



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Judges

Committee on Adjudication

Proposed Recommendation for Committee | April 6, 2018

1 In Recommendation 2016-4,¹ the Administrative Conference offered best practices for
2 structuring the increasing number of legally required evidentiary hearings in administrative
3 adjudications not subject to the adjudication provisions of the Administrative Procedure Act
4 (APA).² Those hearings are usually not presided over by administrative law judges (ALJs)
5 appointed under 5 U.S.C. § 3105, but instead by agency employees often known as
6 “administrative judges”³ (although they often go by any number of other names).⁴ This
7 Recommendation addresses an important subject not addressed by Recommendation 2016-4: the
8 selection, oversight, evaluation, discipline, and removal of administrative judges.⁵

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

² See 5 U.S.C. §§ 554, 556–557.

³ The report underlying this Recommendation determined that agencies collectively employ 10,831 administrative judges. See Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 17* (Feb. 14, 2018) (draft report to the Admin. Conf. of the U.S.) [hereinafter Barnett et al.], <https://acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal>. Given the immense variety of administrative judges and the hearings over which they preside, it is difficult to identify and obtain reliable data on administrative judges. The authors of the report solicited information on administrative judges and non-APA adjudicative hearings through a survey delivered to sixty-four federal agencies and components within agencies. The 10,831 figure offered by the report is based on data obtained from thirty agencies and components. (Fifty-three entities responded in total.) *Id.* at 16–17. Many agencies that employ administrative judges did not participate in the study. The actual number of federal administrative judges is, therefore, almost certainly larger.

⁴ 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 non-ALJ adjudicators. For purposes of this Recommendation, all adjudicators who are neither ALJs nor agency heads are referred to as “administrative judges.”

⁵ This Recommendation does not address topics associated with the selection, oversight, evaluation, discipline, and removal of administrative judges that are addressed in Recommendation 2016-4, such as limitations on ex parte communications and separation-of-functions prohibitions. See Recommendation 2016-4, *supra* note 1, ¶¶ 2–4.



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9 In contrast to hearings over which ALJs preside, which are regulated by the adjudication
10 provisions of the APA, hearings over which administrative judges preside do not share a uniform
11 statutory framework. Instead, they are governed by procedures specific to each administrative
12 judge’s employing agency and relevant governing statutes.⁶ Administrative judges oversee
13 enforcement, benefits, licensing, and other classes of hearings situated within a wide variety of
14 substantive areas. Hearings may be adversarial or inquisitorial, and may involve disputes
15 between private parties or between private parties and the federal government. Hearings outside
16 the APA also contrast widely in their procedural complexity, ranging from those that are similar
17 in formality and procedure to APA hearings, to those that are procedurally minimal and
18 informal.⁷

19 Just as no common statutory framework governs evidentiary hearings outside the APA,
20 no common framework governs the selection, oversight, evaluation, discipline, and removal of
21 administrative judges. In contrast, ALJs are subject to the same policies and procedures
22 prescribed by the APA and regulations of the Office of Personnel Management. These policies
23 and procedures are largely designed to promote ALJ independence. Among other things, they
24 establish a merit-based system for selecting ALJs, prohibit ALJs from engaging in investigation
25 or prosecution or from reporting to officials with such duties, limit the ability of ALJs to engage
26 in ex parte communications, and exempt ALJs from performance appraisals and bonus
27 eligibility.⁸ Administrative judges, however, are subject to the policies of their employing
28 agencies and the laws and regulations governing the employment of all federal civil servants.⁹
29 Because the nature and procedural complexity of hearings outside the APA vary across and even

⁶ All adjudication proceedings are also subject to baseline requirements imposed by the APA at 5 U.S.C. §§ 555 (addressing “ancillary matters”) and 558 (relating to licensing) and constitutional due process.

⁷ Recommendation 2016-4, *supra* note 1; *see also* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 7–9 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

⁸ *See* 5 U.S.C. §§ 554(d), 556(b), 557(d)(1); 5 C.F.R. §§ 930.206(a)–(b).

⁹ Most administrative judges are hired under agencies’ Schedule A hiring authority. Schedule A employees are not subject to the appointment, compensation, and classification rules in title 5 of the U.S. Code. Congress bestowed significant discretion on agencies to set their own qualification requirements for Schedule A positions. *See* 5 C.F.R. § 213.3101.



