are, or ought to be, lawyers--taking into consideration the possibility that some programs might require other types of specialized expertise on the part of adjudicators or on panels of adjudicators.
  4. Those incumbent AJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.
- B. When Congress determines it should require ALJs to preside over hearings in specific classes of existing federal agency adjudications at which ALJs do not now preside, it should specify that those AJs presiding over such proceedings at that time who can satisfy the Office of Personnel Management's eligibility qualifications for ALJs be eligible for immediate appointments as ALJs.
- C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

### **II. ALJ Selection**

- A. Congress should authorize where required, and OPM should establish, a process for the selection of qualified ALJs by federal agencies that contains the following elements:
1. OPM should continue to administer the process for determining whether applicants are qualified to be on the register of those eligible for ALJ positions and for rating such applicants. OPM should ensure that all applicants appearing on the register are in fact qualified to fulfill the



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

duties of an ALJ under applicable law, including that they have the capability and willingness to provide impartial, independent fact finding and decision making. To the extent that this may require revising the examination process, OPM should make the appropriate changes.

2. Those applicants determined by OPM to be qualified should be listed on the register with their numerical scores noted. Agencies seeking to fill ALJ positions should be allowed to request a certificate containing the names of those applicants whose numerical ratings place them in the highest-ranking 50 percent of the register of eligible applicants. Agencies should have the discretion to request a certificate with a smaller number of percentage of the register. Agencies should also be given access to a computerized database containing the complete application files of those applicants on the certificate.

3. A hiring agency should be permitted to select any applicant from the certificate who, in the agency's opinion, possesses the qualifications for the particular position to be filled. An agency may request that OPM provide an additional number of names upon a showing of exceptional circumstances.

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropriate.

C. OPM immediately should implement Parts II (A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

D. In order to implement the proposals in paragraphs II (A) and (B) above, Congress should abolish the veterans' preference in ALJ selection.

### **III. ALJ Evaluation and Discipline**

Congress should authorize, where necessary, and OPM and the agencies that employ ALJs should establish, the following processes for assisting ALJs and the agencies that employ them to carry out their responsibilities to the public and to individual parties:

#### *A. Organization*



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.<sup>18</sup>

3. OPM should provide guidance and assistance to aid Chief ALJs fulfilling the responsibilities given to them under this Part III.

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.<sup>19</sup>

### *B. Evaluation and Training*

Chief ALJs should be given the authority to:

1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.

2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.

3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of non-adherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.

---

<sup>18</sup> In agencies with large numbers of ALJs, the Chief ALJ might appropriately delegate some or all such responsibility to deputy or regional chief ALJs.

<sup>19</sup> Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to consider whether a similar limitation should apply to Chief ALJs.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB) based on such performance reviews.

### *C. Complaints About ALJs*

Each agency that employs ALJs should set up a system for receiving and evaluating complaints or allegations of misconduct by an ALJ, including bias or prejudice.

1. The Chief ALJ in each agency, individually or through involvement of an ALJ peer review group established for this purpose, should be given responsibility for receiving and investigating such complaints.

2. If a Chief ALJ determines that ALJ misconduct occurred, the Chief ALJ should recommend the agency take appropriate corrective action, or, in appropriate cases, recommend that disciplinary action against the ALJ be brought by the agency at the MSPB.

3. If a Chief ALJ determines further investigation by another authority is warranted, he or she should refer the case to that authority.

4. Each agency should make known to interested persons in an appropriate fashion the existence of such complaint procedure.

5. Where allegations of misconduct implicate a Chief ALJ, they should be referred to OPM for such investigation and recommended action.

6. Complainants should be given notice of the disposition of their complaints.

### *D. Complaints by ALJs*

Each agency that employs ALJs should set up a system for receiving and investigating allegations of unlawful agency infringement on ALJ decisional independence or other improper interference in the fulfillment of ALJ responsibilities. Such a system should be subject to OPM oversight. Where investigation reveals the probable occurrence of such an impropriety, the matter should be referred to the appropriate authority for review and recommended action designed to remedy the situation and prevent recurrence, including the issuance of oral or written reprimands and other appropriate sanctions.



#### *E. MSPB Panels*

MSPB should assign cases involving charges against ALJs to a three-judge panel of ALJs drawn from a pool. No judge on the panel should be from the same agency as the respondent ALJ.

#### **IV. Policy Articulation**

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.<sup>20</sup> Congress, the President, and the courts should encourage such policy articulation.

#### **V. The Concept of an ALJ Corps**

Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.

#### **Citations:**

57 FR 61760 (December 29, 1992)

\_\_ FR \_\_\_\_ (2011)

1992 ACUS 28 (vol. 1)

---

<sup>20</sup> See generally Conference Recommendation 71-2, "Articulation of Agency Policies," 1 CFR 305.71-2 (1992); Conference Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87-7 (1992); Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89-8 (1992); Conference Recommendation 92-2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92-2.