

## AGENCY APPELLATE SYSTEMS

Christopher J. Walker  
Matthew Lee Wiener

*The appendices that follow are preliminary drafts subject to revision. The authors welcome corrections and other proposed revisions.*

### APPENDICES C–N

#### AGENCY-SPECIFIC OVERVIEWS

<b>Appendix C</b>	Department of Health and Human Services (HHS): Benefits Review Board/Medicare Appeals Council
<b>Appendix D</b>	Department of Homeland Security (DHS), U.S. Citizen and Immigration Services: Administrative Appeals Office (USCIS)
<b>Appendix E</b>	Department of Justice (DOJ): Board of Immigration Appeals (BIA)
<b>Appendix F</b>	Department of Labor (DOL): Administrative Review Board
<b>Appendix G</b>	Department of Veterans Affairs (VA): Board of Veterans Appeals (BVA)
<b>Appendix H</b>	Environmental Protection Agency (EPA): Environmental Appeals Board
<b>Appendix I</b>	Equal Opportunity Employment Commission (EEOC)
<b>Appendix J</b>	Merit Systems Protection Board (MSPB)
<b>Appendix K</b>	National Labor Relations Board (NLRB)

<b>Appendix L</b>	Patent and Trademark Office (PTO): Patent Trial and Appeals Board (PTAB)
<b>Appendix M</b>	Securities and Exchange Commission (SEC)
<b>Appendix N</b>	Social Security Administration (SSA): Appeals Council

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**APPENDIX C**

**Medicare Appeals Council:  
Review of ALJ Decisions Regarding Medicare Coverage and Payment**

**INTRODUCTION**

People and businesses often disagree with decisions about entitlement to, claims for, or payments from Medicare. Anyone seeking to contest such decisions has the right to appeal. The appeals process has five levels, each of which must be exhausted before proceeding to the next. The five levels are:

1. Redetermination by the Medicare administrative contractor (MAC);
2. Reconsideration by a qualified independent contractor (QIC);
3. Decision by an administrative law judge (ALJ) or attorney adjudicator from the Office of Medicare Hearings and Appeals (OMHA);
4. Review by the Council; and
5. Review by a federal district court.

The first level is simply a request for redetermination by the MAC — the same entity that made the decision underlying the appeal. The second level involves reconsideration of the claim by a QIC — an independent entity with which Medicare contracts to handle reconsideration of a Medicare appeal. The third level involves review of the record by an ALJ or attorney adjudicator, or, when required, a formal APA hearing before an ALJ. At this stage, the ALJ or attorney adjudicator issues a decision on the appeal that includes findings of fact, conclusions of law, and a proposed remedy.

The next level in the appeals process is an appeal to the Council, which ordinarily reviews the record *de novo*. After completing its review, the Council issues a decision dismissing the appeal, remanding the matter for further consideration, or affirming or reversing the decision being appealed. Dissatisfied parties may appeal the Council's decision to the appropriate federal district court.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>The procedures that govern appeals to the Council differ depending on which CMS contractor made the determination that was appealed to the ALJ. The procedures also differ depending on whether the ALJ issued a decision or a dismissal order.<sup>1</sup></p> <p>If an ALJ issued a decision or dismissal for a claim for Part D drugs, other than a claim solely for payment of Part D drugs already furnished, the appeal is governed by the Medicare regulations at 42 C.F.R. Part 423, Subpart U.<sup>2</sup></p> <p>If an ALJ issued a decision after a Qualified Independent Contractor, Independent Review Entity, or Quality Improvement Organization made a reconsideration determination, the appeal is governed by the Medicare regulations at 42 C.F.R. Part 405, Subpart I, along with some Medicare agency rulings.<sup>3</sup></p> <p>If an ALJ issued a dismissal after a Qualified Independent Contractor, Independent Review Entity, or Quality Improvement Organization made a reconsideration determination, the appeal is governed by the Medicare regulations at 42 C.F.R. Part 405, Subpart I, along with some Medicare agency rulings.<sup>4</sup></p>
----------------	---

<sup>1</sup> <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/index.html>

<sup>2</sup> <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/appeals-in-alj-determinations-on-part-d-drugs/index.html>

<sup>3</sup> <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/appeals-in-alj-reconsideration-determinations-involving-qic-or-ire-or-qio-entities/index.html>

<sup>4</sup> <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/appeals-in-alj-dismissal-determinations-involving-qic-or-ire-or-qio-entities/index.html>

Substantive Law	The Medicare Act <sup>5</sup> and related regulations <sup>6</sup> provide the substantive law. Program and policy operations manuals interpret and elaborate upon the Act and regulations. <sup>7</sup>
Miscellaneous	[none]

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	The Council reviews decisions or dismissals by ALJs adjudicating claims for entitlement to Medicare or determinations on individuals claims for Medicare coverage and payment. <sup>8</sup>
Nature of Hearing-Level Proceedings	Hearing-level proceedings are typically conducted before ALJs and are subject to provisions of the Medicare Act and the APA’s formal adjudication procedures. <sup>9</sup> Where a hearing before an ALJ is not required by law (for example, if it is waived under 42 C.F.R. § 1038(b), or not required under 405.1038(c)), non-hearing proceedings may be conducted by attorney adjudicators instead of ALJs. <sup>10</sup>
Nature of Hearing-Level Decision	The adjudicator issues a written decision setting out his or her factual findings, conclusions of law, and rationale for the decision. <sup>11</sup> Each decision ends with an order instructing the effectuating entity to act in accordance with the decision. <sup>12</sup>

<sup>5</sup> 42 U.S.C. §§ 1395 *et seq.*

<sup>6</sup> 42 C.F.R. §§ 400 *et seq.*

<sup>7</sup> <https://www.cms.gov/regulations-and-guidance/guidance/manuals/internet-only-manuals-ioms>

<sup>8</sup> <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/index.html>

<sup>9</sup> See 82 Fed. Reg. 4974, 4988 (Jan. 17, 2017) (explaining relationship between APA and Medicare Act).

<sup>10</sup> See 42 C.F.R. § 405.902 (defining “Attorney Adjudicator” as “a licensed attorney employed by OMHA with knowledge of Medicare coverage and payment laws and guidance, and authorized to take the actions provided for in this subpart on requests for ALJ hearing and requests for reviews of QIC dismissals”).

<sup>11</sup> <https://www.hhs.gov/sites/default/files/ch16-decisions-10-09-2019.pdf>; see also 42 C.F.R. §§ 405.1046(a), 423.2046(a) (requiring written decision by adjudicator).

<sup>12</sup> <https://www.hhs.gov/sites/default/files/ch16-decisions-10-09-2019.pdf> (at page 23).

	There are four types of decisions: (1) favorable, meaning the matter is decided in appellant’s favor with respect to every issue before the adjudicator; (2) unfavorable, meaning the matter is not decided in appellant’s favor with respect to any issue before the adjudicator; (3) partially favorable, meaning that some, but not all, of the issues before the adjudicator are decided in the appellant’s favor; and (4) affirmed, meaning that the adjudicator upheld a dismissal of the appellant’s reconsideration request. <sup>13</sup>
Transfer of Case to Appellate Body After Hearing-Level Decision	When the Council receives a request for review from an appellant, in most instances it will not have a copy of the ALJ’s decision or dismissal, or the case file. The Council will request all case files from the AdQIC, which serves as a sort of administrative clearinghouse for Medicare appeals. <sup>14</sup>
Miscellaneous	[none]

### Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	ALJ decisions are reviewed directly by the Council. There is no intermediate appellate body.
Legal Status of Reviewing Authority(ies)	The Council is established by statute as the Department’s final decisionmaking authority. <sup>15</sup>
Miscellaneous	[none]

<sup>13</sup> <https://www.hhs.gov/sites/default/files/ch16-decisions-10-09-2019.pdf> (pages 4 and 5).

<sup>14</sup> <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2019Downloads/R4278CP.pdf> (page 80 of PDF). The AdQIC is the clearinghouse for all Original Medicare (Part A and Part B) claim case files and decisions from the OMHA field offices as well as any decisions and case files from the Council. <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2019Downloads/R4278CP.pdf> (at page 79 of PDF).

<sup>15</sup> See 42 U.S.C. §§ 1395ff(b)(1)(C), (b)(2), (f)(1)(A)(v) (describing the Council’s decision as the “Secretary’s final decision” and “final agency action”); 42 C.F.R. § 405.1130 (stating that “[t]he MAC’s decision is final and binding on all parties”).

**Institutional Attributes of Appellate/Reviewing Authority(ies)**

Number of Members	The Board consists of six administrative appeals judges. <sup>16</sup>
Qualification Requirements	N/A
Party Affiliation Requirement in Appointment	N/A
Method of Appointment	N/A
Term of Appointment	N/A
Statutory Removal Protections	N/A
Location within Agency; Basis of Legal Authority	The Council’s administrative appeals judges are located within the HHS Departmental Appeals Board (DAB), and the Council is independent of both CMS and OMHA. The Council provides the final administrative review for Medicare claim appeals. <sup>17</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	N/A
Quorum Requirement	N/A
Authority and Function of Appellate Authority’s Head	N/A
Internal Management Structure of Appellate Authority	N/A
Miscellaneous	[none]

**Nature, Form, and Timing of Appeal**

<sup>16</sup> <https://www.gao.gov/assets/680/677034.pdf> (pdf page 13)

<sup>17</sup> <https://www.hhs.gov/sites/default/files/omha/files/medicare-appeals-backlog.pdf>; Section 205(g) of the Act.

