



Recommendation 71-1

Interlocutory Appeal Procedures

(Adopted May 7, 1971)

Interlocutory appeal procedures for agency review of rulings by presiding officers must balance the advantages derived from intermediate correction of an erroneous ruling against interruption of the hearing process and other costs of piecemeal review. Striking an appropriate balance between these competing concerns requires that the exercise of discretion in individual cases be carefully circumscribed. Procedures that delegate the responsibility for allowing interlocutory appeals to presiding officers, with a reserved power in the agency to handle exceptional situations, have proven most satisfactory.

Recommendation¹

Each agency which handles a substantial volume of cases that are decided on the basis of a record should adopt interlocutory appeal procedures based on the following principles:

1. Presiding officers should be authorized to rule initially on all questions raised in the proceeding. A ruling by the presiding officer, supported by a reasoned statement, usually should precede interlocutory review of the question raised.
2. In general, interlocutory appeal from a ruling of the presiding officer should be allowed only when the presiding officer certifies that (a) the ruling involves an important question of law or policy concerning which there is substantial ground for difference of opinion; and (b) an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.
3. Allowance of an interlocutory appeal should not stay the proceeding unless the presiding officer determines that extraordinary circumstances require a postponement. A stay of more than 30 days must be approved by the review authority.

¹ This recommendation supersedes section 5 of Recommendation No. 70-3 and paragraphs 2(6) and 7(b) of Recommendation No. 70-4, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals.



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4. If the number of interlocutory appeals in an agency is substantial, the authority to affirm, modify, or reverse the presiding officer's interlocutory ruling should be delegated, to the extent permitted by law, to a review authority designated by the agency.

5. Unless the review authority orders otherwise in the particular case, the review authority should decide the interlocutory appeal on the record and briefs submitted to the presiding officer without further briefs or oral argument. The review authority should summarily dismiss an interlocutory appeal whenever it determines that the presiding officer's certification was improvidently granted or that consideration of the appeal is unnecessary. If the review authority does not specify otherwise within 30 days after the certification or allowance of the interlocutory appeal, leave to appeal from the presiding officer's interlocutory ruling should be deemed to be denied.

6. Interlocutory review by petition to the review authority without certification by the presiding officer should be restricted to exceptional situations in which (a) vital public or private interests might otherwise be seriously impaired, and (b) the review authority has not had an opportunity to develop standards which the presiding officer can apply in determining whether interlocutory review is appropriate.

Citations:

38 FR 19787 (July 23, 1973)

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2 ACUS 17