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30 within individual agencies, the policies and procedures pertaining to the selection, oversight,
31 evaluation, discipline, and removal of administrative judges are necessarily diverse.

32 While the Administrative Conference does not believe it is possible or even desirable to
33 recommend any uniform policies or practices governing the selection, oversight, evaluation,
34 discipline, and removal of administrative judges, it does believe that agencies should consider
35 the policies and best practices employed by other agencies, federal and state judicial systems,
36 and the ALJ system with respect to these and related matters when designing new, or evaluating
37 existing, adjudication programs. This Recommendation identifies practices that may promote the
38 objectives of judicial competence, integrity, and independence and impartiality¹⁰ appropriate for
39 a system in which decision making and policy making authority ultimately lies in the agency
40 head.

Commented [DS1]: Note for Committee: Are these the key objectives the recommendations promote? Should we include additional objectives?

RECOMMENDATION

Selection

- 41 1. When practicable and permitted by law, agencies should consider using merit selection
42 panels or commissions, such as those used by the federal courts to select United States
43 bankruptcy and magistrate judges, to appoint administrative judges to positions whose
44 principal functions are adjudicative.
- 45 2. Agencies should establish rules and requirements for membership on merit selection
46 panels and identify categories of individuals who may and may not serve on panels. Panel
47 membership could consist of one or more of the following categories of individuals:
 - 48 a. administrative judges from within or outside the agency;
 - 49 b. employees from within or outside the agency who do not perform adjudicative
50 functions; and

¹⁰ “Impartiality” relates to the adjudicator’s ability to issue fair, neutral decisions. See Barnett et al., *supra* note 3, at 1–2 n.3.



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- 51 c. [if legally permissible,] representatives of parties who regularly appear in
52 hearings before the agency over which administrative judges preside.
- 53 3. Agencies should identify the duties and responsibilities of merit selection panels and
54 determine whether panels will offer recommendations to an appointing authority or make
55 final selection decisions. If panels will offer recommendations to a final appointing
56 authority, agencies should identify the appointing authority and determine his or her
57 duties and responsibilities.
- 58 4. Merit selection panels should base their evaluations on clear selection criteria set by the
59 agency that take into account the specific responsibilities for each administrative judge
60 position. Such criteria could include factors used by merit selection panels to select
61 United States bankruptcy and magistrate judges, as well as other relevant factors, such as:
- 62 a. professional credentials, including education;
 - 63 b. subject-matter expertise;
 - 64 c. litigation or adjudication experience;
 - 65 d. professional reputation, as ascertained by references;
 - 66 e. organizational and time-management skills;
 - 67 f. case-management abilities;
 - 68 g. professional demeanor;
 - 69 h. decisiveness;
 - 70 i. patience and courteousness; and
 - 71 j. writing quality.

Commented [DS2]: Note for Committee: Should we provide some indication as to what the bankruptcy/magistrate selection criteria are (perhaps in a footnote)?

Physical Separation and Consolidation of Adjudicative Functions

- 72 5. Agencies should consider the degree to which administrative judges should be physically
73 separated from other agency personnel in order to maintain appropriate levels of
74 independence and impartiality. Physical separation occurs when administrative judges’
75 offices and other agency employees’ offices, respectively, are located in different
76 physical spaces, although such spaces may be located in the same building or premises.



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77 6. When feasible, agencies should consider consolidating all adjudicative functions in
78 fulltime administrative judges, rather than in administrative judges who also have
79 [significant] non-adjudicative duties. In determining whether to consolidate adjudicative
80 functions, agencies should consider any countervailing professional benefits
81 administrative judges obtain from performing non-adjudicative duties.