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	The governing regulations provide for appeal as of right from any ALJ decision. <sup>18</sup>
How Appeal Initiated	<p>Most appeals are initiated when a party requests review of a decision by an ALJ or attorney adjudicator.<sup>19</sup></p> <p>If the ALJ or attorney adjudicator does not issue a decision within 90 days of the date the request for hearing is received by the office specified in the QIC's notice of reconsideration, the applicant may escalate the appeal to the Council by filing a written request with OMHA to escalate the appeal to the Council and sending a copy of the request to escalate to the other parties who were sent a copy of the QIC reconsideration.<sup>20</sup> Escalation will thereby occur unless the ALJ or attorney adjudicator is able to issue a decision, dismissal order, or remand order within the later of five calendar days of receiving the request for escalation, or five calendar days from the end of the applicable adjudication period.<sup>21</sup></p> <p>In some cases, appellate review occurs because CMS or one of its contractors refers a decision to the Council and the Council decides to review the case on its own motion.<sup>22</sup></p>
Time For Appealing	If the ALJ or attorney adjudicator issues a decision, appeals must be filed within 60 days of the date of receipt of the ALJ's or attorney adjudicator's decision. <sup>23</sup> If the ALJ or

<sup>18</sup> 42 C.F.R. § 405.1100.

<sup>19</sup> See 42 C.F.R. § 405.1108.

<sup>20</sup> 42 C.F.R. § 405.1016(f)(1).

<sup>21</sup> 42 C.F.R. § 405.1016(f)(2).

<sup>22</sup> See 42 C.F.R. § 405.1110.

<sup>23</sup> <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c29.pdf>

(page 15)



	attorney adjudicator does not issue a decision within 90 days of the date the request for hearing is received by the office specified in the QIC’s notice of reconsideration, an appellant may escalate the appeal to the Council at any time thereafter — at least until the ALJ or attorney adjudicator issues a decision. <sup>24</sup>
If No Appeal Taken from Hearing Officer’s Decision	The decision of the ALJ or attorney adjudicator generally is binding on all parties unless it is appealed (either to the Council or to a federal court) or reopened and revised. <sup>25</sup>
If Appeal Taken	“When a party requests that the Appeals Council review an ALJ’s or attorney adjudicator’s dismissal, the Appeals Council may deny review or remand the case to an ALJ or attorney adjudicator for further proceedings. The Appeals Council may also dismiss a request for a hearing for any reason the ALJ or attorney adjudicator could have dismissed the request for hearing. In addition, the Appeals Council will decide cases that are escalated from the OMHA level without an ALJ or attorney adjudicator decision or dismissal.” <sup>26</sup> The Council’s review of an ALJ’s or attorney adjudicator’s decision is <i>de novo</i> , <sup>27</sup> but Medicare regulations require that the Council confine its review to the record before the ALJ unless good cause is shown for submitting new evidence. <sup>28</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	“The Council may decide on its own motion to review a decision or dismissal issued by an ALJ or attorney adjudicator. CMS or any of its contractors may refer a case to the Council for it to consider reviewing under this authority anytime within 60 calendar days of

<sup>24</sup> 42 C.F.R. § 405.1016(f).

<sup>25</sup> 42 C.F.R. § 405.1048.

<sup>26</sup> <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c29.pdf>

<sup>27</sup> 42 C.F.R. § 405.1100

<sup>28</sup> 42 C.F.R. § 405.1122

	<p>receipt of an ALJ's or attorney adjudicator's decision or dismissal."<sup>29</sup></p> <p>The Council usually limits its Own Motion Review" of the record to (i) error material to the decision, (ii) abuse of discretion, (iii) conclusions not supported by the preponderance of the evidence, and (iv) issues of broad public policy.<sup>30</sup></p>
Miscellaneous	[none]

### Appellate Authority's Procedures

Record on Review	<p>When a party requests that the Council review an ALJ's or attorney adjudicator's decision, the Council will consider all of the evidence in the administrative record compiled by OMHA.<sup>31</sup> "The record will include marked as exhibits, the appealed determinations, and documents and other evidence used in making the appealed determinations and the ALJ's or attorney adjudicator's decision, including, but not limited to, claims, medical records, written statements, certificates, reports, affidavits, and any other evidence the ALJ or attorney adjudicator admits. The record will also include any evidence excluded or not considered by the ALJ or attorney adjudicator, including, but not limited to, new evidence submitted by a provider or supplier, or beneficiary represented by a provider or supplier, for which no good cause was established, and duplicative evidence submitted by a party.<sup>32</sup></p> <p>When an appellant requests escalation of a case from the OMHA level to the Council (so</p>
------------------	--

<sup>29</sup> 42 C.F.R. § 405.1110(a).

<sup>30</sup> 42 C.F.R. § 405.1110(c).

<sup>31</sup> 42 C.F.R. § 405.1108(a); *see also* 42 C.F.R. § 405.1122(a) (same point).

<sup>32</sup> 42 C.F.R. § 405.1042(a)(2).

	<p>that the administrative record is, at best, incomplete), the Council may issue a decision based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ or attorney adjudicator before the case was escalated.<sup>33</sup> Alternatively, the Council may supplement the record on review by conducting any additional proceedings, including a hearing, that the Council determines are necessary to issue a decision.<sup>34</sup> Or the Council may render the record on appeal moot by remanding the case to OMHA for further proceedings, or by dismissing the request for review for some valid reason.<sup>35</sup></p>
<p>Submissions by Parties in Support of Appeal</p>	<p>A party seeking appellate review must file a written request for review, which may be made on a standard form.<sup>36</sup> A written request that is not made on a standard form is accepted if it contains the beneficiary's name; Medicare number; the specific services or items for which the review is requested; the specific dates of service; the date of the ALJ's or attorney adjudicator's decision or dismissal order, if any; and the name of the party or the representative of the party; and any other information CMS may decide.<sup>37</sup> The request for review must identify the parts of the ALJ's or attorney adjudicator's action with which the party requesting review disagrees and explain why he or she disagrees with the ALJ's or attorney adjudicator's decision, dismissal, or other determination being appealed.<sup>38</sup></p>

<sup>33</sup> 42 C.F.R. § 405.1108(d)(1).

<sup>34</sup> 42 C.F.R. § 405.1108(d)(2).

<sup>35</sup> 42 C.F.R. § 405.1108(d)(3)–(5).

<sup>36</sup> 42 C.F.R. § 405.1112(a).

<sup>37</sup> 42 C.F.R. § 405.1112(a).

<sup>38</sup> 42 C.F.R. § 405.1112(b).

	<p>Upon request, the Council will give parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.<sup>39</sup> Any party who submits a brief or statement must send a copy to all of the other parties.<sup>40</sup> The Council may also request, but not require, CMS or its contractor to file a brief or position paper if the Council determines that it is necessary to resolve the issues in the case.<sup>41</sup></p>
<p>Issue Preservation</p>	<p>The Council limits its review of an ALJ's or attorney adjudicator's actions to those exceptions raised by the party in the request for review, unless the appellant is an unrepresented beneficiary.<sup>42</sup></p>
<p>Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal</p>	<p>If the Council is reviewing an ALJ's or attorney adjudicator's decision, the Council limits its review of the evidence to the evidence contained in the record of the proceedings before the ALJ or attorney adjudicator.<sup>43</sup> Similarly, if the Council is reviewing a case that is escalated from the OMHA level to the Council, the Council will decide the case based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ or attorney adjudicator before the case was escalated.<sup>44</sup></p> <p>There are, however, several exceptions to the general rule against receiving new evidence. For instance, if the ALJ's or attorney adjudicator's decision decides a new issue that the parties were not afforded an</p>

<sup>39</sup> 42 C.F.R. § 405.1120.

<sup>40</sup> 42 C.F.R. § 405.1120.

<sup>41</sup> 42 C.F.R. § 405.1120

<sup>42</sup> 42 C.F.R. § 405.1112(c). For purposes of this limitation, a “representative” is “anyone who has accepted an appointment as the beneficiary’s representative, except a member of the beneficiary’s family, a legal guardian, or an individual who routinely acts on behalf of the beneficiary, such as a family member or friend who has a power of attorney.” 42 C.F.R. § 405.1112(c).

<sup>43</sup> 42 C.F.R. § 405.1122(a)(1).

<sup>44</sup> 42 C.F.R. § 405.1122(b)(1).

	<p>opportunity to address at the OMHA level, the Council considers any evidence related to that issue that is submitted with the request for review.<sup>45</sup> Similarly, if new evidence related to issues previously considered by the QIC is submitted to the Council by a provider, supplier, or a beneficiary represented by a provider or supplier, the Council may consider the evidence if it determines that the provider, supplier, or beneficiary represented by a provider or supplier had good cause for submitting it for the first time at the Council level.<sup>46</sup> Regulations also permit the Council to subpoena parties to make books, records, correspondence, papers, or other documents available when they are material to an issue at a hearing.<sup>47</sup></p>
Standard of Review	The standard of review of ALJ decisions is de novo, both as to conclusions of law and findings of fact. <sup>48</sup>
Consultation with Staff and Other Agency Officials	N/A
Oral Argument	<p>A party may request to appear before the Council to present oral argument.<sup>49</sup> The Council may also grant oral argument <i>sua sponte</i>.<sup>50</sup></p> <p>The Council grants a request for oral argument if it decides that the case raises an important question of law, policy, or fact that cannot be readily decided based on written submissions alone.<sup>51</sup> If the Council decides to hear oral argument, it tells the parties of the time and place of the oral argument at least</p>

<sup>45</sup> 42 C.F.R. § 405.1122(a)(1).

<sup>46</sup> 42 C.F.R. § 405.1122(c)(1).

<sup>47</sup> 42 C.F.R. § 405.1122(d).

<sup>48</sup> 42 U.S.C. § 1395ff(d)(2)(B).

<sup>49</sup> 42 C.F.R. § 1124.

<sup>50</sup> 42 C.F.R. § 1124(b).

<sup>51</sup> 42 C.F.R. § 1124(a).

