



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Information About Agency Adjudicators

Committee on Adjudication

Proposed Recommendation for Committee | October 26, 2020

1 Officials across the federal government conduct hundreds of thousands of adjudications
2 each year.¹ These officials, not including agency heads, consist of roughly 2,000 administrative
3 law judges (ALJs),² as well as the thousands of other agency adjudicators, referred to as
4 “administrative judges” (AJs) in this Recommendation.³

5 Just as members of the public benefit from having ready online access to the key
6 materials associated with adjudications and the procedural rules governing them,⁴ they also
7 benefit from having ready online access to the policies and practices by which agencies appoint
8 and oversee ALJs and AJs. The public availability of these policies and practices promotes
9 public confidence that administrative adjudicators are impartial decision makers⁵ and helps the
10 public understand adjudicators’ constitutional status under the Appointments Clause or other
11 provisions.⁶

¹ See Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

² See 5 U.S.C. §§ 554, 556–557. The vast majority of ALJs work at the Social Security Administration. *ALJs by Office*, OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Oct. 19, 2020).

³ Titles used by agencies that employ administrative judges include “Hearing Officer,” “Immigration Judge,” “Veterans Law Judge,” “Administrative Patent Judge,” and “Administrative Appeals Judge.” “Administrative Judge” is also an official title held by some adjudicators.

⁴ Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

⁵ Cf. Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

⁶ See, e.g., *Lucia v. S.E.C.*, 585 U.S. ___, 138 S.Ct. 2044 (2018); *Arthrex v. Smith & Nephew*, 941 F.3d 1320, *reh'g en banc denied* (Fed. Cir. 2020), 953 F.3d 760, *cert. granted* 592 U.S. __ (2020).

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12 Agencies also benefit from comparing their own practices with the policies made publicly
13 available by other agencies and by learning from their experiences. Proactive disclosures by
14 agencies, including those required under the Freedom of Information Act and the E-Government
15 Act, may also be more cost-effective, because agencies will not need to respond to individual
16 requests for information about their adjudicators.⁷

17 Relevant policies and practices include those governing appointment and qualifications of
18 adjudicators, compensation (including salaries, bonuses, and performance incentives), duties and
19 responsibilities, supervision and assignment of work, adjudicators' position within agencies'
20 organizational hierarchies, methods of evaluating adjudicator performance, limitations on ex
21 parte communications and other policies ensuring the separation of functions, recusal and
22 disqualification, the process for review of adjudications, and discipline and removal.

23 Many of the policies and practices applicable to ALJs are already publicly available in
24 the APA, Office of Personnel Management rules, and elsewhere.⁸ Among other things, these
25 sources regulate how agencies evaluate, discipline, remove, compensate, assign duties to,
26 communicate with, and allocate cases among ALJs. Nevertheless, agencies that employ ALJs
27 can take steps to improve the public's access to this information. For example, the
28 Administrative Conference recently recommended that agencies "publish minimum
29 qualifications and selection criteria for ALJ hiring."⁹

30 Further, ALJs make up only a portion of federal adjudicators. AJs are regulated by a
31 complex mix of statutory provisions, including civil service laws where applicable; agency rules
32 codified in the Code of Federal Regulations; and other agency documents, including manuals,
33 bench books, and other explanatory materials. Many types of information about AJs are available
34 in these sources, but they may be difficult to find, particularly when located in the Code of

⁷ E-Government Act of 2002, Pub. L. No. 140-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501); FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (amending 5 U.S.C. § 552(a)(2)).

⁸ 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521; 5 C.F.R. part 930, subpart B; Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018).

⁹ Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).



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35 Federal Regulations or the *Federal Register*.¹⁰ Some relevant sources may not be available to the
36 public, including internal administrative and personnel manuals, position descriptions, and labor
37 agreements. Many agencies seem not to disclose certain kinds of information, especially those
38 relating to compensation and performance incentives.¹¹

39 Agency websites are the most helpful location for agencies to make relevant policies and
40 practices publicly available. Members of the public most naturally seek information about
41 administrative policies and practices on agencies' websites. Agencies can situate information
42 about their adjudicators in a logical and easily identifiable place on their websites and structure
43 their websites to synthesize policies in plain language and link to information from many
44 different sources.

45 This Recommendation offers best practices to optimize agencies' online presentation of
46 the policies by which agencies appoint and oversee administrative adjudicators other than agency
47 heads. Because a significant amount of the information discussed in this Recommendation is
48 already publicly available, agencies will not face a significant burden implementing it, and may
49 only need to reorganize some of the content already located on their websites. This
50 recommendation simply encourages agencies to explain to members of the public, plainly and
51 accessibly, how they appoint and oversee ALJs and AJs. Although the Recommendation
52 identifies which kinds of information agencies should consider providing on their websites and
53 where and how they should do so, agencies clearly vary in terms of how they structure their
54 websites, the specific features of their adjudicative programs, and their institutional needs. The
55 Conference also recognizes that some agency policies and practices may qualify for an
56 exemption under the Freedom of Information Act, Privacy Act, or other laws and executive-
57 branch policies. Agencies will have to tailor this recommendation to their own needs so that they
58 can present information in the clearest and most accessible way possible given their unique
59 circumstances and consistent with law and policy.

