Public Availability of Information About Agency Adjudicators

Committee on Adjudication

Proposed Recommendation for Committee | November 6, 2020

Federal agency officials throughout the country preside over hundreds of thousands of adjudications each year. As the Administrative Conference has previously indicated, litigants, their lawyers, and other members of the public benefit from having ready online access to the key materials associated with adjudications and the procedural rules governing them. They also benefit from having ready online access to the policies and practices by which agencies appoint and oversee administrative law judges (ALJs) and other adjudicators. The availability of these policies and practices allows the public, among other things, to assess the impartiality of administrative adjudicators and promotes an understanding of adjudicators’ constitutional status under the Appointments Clause or other constitutional provisions.

Agencies may also benefit from disclosures about agency adjudicators because it allows them to compare their own practices with the policies made publicly available by other agencies. Proactive disclosures by agencies, including those that may already be required under the Freedom of Information Act and the E-Government Act, may also be more cost-effective than agencies’ responding to individual requests for information.

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The officials addressed by this Recommendation are those who preside over hearings that are governed by the formal hearing provisions of the APA or that are not so governed but are legally required by statute, regulation, or executive order, as well as officials (agency heads excluded) who review their decisions on appeal. These adjudicators may go by a variety of titles in different agencies, including “Hearing Officer,” “Immigration Judge,” “Veterans Law Judge,” “ Administrative Patent Judge,” and “Administrative Appeals Judge.” For ease of reference, this Recommendation refers to those adjudicators as “administrative law judges” (ALJs) or “administrative judges” (AJs). Agencies may decide to include disclosures identified in this Recommendation about other adjudicators, depending on the level of formality of the hearings over which they preside and whether they serve as full-time adjudicators. Agencies may also decide to make similar disclosures with respect to agency heads if their websites do not already provide sufficient information.

This Recommendation is concerned with policies and practices governing adjudicators that agencies should disclose including those addressing appointment and qualifications; compensation (including salaries, bonuses, and performance incentives); duties and responsibilities; supervision and assignment of work; position within agencies’ organizational hierarchies; methods of evaluating performance; limitations on ex parte communications and other policies ensuring the separation of functions; recusal and disqualification; the process for review of adjudications; and discipline and removal.

Many of the policies and practices applicable to ALJs are already publicly available in the APA, Office of Personnel Management rules, and elsewhere. These sources regulate, among others:

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8 The coverage of this recommendation is similar other recent ACUS recommendations regarding adjudicators. See, e.g., Admin. Conf. of the U.S., Recommendation 2018-4, Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139 (Feb. 6, 2019).

7 These officials work for a variety of agencies, including the Executive Office for Immigration Review, the Board of Veterans Appeals, the Patent and Trademark Office, the Merit Systems Protection Board, the Department of Agriculture, the Social Security Administration's Appeals Council, the Department of Labor’s Benefits Review Board, and the Board of Immigration Appeals.


other things, how agencies discipline, remove, compensate, and assign cases and other duties to
ALJs. Nevertheless, agencies that employ ALJs can take steps to improve the public’s access to
this information.

ALJs, in any case, make up only a small portion of federal adjudicators. There are many
more AJs than ALJs.₁₀ AJs are regulated by a complex mix of statutory provisions, including
civil service laws; agency rules codified in the Code of Federal Regulations; and agency-specific
policies that take any number of forms. Many types of information about AJs are available in
these sources, but they may be difficult to find, particularly when located in the Code of Federal
Regulations or the Federal Register.₁¹ Some relevant sources may not be publicly available,
including internal administrative and personnel manuals, position descriptions, and labor
agreements. This is particularly true with respect to certain kinds of policies, such as those
relating to compensation and performance incentives.₁²

Agency websites are the most helpful location for agencies to make relevant policies and
practices publicly available. Individuals most naturally seek information about administrative
policies and practices on agencies’ websites. Agencies can situate information about their
adjudicators in a logical and easily identifiable place on their websites and structure their
websites to synthesize policies in plain language and link to information from many different
sources.₁³

This Recommendation encourages agencies to provide a clear and readily accessible
description on their websites of the policies governing the appointment and oversight of ALJs
and AJs. Although the Recommendation identifies which kinds of information agencies should
consider providing on their websites and where and how they should do so, agencies clearly vary

₁₀ Kent Barnett et al., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 1
(September 24, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/non-alj-adjudicators-

₁¹ Leigh Anne Schriever, Public Availability of Information About Adjudicators 10 (Oct. 21, 2020) (draft report to the
Admin. Conf. of the U.S.).