	10 calendar days before the scheduled date. <sup>52</sup> The Council may also request, but not require, CMS or its contractor to appear before it if the Council determines that it may be helpful in resolving the issues in the case. <sup>53</sup>
Amicus Participation; Intervention; etc.	N/A
Public Access to Hearings	No statute or rule address public access to hearings.
Staff's Role in Writing Decisions	N/A
Deadlines for Decision	The Act contemplates that the Council will render a decision or remand the case to an ALJ within 90 days from the date the request for review is timely filed. <sup>54</sup> If the Council does not render a decision within 90 days, the appellant may request that the appeal be escalated to federal district court. <sup>55</sup>
Nature of Decision	<p>The Council may adopt, modify, or reverse the ALJ's or attorney adjudicator's decision, or remand the case to an ALJ or attorney adjudicator for further proceedings.<sup>56</sup> The Council will dismiss a request for review when a party does not have a right to Council review.</p> <p>When a party requests that the Council review an ALJ's or attorney adjudicator's dismissal, the Council may deny review or remand the case to an ALJ or attorney adjudicator for further proceedings.<sup>57</sup></p>

<sup>52</sup> 42 C.F.R. § 1124(b).

<sup>53</sup> 42 C.F.R. § 1124(d).

<sup>54</sup> 42 U.S.C. § 1395ff(d)(2).

<sup>55</sup> 42 U.S.C. § 1395ff(d)(3)(B).

<sup>56</sup> 42 C.F.R. § 405.1108; 42 C.F.R. § 405.1128(b).

<sup>57</sup> <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c29.pdf> (page 95)

Reconsideration, Rehearing, etc.	<p>A party to a Council review may request that the Council reopen its decision within 180 calendar days from the date of the review decision for good cause.<sup>58</sup></p> <p>When a party has filed a valid request for an appeal of Council review, the Council lacks jurisdiction to reopen an issue on a claim that is under appeal until all appeal rights for that issue have been exhausted. Once the appeal rights for the issue have been exhausted, the Council may reopen the issue.<sup>59</sup></p> <p>The Council's decision whether to reopen is binding and not subject to appeal.<sup>60</sup></p>
Miscellaneous	[none]

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	N/A
Assignment of Cases	No publicly available document addresses the assignment of cases.
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	N/A

<sup>58</sup> 42 C.F.R. § 405.980(e)(3). Good cause may be established when there is new and material evidence that was not available or known at the time of the determination or decision, and that may result in a different conclusion; or (2) the evidence considered in making the determination or decision clearly shows on its face that an obvious error was made at the time of the determination or decision. *See* 42 C.F.R. § 405.986(a). A change in substantive law or interpretative policy is not a basis for reopening a determination or hearing decision. 42 C.F.R. § 405.986(b).

<sup>59</sup> 42 C.F.R. § 405.980(a)(4).

<sup>60</sup> 42 C.F.R. § 405.980(a)(5).

Miscellaneous	[none]
---------------	--------

### Form of Decisions, Publication, and Precedential Status

Form of Decision	[forthcoming]
Signed or Per Curiam	[forthcoming]
Dissents	[forthcoming]
Publication	Notice of all precedential decisions is to be published in the Federal Register, with the decisions themselves to be posted on an accessible HHS website. <sup>61</sup> There are no requirements for publishing nonprecedential decisions.
Where Published	Some Council decisions are carried by Westlaw and Lexis. A number of pre-2017 decisions are available on the Departmental Appeals Board’s website. <sup>62</sup> Those decisions are not (yet) precedential, but were published on the theory that they involve the adjudication of issues that may be of interest to various stakeholders in the Medicare appeals process. <sup>63</sup>
Precedential Status	Since 2017, the Chair of the Departmental Appeals Board has had power to designate as precedential a final decision issued by the Council in accordance with Part 405, subpart I; Part 422, subpart M; Part 423, subpart U; or Part 478, subpart B of Chapter IV of Title 42 of the Code of Federal Regulations Title 42, Chapter IV. <sup>64</sup> Precedential effect means that the Council’s: (1) legal analysis and interpretation of a Medicare authority or provision is binding and must be followed in

<sup>61</sup> 42 C.F.R. § 401.109(b).

<sup>62</sup> <https://www.hhs.gov/about/agencies/dab/decisions/council-decisions/index.html>

<sup>63</sup> <https://www.hhs.gov/about/agencies/dab/decisions/council-decisions/index.html>

<sup>64</sup> 42 C.F.R. § 401.109(a).



	<p>future determinations and appeals in which the same authority or provision applies and is still in effect; and (2) factual findings are binding and must be applied to future determinations and appeals involving the same parties if the relevant facts are the same and evidence is presented that the underlying factual circumstances have not changed since the issuance of the precedential final decision.<sup>65</sup></p> <p>Precedential decisions have precedential effect from the date they are made available to the public.<sup>66</sup></p>
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The Council does not issue guidance documents governing hearing-level adjudications.
Feedback to Adjudicators	Parties, their representatives, and other interested individuals and organizations are invited to give feedback about the procedures used when resolving cases. <sup>67</sup> Feedback can be provided by emailing <a href="mailto:DABStakeholders@hhs.gov">DABStakeholders@hhs.gov</a> .
Quality-Assurance Reviews and Related Mechanisms	[none]
Participation of Appellate Body in Substantive Rulemaking	The Council has no authority to promulgate substantive rules.
Miscellaneous	[none]

<sup>65</sup> 42 C.F.R. § 401.109(d).

<sup>66</sup> 42 C.F.R. § 401.109(b).

<sup>67</sup> <https://www.hhs.gov/about/agencies/dab/stakeholders.html>

**Miscellaneous**

Alternative Dispute Resolution (ADR)	N/A
Participation of Appellate Body in Agency Decisions on Judicial Review	N/A
Role and Participation of Appellate Body in Writing Rules	N/A
Miscellaneous	[none]

**PUBLICLY AVAILABLE CASE STATISTICS**

[forthcoming]

**TREATISES AND SCHOLARSHIP OF NOTE**

[forthcoming]

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**APPENDIX D**

**United States Citizen and Immigration Services –  
Administrative Appeals Office:  
Review of USCIS Officers’ Decisions for Immigration Benefit Requests**

**INTRODUCTION**

The Administrative Appeals Office (AAO), under the Immigration and Nationality Act (INA)<sup>1</sup> and Title 8 of the Code of Federal Regulations (CFR)<sup>2</sup>, conducts administrative review of roughly 50 types of immigration cases filed with U.S. Citizen and Immigration Services (USCIS).<sup>3</sup>

There are three types of adjudications that AAO deals with: appeals, motions, and certifications. Appeals are when the AAO conducts appellate review of an immigration benefit request decision. A motion to reopen “must state new facts and be supported by documentary evidence”, this review unlike appeals is conducted by the AAO over an AAO decision.<sup>4</sup> A motion to reconsider “must establish that AAO based its decision on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision.”<sup>5</sup> Lastly, certifications occur when a USCIS official asks the AAO to review an initial decision that is very complex.<sup>6</sup>

In addition to the three types of adjudications, there are three types of decisions that AAO produces. These are non-precedent, precedent, and adopted. The most frequently utilized type of decision is non-precedent. Non-precedent decisions are only binding on the case at hand, they “do not create or modify USCIS policy or

---

<sup>1</sup> 8 U.S.C. §§ 1101-1178.

<sup>2</sup> 8 C.F.R. § 103.

<sup>3</sup> AAO, also, reviews some types of Immigration and Customs Enforcement (ICE) cases. However, not every immigration benefit is appealable and some are under the Board of Immigration Appeal (BIA) jurisdiction.

<sup>4</sup> USCIS, *AAO Practice Manual*, Chapter 1.4(b), April 18, 2018, <https://www.uscis.gov/ao-practice-manual>.

<sup>5</sup> *Id.* at 4.3.

<sup>6</sup> *See id.* at 5.1.

practice.”<sup>7</sup> The second type is adopted decisions. These decisions “[p]rovide policy guidance to USCIS employees in making determinations on applications and petitions for immigration benefits.”<sup>8</sup> Adopted decisions are only binding on USCIS internally. Lastly, are precedent decisions which, with the approval of the Attorney General, “designate decisions to serve as precedents in all future proceedings.”<sup>9</sup> The decisions “announce a new legal interpretation or agency policy, or may reinforce an existing law or policy by demonstrating how it applies to a unique set of facts.”<sup>10</sup>

There are several different ways a case can reach the AAO, whether it be from an appellant’s appeal or the AAO itself reopening a case. Once a case reaches the AAO there are multiple directions in which the case can go, be it a remand back to USCIS or a dismissal by the AAO. Due to the various pathways cases can take, the jurisdictional nuisances, and the binding weight of the decisions, the AAO’s adjudication system is complex.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>Appellate procedures are governed by the INA<sup>11</sup> and C.F.R.-codified procedural rules<sup>12</sup>, as interpreted by the AAO in precedential decision.</p> <p>There are also guidance documents (including USCIS Policy Memorandum) governing the adjudicative activities of the AAO.<sup>13</sup></p> <p>USCIS publishes an online explanatory material for the public.<sup>14</sup></p>
Substantive Law	The INA provides the substantive law. The AAO exercises appellate jurisdiction over

<sup>7</sup> *Id.* at 1.5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 8 U.S.C. §§ 1101-1178.

<sup>12</sup> 8 C.F.R. § 103.

<sup>13</sup> There are several guidance documents cited to in the Table of Changes in the AAO Practice Manual such as the USCIS Policy Memorandum PM-602-0124, *Initial Field Review of Appeals to the Administrative Appeals Office* (Nov. 4, 2015).

<sup>14</sup> USCIS, *AAO Practice Manual*, April 18, 2018, <https://www.uscis.gov/aao-practice-manual>.

	<p>around 50 types of immigration benefit cases filed with USCIS and ICE.<sup>15</sup> They adjudicate three primary types of cases: appeals, motions, and certifications.<sup>16</sup> Non-precedent decisions are generally issued by the AAO based on existing law and policy, but the decisions do not change USCIS policy or practice.<sup>17</sup> However, USCIS may “adopt” the non-precedent decisions to operate as policy guidance to USCIS employees.<sup>18</sup> Still, with review and approval from the Attorney General, the AAO may issue precedent decisions.<sup>19</sup></p>
Miscellaneous	<p>The USCIS exercises appellate jurisdiction over approximately 50 different immigration case types and certain U.S. Immigration and Customs Enforcement (ICE) determinations.<sup>20</sup> But not all cases go to the AAO. The Board of Immigration Appeals (BIA) has jurisdiction over some of these appeals.<sup>21</sup></p>

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	<p>The AAO reviews decisions of USCIS officers adjudicating immigration benefits.<sup>22</sup> The office that denied the benefit “will review the appeal and determine whether to take favorable action and grant the benefit request.”<sup>23</sup> If that office does not take a favorable action, it forwards the appeal to the</p>
------------------------------------	--

<sup>15</sup> See USCIS, *The Administrative Appeals Office*, Jurisdiction and Types of Cases, August 2, 2019, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aa0>.

