Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation for Committee | October 24, 2018

[PREAMBLE WILL BE INSERTED HERE]

RECOMMENDATION

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA) as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive orders. The recusal rules would also apply to adjudicators who conduct intra-agency appellate review of decisions from those hearings, though they would not apply to agency heads. In so doing, they should consider both actual and perceived integrity of agency adjudications and seek to maximize the effectiveness and efficiency of their adjudicative proceedings.

2. Agency rules should, consistent with ACUS Recommendation 2016-4, require recusal in cases of actual adjudicator partiality (referred to as bias in ACUS Recommendation 2016-4), such as:
   a. Improper financial or other personal interest in the decision;
   b. Personal animus against a party or group to which that party belongs; or
   c. Prejudgment of the adjudicative facts at issue in the proceeding.

3. Agency recusal rules should include provisions preserving the appearance of impartiality among its adjudicators. Such provisions should be tailored to accommodate the specific

17 features of an agency's adjudicative proceedings and its institutional needs, including

18 consideration of the following factors:

    a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in assuring the public that its adjudicators are impartial);

    b. Whether or not the hearing is part of enforcement proceedings (an agency's direct interest and investment in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger recusal standards);

    c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible recusal standards may be necessary);

    d. The level of public scrutiny that rests upon the agency's activities (the closer the public's attention to an agency's activities, the more diligent it will have to be to maintain an appearance of impartiality);

    e. Whether the adjudicative body presides over the initial determination of acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict recusal standards, but the higher profile and greater authority of the appellate body could draw additional public attention such that stronger recusal standards are needed to protect against public cynicism); and

    f. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible recusal standards).

4. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for litigants seeking recusal, initial determination by the presiding adjudicator, and intra-agency appeal.

Commented [A1]: This parenthetical and those that follow have been inserted here for the purposes of discussion in the absence of a preamble and are not necessarily in their final location.