



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Appellate Systems

Committee on Adjudication

Proposed Recommendation | December 16, 2020

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).

1 In Recommendation 2016-4,¹ the Administrative Conference offered best practices for
2 evidentiary hearings in administrative adjudications. Paragraph 26 recommended that agencies
3 provide for “higher-level review” (or “agency appellate review”) of the decisions of hearing-
4 level adjudicators.² This Recommendation offers best practices for such review. The
5 Administrative Conference intends this Recommendation to cover appellate review of decisions
6 resulting from (1) hearings governed by the formal hearing provisions of the Administrative
7 Procedure Act (APA) and (2) evidentiary hearings that are not governed by those provisions but
8 are required by statute, regulation, or executive order. Agencies may also decide to apply this
9 Recommendation to appellate review of decisions arising from other hearings, depending on
10 their level of formality.

11 Appellate review of hearing-level decisions can be structured in numerous ways. Two
12 structures are most common. In the first, litigants appeal directly to the agency head, which may

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

² Recommendation 2016-4 addressed agency adjudications in which an evidentiary hearing, though not governed by the formal hearing provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 554, 556–57 (2018)), is required by statute, regulation, or executive order. Those adjudications, which are often as formal as APA adjudications in practice, far outnumber so-called APA adjudications. Although Recommendation 2016-4 addresses only non-APA adjudications, most of its best practice are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA's formal hearing provisions.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 be a multi-member board or commission. In the second, litigants appeal to an appellate
14 adjudicator or group of adjudicators—often styled as a board or council—sitting below the
15 agency head. The appellate decision may be the agency’s final action or may be subject to
16 further appeal within the agency (usually to the agency head).

17 The Administrative Conference has twice before addressed agency appellate review. In
18 Recommendations 68-6 and 83-3, it provided guidance to agencies when establishing new, and
19 reviewing existing, organizational structures of appellate review.³ Both recommendations
20 focused on the selection of “delegates”—individual adjudicators, review boards composed of
21 multiple adjudicators, or panels composed of members of a multi-member agency—to exercise
22 appellate review authority vested in agency heads (including boards and commissions).
23 Recommendation 83-3 also addressed when agencies should consider providing appellate review
24 as a matter of right and when as a matter of discretion, and, in the case of the latter, under what
25 criteria.

26 With the exception of the appropriate standard for granting review, this
27 Recommendation’s focus lies elsewhere. It addresses, and offers best practices with respect to,
28 the following subjects: first, an agency’s identification of the purpose or objective served by its
29 appellate review; second, its selection of cases for appellate review, when review is not required
30 by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth,
31 its management, administration, and bureaucratic oversight of its appellate system; and sixth, its
32 public disclosure of information about its appellate system.⁴

³ Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973); Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983). Both recommendations concerned only the review of decisions in proceedings governed by the formal hearing provisions of the APA. Their principles, though, are not so confined.

⁴ Christopher J. Walker & Matthew Lee Wiener, *Agency Appellate Systems* (Nov. 10, 2020) (Dec. 14, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-agency-appellate-systems>; <https://www.acus.gov/report/draft-report-agency-appellate-systems>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

33 Most importantly, this Recommendation begins by suggesting that agencies identify, and
34 publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems
35 may have different purposes, and any given appellate system may have multiple purposes.
36 Purposes or objectives can include the correction of errors, inter-decisional consistency of
37 decisions, policymaking, political accountability, management of the hearing-level adjudicative
38 system, organizational effectiveness and systemic awareness, and the reduction of litigation in
39 federal courts. The identification of purpose is important both because it dictates (or should
40 dictate) how an agency administers its appellate system—including what cases it hears and under
41 what standards of review it decides them—and provides a standard against which an agency’s
42 performance can be evaluated.

43 This Recommendation proceeds from the recognition that agency appellate systems vary
44 enormously—as to their purposes or objectives, governing substantive law, size, and resources—
45 and that what may be a best practice for one system may not always be the best practice for
46 another. In offering the best practices that follow, moreover, the Administrative Conference
47 recognizes that (1) an agency’s procedural choices may sometimes be constrained by statute and
48 (2) available resources and personnel policies may dictate an agency’s decision as to whether and
49 how to implement some of the best practices that follow. The Administrative Conference makes
50 this Recommendation subject to these important qualifications. The Recommendation is drafted
51 accordingly.