Disqualification [and/or Recusal]

82 7. Agencies should consider establishing explicit procedures that identify the grounds for
83 which administrative judges must be disqualified from a hearing. Such procedures should
84 provide that administrative judges shall be disqualified when any of the following bases
85 for disqualification in Recommendation 2016-4 is shown: improper financial or other
86 personal interest in a decision, personal animus against a party or group to which that
87 party belongs, or prejudgment of the adjudicative facts at issue in the proceeding. In
88 addition to these bases, circumstances in which administrative judges shall be
89 disqualified could include the following situations drawn from 28 U.S.C. § 455(b), which
90 prescribes the conditions for which justices, judges, and magistrate judges of the United
91 States must disqualify themselves:

- 92 a. When an administrative judge has personal knowledge of disputed evidentiary
93 facts concerning the proceeding.
- 94 b. When an administrative judge served as an attorney in the matter in controversy
95 when in private practice, or an attorney with whom the administrative judge
96 previously practiced law served during such association as an attorney
97 concerning the matter, or the administrative judge or such attorney has been a
98 material witness concerning the matter.
- 99 c. When an administrative judge:
 - 100 i. is a party to the proceeding, or an officer, director, or trustee of a
101 party;
 - 102 ii. is acting as a representative in the proceeding;

Commented [DS3]: Note for Committee: Is this actually only saying that there needs to be a procedure to allow for recusals (see ¶ 8)? Are OGE ethics requirements relevant?

Commented [DS4]: Note for Committee: Rec. 2016-4 only treats disqualification in the context of claims of bias. See ¶ 5 of that recommendation: <https://acus.gov/recommendation/evidentiary-hearings-not-required-administrative-procedure-act>.



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- 103 iii. knows that he or she has an interest that could be substantially affected
104 by the outcome of the proceeding; or
105 iv. knows that he or she is likely to be a material witness in the
106 proceeding.
- 107 8. Agencies should establish procedures that explain when and how parties should seek an
108 administrative judge’s disqualification and how agencies should resolve such claims.

Performance

- 109 9. Evaluations of administrative judges’ performance and eligibility for bonuses should be
110 based on relevant factors, including case processing guidelines; case volume goals and
111 requirements; judicial comportment and demeanor; and the existence, if any, of a clear
112 disregard of or pattern of non-adherence to properly articulated and disseminated rules,
113 procedures, precedents, and other agency policy.¹¹ Maintaining administrative judges’
114 independence and impartiality does not preclude the articulation of appropriate
115 performance norms or efforts to secure adherence to previously announced standards and
116 policies.¹²
- 117 10. In the instance of administrative judges who perform both adjudicative and non-
118 adjudicative functions, the criteria agencies use to evaluate administrative judges’
119 performance and eligibility for bonuses should distinguish between the two functions.
- 120 11. Agencies should not consider the outcomes of particular cases when evaluating
121 administrative judges’ performance of adjudicative functions.

Commented [D55]: Note to Committee: Should we include additional factors? What about criteria such as impartiality and freedom from bias, or clarity of oral and written communications? See Institute for the Advancement of the American Legal System, *Judicial Performance Evaluation: How it Works*, <http://iaals.du.edu/quality-judges/judicial-performance-evaluation-how-it-works> (recommendations for evaluations of state-court judges).

¹¹ Cf. Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, § III.B.3, 57 Fed. Reg. 61760 (Dec. 29, 1992) (recommending that chief administrative law judges (ALJs) “be given authority to . . . [c]onduct regular ALJ performance reviews based on relevant factors”).

¹² Cf. Admin. Conf. of the U.S., Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, § A.1, 43 Fed. Reg. 27508 (June 26, 1978) (explaining that “[m]aintaining the . . . decisional independence [of the Social Security Administration’s ALJs] does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies”).



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Removal and Other Adverse Actions

- 122 12. Agencies should consider articulating any internal procedures or requirements not
123 required by applicable governing law that they apply in removal and other adverse
124 actions against administrative judges.

Transparency

- 125 13. Agencies should consider, to the extent practicable, making policies and procedures
126 governing the selection, oversight, evaluation, discipline, and removal of administrative
127 judges available to the public.

Commented [DS6]: Note to Committee: Should there be a recommendation that suggests agencies should explain under what circumstances removal and other adverse actions against administrative judges are based on the administrative judge's "unacceptable performance," the standard contained in 5 U.S.C. § 4303, or brought "for such cause as will promote the efficiency of the service," the standard contained in 5 U.S.C. § 7513. *[Note: Agencies are authorized to bring adverse actions under either statute.]*

Commented [DS7]: Note for Committee: Should there be a recommendation(s) concerning probationary periods?