<sup>16</sup> See *AAO Practice Manual*, Chapter 1.4, <https://www.uscis.gov/tools/practice-manual/chapter-1-administrative-appeals-office#1.1>.

<sup>17</sup> See *id.* at 1.5.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> *The Administrative Appeals Office*, Jurisdiction and Types of Cases, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aa0>.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at Appeal Process.

<sup>23</sup> *Id.*

	AAO for appellate review. <sup>24</sup> The initial review should be concluded within 45 days and the appellate review should be concluded within 180 days from the date the AAO receives the entirety of the case record. <sup>25</sup>
Nature of Hearing-Level Proceedings	<p>The USCIS field office reviews the initial benefit requests and adjudicates on them depending on the evidence provided.</p> <p>If the adjudication is appealed then there is an initial field review of the USCIS field office decision of the denied benefit request.<sup>26</sup> The field office may take the appeal as a motion to reopen or reconsider and approve the benefit request or will forward the appeal to the AAO.<sup>27</sup></p>
Nature of Hearing-Level Decision	<p>The adjudicator must thoroughly review each case “to determine jurisdiction, presence of required supporting documentation, existence of relating files and basic statutory eligibility.”<sup>28</sup> The approval of the case is up to the adjudicator’s discretion.<sup>29</sup></p> <p>When denying a case, the adjudicator must prepare a written denial notice.<sup>30</sup> Denials may include a “boilerplate” legal basis for the adverse decision or they may be entirely original.<sup>31</sup> In all cases, the specific facts of the individual case must be explained in the decision.<sup>32</sup> The reason for denial must be</p>

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See AAO Practice Manual*, Chapter 3.9, <https://www.uscis.gov/tools/practice-manual/chapter-3-appeals>.

<sup>27</sup> *See id.*

<sup>28</sup> USCIS, *Adjudicator’s Field Manual*, Chapter 10.3(a), Sep. 27, 2019, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html#0-0-0-276>. (The *Adjudicator’s Field Manual* and *Policy Manual* are in the process of being consolidated so different issues are available at either manual for the time being.)

<sup>29</sup> *See USCIS, Policy Manual*, Chapter 5(G), Sep. 27, 2019, <https://www.uscis.gov/policy-manual/volume-7-part-m-chapter-5>.

<sup>30</sup> *Adjudicator’s Field Manual* at 10.3(h).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

	explicit in the written notice for the applicant to understand. <sup>33</sup> And the applicant has to be advised of the decision and their right of appeal. <sup>34</sup>
Transfer of Case to Appellate Body After Hearing-Level Decision	Typically, the field office must prepare an appellate case record before sending a case to the AAO. <sup>35</sup> A case may be subject to AAO review “based on either an appeal (8 CFR 103.3) or the certification of a decision for review (8 CFR 103.4).” <sup>36</sup>  “Additionally, a petitioner or applicant may file a motion on an earlier AAO decision (8 CFR 103.5). While the AAO holds the appellate record during the motion period, a field office may be required to forward the record to the AAO if the affected party files a late motion.” <sup>37</sup>
Miscellaneous	The transfer of an appeal from the field office to the AAO occurs after the appeal undergoes the initial field review and it results in another unfavorable decision for the applicant. <sup>38</sup>

### **Identity of Reviewing/Appellate Authority and Its Legal Status**

Reviewing Authority(ies)	Immigration benefit adjudications are reviewed first by “the USCIS field office that made the unfavorable decision” and then by the AAO. <sup>39</sup>
Legal Status of Reviewing Authority(ies)	The AAO is established by statute as the agency’s final decision-making authority. <sup>40</sup> If an applicant has their appeal denied by the

<sup>33</sup> See *Policy Manual*, Chapter 5(G).

<sup>34</sup> See *id.*

<sup>35</sup> *Adjudicator’s Field Manual* at 10.8(a)(1).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 10.8(a)(3).

<sup>39</sup> *Id.*

<sup>40</sup> See 8 C.F.R. 103.3.



	<p>AAO they “may be able to file a motion to reopen the case or a motion to reconsider the decision.”<sup>41</sup> A motion to reopen is based on documented evidence of new facts and a motion to reconsider is based on “a claim of an incorrect application of law or policy.”<sup>42</sup></p> <p>Generally, an AAO decision cannot be appealed to any outside body, but in limited cases the “decision can be appealed to a federal appellate court.”<sup>43</sup></p>
Miscellaneous	The BIA and AAO’s distinct immigration appellate jurisdiction is highlighted by the BIA’s location within the DOJ’s Executive Office for Immigration Review (EOIR). <sup>44</sup>

### **Institutional Attributes of Appellate/Reviewing Authority(ies)**

Number of Members	N/A
Qualification Requirements	N/A
Party Affiliation Requirement in Appointment	N/A
Method of Appointment	N/A
Term of Appointment	N/A
Statutory Removal Protections	N/A
Location within Agency; Basis of Legal Authority	The AAO is under the Director of USCIS as a program office. <sup>45</sup>

<sup>41</sup> Shouse California Law Group, *Appealing an Immigration Decision to the Administrative Appeals Office*, <https://www.shouselaw.com/immigration/AAO-appeals#10> (last visited Oct. 6, 2019).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *AAO Practice Manual*, Chapter 1.6, <https://www.uscis.gov/tools/practice-manual/chapter-1-administrative-appeals-office>.

<sup>45</sup> See the USCIS Organizational Chart at <https://www.uscis.gov/about-us/uscis-organizational-chart>.

Authority to Delegate to Subunit(s); Designating Official and Process	N/A
Quorum Requirement	N/A
Authority and Function of Appellate Authority's Head	N/A
Internal Management Structure of Appellate Authority	N/A
Miscellaneous	N/A

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	If an immigration benefit request falls under AAO's jurisdiction then "the appellant may appeal the decision to the AAO." <sup>46</sup> For motions to reopen and motions to reconsider the AAO or appellant may file the motion. <sup>47</sup> For certifications the USCIS officers may ask the AAO to review. <sup>48</sup>
How Appeal Initiated	Appeals, motions to reconsider, and motions to reopen are initiated by an appellant filing a Form I-290B, Notice of Appeal or Motion, with the AAO. <sup>49</sup> The AAO also has the power to reopen or reconsider a proceeding on its own. <sup>50</sup> USCIS officials may ask the AAO to review a decision for a case. <sup>51</sup>

<sup>46</sup> *AAO Practice Manual*, Chapter 1.4, <https://www.uscis.gov/tools/practice-manual/chapter-1-administrative-appeals-office>.

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See AAO Practice Manual*, Chapter 3.7 & 4.6.

<sup>50</sup> *See id.* at 4.1.

<sup>51</sup> *See id.* at 5.1.

<p>Time For Appealing</p>	<p>For the majority of appeals and motions, appellants need to file the I-290B “within 30 calendar days after personal service of the decision, or 33 calendar days if the decision was mailed.”<sup>52</sup></p> <p>Appellants must file an appeal to revoke the approval of an immigrant petition “upon notice under 8 C.F.R. § 205.2 within 15 calendar days after personal service of the decision, or 18 calendar days if the decision was mailed.”<sup>53</sup> However, the AAO has the discretion to excuse a failure to timely file a motion to reopen if “the appellant demonstrates that the delay was reasonable and was beyond his or her control.”<sup>54</sup></p>
<p>If No Appeal Taken from Hearing Officer’s Decision</p>	<p>In the absence of timely exceptions, the USCIS decision and order becomes the effective and final decision.</p>
<p>If Appeal Taken</p>	<p>If an appeal, certification, or motion is taken the AAO “conduct[s] administrative review of those appeals to ensure consistency and accuracy in the interpretation of immigration law and policy.” Appellants may provide supplemental briefs and evidence in their appeal to be taken into consideration in addition to the original record. Appellants may also request an oral argument which does not have to be granted.</p>

---

<sup>52</sup> *Id.* at 3.7 & 4.6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 4.6.

	The AAO “generally issue[s] non-precedent decisions. These apply existing law and policy to the facts of a given case. A non-precedent decision is binding on the parties involved in the case, but does not create or modify agency guidance or practice.” That decision is effective and final on the date that the AAO issues it, unless the AAO reopens the decision or a federal court modifies or overrules it. <sup>55</sup> And the AAO decisions may order “any action consistent with its authority under the Act, the regulations, and applicable USCIS policy as is appropriate and necessary for the disposition of the appeal.” <sup>56</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	The AAO may review cases on their own initiative whether it be motions to reconsider or motions to reopen. USCIS can also request certification on a decision.
Miscellaneous	The AAO, even for cases under its jurisdiction, does not consider appeals for: rejected applications and petitions, abandoned applications and petitions, withdrawn applications and petitions, denied motions to reopen or reconsider, and AAO decisions. <sup>57</sup>

**Appellate Authority’s Procedures**

Record on Review	The record on review consists of the complete record from the initial USCIS adjudication and, if the appellant chooses to submit, additional supplemental briefs and evidence.
Submissions by Parties in Support of Appeal	The appellants are allowed to submit supplemental briefs, additional evidence, request oral argument, and submit amicus briefs. This is in addition to the I-290B which has an attached statement on any erroneous conclusion of law or statement of fact which is the basis of the appeal. <sup>58</sup>

Issue Preservation	Since there is de novo review, “the AAO looks at the record anew and its decision may address new issues that were not raised or resolved in the prior decision.” <sup>59</sup>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	There is an open record on appeal. The appellant may submit for consideration a supplemental brief and new evidence. <sup>60</sup>
Standard of Review	The standard of review for appeals, motions, and certifications is de novo review “of all issues of fact, law, policy, and discretion.” <sup>61</sup>
Consultation with Staff and Other Agency Officials	N/A
Oral Argument	<p>The AAO generally adjudicates based on the record of the proceedings without oral argument. But the AAO may grant a written request for oral argument “when a case involves an issue of particular significance and the AAO determines that it would benefit from supplemental argument.”<sup>62</sup></p> <p>The oral argument must be requested at the time of the filing of the appeal or when submitting a supporting brief.<sup>63</sup> If the AAO grants oral argument then it will notify the appellant of the pertinent information regarding the oral argument, including the conditions which are governed by 8 C.F.R. § 103.3(b)(2).<sup>64</sup></p>

<sup>55</sup> *AAO Practice Manual*, Chapter 3.2, <https://www.uscis.gov/tools/practice-manual/chapter-3-appeals>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See AAO Practice Manual*, Chapter 3.7, <https://www.uscis.gov/tools/practice-manual/chapter-3-appeals>

<sup>59</sup> *Id.* at 3.4.