₁² Id. at 7.

61,728 (Dec. 29, 2017).
in terms of how they structure their websites, the specific features of their adjudicative programs, and their institutional needs. The Administrative Conference also recognizes that some agency policies and practices may qualify for an exemption under the Freedom of Information Act, Privacy Act, or other laws and executive-branch policies. Agencies will have to tailor this Recommendation to their own needs so that they can present information in the clearest and most accessible way possible that is consistent with law and policy, given their unique circumstances.

RECOMMENDATION

1. Each adjudicative agency should prominently display a short, straightforward description on its website of all generally applicable policies and practices governing the appointment and oversight of ALJs and AJs, including, as applicable, those that address:
   a. The procedures for assessing, selecting, and appointing candidates for adjudicator positions;
   b. The placement of adjudicators within agencies’ organizational hierarchies;
   c. Compensation structure and performance incentives, such as bonuses, non-monetary awards, and promotions;
   d. The assignment of non-adjudicative duties to adjudicators, especially duties that relate to investigation or prosecution;
   e. Limitations on ex parte communications, including between adjudicators and other agency officials, related to the disposition of individual cases, as well as other policies ensuring a separation of adjudication and enforcement functions;
   f. Standards for recusal by and disqualification of adjudicators;
   g. Administrative review of adjudicators’ decisions;
   h. The supervision of adjudicators by higher-level officials;
   i. The procedure for assigning cases;
   j. The evaluation of adjudicators, including quantitative and qualitative methods for appraising adjudicators’ performance; and
   k. The discipline and removal of adjudicators.
2. On the same webpage as the information described in Paragraph 1, each adjudicative agency should provide links to key legal documents, or, when links are not available, citations. The legal documents should include the authorities for the policies described in Paragraph 1, and may include documents such as (a) federal statutes, including relevant provisions of the APA and other laws applicable to ALJs and AJs; (b) agency-promulgated rules regarding adjudicators, including Office of Personnel Management rules applicable to ALJs; and (c) publicly available agency-promulgated guidance documents relating to adjudicators, including manuals, bench books, and other explanatory materials. To the extent that some policies concerning adjudicators may be a matter of custom, each adjudicative agency should consider documenting policies in order to make them publicly accessible to the extent practicable. Agencies do not need to provide access to policies covered by a Freedom of Information Act exemption that the agency intends to invoke or which are otherwise protected by law.

3. The webpage containing the information described in paragraphs 1 and 2 should present the materials in a clear, logical, and comprehensive fashion. One possible method of presenting this information, with one model disclosure for ALJs and another for AJs, appears in Appendix A.

4. When an agency’s mission consists exclusively or almost exclusively of conducting adjudications, the agency should link to the webpage containing the information described in Paragraphs 1 and 2 on the agency’s homepage. When conducting adjudications is merely one of an agency’s many functions, the agency should link to these materials from a location on the website that is both dedicated to adjudicatory materials and logical in terms of a person’s likelihood of finding the documents in the selected location, such as an enforcement or adjudications page or the homepage for the component in which a particular category of adjudicators works. Examples of agency websites that currently provide this information in a way that makes it easy for the public to locate appear in Appendix B.

Commented [LAS1]: Edit based on suggestion by Jeffrey Lubbers in his comment

Commented [LAS2]: For Committee consideration: The Committee may wish to consider whether a template is useful to include for either or both kinds of positions. The templates included in Appendix A may help structure the discussion, but will undoubtedly require revision based on what disclosures the Committee recommends that agencies make. The Committee may also want to consider whether a separate template for AJ positions is actually helpful.
APPENDIX A

Template Website Text for ALJs

About Our Administrative Law Judges

Administrative Law Judges (ALJs) at [agency name] conduct hearings and decide cases under [insert name of authorizing act]. They are part of the [agency component in which ALJs are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

ALJs provide a neutral forum to resolve cases involving [kinds of cases ALJs hear] in a fair, transparent, and accessible manner. Our ALJs are highly trained, impartial judges, appointed by [agency official], who [describe qualifications]. ALJs are paid according to the [pay scale for ALJs with link to the scale] set by another agency (with cost-of-living adjustments for ALJs' locations), the Office of Personnel Management.

