Agency Recruitment and Selection of Administrative Law Judges

Committee on Adjudication

Committee on Administration and Management

Proposed Recommendation for Committee | April 26, 2019

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

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

4 Id. § 3105.
OPM-administered and developed examination and panel interview process, as well as veterans’ status.⁶ EO 13,843 placed ALJs in what is known as the “excepted service.”⁷ As a result, agencies now hire new ALJs directly—that is, without OPM’s involvement—generally using whatever selection criteria and procedures they deem appropriate. EO 13,843 was justified on two grounds. The first was the need to “mitigate” the concern that, after the Supreme Court’s 2018 decision in Lucia v. Securities and Exchange Commission,⁸ the OPM-administered process might unduly circumscribe an agency’s head’s discretionary hiring authority under the Appointments Clause.⁹ Lucia held that the SEC’s ALJs were officers under the Constitution’s Appointment’s clause, with the result being that—assuming that the SEC’s ALJs are inferior rather than principal officers¹⁰—they must be appointed directly by the Commission itself as the head of a department rather than, as was being done, by SEC staff.¹¹ The second justification was the need to give “agencies greater ability and discretion to assess critical qualities in ALJ candidates . . . and [such candidates’] ability to meet the particular needs of the agency.”¹² Although EO 13,843 identifies desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and the ability to communicate their decisions, it explicitly leaves it to each agency to determine its own selection criteria (except that it requires 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.
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.
hiring criteria that agencies will employ in selecting among ALJ candidates, though it does recommend that agencies publish the minimum qualifications and selection criteria for ALJ positions. The selection criteria that an agency considers adopting might include things such as litigation experience, experience as an adjudicator, experience in dispute resolution, experience with the subject-matter that comprises the agency’s caseload, specialized technical skills, experience with case management systems, demonstrated legal research and legal writing skills, a dedicated work ethic, and strong leadership and communications skills.

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

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

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

RECOMMENDATION

Recruitment

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

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

Formulation and Public Announcement of Hiring Criteria

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

Selection Panels and Writing Samples

3. Agencies should develop policies to review and assess ALJ applications. Agencies might wish to consider including among these policies the development of screening panels to select which applicants to interview, interview panels to select which applicants to recommend for appointment, or both kinds of panels. Such panels could include internal reviewers only or both internal and external reviewers, and could include overlapping members among the two types of panels or could include entirely different members. Agencies might also wish to consider including among these policies procedures to evaluate applicants’ writing samples. Such writing samples could be submitted with the
applicants’ initial applications, as part of a second round of submissions for applicants who meet the agencies’ qualifications expectations, and/or as part of a proctored writing assignment in connection with an interview.