In Recommendation 2016-4,¹ the Administrative Conference offered best practices for structuring the increasing number of legally required evidentiary hearings in administrative adjudications not subject to the adjudication provisions of the Administrative Procedure Act (APA).² Those hearings are usually not presided over by administrative law judges (ALJs) appointed under 5 U.S.C. § 3105,³ but instead by agency employees often known as

³ If an agency’s authorizing statute requires an adjudication “on the record after opportunity for an agency hearing,” the formal adjudication provisions of the APA apply. Id. § 554(a). The presiding official in an APA hearing must be an ALJ (or “the agency” or “one or more members of the body which comprises the agency”). Id. § 556(b). “In the absence of a statute requiring formal APA adjudication, agencies have broad discretion to fashion their own adjudicatory procedures.” Matthew Lee Wiener et al., Office of the Chairman, Admin. Conf. of the U.S., Office of the Chairman, Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program 6 (March 31, 2014), https://acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal. Agencies generally use their discretion to appoint administrative judges to preside over non-APA hearings, rather than ALJs. Id. On the circumstances under which Congress may consider converting certain administrative judge positions to ALJ positions, see Admin. Conf. of the U.S., Recommendation 92-7, The Federal Administrative Judiciary, ¶ I.A, 57 Fed. Reg. 61,760, 61,763–64 (Dec. 29, 1992).
“administrative judges” (although they often go by any number of other names). For purposes of this Recommendation, all adjudicators who are neither ALJs nor agency heads are referred to as “administrative judges.”

This Recommendation addresses an important subject not addressed by Recommendation 2016-4: the selection, oversight, evaluation, discipline, and removal of administrative judges. In addressing these matters, the recommendation is intended to apply to those administrative judges who are responsible for making factual findings or applying established law or agency policy to facts as opposed to making policy decisions on behalf of the agency. Adjudicators who review the decisions of hearing-level adjudicators are especially likely to undertake such a policymaking function, though there may be circumstances under which hearing-level adjudicators also permissibly do so under certain adjudicative schemes. In addition, much of the recommendation is intended to apply to employees who serve exclusively or nearly so as adjudicators, rather than those who also perform significant non-adjudicative duties.

In contrast to hearings over which ALJs preside, which are regulated by the adjudication provisions of the APA, hearings over which administrative judges preside do not share a uniform statutory framework. Instead, they are governed by procedures, norms, and practices specific to

---

Commented [CA1]: Proposed amendment from Council

---


2 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.

3 As the Conference stated in a prior recommendation, “the APA model of agency decision making is based on the use of independent ALJs to find facts and to apply agency policy to those facts... Where an agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ’s (or AJ’s) role is to apply such policies to the facts the judge finds in an individual case.” Admin. Conf. of the U.S., Recommendation 92-7, The Federal Administrative Judiciary, 57 Fed. Reg. 61,760, 61,763 (Dec. 1992).
each administrative judge’s employing agency and relevant governing statutes.\textsuperscript{7} Administrative judges oversee enforcement, benefits, licensing, and other classes of hearings situated within a wide variety of substantive areas. Hearings may be adversarial or inquisitorial, and may involve disputes between private parties or between private parties and the federal government. Hearings outside the APA also contrast widely in their procedural complexity, ranging from those that are similar in formality and procedure to APA hearings to those that are procedurally minimal and informal.\textsuperscript{8}

As with the nature and procedural complexity of hearings outside the APA, the policies and procedures pertaining to the selection, oversight, evaluation, discipline, and removal of administrative judges are necessarily diverse and not governed by a specific framework. In regard to hiring in particular, administrative judges are typically attorneys in “schedule A” of the excepted service, which means they are hired under agency-specific procedures without a competitive civil service examination and their qualifications are set by their hiring agencies.\textsuperscript{9} Further, attorney hiring is not subject to Office of Personnel Management rules on rating applicants for excepted service positions, and veterans preference is required only as far as administratively feasible.\textsuperscript{10} Once hired, attorneys are generally subject to a longer trial period before they acquire statutory rights in removal proceedings.\textsuperscript{11} However, they are subject to generally-applicable civil service laws, rules, and regulations, such as those related to background investigations, job classification, compensation, and performance management.