Cases are assigned to ALJs [in each geographic office] in rotation so far as practicable. The ALJ assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. ALJs are required by statute to perform their functions impartially. 5 U.S.C. § 556(b). To ensure impartiality, he or she does not take part in investigative or enforcement activities, nor does he or she report to officials in the [agency]'s investigative or enforcement components, including [list investigative/enforcement component(s)] 5 U.S.C. §§ 554(d); 3105. The ALJ assigned to your case may not communicate privately about the facts of your case with other agency officials[, and more details on [agency name]'s rules about communicating with ALJs are available [location of stronger ex parte prohibitions]].

By law, [agency] does not reward or discipline ALJs for their decisions. [Agency] does not evaluate ALJs' performance and can only discipline or remove an ALJ from office if another agency, the Merit Systems Protection Board, decides after a hearing that good cause supports doing so. 5 U.S.C. §§ 4301, 7521.

The agency has adopted rules of recusal [link] that allow a participant to request that the ALJ in charge his or her case be disqualified if the participant believes the ALJ cannot fairly and impartially decide the cases. If you are dissatisfied with an ALJ’s decision, you can appeal that decision to [agency office/official]. Visit [link] for information on appealing an ALJ decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the ALJ’s decision.

For Further Information:

Commented [LAS3]: For committee consideration: Judge Alexander Manuel suggested the following language be included somewhere in the appendix:

"The Department is committed to ensuring that all hearings and appeals are conducted in a fair and equitable manner. Petitioners are entitled to procedural due process as determined by an impartial administrative law judge or adjudicator. If you disagree with this determination, you have the right to make a timely request for reconsideration of the decision, or to appeal to the Secretary of , at (link). In certain cases, you have the right to appeal the ALJ's decision directly to federal court. For information on this, see (link)."
Hiring Process: [link]
Pay rates: [link]
How cases are assigned to ALJs: [link]
Communicating with administrative law judges (ex parte communications): [link]
How to handle a judge with a conflict of interest (recusal and disqualification procedures): [link]
How to appeal an administrative law judge decision: [link]
Case processing goals: [link]
How to report misbehavior by an administrative law judge and how your complaint will be handled: [link]

See also:

- Congress’s rules governing ALJs: 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521
- OPM’s regulations governing ALJs: 5 C.F.R. §§ 930.205, 930.206, 930.207, 930.211
- Executive Orders pertaining to ALJs: EO 13,843 (giving agencies control over the hiring process of ALJs)

Commented [LAS4]: Edit based on suggestion by Jeffrey Lubbers in his comment
Template Website Text for AJs

About Our [Insert Adjudicator Title]

[Adjudicator title] at [agency name] [conduct hearings and decide cases/review appeals] under [name of authorizing act]. They are part of the [agency component in which adjudicators are located], which is directed by [title of office head] and has offices in [cities]. Visit [link to agency organization chart] to see how [office] relates to other offices at [agency].

[Office name] provides a neutral forum to resolve cases involving [kinds of cases] in a fair, transparent, and accessible manner. Our [adjudicator title] are highly trained, impartial decision makers, appointed by [agency official] [for terms of [number of years] years], who [describe qualifications]. [Adjudicator title] [are/are not] political appointees. [Adjudicator title] are paid according to the [pay scale for adjudicator with link to the scale] scale set [by another agency, the Office of Personnel Management/by [agency title]], and they [are/are not] eligible to receive bonuses or other performance incentives.

Cases are [describe how cases are assigned]. The [adjudicator title] assigned to your case is responsible for [job duties, like taking evidence, hearing objections, issuing decisions]. [Description of policies (if any exist) that ensure the agency component or adjudicators remain independent from investigative or enforcement activities]. [Description of rules about ex parte communications, if any exist].

[Agency official or body] is responsible for evaluating the quality of [adjudicator title] decisions, and [agency official or body] conducts performance reviews of [adjudicator title]. [Agency official/entity from another agency] may remove the [adjudicator title] or [agency official or body/other entity] may discipline the [adjudicator title] by [kinds of discipline] when warranted.