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

¹¹ *Id.*



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RECOMMENDATION

- 60 1. Each adjudicative agency should provide a short, straightforward description on its
61 website of all policies and practices governing the appointment and oversight of ALJs
62 and AJs, including, as appropriate, those that address:
- 63 a. The procedures for assessing, selecting, and appointing candidates for adjudicator
64 positions;
 - 65 b. The placement of adjudicators within agencies' organizational hierarchies;
 - 66 c. Compensation and performance incentives, such as bonuses, non-monetary
67 awards, and promotions;
 - 68 d. The assignment of non-adjudicative duties to adjudicators, especially those that
69 relate to investigation or prosecution;
 - 70 e. Limitations on ex parte communications between adjudicators and other agency
71 officials related to the disposition of individual cases, as well as other policies
72 ensuring a separation of adjudication and enforcement functions;
 - 73 f. Standards for recusal by and disqualification of adjudicators;
 - 74 g. Administrative review of adjudicators' decisions;
 - 75 h. The supervision of adjudicators by higher-level officials, including the assignment
76 of cases;
 - 77 i. The evaluation of adjudicators, including quantitative and qualitative methods for
78 appraising adjudicators' performance; and
 - 79 j. The discipline and removal of adjudicators.
- 80 2. On the same webpage as the information described in Paragraph 1, each adjudicative
81 agency should provide citations and/or links to key legal documents, such as (a) federal
82 statutes, including the APA and other laws applicable to ALJs and AJs; (b) agency-
83 promulgated rules regarding adjudicators, including Office of Personnel Management
84 rules applicable to ALJs; and (c) publicly available agency-promulgated guidance
85 documents relating to adjudicators, including manuals, bench books, and other
86 explanatory materials. To the extent that some of policies concerning adjudicators may be



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- 87 a matter of custom, each adjudicative agency should consider documenting policies in
88 order to make them publicly accessible to the extent practicable. Agencies do not need to
89 provide access to policies covered by a Freedom of Information Act exemption that the
90 agency intends to invoke or which are otherwise protected by law.
- 91 3. The webpage containing the information described in paragraphs 1 and 2 should present
92 the materials in a clear, logical, and comprehensive fashion. One possible method of
93 presenting this information, with a model disclosure for ALJs, appears in the Appendix.
- 94 4. When an agency's mission consists exclusively or almost exclusively of conducting
95 adjudications, the agency should link to the webpage containing the information
96 described in Paragraphs 1 and 2 on the agency's homepage. When conducting
97 adjudications is merely one of an agency's many functions, the agency should link to
98 these materials from a location on the website that is both dedicated to adjudicatory
99 materials and logical in terms of a person's likelihood of finding the documents in the
100 selected location, such as an enforcement or adjudications page or the homepage for the
101 component in which a particular category of adjudicators works.

Commented [LAS1]: For Committee consideration: The Committee may wish to consider whether a template is useful to include for either or both kinds of positions. The template included in the Appendix is specific to ALJs and 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 would be helpful.



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APPENDIX

104 *Template Website Text for ALJs*

105 **About Our Administrative Law Judges**

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

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

115 Cases are assigned to ALJs [in each geographic office] in rotation so far as practicable. The ALJ
116 assigned to your case is responsible for [job duties, like taking evidence, hearing objections,
117 issuing decisions]. ALJs are required by statute to perform their functions impartially. 5 U.S.C.
118 § 556(b). To ensure impartiality, he or she does not take part in investigative or enforcement
119 activities, nor does he or she report to officials in the [agency]'s investigative or enforcement
120 components, including [list investigative/enforcement component(s)]. 5 U.S.C. §§ 554(d), 3105.
121 The ALJ assigned to your case may not communicate privately about the facts of your case with
122 other agency officials[, and more details on [agency name]'s rules about communicating with
123 ALJs are available [location of stronger ex parte prohibitions]].

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

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

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

135 ***For Further Information:***

- 136 • Hiring Process: [link]



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- 137 • Pay rates: [\[link\]](#)
- 138 • How cases are assigned to ALJs: [\[link\]](#)
- 139 • Communicating with administrative law judges (ex parte communications): [\[link\]](#)
- 140 • How to handle a judge with a conflict of interest (recusal and disqualification
- 141 procedures): [\[link\]](#)
- 142 • How to appeal an administrative law judge decision: [\[link\]](#)
- 143 • Case processing goals: [\[link\]](#)
- 144 • How to report misbehavior by an administrative law judge and how your complaint will
- 145 be handled: [\[link\]](#)

146 ***See also:***

- 147 • Congress's rules governing ALJs: 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521
- 148 • OPM's regulations governing ALJs: 5 C.F.R. §§ 930.205, 930.206, 930.207, 930.211.
- 149 • [EO 13,843](#) (giving agencies control over the hiring process of ALJs)