In contrast, the policies and procedures pertaining to the selection, oversight, evaluation, discipline, and removal of ALJs are prescribed by the APA. These policies and procedures are

\textsuperscript{7} 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.


\textsuperscript{9} See 5 C.F.R. §§ 6.2, 6.3(b), 213.3101.

\textsuperscript{10} See id. § 302.101(c).

\textsuperscript{11} See 5 U.S.C. § 7511.
largely designed to promote ALJ independence. Among other things, they establish a merit-based system for selecting ALJs, prohibit ALJs from engaging in investigation or prosecution or from reporting to officials with such duties, limit the ability of ALJs to engage in ex parte communications, and exempt ALJs from performance appraisals and bonus eligibility. In addition, ALJs may only be removed or disciplined “for good cause established and determined by the Merit Systems Protection Board.”

While the Administrative Conference does not believe it is possible or desirable to recommend uniform policies or practices governing the selection, oversight, evaluation, discipline, and removal of administrative judges, it does believe that agencies should consider the policies and practices employed by other agencies, federal and state judicial systems, and the ALJ system with respect to these and related matters when designing or evaluating adjudication programs. The Administrative Conference also believes that agencies should consider the ethical standards of the Office of Government Ethics (OGE), which agencies may supplement pursuant to executive order and OGE regulation, and governing conflict-of-interest laws that are applicable to administrative judges. This Recommendation identifies practices that may promote (1) the objectives of competence, integrity, impartiality, and the degree of

12 See id. §§ 554(d), 556(b), 557(d)(1); 5 C.F.R. § 930.206(a).
14 See, e.g., 28 U.S.C. § 455(b) (prescribing the conditions for which justices and judges of the United States must disqualify themselves); id. § 631(b)(5) (directing the Judicial Conference of the United States to promulgate regulations that provide for the establishment of merit selection panels to advise in the selection of federal magistrate judges); JUD. CONF. OF THE U.S., REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES ch. 3 (1984) (authorizing the use of merit selection panels to advise in the selection of bankruptcy judges); see also Barnett et al., supra note 4, at 61–62 (remarking on the use of state and federal merit selection panels and commissions to advise in the selection of some state judges and federal bankruptcy and magistrate judges).

DRAFT June 8, 2018
independence appropriate for a system in which decision-making and policy-making authority ultimately lies in the agency head; and (2) clarity and transparency with respect to the policies and practices governing the selection, oversight, evaluation, discipline, and removal of administrative judges.

RECOMMENDATION

The recommendations that follow are intended to apply only to those administrative judges who are responsible for making factual determinations or applying established law to facts as opposed to making policy decisions on behalf of the agency. With the exception of recommendations 5, 7–10, and 12, the recommendations are also intended to apply only to employees who serve exclusively or nearly exclusively as adjudicators, rather than those who also perform significant non-adjudicative duties.

Selection

1. When practicable and permitted by law, agencies should consider using merit selection panels or commissions to select or recommend administrative judges for positions whose principal duties are adjudicative. Models for the use of such panels or commissions could include those used by some state governments to advise those who select judges and by the federal courts to advise in the selection of United States bankruptcy and magistrate judges.

