



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Selection of Administrative Law Judges

Joint Ad Hoc Committee of the Committee on Adjudication and Committee on Administration and Management

Proposed Recommendation | June 13, 2019

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

Commented [CMA1]: The Committee on Adjudication and the Committee on Administration and Management voted to change the title of this Recommendation to "Agency Recruitment and Selection of Administrative Law Judges."

1 The Administrative Procedure Act (APA) requires that hearings conducted under its main
2 adjudication provisions¹ (sometimes known as "formal" hearings) be presided over by the
3 agency itself, by "one or more members of the body which comprises the agency," or by "one or
4 more administrative law judges [(ALJs)] appointed under" 5 U.S.C. § 3105.² Section 3105, in
5 turn, authorizes "[e]ach agency" to "appoint as many [ALJs] as are necessary for proceedings
6 required to be conducted in accordance" with those provisions.³

7 The process for appointing ALJs recently changed as a result of Executive Order (EO)
8 13,843.⁴ Until that order was issued, agencies could hire a new ALJ only from a certificate of
9 qualified applicants (that is, a list of applicants eligible for hire) prepared by the Office of
10 Personnel Management (OPM).⁵ Each certificate generally had for each opening, three

¹ 5 U.S.C. §§ 554, 556–57.

² *Id.*

³ *Id.* § 3105.

⁴ Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018); *see also* Memorandum from Jeff T.H. Pon, Dir., Office of Pers. Mgmt., to Heads of Exec. Dep'ts and Agencies, Executive Order – Excepting Administrative Law Judges from the Competitive Service (July 10, 2018), <https://chcoc.gov/print/9282> (noting that "OPM's regulations continue to govern some aspects of ALJ employment").

⁵ This was the process for hiring new ALJs. Many agencies hired incumbent ALJs from other agencies under a process known as "interagency transfer." This process no longer exists, but agencies are still free to hire ALJs from other agencies using their own process.



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11 applicants selected from a much larger register of applicants OPM deemed “qualified.” The “list
12 of three,” as it was known, consisted of the three highest-scoring applicants based upon, among
13 other things, an OPM-administered and -developed examination and panel interview process, as
14 well as veterans’ status.⁶

15 Under EO 13,843, newly appointed ALJs ~~were removed from the~~ ~~are no longer in the~~
16 ~~“competitive service,” and were instead placed~~ ~~but instead are~~ in what is known as the “excepted
17 service.”⁷ As a result, agencies now hire new ALJs directly—that is, without OPM’s
18 involvement—generally using whatever selection criteria and procedures they deem appropriate.
19 EO 13,843 was premised on two primary bases. The first was the need to “mitigate” the concern
20 that, after the Supreme Court’s 2018 decision in *Lucia v. Securities and Exchange Commission*,⁸
21 the OPM-administered process might unduly circumscribe an agency head’s discretionary hiring
22 authority under the Constitution’s Appointments Clause.⁹ *Lucia* held that the Securities and
23 Exchange Commission’s (SEC) ALJs were officers under the Appointments Clause, with the
24 result being that—assuming that the SEC’s ALJs are inferior rather than principal officers¹⁰—
25 they must be appointed directly by the Commission itself as the head of a department rather than,
26 as was being done, by SEC staff.¹¹ The second basis was the need to give “agencies greater
27 ability and discretion to assess critical qualities in ALJ candidates . . . and [such candidates’]
28 ability to meet the particular needs of the agency.”¹²

⁶ See Admin. Conf. of the U.S., Recommendation 1992-7, *The Federal Administrative Judiciary* 5, 57 Fed. Reg. 61,759, 61761 (Dec. 29, 1992). Qualified veterans received extra points that “had an extremely large impact, given the small range in unadjusted scores.” *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 No. 13,843, § 1, 83 Fed. Reg. at 32,755.

¹⁰ The *Lucia* majority expressly refrained from deciding whether the SEC’s 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 *id.* This Recommendation takes no position on constitutional questions.

¹² Exec. Order No. 13,843, § 1, 83 Fed. Reg. at 32,755.