<sup>60</sup> *See id.* at 3.8.

<sup>61</sup> 3.4 & 5.6

<sup>62</sup> *AAO Practice Manual*, Chapter 3.8(f), <https://www.uscis.gov/tools/practice-manual/chapter-3-appeals>.

<sup>63</sup> *Id.* at 6.5.

<sup>64</sup> *See id.*

Amicus Participation; Intervention; etc.	The AAO may solicit amicus briefs “to inform its review of complex or unusual issues of law or policy.” <sup>65</sup> The appellant may also submit amicus briefs, but an amicus brief may not be submitted without solicitation or by a party other than the appellant. <sup>66</sup> The AAO limits amicus curiae to the filing of briefs. <sup>67</sup>
Public Access to Hearings	No statute or rule address public access to hearings. However, actual hearings are rare because an appellant must request oral argument.
Staff’s Role in Writing Decisions	N/A
Deadlines for Decision	The office conducting the initial field review has 45 days to make a determination on the appeal. <sup>68</sup> When the case gets to the AAO they “strive[s] to complete its appellate review within 180 days from the time it receives a complete case record after the initial field review.” <sup>69</sup>
Nature of Decision	AAO decisions may order “any action consistent with its authority under the Act, the regulations, and applicable USCIS policy as is appropriate and necessary for the disposition of the appeal.” <sup>70</sup> The common dispositions are sustain, dismissal, summary dismissal, reject, and remand. <sup>71</sup> The decisions can be issued as non-precedent, adopted, and precedent decisions.

---

<sup>65</sup> *Id.* at 3.8(e).

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 3.9.

<sup>69</sup> USCIS, *AAO Processing Times*, July 8, 2019, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/aao-processing-times>.

<sup>70</sup> *Id.* at 3.14.

<sup>71</sup> *See id.*

Reconsideration, Rehearing, etc.	The AAO does not permit appeals of their decisions, but they do permit motions to reopen and motions to reconsider.
Miscellaneous	Unlike appeals—which ask a different authority to review—motions request a review by the authority that issued the latest decision in the proceeding. Therefore, USCIS field offices have jurisdiction over motions relating to its decisions, and the AAO has jurisdiction over motions relating to its decisions. <sup>72</sup>

**Other Case-Management Features**

Interlocutory Appeals: Availability, Procedures, Standard	N/A
Assignment of Cases	N/A
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	Each appeal is adjudicated on a case by case basis.
Miscellaneous	N/A

**Form of Decisions, Publication, and Precedential Status**

Form of Decision	The typical decisions from the AAO are dismissed, remanded, or sustained. The decisions released can be non-precedent, precedent, or adopted.
------------------	---

---

<sup>72</sup> *Id.* at 4.1.

Signed or Per Curiam	Decisions are issued under the name of the AAO. The writers commonly refer to “us” in the opinions.
Dissents	N/A
Publication	All decisions are made available on USCIS’s website. The decisions are separated into the three categories pertaining to their binding status.
Where Published	The decisions can be found at the USCIS website. The adopted decisions are presented as policy memoranda. Precedent decisions are published on the Department of Justice website in volumes. These decisions tend to be longer than the non-precedent decisions. There are a lot more non-precedent decisions so there is a search engine on the USCIS website you can use to browse through them. You can find non-precedent decisions dated back to 2005, adopted decisions date to 2010, and precedent decisions date back to the 1950s (when the AAO was not a thing and such decisions were made by Assistant Commissioners).
Precedential Status	As seen above, there are three types of categories of cases: precedent (binding on future cases), adopted (policy guidance), and non-precedent (only binding on the case at hand). Most of the cases are non-precedent with adopted and precedent cases coming few and far between.
Miscellaneous	N/A

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The USCIS may also “adopt” an AAO non-precedent decision to provide policy guidance to its employees for making determinations
---	--



	on applications and petitions for immigration benefits. <sup>73</sup>
Feedback to Adjudicators	The issuance of certifications of USCIS decisions can be seen as direct feedback to adjudicators below.
Quality-Assurance Reviews and Related Mechanisms	N/A
Participation of Appellate Body in Substantive Rulemaking	The Secretary of DHS may occasionally, with the Attorney General's approval, designate AAO decisions to serve as precedents in all future proceedings involving the same issue(s). <sup>74</sup> AAO precedent decisions may announce a new legal interpretation or agency policy, or may reinforce an existing law or policy by demonstrating how it applies to a unique set of facts. <sup>75</sup> DHS employees must follow these precedent decisions unless modified or overruled.
Miscellaneous	N/A

## Miscellaneous

Alternative Dispute Resolution (ADR)	N/A
Participation of Appellate Body in Agency Decisions on Judicial Review	N/A
Role and Participation of Appellate Body in Writing Rules	The AAO issues non-precedent, adopted, and precedent decisions which range from not binding on other cases to policy guidance to new legal interpretation. There is no evidence found, however, that shows the AAO has a direct role in the writing of rules.

<sup>73</sup> *AAO Practice Manual* at 1.5.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Miscellaneous	N/A
---------------	-----

### PUBLICLY AVAILABLE CASE STATISTICS

The AAO releases three different categories of decision data: “Initial immigration benefit adjudication”, “Initial field review of appeals”, and “AAO appeal decisions.”<sup>76</sup> In fiscal year 2018 the AAO adjudicated the highest amount of cases on Nonimmigrant Specialty Occupation Worker forms.<sup>77</sup> They dismissed 758 cases, sustained 142 cases, and remanded 72 cases.<sup>78</sup> It is clear by the numbers that the AAO dismisses appeals at a much higher rate than sustains or remands.<sup>79</sup> The AAO points out though that “a significant number of appeals are favorably resolved during initial field review.”<sup>80</sup>

They also release statistics regarding their timeliness of completion by case type.<sup>81</sup> From April to June 2019 the AAO completed 1,445 cases with 94.81% of those completions occurring within the designated 180 days.<sup>82</sup> Their lowest timeliness completion rate is for Alien with Extraordinary Ability cases which is at 49.28%.<sup>83</sup> However, the largest chunk of their completions came from the Nonimmigrant Specialty Occupation Worker cases with 468 cases completed at 96.79% completed within 180 days.<sup>84</sup>

### TREATISES AND SCHOLARSHIP OF NOTE (THERE IS LITTLE TO NOTHING OF USE OUTSIDE THE USCIS RESOURCES)

USCIS, *AAO Practice Manual*, April 18, 2018, <https://www.uscis.gov/aao-practice-manual>.

<sup>76</sup> USCIS, *AAO Decision Data*, Oct. 29, 2018, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-decision-data>.

<sup>77</sup> *AAO Decision Data* at AAO appeal decisions, [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/USCIS\\_and\\_AAO\\_Data\\_for\\_Publishing\\_Thru\\_FY\\_18.pdf](https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/USCIS_and_AAO_Data_for_Publishing_Thru_FY_18.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> USCIS, *AAO Decision Data*, Oct. 29, 2018, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-decision-data>.

<sup>80</sup> *AAO Decision Data* at Initial field review of appeals, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-decision-data>.

<sup>81</sup> USCIS, *AAO Processing Times*, July 8, 2019, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

USCIS, *Policy Memoranda*, Sept. 30, 2019, [https://www.uscis.gov/legal-resources/policy-memoranda?field\\_native\\_doc\\_policymem\\_topic\\_tid=All&field\\_native\\_doc\\_issue\\_date\\_value%5Bvalue%5D%5Bmonth%5D=&field\\_native\\_doc\\_issue\\_date\\_value\\_1%5Bvalue%5D%5Byear%5D=2019&topic\\_id=&items\\_per\\_page=10](https://www.uscis.gov/legal-resources/policy-memoranda?field_native_doc_policymem_topic_tid=All&field_native_doc_issue_date_value%5Bvalue%5D%5Bmonth%5D=&field_native_doc_issue_date_value_1%5Bvalue%5D%5Byear%5D=2019&topic_id=&items_per_page=10).

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher J. Walker  
Matthew Lee Wiener

**APPENDIX E**

**Board of Immigration Appeals:  
Review of Immigration Adjudication**

**INTRODUCTION**

Under the immigration laws of the United States, the Attorney General (AG) has appellate authority over immigration judge (IJ) decisions as well as immigration-related decisions of the Department of Homeland Security (DHS).<sup>1</sup> An IJ and DHS decide whether or not an alien is subject to, generally speaking, removal proceedings. The AG, acting as the appellate authority, can review such lower body decisions to determine if the IJ or DHS applied immigration law correctly. Under the Immigration and Nationality Act (INA) the AG has the ability to delegate his or her appellate authority.<sup>2</sup> In 1940, the AG established the Board of Immigration Appeals (BIA), a 21-member body consisting of immigration lawyers that the AG appoints.<sup>3</sup> The BIA acts in place of the AG and determines whether IJ or DHS decisions applied immigration law correctly.