Commented [CA1]: Proposed Amendment from Council # 1

RECOMMENDATION

Objectives of Appellate Review

- 52 1. Agencies should identify and publish in procedural regulations what the objective(s) or
53 objectives their of appellate systems serve; disclose those objectives in procedural
54 regulations; and design rules and processes, including especially the scope and standard
55 of review, to serve them and they should design their processes and draft their procedural
56 regulations accordingly. In particular, agencies should set their scope and standard of
57 review to be consistent with the objectives of their appellate system.

Commented [CM2]: Proposed Amendment from Public Member Emily S. Bremer: If the original text of Paragraph 1 is retained, Ms. Bremer proposes the following amended language for Paragraph 1: “Agencies should identify and publish in procedural regulations the objective or objectives their appellate systems serve, and they should design their processes and draft their regulations accordingly. In particular, agencies should establish a scope and standard of review that is consistent with the objectives of their appellate system.”

Commented [CA3]: Proposed Amendment from Council # 2



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Procedures for Appellate Review

- 58 2. Agencies should promulgate and publish procedural regulations governing agency
59 appellate review in the *Federal Register* and codify them in the *Code of Federal*
60 *Regulations*. These regulations should cover all significant procedural matters pertaining
61 to agency appellate review, including but not limited to the following:
- 62 a. the objectives of the agency’s appellate review system;
 - 63 b. the timing and procedures for initiating review, including any available
64 interlocutory review;
 - 65 c. the standards for granting review, if review is discretionary;
 - 66 d. the standards for permitting participation by interested persons and amici;
 - 67 e. the standard of review;
 - 68 f. the allowable and required submissions by litigants and their required form and
69 contents;
 - 70 g. the procedures and criteria for designating decisions as precedential and the legal
71 effect of such designations;
 - 72 h. the record on review and the opportunity, if any, to submit new evidence;
 - 73 i. the availability of oral argument or other form of oral presentation;
 - 74 j. the standards of and procedures for reconsideration and reopening, if available;
 - 75 k. any administrative or issue exhaustion requirements that must be satisfied before
76 seeking agency appellate or judicial review, including a clear statement as to
77 whether agency appellate review is a mandatory prerequisite to judicial review;
 - 78 l. openness of proceedings to the public and availability of video or audio streaming
79 or recording; ~~and~~
80 m. in the case of multi-member appellate boards, councils, and similar entities, the
81 authority to assign decision-making authority to fewer than all members (e.g.,
82 panels); and
83 ~~m.n.~~ whether seeking agency appellate review automatically stays the
84 effectiveness of the appealed agency action until appeal is resolved, and, if not,

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

85 [how a party seeking agency appellate review may request such a stay and the](#)
86 [standards for deciding whether to grant it.](#)

- 87 3. Agencies should include in the procedural regulations governing their appellate
88 programs: (a) a brief statement or explanation of each program’s review authority,
89 structure, and decision-making components; and (b) for each provision based on a
90 statutory source, an accompanying citation to that source.
- 91 4. When revising existing or adopting new appellate rules, agencies should consider the
92 appellate rules (Rules 400–450) in the Administrative Conference’s *Model Rules of*
93 *Agency Adjudication* (rev. 2018) **in deciding what their rules should provide.**
- 94 5. When materially revising existing or adopting new appellate rules, agencies should use
95 notice-and-comment procedures or other mechanisms for soliciting public input,
96 notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs
97 clearly outweigh the benefits of doing so.

Case Selection for Appellate Review

- 98 6. Based on the agency-specific objectives of appellate review, agencies should decide
99 whether the granting of review should be mandatory or discretionary (assuming they have
100 statutory authority to decide); if discretionary, the criteria for granting review should
101 track the objectives of the appellate system, and they should be published in the
102 procedural regulations.
- 103 7. Agencies should consider implementing procedures for sua sponte appellate review of
104 non-appealed hearing-level decisions, as well as for the referral of cases or issues by
105 hearing-level adjudicators to the appellate entity for interlocutory review.

