

Comment on Proposed ACUS Recommendation: Selection of Administrative Law Judges

Renee M. Landers, Public Member

Agency Recruitment and Selection of Administrative Law Judges

Committee on Adjudication

Committee on Administration and Management

Proposed Recommendation for Committee | April 26, 2019

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

7 The process for appointing ALJs recently changed as a result of Executive Order (EO)
8 13,843.⁵ Until that order was issued, agencies could hire a new ALJ only from a certificate of

¹ 5 U.S.C. §§ 554, 556–57.

² See JACOB A. STEIN & GLENN A. MITCHELL, ADMINISTRATIVE LAW § 31.01 (Matthew Bender & Co. 2018). Recommendation 2016-4 and the associated report refer to the adjudications conducted pursuant to the main adjudicative provisions of the Administrative Procedure Act as “Type A” adjudications. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016); Michael Asimow, *Adjudication Outside The Administrative Procedure Act 2* (Mar. 24, 2016) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/adjudication-outside-administrative-procedure-act-updated-draft-report>.

³ 5 U.S.C. § 556.

⁴ *Id.* § 3105.

⁵ Exec. Order 13,843 (July 10, 2018), 83 Fed. Reg. 32,755 (July 13, 2018). See also Memorandum from Dr. Jeff T.H. Pon, Director, Office of Personnel Mgmt., to Heads of Exec. Dep’ts and Agencies, Executive Order — Excepting Administrative Law Judges from the Competitive Service (July 10, 2018) (detailing areas in which “OPM’s regulation continue to govern some aspects of ALJ employment”), <https://chcoc.gov/print/9282>.

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9 qualified applicants (that is, a list of applicants eligible for hire) prepared by the Office of
10 Personnel Management (OPM).⁶ Each certificate generally had three applicants selected from a
11 much larger register of applicants OPM deemed “qualified.” The “list of three,” as it was known,
12 consisted of the three highest-scoring applicants based upon, among other things, an OPM-
13 administered and -developed examination and panel interview process, as well as veterans’
14 status.⁷

15 Under EO 13,843 newly appointed ALJs are no longer in the “competitive service,” but
16 instead are in what is known as the “excepted service.”⁸ As a result, agencies now hire new ALJs
17 directly—that is, without OPM’s involvement—generally using whatever selection criteria and
18 procedures they deem appropriate. EO 13,843 was premised on two primary bases. The first was
19 the need to “mitigate” the concern that, after the Supreme Court’s 2018 decision in *Lucia v.*
20 *Securities and Exchange Commission*,⁹ the OPM-administered process might unduly
21 circumscribe an agency’s head’s discretionary hiring authority under the Appointments Clause.¹⁰
22 *Lucia* held that the SEC’s ALJs were officers under the Constitution’s Appointment’s clause,
23 with the result being that—assuming that the SEC’s ALJs are inferior rather than principal
24 officers¹¹—they must be appointed directly by the Commission itself as the head of a department
25 rather than, as was being done, by SEC staff.¹² The second basis was the need to give “agencies
26 greater ability and discretion to assess critical qualities in ALJ candidates . . . and [such
27 candidates’] ability to meet the particular needs of the agency.”¹³

⁶ This was the process for hiring “new” Administrative Law Judges (ALJs). Many agencies hired incumbent ALJs from other agencies in 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.

⁷ 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.*

⁸ “[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.

⁹ 138 S. Ct. 2044 (2018).

¹⁰ See Exec. Order 13,843, *supra* note 5, § 1.

¹¹ The *Lucia* majority expressly refrained from deciding whether the Securities and Exchange Commission’s (SEC) 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.

¹² See *generally id.* This recommendation takes no position on constitutional questions.

¹³ Exec. Order 13,843, *supra* note 5, § 1.

28 EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies
29 desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and
30 the ability to communicate their decisions, explicitly leaving it, however, to each agency to
31 determine its own selection criteria. This recommendation does not address the substantive
32 hiring criteria that agencies will employ in selecting among ALJ candidates, though it does
33 recommend that agencies publish the minimum qualifications and selection criteria for their ALJ
34 positions. The selection criteria that an agency considers adopting might include, for example,
35 litigation experience, experience as an adjudicator, experience in dispute resolution, experience
36 with the subject-matter that comprises the agency’s caseload, specialized technical skills,
37 experience with case management systems, demonstrated legal research and legal writing skills,
38 a dedicated work ethic, and strong leadership and communications skills.¹⁴

39 Each agency must decide not only which selection criteria will apply, but also which will
40 be mandatory and which will be only desirable or preferred. Of course, agencies must also
41 ensure compliance with generally applicable legal requirements, including those relating to equal
42 employment opportunity [such as are embodied in Executive Order 13,583 regarding](#)
43 [government-wide initiatives to promote diversity and inclusion in the federal workforce](#)¹⁵ and
44 veterans’ preference.¹⁶

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

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

¹⁴ See generally Jack M. Beermann and Jennifer L. Mascott, Federal Agency ALJ Hiring After Lucia And Executive Order 13843 (Mar. 28, 2019) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-research-report-federal-agency-alj-hiring-after-lucia-and-executive-order-13843>. This report is based in part upon interviews with officials at a number of agencies, including those employing the vast majority of federal agency ALJs.

¹⁵ [Executive Order 13583, Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce, \(August 18, 2011\)](#).

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¹⁶ The Executive Order provides that “each agency shall follow the principle of veteran preference as far as administratively feasible.” Exec. Order 13,843, *supra* note 5, § 3.

51 new procedures for appointing ALJs under the EO.¹⁷ Each agency will have to construct a system
52 that is best suited to the particular agency’s needs, including the nature of the proceedings the
53 ALJs will preside over, the size of the agency’s caseload, the substance of the statutes, and rules
54 involved in the proceedings.

RECOMMENDATION

Recruitment

55 1. To ensure the widest possible awareness of their ALJ vacancies and a broad pool of
56 applicants, agencies should announce their ALJ vacancies on USAJOBS, their own
57 websites, and/or other websites that might reach [a diverse range of](#) potential ALJ
58 applicants. Agencies that desire or require prior subject-matter, adjudicative, and/or
59 litigation experience should also reach out to lawyers who practice in the field and/or
60 those with prior experience as an adjudicator. Each agency should keep the application
61 period open for a reasonable period of time to achieve an optimal pool of applicants.

Formulation and Public Announcement of Hiring Criteria

62 2. Agencies should formulate and publish minimum qualifications and selection criteria for
63 ALJ hiring. Those qualifications and criteria should include those factors specified in
64 Executive Order 13,843 and qualifications the agency deems important for service as an
65 ALJ in the particular agency. The notice should distinguish between mandatory and
66 desirable criteria. When constructing guidelines and processes for the hiring of ALJs,
67 agencies should be mindful of the importance of the appearance of impartiality and the
68 independence and neutrality of ALJs.

Selection Panels and Writing Samples

¹⁷ Some agencies have already publicly disseminated guidance. *See* U.S. Department of Health and Human Services, “Administrative Law Judge Appointment Process: Departmental Appeals Board, Office of Medicare Hearings and Appeals,” <https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf>; Secretary’s Order 07-2018, Procedures for Appointments of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44307 (Aug. 30, 2018).

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