

Comment on Proposed ACUS Recommendation: Recusal Rules for Administrative Adjudicators

David Apol, Government Member

The following proposed amendment (at lines 44 through 65 of the redline draft) is intended to clarify that: (1) OGE’s ethics rules, like the contemplated adjudicatory recusal rules, can also be agency-specific and are also concerned with appearance of conflict of interest in addition to actual conflict; and (2) OGE’s ethics rules differ from adjudicatory recusal rules because OGE’s ethics rules prohibit an employee’s actions and can serve as the source of discipline, whereas the adjudicatory recusal rules contemplated here set up a process for agencies to determine who will hear a particular case.

...

43 of recusal decisions increase transparency and thus the appearance of impartiality.

44 It is important to distinguish ~~agency specific~~adjudicatory recusal rules and procedures
45 from the ethics rules promulgated by the Office of Government Ethics (OGE).¹ As an initial

- *Ethics rules can be “agency specific,” so that is not what distinguishes them from other rules*

46 matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is
47 entirely possible and coherent to enforce both. This is due, at least in part, to the differences in
48 scope, form, and enforcement mechanisms between the two. Ethics rules ~~focus on preventing~~
49 prohibit employees from participating in certain matters where they have a conflicts of interest or
50 an appearance of a conflict among all executive branch employees. Adjudicatory Recusal rules
51 focus on how an agency, acting through its adjudicators and appeal authorities, decides who will
52 hear certain cases in a manner that ensures ~~ing~~ the integrity and perceived integrity of
53 adjudicative proceedings. Adjudicatory Recusal rules are thus broader in focus and narrower in

- *This is the heart of the change. Ethics Rules prohibit an employee’s actions, while these rules set up a process for an agency (albeit through its employees) to determine who will hear a particular case*

¹ The Ethics in Government Act of 1978 (P.L. 95-521) established the Office of Government Ethics to provide “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” OGE’s *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.

54 application than ethics rules. In this light, ethics rules tend to be very precise, as agency
55 employees need to have clear guidance as to what they may or may not do~~to ensure that they~~
56 ~~behave ethically~~. Adjudicatory Recusal rules, by contrast, tend to be much more open-ended
57 and standard-like. They are focused on maintaining both actual impartiality and the appearance
58 of impartiality of adjudicative proceedings, which may be compromised by conduct that would
59 not constitute a breach of any ethics rule, such as advocating a particular policy in a speech
60 before a professional association. The enforcement mechanism is also different. If an employee,
61 including an adjudicator, participates in a matter in violation of an ethics rule, the employee can
62 be subject to discipline. In contrast, if an adjudicator decides not to recuse him or herself in a
63 case where he or she should have been recused, the adjudicator would not be subject to discipline
64 but the decision not to recuse could be appealed under whatever process the agency has
65 established. In addition, a potential ethics issue is reviewed privately inside the agency,
66 whereas the recusal process is public and can be initiated by a party to the adjudication if an
67 adjudicator does not recuse him or herself sua sponte.

...

- *The fact that these rules do not subject adjudicators to discipline is one of the reasons OGE can go along with this recommendation, so I think it is worth making that clear*