Commented [CM4]: Proposed Amendment from Public Member Jonathan R. Siegel



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Appellate Decision-making Processes and Decisions

- 106 8. Whenever possible, agencies should consider maintaining electronic case management
107 systems ~~eCMS~~ that ensure that hearing records are easily accessible to appellate
108 adjudicators. Such ~~an eCMS~~ systems may include the capability for electronic filing.
- 109 9. Although the randomized assignment of cases to appellate adjudicators is typically an
110 appropriate docketing method for an agency appellate system, agencies should consider
111 the potential benefits of sorting and grouping appeals on the appellate docket, such as
112 reduced case processing times and more efficient use of adjudicators', staff attorneys',
113 and law clerks' skills and time. Criteria for sorting and grouping cases may include ~~the~~
114 size of a case's record, complexity of a case's issues, subject matter of a case, and
115 similarity of a case's legal issues to those of other pending cases.
- 116 10. Consistent with the objectives of the agency's appellate system and in light of the costs of
117 time and resources, agencies should consider adopting an appellate model of judicial
118 review in which the standard of review is not de novo with respect to findings of fact and
119 application of law to facts. For similar reasons, many agencies should consider limiting
120 the introduction of new evidence on appeal that is not already in the administrative record
121 from the hearing-level adjudication.
- 122 11. Taking agency resources into account, agencies should emphasize concision, readability,
123 and plain language in their appellate decisions and explore the use of decision templates,
124 summary dispositions, and other quality-improving measures.
- 125 12. Agencies should establish clear criteria and processes for identifying and selecting
126 appellate decisions as precedential, especially for appellate systems with objectives of
127 policymaking or inter-decisional consistency.
- 128 13. Agencies should assess the value of oral argument and amicus participation in their
129 appellate system based on the agencies' identified objectives for appellate review and
130 should establish ~~clear~~ rules governing both. Criteria ~~which that~~ may favor oral argument
131 and amicus participation include issues of high public interest, issues of concern beyond



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

132 the parties to the case, specialized or technical matters, and a novel or substantial
133 question of law, policy, or discretion.

Administration, Management, and Bureaucratic Oversight

134 14. Agency appellate systems should promptly transmit their precedential decisions to all
135 appellate program adjudicators and, directly or through hearing-level programs, to
136 hearing-level adjudicators (as appropriate). Appellate programs should include in their
137 transmittals, when feasible, brief summaries of the decision.

138 15. Agencies should notify their adjudicators of significant federal court decisions reviewing
139 the agencies' decisions and, when providing notice, explain the significance of those
140 decisions to the program. As appropriate, agencies should notify adjudicators if the
141 agency will not acquiesce in a particular decision of the federal courts of appeals.

142 16. Agencies in which decision making relies extensively on their own precedential decisions
143 should consider preparing or having prepared indexes and digests—with annotations and
144 comments, as appropriate—to identify those decisions and their significance.

145 17. As appropriate, agency appellate systems should communicate with agency rule-writers
146 and other agency policymakers—and, as appropriate, institutionalize communication
147 mechanisms—to address whether recurring issues in their decisions should be addressed
148 by rule rather than precedential case-by-case adjudication.

149 18. The Office of the Chairman of the Administrative Conference should provide for, as
150 authorized by **5 U.S.C. § 594(2) statute**, the “interchange among administrative agencies
151 of information potentially useful in improving” **5 U.S.C. § 594(2)** agency appellate
152 systems. The subjects of interchange might include electronic case management systems,
153 procedural innovations, quality-assurance reviews, and common management problems.

Public Disclosure and Transparency

154 19. Agencies should disclose on their websites any rules (sometimes styled as “orders”), and
155 statutes authorizing such rules, by which an agency head has delegated review authority
156 to appellate adjudicators.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 157 20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs
158 their appellate review system, agencies should consider announcing, livestreaming, and
159 maintaining video recordings on their websites of appellate proceedings (including oral
160 argument) that present significant legal and policy issues likely to be of interest to
161 regulated parties and other members of the public. Brief explanations of the issues to be
162 addressed by oral argument may usefully be included in website notices of oral argument.
- 163 21. Agencies should include on their websites brief and accessibly written explanations as to
164 how their internal decision-making processes work and, as appropriate, include links to
165 explanatory documents appropriate for public disclosure. Specific subjects agencies
166 should consider addressing include: the process of assigning cases to adjudicators (when
167 fewer than all of the programs' adjudicators participate in a case), the role of staff, and
168 the order in which cases are decided.
- 169 22. When posting decisions on their websites, agencies should distinguish between
170 precedential and non-precedential decisions. Agencies should also include a brief
171 explanation of the difference.
- 172 23. When posting decisions on their websites, agencies should consider including, as much as
173 practicable, brief summaries of precedential decisions and, for precedential decisions at
174 least, citations to court decisions reviewing them.
- 175 24. Agencies should include on their websites any digests and indexes of decisions they
176 maintain. It may be appropriate to remove material exempt from disclosure under the
177 Freedom of Information Act or other laws.
- 178 25. Agencies should affirmatively solicit feedback concerning the functioning of their
179 appellate systems and provide a means for doing so on their websites.