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29 EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies
30 desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and
31 the ability to communicate their decisions, explicitly leaving it, however, to each agency to
32 determine its own selection criteria. This Recommendation does not address the substantive
33 hiring criteria that agencies should employ in selecting among ALJ candidates, though it does
34 recommend that agencies publish the minimum qualifications and selection criteria for their ALJ
35 positions. The selection criteria that an agency adopts might include, for example, litigation
36 experience, experience as an adjudicator, experience in dispute resolution, experience with the
37 subject-matter that comprises the agency’s caseload, specialized technical skills, experience with
38 case management systems, demonstrated legal research and legal writing skills, a dedicated work
39 ethic, and strong leadership and communications skills.¹³

40 Each agency must decide not only which selection criteria will apply, but also which
41 ~~are~~ will be mandatory and which are only desirable or preferred. Of course, agencies must also
42 ensure compliance with generally applicable legal requirements, including those relating to equal
43 employment opportunity such as are embodied in Executive Order 13,583 regarding
44 government-wide initiatives to promote diversity and inclusion in the federal workforce¹⁴ and
45 veterans’ preference.¹⁵

Commented [CMA2]: Proposed Amendment from Public Member Renee M. Landers

46 Because the EO allows each agency to design its own selection procedures, each agency
47 must now decide which of its officials will be involved in the selection process, how the process
48 will be structured, how vacancies will be announced and otherwise communicated to potential
49 applicants, and whether the agency will require review writing samples or use some other
50 evaluation method.

¹³ See generally Jack M. Beermann and Jennifer L. Mascott, Federal Agency ALJ Hiring After *Lucia* and Executive Order 13843 (May 29, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-research-report-federal-agency-alj-hiring-after-lucia-and-eo-13843>. This report is based in part upon interviews with officials at a number of agencies, including those employing the vast majority of ALJs.

¹⁴ Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011).

¹⁵ The Executive Order provides that “each agency shall follow the principle of veteran preference as far as administratively feasible.” Exec. Order No. 13,843, § 3, 83 Fed. Reg. at 32,755.



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51 This Recommendation is built upon the view that there is no “one-size-fits-all” procedure
52 for appointing ALJs and is designed to assist agencies that are in the initial stages of thinking
53 through new procedures for appointing ALJs under the EO.¹⁶ Each agency will have to construct a
54 system that is best suited to its particular needs. Doing so will require consideration of, among
55 other things, the nature of its proceedings, the size of the agency’s caseload, and the substance of
56 the relevant statutes and the procedural rules involved in an agency’s proceedings.

RECOMMENDATION

- 57 1. To ensure the widest possible awareness of their Administrative Law Judge (ALJ)
58 vacancies and an optimal and broad pool of applicants, agencies should announce their
59 ALJ-vacancies on the Office of Personnel Management’s website USAJOBS (currently
60 operated by the Office of Personnel Management), their own websites, and/or other
61 websites that might reach a diverse range of potential ALJ applicants. Agencies that
62 desire or require subject-matter, adjudicative, or litigation experience should also reach
63 out to lawyers who practice in the field or those with prior experience as an adjudicator,
64 as well as the relevant bar associations. Each agency should keep the application period
65 open for a sufficient reasonable period of time to achieve an optimal and broad pool of
66 applicants.
67 2. Agencies should formulate and publish minimum qualifications and selection criteria for
68 ALJ hiring. Those qualifications and criteria should include the factors specified in
69 Executive Order 13,843 and the qualifications the agency deems important for service as
70 an ALJ in the particular agency. The notice should distinguish between mandatory and
71 desirable criteria. When constructing guidelines and processes for the hiring of ALJs,
72 agencies should be mindful of the importance of the appearance of impartiality and the
73 independence and neutrality of ALJs.

Commented [CA3]: Proposed Council Amendment #1

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Commented [CMA5]: Proposed Amendment from Public Member Renee M. Landers

Commented [CMA6]: Proposed Amendment from Senior Fellow Alan B. Morrison #2

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Commented [CA8]: Proposed Council Amendment #2

¹⁶ Some agencies have already publicly disseminated guidance. See, e.g., Secretary’s Order 07-2018, Procedures for Appointments of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307 (Aug. 30, 2018); U.S. DEP’T OF HEALTH & HUMAN SERV.’S, ADMINISTRATIVE LAW JUDGE APPOINTMENT PROCESS UNDER THE EXCEPTED SERVICE (Nov. 29, 2018), https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf.



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74 3. Agencies should develop policies to review and assess ALJ applications. These policies
75 might include the development of screening panels to select which applicants to
76 interview, interview panels to select which applicants to recommend for appointment, or
77 both kinds of panels. **If used, s**Such panels could include internal reviewers only or both
78 internal and external reviewers, and could include overlapping members among the two
79 types of panels or could include entirely different members. These policies might include
80 procedures to evaluate applicants' writing samples. **If used, s**Such writing samples could
81 be submitted with the applicants' initial applications, as part of a second round of
82 submissions for applicants who meet the agencies' qualifications expectations, or as part
83 of a proctored writing assignment in connection with an interview.

84 ~~3.4.~~ The guidelines and procedures for the hiring of ALJs should be designed and
85 administered to ensure the hiring of ALJs who will carry out the functions of the office
86 with impartiality and maintain the appearance of impartiality.

Commented [CA9]: Proposed Council Amendment #2