



Recommendation 83-3

Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act

(Adopted December 15, 1983)

This recommendation is addressed to the organizational structures which agencies establish to review decisions of presiding officers (ordinarily, administrative law judges) in proceedings governed by sections 556 and 557 of the Administrative Procedure Act or otherwise involving agency determinations on the record after opportunity for a hearing. It is based on a study of structures now in use and their relationship to the accuracy, efficiency and acceptability of the adjudicatory process.

The study concludes that variations in the characteristics and numbers of adjudicatory proceedings in different agencies and in the organization and functions of such agencies caution against recommending any single structure for review of adjudicatory decisions made by presiding officers. By and large the present review structures in the agencies studied seem well adapted to the particular circumstances of the agency. Consequently, the purpose of this recommendation is not to effect any drastic change in present structures, but to provide general guidance to agencies which are establishing new review structures or revising present ones.

In selecting among possible structures for review of adjudicatory decisions four basic precepts should be kept in mind. The first two involve considerations of efficiency; the others involve considerations of accuracy and acceptability.

First, efficiency is generally served by spreading the review load over a number of reviewers adequate to keep review time low relative to initial decision time. Application of this precept requires attention to three variables: the total relevant adjudicatory caseload, the difficulty of the cases, and the number of reviewers.

Second, efficiency also is served by minimizing repetition; the same matter seldom should be put in issue more than once. This cautions against *de novo* review, instead favoring more limited review of issues properly committed to a subordinate.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Third, accuracy depends on matching the skills of the reviewer to the issues presented. Officials integrated into the agency's policymaking apparatus should review decisions that significantly involve policy issues while officials trained in factfinding should review decisions presenting fact issues. Furthermore, the level of the reviewer should match the magnitude of the issue. Agency heads with numerous other responsibilities should be insulated from routine cases, but attempts to force resolution of major policy issues at lower levels seem misguided except when those issues can readily be addressed by rulemaking. Similarly, individual reviewers easily can address relatively simple issues, whether of fact or of policy, while more complex questions may call for collegial consideration.

Fourth, acceptability generally requires that *some* review by a higher agency authority be available at the instance of the aggrieved party, at least in cases of great impact on individual parties. Inspection of a substantial penalty and removal of a valuable government benefit are obvious candidates for review as of right.

Recommendation

1. Agency Head Review

a. In drafting legislation governing the institutional structure for agency adjudicatory proceedings, Congress should favor delegation of decisional authority and should not prescribe detailed review structures. The presumption should be that each agency head is best able to allocate review functions within the agency.

b. Congress should authorize agency heads¹ —

(i) to review initial decisions of presiding officers in adjudicatory matters on a discretionary basis, as described, in Administrative Conference Recommendation 68-6, section 2(b); and

(ii) to delegate review authority on an *ad hoc* basis or with respect to any or all classes of decisions to a subordinate official or board of officials either with possibility for further review by the agency head in his discretion or without further administrative review.

¹ "Agency head" is used in the functional sense of the individual or body politically responsible for the administration of the program in question whether this responsibility is vested by statute or by delegation from a superior official, such as the Secretary of a department.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Where the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review, in accordance with the guidelines set forth in section 2(b) of this Recommendation.

c. Only in the rarest circumstances should Congress require agency heads to review decisions personally. These circumstances are where:

(i) in the case of an agency headed by an individual, the subject matter at issue is of such importance that attention at the very highest level is imperative; or

(ii) in the case of an agency headed by a collegial body, the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks. This paragraph does not address requirements for discretionary review procedure under which a case may be brought before the agency for review on the vote of one or more members of the agency.

Nothing in this section is intended to deal with the appropriate allocation of responsibilities between the agency head and his subordinates in connection with the decisions in cases which he personally reviews.

2. Forms of Delegations

a. *General.* Agency heads having powers of delegation should delegate review authority on a class, rather than case-by-case, basis whenever a substantial number of cases is adjudicated at the agency. Delegations on an *ad hoc* basis should be limited to situations where adjudicatory proceedings are relatively few and of such varied nature as to make selection of a single qualified reviewing authority difficult.

b. *Reservation of Authority.* Where an agency head delegates review authority, any authority he retains to grant further review should normally be exercisable only in his discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy. Multilevel review of purely factual issues should be avoided.

3. Choice of Delegate

When an agency head determines to make a standing delegation of his review authority, either unconditionally or subject to further discretionary review, he may choose between



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

delegating to a subordinate authorized to act individually, *e.g.*, a judicial officer, or to an employee board authorized to act collegially. A multi-member agency might also delegate to one of its members or a panel made up of its members. In choosing the form of reviewing authority, the agency head should consider the function to be performed by the authority and the degree of finality expected of its decisions. This section sets forth some factors which may guide an agency head in his choice among these forms. The list is not intended to be exclusive, nor to suggest that in every case there are clear grounds for preferring one form to another.

a. *Individual Delegates.* Where a standing delegation of review authority is to be adopted, the following factors favor a delegation to an individual delegate (or to a number of delegates authorized to review decisions individually) rather than to several delegates acting jointly: the number of cases is large, the cases are relatively simple, and the predominant issues concern descriptive facts, or, to the extent complex issues are presented, their resolution generally depends on application of a single skill or discipline, such as legal interpretation, or application of knowledge uniquely associated with the medical or engineering professions or with a discrete branch of science rather than on some combination of skills or disciplines.

b. *Review Boards.* In deciding whether a delegation instead should be made to a group of persons jointly charged with review of ALJ decisions, among the factors that should be considered as favoring such delegation are: the caseload is substantial (but somewhat less than that contemplated by paragraph (a) above), and includes more complex cases that consume a significant amount of time at the initial decision stage, and cases presenting a class of issues dependent for resolution on the application of several different skills or disciplines.

c. *Agency Panels.* In some circumstances, a multi-member agency may find it desirable to make a standing delegation of review authority to a panel of agency members. Factors favoring such delegation include a large adjudicatory caseload and difficulty in elaborating or clarifying agency policy (especially through formal mechanisms such as rulemaking) in a manner that will substantially limit the number of significance of policy issues presented in adjudications.

4. *Standards for Grant of Review*

a. *Review of Right; Discretionary Review.* Delegation of review authority does not necessarily imply that such review must be available as of right. While review of right is appropriate in certain cases because of the severe consequences to the parties, such as cases involving the imposition of a substantial penalty or the revocation of a license, agency heads should consider



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the desirability in routine cases of authorizing the review authority to decline review in the absence of a reasonable showing that:

(i) a prejudicial procedural error was committed in the conduct of the proceeding, or

(ii) the initial decision embodies (A) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (B) a legal conclusion which is erroneous; or (C) an exercise of discretion or decision of law or policy which is important and which should be reviewed.

b. *Review Sua Sponte*. Normally, a reviewing authority should call up a case for review sua sponte only where policy issues are involved and the functions of that authority include the resolution of such issues.

Citations:

48 FR 57461 (December 30, 1983)

___ FR _____ (2012)

1983 ACUS 11