The BIA has no statutory basis other than reviewing immigration law. The BIA is purely a creature of regulation, and the AG has made significant regulatory changes to the structure of the BIA. In 2002, AG reorganized the BIA to allow members, by themselves, to affirm lower body decisions or dismiss appeals.<sup>4</sup> When affirming a decision, a single member issues an “affirmance without opinion.” When dismissing an appeal, the BIA regulations specify the grounds that permit the member to act. Single-member BIA decisions are the most common form of BIA decision making.

---

<sup>1</sup> 8 U.S.C. §1103(g)(2).

<sup>2</sup> *Id.*

<sup>3</sup> 5 Fed. Reg. 3,502 (Sept. 4, 1940).

<sup>4</sup> Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

The BIA does not act as a factfinder. Instead, the BIA reviews IJ and DHS findings of fact or questions of law appellate court.<sup>5</sup> The BIA can issue binding “precedential” decisions which clarify existing requirements under immigration law. The AG may, if he or she desires, can oversee a case by themselves, but this authority is primarily reserved for when the AG does not believe the BIA made a correct ruling of law. Once the BIA rules on a case, like an appellate court would, it can remand the case to the lower body or make a ruling clarifying existing requirements under immigration law.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>Appellate procedures for the BIA are primarily governed by the AG’s regulations as interpreted by the BIA in precedential decisions.<sup>6</sup></p> <p>The AG according to the CFR, allows the BIA, subject to the director of the EOIR, to “prescribe precures governing the proceedings before it.<sup>7</sup> Pursuant to this authority, the BIA publishes an “Online Practice Manual” for parties arguing before the BIA.<sup>8</sup></p> <p>The AG’s regulations specify that certain BIA decisions can be referred to the AG if:</p> <ol style="list-style-type: none"> <li>1. The AG directs the Board to refer cases to the AG.</li> <li>2. The BIA Chairman or a majority of the BIA believes it should be referred to the AG for review.</li> <li>3. The Secretary of DHS, or specific officials of DHS designated by the Secretary with the concurrence of</li> </ol>
----------------	---

<sup>5</sup> 8 C.F.R. §1003.1(d)(3).

<sup>6</sup> 8 C.F.R. §1003.1-.8.

<sup>7</sup> 8 C.F.R. §1003.1(d)(4).

<sup>8</sup> Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, <https://www.justice.gov/eoir/board-immigration-appeals-2> (last visited September 4, 2019).

	the AG, refer the decision to the AG for review. <sup>9</sup>
Substantive Law	The INA provides the substantive law for the BIA. The BIA engages exclusively in case-by-case adjudicative procedurals per AG regulations. <sup>10</sup>  The BIA does not have rulemaking authority, and its precedential decisions can be found in bound volumes on the Department of Justice’s website. <sup>11</sup>
Miscellaneous	[none]

### **Hearing-Level Proceedings in Appellate System**

Hearing-Level Decisions Appealable	The BIA reviews decisions of IJ of immigration courts and certain decisions made by DHS adjudicating violations of the INA. <sup>12</sup>
Nature of Hearing-Level Proceedings	Proceedings before IJs are subject to the AG’s regulations on their rules of procedure. <sup>13</sup>  Such proceedings are also governed by the INA’s procedural requirements for removal. <sup>14</sup>
Nature of Hearing-Level Decision	The IJ issues an appealable decision, however Congress delegated the rules governing appeals to the Attorney General. <sup>15</sup>

<sup>9</sup> 8 C.F.R. §1003.1(h). See Alberto R. Gonzalez & Patrick Glen, *Advancing Executive Branch Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841 (2016) (detailing the AG’s referral and review of BIA decisions); see, e.g., Christopher J. Walker, REFERRAL, REMAND, AND DIALOGUE, 101 IOWA L. REV. ONLINE 84 (2016) (emphasizing the AG’s referral and review authority as a powerful tool to enhance dialogue between Congress, the federal courts, and administrative agencies).

<sup>10</sup> 8 C.F.R. §1003.1(d).

<sup>11</sup> See Executive Office for Immigration Review, AGENCY DECISIONS, <https://www.justice.gov/eoir/ag-bia-decisions> (last visited September 4, 2019).

<sup>12</sup> 8 C.F.R. §1003.1(g).

<sup>13</sup> 8 C.F.R. §1003.12-47.

<sup>14</sup> 8 U.S.C. §1229(a).

<sup>15</sup> See 8 U.S.C. §1103(g)(2) (“The Attorney General shall review [IJ decisions] in immigration proceedings [and] delegate such authority”).

Transfer of Case to Appellate Body After Hearing-Level Decision	Parties can appeal an IJ's decision to the BIA; the BIA then usually conducts a "paper review" of the case and makes a decision on the merits. <sup>16</sup>
Miscellaneous	[none]

### Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	The BIA directly reviews IJ decisions. The BIA's decisions are final unless modified by the BIA itself or the AG. <sup>17</sup>
Legal Status of Reviewing Authority(ies)	The INA nor any other immigration-related statute established the BIA. <sup>18</sup>
Miscellaneous	[none]

### Institutional Attributes of Appellate/Reviewing Authority(ies)

Number of Members	The BIA consists of 21 members. <sup>19</sup> The AG designates one BIA members to serve as the Chairman of the BIA. <sup>20</sup> The AG may also designate one or two BIA members to serve as Vice Chairman(men). <sup>21</sup>
Qualification Requirements	BIA regulations do not specify any qualification requirements other than the BIA members "shall be attorneys" the AG appoints. <sup>22</sup>

<sup>16</sup> 8 C.F.R. §1240.15; 8 C.F.R. §1003.1(b); *see* Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS, *supra* note 3, ("[The BIA] decides appeals by conducting a 'paper review' of cases").

<sup>17</sup> 8 C.F.R. §1003.1(g).

<sup>18</sup> *See* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647 (2008) ("The Attorney General created the [BIA] by regulation, and it therefore has historically been without a statutory basis"); REGULATIONS GOVERNING DEPARTMENTAL ORGANIZATION AND AUTHORITY, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (establishing the BIA); *see also* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 30 (1977) (noting that Congress acknowledges the BIA's existence, but has yet to authorize it by statute).

<sup>19</sup> 8 C.F.R. §1003.1(a)(1).

<sup>20</sup> *Id.* §1003(a)(2).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* §1003.1(a)(1).

Party Affiliation Requirement in Appointment	The INA nor the AG regulations specify any party affiliation requirements in appointment. <sup>23</sup>
Method of Appointment	The AG appoints members of the BIA. <sup>24</sup>
Term of Appointment	<p>BIA members have no term of appointment.</p> <p>The Director of the EOIR, however, may designate certain adjudicators as “Temporary [BIA] Members” for a six-month term.<sup>25</sup></p> <p>Unlike the 21 BIA members that the AG selects, the temporary BIA members do have qualification requirements. The Director of the EOIR has the discretion to select IJs, retired BIA members, retired IJs, and current or retired EOIR administrative law judges (ALJ) as temporary BIA members.<sup>26</sup></p> <p>The Director of the EOIR, subject to the approval from the Deputy AG, may also designate “one or more senior EOIR attorneys with at least ten years of experience in the field of immigration law” to act as temporary BIA members.<sup>27</sup> These temporary BIA members also serve six-month terms.<sup>28</sup></p>

<sup>23</sup> DOJ policies specify that hiring on the basis of political affiliation, among other discriminatory criteria, is prohibited. *See* 28 C.F.R. §42.1(a) (“It is the policy of the Department of Justice to seek to eliminate discrimination on the basis of...political affiliation... employment within the Department and to assure equal employment opportunity for all employees and applicants for employment). In 2008, an Inspector General and Office of Professional Responsibility investigation concluded that there was a practice of “[considering] political or ideological affiliations” for BIA appointments. *See* Department of Justice, Office of Professional Responsibility and Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, (July 28, 2008) (online at [www.justice.gov/sites/default/files/opr/legacy/2008/07/28/goodling072408.pdf](http://www.justice.gov/sites/default/files/opr/legacy/2008/07/28/goodling072408.pdf)).

<sup>24</sup> 8 C.F.R. §1003.1(a)(1).

<sup>25</sup> *Id.* §1003.1(a)(4).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



Statutory Removal Protections	Members of the BIA are subject to at-will removal by the AG. <sup>29</sup>
Location within Agency; Basis of Legal Authority	The BIA serves as an appellate authority within the DOJ. <sup>30</sup>  The BIA is not established by statute. Instead, the AG delegated adjudicative authority over immigration appeals to the BIA beginning in 1940. <sup>31</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	The AG's regulations governing the BIA do not state whether the BIA can delegate its authority.
Quorum Requirement	The Chairman of the BIA has the authority to divide the 21 BIA members into 3-member panels. A majority of the 3 panel is a quorum. <sup>32</sup>  A majority of the 21 BIA members constitutes a quorum for the purposes of convening en banc. <sup>33</sup>  BIA regulations, however, specify that a single BIA member can review a case pending before the BIA and affirm it, without an opinion unless the case meets certain criteria. <sup>34</sup>
Authority and Function of Appellate Authority's Head	The AG's regulations governing the BIA vest adjudicative authority in the Chairman (or any Vice Chairmen) like any other member of the BIA.

<sup>29</sup> See Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1380 n.488 (1986) (noting that the AG has the theoretical power to remove BIA members at-will, but rarely does so).

<sup>30</sup> 8 C.F.R. §1003.1(a)(1).

<sup>31</sup> See Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, *supra* note 13.

<sup>32</sup> 8 C.F.R. §1003.1(a)(3).

<sup>33</sup> *Id.* §1003.1(a)(5).

<sup>34</sup> *Id.* §1003.1(e); §1003.1(e)(6) (setting forth the circumstances where a single BIA member should assign the case to a BIA panel).

