

**Comment on Administrative Judges Recommendation
Committee on Adjudication**

*Submitted by Carol Ann Siciliano, Government Member (EPA)
June 7, 2018*

Note to ACUS: please include the edits described below in the body of the draft Recommendation. Please include some or all of the text labeled “Rationale” in the comment bubbles accompanying my suggested edits.

COMMENT 1

Page 4, line 55 and page 5, line 70: Delete “merit selection”; insert “using”

The sentence on page 4 would now read: “When practicable and permitted by law, agencies should consider **using** ~~merit selection~~ panels or commissions to ~~select or~~ [see Comment 2] recommend administrative judges for positions whose principal duties are adjudicative.”

The sentence on page 5 would now read: “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 [see Comment 2 which recommends deleting or replacing that sentence in its entirety].”

Rationale:

(1) The preamble does not explain why the current “excepted service” model fails to achieve the Recommendation’s goals of “competence, integrity, impartiality, and degree of independence”; and

(2) As ¶ 5 recognizes, some agencies (like EPA) assign non-adjudicatory functions to administrative judges because, in an era of limited resources, it is simply infeasible to do otherwise. Indeed, at EPA, there is often insufficient workload to justify exclusive adjudicatory functions. Changing the civil service hiring process under these circumstances would introduce hiring complications that are not justified by whatever benefits the draft Recommendation seeks to achieve by alignment with ALJ hiring.

COMMENT 2

Page 4, line 56: Delete “select or”

Page 5, line 73: Delete “and selections”

The sentence on page 4 would now read: “When practicable and permitted by law, agencies should consider **using** ~~merit selection~~ [see Comment 1] panels or commissions to ~~select or~~ recommend administrative judges for positions whose principal duties are adjudicative.”

The sentence on page 5, line 73, would now read: “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.”

Conforming edit: Page 5, lines 70-72: Delete entire ¶ 3, including footnote 18.

Optional additional edit: Replace current ¶ 3 with new text as follows:

“3. Agencies should consider designating as the selection official someone in the agency who will not be subject to the administrative judge’s rulings.”

Rationale:

(1) I agree that the selected administrative judge should not have a sense of “indebtedness” to the selecting official (which may be why the Recommendation suggests decision by panel). But I believe this goal can be achieved by suggesting that the selection decision be made by someone who is not immediately subject to the administrative judge’s rulings, like a senior leader in the agency. (See proposed new text in ¶ 3.)

(2) In further support of deleting “select or” and “and selections”: As footnote 18 notes, the selection of administrative judges may be affected by the Supreme Court’s imminent ruling in *Lucia*. Deleting the suggestion that panels/commissions make “final selection decisions” will allow the Recommendation to remain clear and viable, irrespective of the Court’s holding.

COMMENT 3

Page 4-5, lines 65, 66 and 68-69: Delete “or outside” in lines 65 and 66. Delete lines 68-69 (subparagraph “c”) in their entirety.

Paragraph 2 would now read:

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**
- b. other federal employees with relevant expertise from within ~~or outside~~ the agency.
- c. ~~if legally permissible, representatives of parties with experience in the agency’s adjudication proceedings.~~

Rationale: An appearance of bias or indebtedness that may arise from inviting representatives of experienced parties to help select administrative judges.

COMMENT 4

Page 6, lines 90-91: Delete the entire sentence beginning “Occasional cross-over of duties.” Replace that sentence with the following sentence: “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.”

Paragraph 5 would now read:

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 objective, including professional development.~~

Rationale: At some agencies (like EPA), it is infeasible to designate some employees (like Regional Hearing Officers) to serve exclusively as administrative judges: their RJO workload is often light, and other demands for their services are often high. Moreover, these agencies prevent appearance of impartiality by managing the RJO’s non-adjudicative workload to ensure he/she works on matters not amenable to adjudication. These agencies also use recusal when necessary. Because the second sentence accounts for only some factors and strongly leans in favor of exclusive assignments, I request deleting it and replacing it with a sentence suggesting a structure to accommodate recusals.