2. Agencies that use such panels or commissions should establish rules and requirements for membership on them and identify categories of individuals who are eligible to serve on them. Membership could consist of one or more of the following categories of individuals:
   a. current or former administrative judges from within or outside the agency; and

---

18 "Impartiality" relates to the adjudicator’s ability to issue fair, neutral decisions. See Barnett et al., supra note 4, at 2 n.3.
b. other federal employees with relevant expertise from within or outside the agency; and

e. if legally permissible, representatives of parties with experience in the agency’s adjudication proceedings;

3. Agencies should identify the duties and responsibilities of merit selection panels or commissions and determine whether they will offer recommendations to an appointing authority or make final selection decisions.\(^{19}\)

4. Recommendations and selections should be based on criteria set by the agency that take into account the specific responsibilities for each administrative judge position. Such criteria could include factors used in the selection of United States bankruptcy and magistrate judges, as well as other relevant factors, such as:

a. professional credentials, including experience and education;

b. diversity of background and experience;

c. subject-matter expertise;

d. litigation or adjudication experience;

e. professional reputation, as ascertained by references;

f. organizational and time-management skills;

g. case-management abilities;

h. temperament;

i. decisiveness;

j. ethics and integrity; and

k. analytical and writing ability.

---

\(^{19}\) A merit selection panel’s authority to select administrative judges may be contingent on the outcome in Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016), petition for en banc rev. denied, 868 F.3d 1021 (D.C. Cir. 2017), cert. granted, 138 S. Ct. 736 (Jan. 12, 2018) (concerning whether ALJs of the Securities and Exchange Commission are “officers of the United States” within the meaning of the Constitution’s Appointments Clause). If the Supreme Court in Lucia determines that ALJs are “inferior officers” under the Appointments Clause, its holding will effectively require that ALJs will be required to be appointed by the “heads of departments.” U.S. CONST. art. II, § 2, cl. 2. If such a holding is applied to administrative judges who perform duties that are sufficiently analogous to those performed by ALJs, merit selection panels could make recommendations but would be prohibited from making final selection decisions regarding such positions.
Assignment of Adjudicative Functions

5. To the extent feasible, agencies should consider assigning all adjudicative functions to employees who serve exclusively as administrative judges, rather than to administrative judges who also have significant non-adjudicative duties. When exclusive assignment of adjudicative functions is not feasible, agencies should consider appointing alternate administrative judges to adjudicate matters when the designated administrative judge may have a conflict. Occasional cross-over of duties may be appropriate to meet agency objectives, including professional development.

Physical Separation

6. To the extent feasible, agencies should physically separate administrative judges and their support staff from other agency personnel to maintain appropriate levels of independence and impartiality. Physical separation occurs when administrative judges’ offices and other agency employees’ offices, respectively, are located in different physical spaces, even if such spaces are located in the same building or premises.

Ethics and Disqualification

7. Agencies should consider providing guidance and educational resources to administrative judges on the applicable requirements of the criminal conflict-of-interest laws, contained in 18 U.S.C. §§ 201–209, and the Office of Government Ethics’s (OGE) standards governing the disqualification of federal employees from participating in particular

8. Agencies should consider developing procedures for assigning cases to administrative judges that are aimed at preventing them from presiding over hearings in which they have conflicts of interest.

9. When appropriate, agencies should consider exercising their authority under Executive Order 12,674 (as amended by Executive Order 12,731) and 5 C.F.R. § 2635.105 to adopt, subject to OGE’s approval, supplemental regulations pertaining to the disqualification of administrative judges from particular hearings. Such regulations should augment OGE’s standards in 5 C.F.R. §§ 2635.501–2635.503, which govern the disqualification of federal employees from participating in particular matters due to the appearance of loss of impartiality. Any supplemental regulations adopted should be tailored to the particular needs of the adopting agency’s adjudication program.

10. Agencies should establish procedures that explain when and how parties may seek an administrative judge’s disqualification and how agencies and administrative judges should resolve such claims.

Performance

11. Evaluations of administrative judges’ performance and potential eligibility for bonuses should be based on the following factors derived, in part, from Recommendation 92-7: case processing guidelines; appropriate case volume goals and requirements; adjudicative comportment and demeanor; adherence to governing ethical requirements; adherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy; and all other relevant considerations. Agencies should not consider the outcomes of particular cases when evaluating administrative judges’ performance of adjudicative functions.
12. Agencies should, to the extent appropriate and practicable, make available to the public generally applicable policies and procedures governing the selection, oversight, evaluation, discipline, and removal of administrative judges.