Internal Management Structure of Appellate Authority	The Chairman of the BIA is the BIA’s managerial authority. The Chairman has the authority to do the following (but not limited to): provide for BIA member training, manage the BIA’s docket, and establish a case management system for the BIA. <sup>35</sup>
Miscellaneous	[none]

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	<p>The Attorney General’s BIA regulations provide for an appeal as of right from any IJ decision or a DHS immigration decision.<sup>36</sup></p> <p>A party seeking to appeal an IJ’s decision must file a Notice of Appeal, known as “Form EOIR-26.”</p> <p>A party seeking to appeal a DHS immigration decision must file a Notice of Appeal, known as “Form EOIR-29.”</p>
How Appeal Initiated	Appeals are initiated by filing a notice of appeal from the decision of an IJ or an immigration decision from DHS. <sup>37</sup>
Time For Appealing	Parties have 30 calendar days to appeal from an IJ’s decision. <sup>38</sup> Parties also have 30 days from the DHS officer’s immigration decision to file an appeal. <sup>39</sup>
If No Appeal Taken from Hearing Officer’s Decision	In the absence of timely appeals, or if no appeal is taken at all, the IJ’s decision becomes final. <sup>40</sup>

<sup>35</sup> 8 C.F.R. §1003.1(a)(2); 8 C.F.R. §1003.1(e) (IJ decisions); 8 C.F.R. §1003.3(a)(2) (DHS immigration decisions).

<sup>36</sup> 8 C.F.R. §1003.3(a) and 1003.38(b).

<sup>37</sup> 8 C.F.R. §1003.3.

<sup>38</sup> 8 C.F.R. §1003.38(b).

<sup>39</sup> 8 C.F.R. §1003.3(a)(2).

<sup>40</sup> 8 C.F.R. §1003.39.

If Appeal Taken	The BIA may only resolve questions before it in a manner that is “timely, impartial, and consistent with” the INA. <sup>41</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	The BIA may, on its own motion at any time, reopen or reconsider any case which it has rendered a decision. <sup>42</sup>
Miscellaneous	[none]

### Appellate Authority’s Procedures

Record on Review	The record consists of, among other things, “charging documents, hearing notices, notices of appearances, applications for relief and any accompanying documents, court-filed papers and exhibits, transcript of proceedings and oral decision of the IJ if prepared, written memorandum order or decision of the IJ, notice of appeal, briefing schedules, briefs, motions, correspondence, and any prior decisions of the Board.” <sup>43</sup>
Submissions by Parties in Support of Appeal	<p>The appealing party’s Notice of Appeal must “specifically identify the findings of fact, conclusions of law, or both” that they challenge.<sup>44</sup></p> <p>The appellant has the option to file a separate brief or statement in support of the appeal.<sup>45</sup> The appellee then typically has the “same period of time” as the appellant to file a reply brief opposing the appeal.<sup>46</sup></p>

---

<sup>41</sup> 8 C.F.R. §1003.1(d)(1).

<sup>42</sup> 8 C.F.R. §1003.2(a).

<sup>43</sup> See Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, *supra* note 3.

<sup>44</sup> 8 C.F.R. §1003.3(c)(1).

<sup>45</sup> *Id.*

<sup>46</sup> 8 C.F.R. §1003.3(c)(1).

Issue Preservation	If a party fails to identify the reasons for the appeal in its Notice of Appeal, the BIA may summarily dismiss the appeal. <sup>47</sup>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	The BIA is not allowed to engage in factfinding when deciding an appeal. <sup>48</sup> The only exception is for “taking administrative notice of commonly known facts such as current events or the contents of official documents.” <sup>49</sup> But if further factfinding is needed, the BIA may remand the proceeding. <sup>50</sup>
Standard of Review	The BIA does not engage in de novo review of findings of fact. <sup>51</sup>  The BIA only reviews decisions under the clearly erroneous standard. <sup>52</sup>
Consultation with Staff and Other Agency Officials	[none]
Oral Argument	The appealing party may request an oral argument in its Notice of Appeal. <sup>53</sup> The BIA then has the discretion to grant requests for oral arguments, but rarely does so. <sup>54</sup> Single BIA members cannot preside over oral argument. <sup>55</sup>  During oral argument, each party has 30 minutes. <sup>56</sup>

<sup>47</sup> *Id.* §1003.3(b); *see* 8 C.F.R. §1003.1(d)(2)(i) (authorizing the BIA’s summary dismissal authority).

<sup>48</sup> 8 C.F.R. §1003.1(d)(3)(iv).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 8 C.F.R. §1003.1(d)(3)(i).

<sup>52</sup> *Id.* §1003.1(d)(3)(ii).

<sup>53</sup> *Id.* §1003.1(e)(7).

<sup>54</sup> *Id.*; *see* Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, <https://www.justice.gov/eoir/board-immigration-appeals-2> (last visited September 7, 2019).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, <https://www.justice.gov/eoir/board-immigration-appeals-2> (last visited September 7, 2019).

Amicus Participation; Intervention; etc.	<p>The BIA has sole discretion to allow amicus participation on a case-by-case basis.<sup>57</sup></p> <p>The BIA generally limits amicus participation to the filing of briefs.<sup>58</sup></p>
Public Access to Hearings	BIA policy allows the public and employees of the DOJ to attend BIA hearings. <sup>59</sup>
Staff's Role in Writing Decisions	[none]
Deadlines for Decision	[none]
Nature of Decision	<p>The BIA shall resolve questions before it in a manner that is “timely, impartial, and consistent” with the INA and regulations.<sup>60</sup></p> <p>When a single BIA member affirms an IJ decision without an opinion, BIA regulations specify that the affirmance without opinion must state the following: “The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. §1003.1(e)(4).”<sup>61</sup></p>
Reconsideration, Rehearing, etc.	<p>The BIA may on its own motion, reconsider any case that it has already rendered a decision.<sup>62</sup></p> <p>If a party requests to reopen or reconsider a case, they must make a written request to the BIA.<sup>63</sup> The BIA has the discretion to deny</p>

<sup>57</sup> 8 C.F.R. §1292.1(d); *See* Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, <https://www.justice.gov/eoir/board-immigration-appeals-2> (last visited September 7, 2019).

<sup>58</sup> *Id.*

<sup>59</sup> *See generally*, 8 C.F.R. §1003.27 (specifying public access to IJ hearings). The BIA has adopted IJ public access requirements for its own proceedings.

<sup>60</sup> 8 C.F.R. §1003.1(d)(1).

<sup>61</sup> 8 C.F.R. §1003.1(e)(4)(ii).

<sup>62</sup> 8 C.F.R. §1003.2(a).

<sup>63</sup> *Id.*

	<p>such a request even if the party makes out a prima facie case for relief.<sup>64</sup></p> <p>Motions to reconsider must state the errors of fact or law from the other BIA decision, and the motion must be supported by “pertinent authority.”<sup>65</sup> Any motions to reconsider that are “based solely on an argument that the case should not have been affirmed by a single [BIA] member, or by a three-member panel, [are] barred.”<sup>66</sup></p> <p>A motion to reopen must state “the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material.”<sup>67</sup></p> <p>A motion to reopen proceedings in order to submit an application for relief “must be accompanied by the appropriate application for relief and supporting documentation.”<sup>68</sup></p>
Miscellaneous	<p>Rulings on motions to reopen or reconsider have to be in writing.<sup>69</sup> If the BIA reopens a case and further proceedings are necessary, the BIA returns the record to the lower deciding authority.<sup>70</sup></p> <p>There has also been significant controversy surrounding the BIA prohibiting parties subject to departure, deportation, or removal proceedings from filing a motion to reopen or reconsider their case.<sup>71</sup> Some circuit courts have held that this provision is inconsistent with Congress’s intent behind the Illegal</p>

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* §1003.2(b)(1).

<sup>66</sup> *Id.* §1003.2(b)(3).

<sup>67</sup> *Id.* §1003.2(c)(1).

<sup>68</sup> *Id.*

<sup>69</sup> 8 C.F.R. §1003.2(h)(i).

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* §1003.2(d). This provision also states that the BIA treats departures from the United States, including the departure that the party is subject to, as a withdrawal of the party’s motion to reopen or reconsider their proceeding. *Id.*

	Immigration Reform and Immigration Responsibility Act (IIRIRA) and the INA. <sup>72</sup>
--	---

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	Ordinarily, the BIA does not entertain interlocutory appeals and generally limits them to certain instances involving either an important jurisdictional question regarding the administration of immigration laws or recurring questions in the handling of cases. <sup>73</sup>
Assignment of Cases	<p>Pursuant to the BIA Chairman’s directive, the BIA adjudicates cases in one of three ways:</p> <p><b>Single BIA Member Adjudication:</b> A single BIA member may review a case and either affirm the lower decisionmaker’s decision, dismiss the appeal, or refer the case to the BIA for review.<sup>74</sup> This procedure became the predominant form of BIA adjudication after AG Ashcroft’s Reorganization Plan.<sup>75</sup></p> <p><b>Three-Member Panel Adjudication:</b> The Chairman of the BIA may assign cases to three-member panels according to the Chairman’s administrative plan(s).<sup>76</sup> A single member of the BIA, when reviewing a case,</p>

<sup>72</sup> See *Garcia-Carias v. Holder*, 697 F.3d 257, 264 (holding that, under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), IIRIRA “plainly does not impose a general physical presence requirement” in order to file a motion to reconsider or reopen); see also *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011) (same); see *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593-94 (7th Cir. 2010) (“The Immigration and Nationality Act Authorizes the [BIA] to reconsider or reopen its own decision. It does not make that step depend on the alien’s presence in the United States.”)

<sup>73</sup> See *Matter of K-*, 20- I&N Dec. 418 (BIA 1991).

<sup>74</sup> 8 C.F.R. §1003.1(d)(2)(i) (Single BIA member dismissal authority); *id.* §1003.1(e)(4) (Single BIA member affirmance authority)

<sup>75</sup> See BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT, 67 Fed. Reg. 54,878, 54, 879 (Aug. 26, 2002)

<sup>76</sup> 8 C.F.R. §1003.1(a)(3).