The agency has adopted rules of recusal [link] that allow a participant to request that the [adjudicator title] in charge his or her case be disqualified if the participant believes the [adjudicator title] cannot fairly and impartially decide the cases.

If you are dissatisfied with an [adjudicator title] decision, you can appeal that decision to [agency office/official]. Visit [link] for information on appealing an [adjudicator title] decision. [Agency office/official] may also review your case on [its/his or her] own initiative if there is an issue with the [adjudicator title]’s decision.

For Further Information:

- Hiring Process: [link]
- Pay rates: [link]
- Bonuses and Performance Incentives: [link]
- How cases are assigned to [adjudicator title]: [link]

Commented [LAS5]: For committee consideration: Not all of the provisions in this template will apply to all AJs. This is intended to be a comprehensive list of the types of things that might apply to AJs, but the agency will need to tailor it based on how its program is structured. The committee may also want to consider whether policies governing AJs are so heterogenous that it’s not worth including a model disclosure of this type.
• Communicating with [adjudicator title] (ex parte communications): [link]
• How to handle a judge with a conflict of interest (recusal and disqualification procedures): [link]
• How to appeal an [adjudicator title] decision: [link]
• Case processing goals: [link]
• How to report misbehavior by an [adjudicator title] and how your complaint will be handled: [link]

See also:

• Congress’s provisions regarding [adjudicator title]: [statutory citations]
• Agency regulations governing [adjudicator title]: [C.F.R. provisions]
APPENDIX B

Figure 1 – Department of Labor’s Office of Administrative Law Judges

The Office of Administrative Law Judge’s website provides an example of how to include some of the relevant information about adjudicators in plain-language text with citations. It is also intuitively located in the Department of Labor’s website because a link to it is placed on the home page for the Office of Administrative Law Judges.

About the Office of Administrative Law Judges

The Office of Administrative Law Judges (OALJ) is the administrative trial court for the United States Department of Labor. OALJ conducts hearings nationwide. The Department of Labor has the third-largest administrative law judge (ALJ) office in the Federal government. OALJ is headquartered in Washington, DC, and has judges and staff located in eight district offices. ALJs are appointed under the U.S. Const. art. II, § 2, cl. 2 and the Administrative Procedure Act, 5 U.S.C. § 555.

Mission

OALJ’s mission is to provide a neutral forum to resolve labor-related administrative disputes before the Department of Labor in a fair, transparent, and accessible manner, and to promptly issue sound decisions correct in law and fact.

Department of Labor ALJs adjudicate complaints and claims in a wide variety of cases. Cases where individuals seek benefits under the Black Lung Benefits Act; the Longshore and Harbor Workers’ Compensation Act and the Defense Base Act constitute the largest part of the office’s workload. ALJs also hear and decide cases arising from over 80 other labor-related statutes, Executive Orders, and regulations, including such diverse subjects as: whistleblower complaints involving corporate fraud and violations of transportation, environmental and food safety statutes; alien labor certifications; actions involving the working conditions of migrant farm laborers; grants administration relating to preparation of workers and job seekers to attain needed skills and training; prohibition of workplace discrimination by government contractors; minimum wage disputes; child labor violations; mine safety variances; OSHA formal rulemaking proceedings; federal contract disputes; civil fraud in federal programs; certain recordkeeping required by ERISA; and standards of conduct in union elections.

Values

- **Respect** – We treat everyone with dignity and respect.
- **Expertise** – Our decisions are based upon the competent application of the law to the facts of the case.
- **The Rule of Law** – We administer equal justice under the law and do equal right to the poor and to the rich by consistent and even application of the law to all.
- **Integrity** – We hold ourselves to the highest level of ethical standards.
The Office of Medicare Hearings and Appeals’ website shows a clear and intuitive way to organize information about adjudicators. The “About OMHA” page is linked on the main page for the Office of Medicare Hearings and Appeals, so it is easy to find for an individual who is aware the agency exists.
The Independent Office of Appeal’s website presents an example of how agencies can use website text to reassure the public about their independence and impartiality in plain language. The IRS website has a link to the Independent Office of Appeals webpage on its main page and the page shown below is hyperlinked in the first sentence on the landing page for the Office.
Figure 4 – Federal Labor Relations Authority

The Federal Labor Relations Authority website provides a good example of how an agency can create an easily-located page that is linked to from the main page and that provides some information about the appointment and job duties of the adjudicators.