



## **Administrative Conference Recommendation 2019-2**

### **Agency Recruitment and Selection of Administrative Law Judges**

**Adopted June 13, 2019**

The Administrative Procedure Act (APA) requires that hearings conducted under its main adjudication provisions<sup>1</sup> (sometimes known as “formal” hearings) be presided over by the agency itself, by “one or more members of the body which comprises the agency,” or by “one or more administrative law judges [(ALJs)] appointed under” 5 U.S.C. § 3105.<sup>2</sup> 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.<sup>3</sup>

The process for appointing ALJs recently changed as a result of Executive Order (EO) 13,843.<sup>4</sup> 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).<sup>5</sup> Each certificate generally had, for each opening, 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

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<sup>1</sup> 5 U.S.C. §§ 554, 556–57.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* § 3105.

<sup>4</sup> 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”).

<sup>5</sup> 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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

other things, an OPM-administered and -developed examination and panel interview process, as well as veterans' status.<sup>6</sup>

Under EO 13,843, newly appointed ALJs were removed from the “competitive service,” and were instead placed in what is known as the “excepted service.”<sup>7</sup> 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 premised on two primary bases. The first was the need to “mitigate” the concern that, after the Supreme Court’s 2018 decision in *Lucia v. Securities and Exchange Commission*,<sup>8</sup> the OPM-administered process might unduly circumscribe an agency head’s discretionary hiring authority under the Constitution’s Appointments Clause.<sup>9</sup> *Lucia* held that the Securities and Exchange Commission’s (SEC) ALJs were officers under the Appointments Clause, with the result being that—assuming that the SEC’s ALJs are inferior rather than principal officers<sup>10</sup>—they must be appointed directly by the Commission itself as the head of a department rather than, as was being done, by SEC staff.<sup>11</sup> The second basis 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.”<sup>12</sup>

EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and

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<sup>6</sup> See Admin. Conf. of the U.S., Recommendation 1992-7, *The Federal Administrative Judiciary* 5, 57 Fed. Reg. 61,759, 61,761 (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.*

<sup>7</sup> “[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.

<sup>8</sup> 138 S. Ct. 2044 (2018).

<sup>9</sup> See Exec. Order No. 13,843, *supra* note 4, § 1.

<sup>10</sup> 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.

<sup>11</sup> See *id.* This Recommendation takes no position on constitutional questions.

<sup>12</sup> Exec. Order No. 13,843, *supra* note 4, § 1.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the ability to communicate their decisions, explicitly leaving it, however, to each agency to determine its own selection criteria. This Recommendation does not address the substantive hiring criteria that agencies should employ in selecting among ALJ candidates, though it does recommend that agencies publish the minimum qualifications and selection criteria for their ALJ positions. The selection criteria that an agency adopts might include, for example, 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.<sup>13</sup>

Each agency must decide not only which selection criteria will apply, but also which are mandatory and which are only desirable or preferred. Of course, agencies must also ensure that recruitment and selection comply with generally applicable legal requirements, such as those relating to veterans’ preference and equal employment opportunity and government-wide initiatives to promote diversity and inclusion in the federal workforce.<sup>14</sup>

Because the EO 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 applicants, and whether the agency will review writing samples or use some other evaluation method.

This Recommendation is built upon the view that there is no “one-size-fits-all” procedure for appointing ALJs and is designed to assist agencies that are in the initial stages of thinking

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<sup>13</sup> 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.

<sup>14</sup> See, e.g., Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011). As far as veterans’ preference is concerned, Executive Order 13,843 provides that “each agency shall follow the principle of veteran preference as far as administratively feasible.” Exec. Order No. 13,843, *supra* note 4, § 3.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

through new procedures for appointing ALJs under the EO.<sup>15</sup> Each agency will have to construct a system that is best suited to its particular needs. Doing so will require consideration of, among other things, the nature of its proceedings, the size of the agency's caseload, and the substance of the relevant statutes and the procedural rules involved in an agency's proceedings.

### RECOMMENDATION

1. To ensure the widest possible awareness of their Administrative Law Judge (ALJ) vacancies and an optimal and broad pool of applicants, agencies should announce their vacancies on the government-wide employment website (currently operated by the Office of Personnel Management as USAJOBS), their own websites, and/or other websites that might reach a diverse range of potential ALJ applicants. Agencies that desire or require subject-matter, adjudicative, or litigation experience should also reach out to lawyers who practice in the field or those with prior experience as an adjudicator. Each agency should keep the application period open for sufficient time to achieve an optimal and broad pool of applicants.
2. Agencies should formulate and publish minimum qualifications and selection criteria for ALJ hiring. Those qualifications and criteria should include the factors specified in Executive Order 13,843 and the qualifications the agency deems important for service as an ALJ in the particular agency. The notice should distinguish between mandatory and desirable criteria.
3. Agencies should develop policies to review and assess ALJ applications. These policies might include 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. If used, such panels could include internal reviewers only or both internal and external reviewers, and could include overlapping members among the two

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<sup>15</sup> 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>.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

types of panels or could include entirely different members. These policies might include procedures to evaluate applicants' writing samples. If used, 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, or as part of a proctored writing assignment in connection with an interview.

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