	<p>may refer the case to a three-member panel if one of six circumstances apply.<sup>77</sup></p> <p><b>En Banc:</b> the BIA may convene en banc.<sup>78</sup></p>
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	<p>The BIA Chairman’s procedural guidelines permit consolidated appeals, but they are “generally limited to appeals involving immediate family members, although the BIA may consolidate other appeals where the cases are sufficiently interrelated.”<sup>79</sup></p> <p>Motions for reconsideration or for reopening may be consolidated with the appeal to the BIA.<sup>80</sup></p>
Miscellaneous	[none]

### Form of Decisions, Publication, and Precedential Status

Form of Decision	The BIA writes its own decisions. BIA regulations allow the BIA to affirm, reject, or modify IJ decisions in order to fulfill its mission to “provide clear and uniform guidance . . . on the proper interpretation and
------------------	---

<sup>77</sup> 8 C.F.R. §1003.1(e)(6)(i)-(vii). The six circumstances are, according to the BIA’s regulations: (1) the need to settle inconsistencies among the rulings of different immigration judges, (2) the need to establish a precedent construing the meaning of laws, regulations, or procedures, (3) the need to review a decision by an immigration judge or DHS that is not in conformity with the law or with applicable precedents, (4) the need to resolve a case or controversy of major national import, (5) the need to review a clearly erroneous factual determination by an immigration judge, (6) the need to reverse the decision of an immigration judge or DHS, other than a reversal under 8 C.F.R. §1003.1(e)(5), or (7) the need to resolve a complex, novel, unusual, or recurring issue of law or fact.

<sup>78</sup> 8 C.F.R. §1003.1(a)(5). The BIA can hear a case en banc either by a majority vote of the BIA or at the Chairman’s direction.

<sup>79</sup> Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, <https://www.justice.gov/eoir/board-immigration-appeals-2> (last visited September 7, 2019).

<sup>80</sup> 8 C.F.R. §1003.2(b)(1) (reconsideration); *Id.* §1003.2(c)(4) (reopening).



	administration” of the INA and its regulations. <sup>81</sup>
Signed or Per Curiam	Decisions are issued under the names of all members in the majority, but majority opinions can be written by a single member. <sup>82</sup>  Older BIA decisions used to be signed as “Board.”
Dissents	Members may, and do frequently, write dissenting opinions, which immediately follow the BIA’s decision. <sup>83</sup>
Publication	All decisions are available on the EOIR’s website. Final decisions can be published if they meet one or more of several criteria, according to the BIA’s practice manual. Such criteria include, but are not limited to: <ul style="list-style-type: none"> <li>• The resolution of an issue of first impression;</li> <li>• Alteration, modification, or clarification of an existing rule of law;</li> <li>• Reaffirmation of an existing rule of law;</li> <li>• Resolution of a conflict of authority; or</li> <li>• Discussion of an issue of significant public interest<sup>84</sup></li> </ul> The EOIR’s website include up-to-date BIA decisions.
Where Published	Published opinions are published in bound volumes of Administrative Decisions Under Immigration and Nationality Laws of the United States, which are available on the EOIR’s website. <sup>85</sup>

<sup>81</sup> 8 C.F.R. §1003.1(d)(1).

<sup>82</sup> See *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (Member Guendelsberger writing the majority opinion); *In re Guang Li Fu*, 23 I&N Dec. 985 (BIA 2006) (Member Holmes writing the majority opinion).

<sup>83</sup> See *Matter of Mendoza-Hernandez, Capula-Cortes*, 27 I&N Dec. 520, 536 (BIA 2019) (Member Guendelsberger dissenting).

<sup>84</sup> Executive Office for Immigration Review, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, <https://www.justice.gov/eoir/board-immigration-appeals-2> (last visited September 7, 2019).

<sup>85</sup> Executive Office for Immigration Review, AGENCY DECISIONS, <https://www.justice.gov/eoir/ag-bia-decisions>. (last visited September 7, 2019).

	The BIA does not make unpublished decisions available on the EOIR website. An advocacy group known as the Immigrant & Refugee Appellate Center (IRAC), however, collects “noteworthy” unpublished BIA decisions and files them in an Index. <sup>86</sup>
Precedential Status	All published BIA decisions are precedential and hence binding on IJs and DHS. <sup>87</sup> Unpublished decisions are not precedential. <i>Id.</i> <sup>88</sup> The BIA and/or the AG may modify or overrule precedential decisions. <sup>89</sup> The AG, in addition to the BIA, may issue binding precedential decisions if he or she decides the merits of an immigration appeal. <sup>90</sup>
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The BIA does not issue guidance documents governing ALJ adjudications.
Feedback to Adjudicators	[none]
Quality-Assurance Reviews and Related Mechanisms	[none]
Participation of Appellate Body in Substantive Rulemaking	The BIA is limited to serving as an appellate body. The Chairman of the BIA, however, may issue operational instructions and policy, including procedural instructions

<sup>86</sup> Immigrant & Refugee Appellate Center, INDEX OF UNPUBLISHED BIA DECISIONS, <https://www.ircac.net/unpublished/>, (last visited September 7, 2019).

<sup>87</sup> 8 CFR §1003.1(g).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

	regarding the implementation of new statutory or regulatory authorities.” <sup>91</sup>
Miscellaneous	[none]

**Miscellaneous**

Alternative Dispute Resolution (ADR)	[none]
Participation of Appellate Body in Agency Decisions on Judicial Review	The BIA does not participate in decisions relating to judicial review of its decisions.
Role and Participation of Appellate Body in Writing Rules	The AG, not the BIA, is the Department of Justice’s rulemaking authority.
Miscellaneous	[none]

---

<sup>91</sup> 8 C.F.R. §1003.1(a)(2)(i).

## PUBLICLY AVAILABLE CASE STATISTICS

In Fiscal Year (FY) 2018, the BIA completed 14,464 out of 31,956 cases.<sup>92</sup> Beginning in 2008, the number of appeals filed steadily decreased.<sup>93</sup> From FY 2017-FY 2018, however, the BIA saw a jump from 17,135 case appeals filed to 31,956 case appeals filed.<sup>94</sup> As of the Third Quarter of FY 2019, there are already 39,694 case appeals filed, which is 7,738 more than FY 2018.<sup>95</sup>

## TREATISES AND SCHOLARSHIP OF NOTE

Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35 (2004).

Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, STANFORD L. & POL. REV., VOL. 16. (2005).

Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647 (2008).

Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016).

Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986).

Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, UNIVERSITY OF ILLINOIS L. REV. 829 (2009).

Scott Rempell, *Judging the Judges: Appellate Review of Immigration Decisions*, 53 S. TEX. L. REV. 477, 483 (2012).

Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

---

<sup>92</sup> Executive Office for Immigration Review, Adjudication Statistics, <https://www.justice.gov/eoir/file/1198906/download>, (last visited September 7, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 Iowa L. Rev. Online 84 (2016).

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**APPENDIX F**

**Department of Labor Appeals:  
The Administrative Review Board, Benefits Review Board, Employees’  
Compensation Appeals Board, and Office of Administrative Law Judges**

**INTRODUCTION**

The Department of Labor (DOL) has four main bodies of appellate review, the Administrative Review Board, the Benefits Review Board, the Employees’ Compensation Appeals Board, and the Office of Administrative Law Judges.<sup>1</sup> This research paper briefly outlines all four bodies, and then dissects the primary one, the Administrative Review Board.

**Administrative Review Board:**

The Administrative Review Board (ARB) was created in 1996, to take the place of the Board of Service Contact Appeals and the Wage Appeals Board.<sup>2</sup> Under the authority of the Secretary of Labor, the ARB can “issue final agency decisions after review or on appeal of matters arising under a wide range of employee protection laws.”<sup>3</sup> The Board has a wide jurisdiction,<sup>4</sup> and its cases are generally on appeal from decisions by the Department of Labor’s Administrative Law Judges (ALJs) or determinations from the Administrator of the Department’s Wage and Hour Division.<sup>5</sup> Different areas of review have different

---

<sup>1</sup> U.S. U.S. Dep’t of Labor, *DOL Appeals*, U.S. U.S. DEPT OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/appeals/>.

<sup>2</sup> See Establishment of the Administrative Review Board, 61 Fed. Reg. 19982 (May 3, 1996).

<sup>3</sup> U.S. U.S. Dep’t of Labor, *Administrative Review Board: Establishment and Mission of the Board*, U.S. U.S. DEPT OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/arb/mission.htm>.

<sup>4</sup> *Id.* (Including, but not limited to: [E]nvironmental, transportation, and securities whistleblower protection; temporary immigration programs; child labor; employment discrimination; job training; and federal construction and service contracts.)

<sup>5</sup> *Id.*

practices as enumerated in the Code of Federal Regulations.<sup>6</sup> The appeals are discretionary within the ARB's jurisdiction,<sup>7</sup> and depending on the statute at issue, the Board's own decisions can be appealed to federal district courts, appellate courts, and eventually the United States Supreme Court.<sup>8</sup>

### **Benefits Review Board:**

The Benefits Review Board (BRB) was created by Congress in 1972 to review ALJ decisions arising under two specific acts, the Black Lung Act, and the Longshore and Harbor Worker's Compensation Act.<sup>9</sup> The BRB was established in 33 U.S.C. § 921, as a part of the Longshore and Harbor Worker's Compensation Act.<sup>10</sup> The Board has the power to hear appeals from questions of law of fact, and may stay awards pending final decision if "irreparable injury" would happen to the employer or carrier.<sup>11</sup> ALJ's can serve for one-year temporary terms on the board, at the discretion of the Secretary of Labor, if the Board's Chairman suggests it to them.<sup>12</sup> The BRB can delegate panels of three members with all the power of the Board to make decisions.<sup>13</sup> But if a party is unhappy with the panel decision, it may petition the whole Board for a review of the panel's decision.<sup>14</sup> Board decisions can be reviewed in the court of appeals for the circuit where the injury occurred, via a written petition filed in that court within sixty days after the final court decision.<sup>15</sup> If an injured party is successful, but the employer fails to comply with the compensation, the award beneficiary or the deputy commissioner who made the order may apply for enforcement in the Federal district court where the injury at issue occurred.<sup>16</sup>

### **Employees' Compensation Appeals Board:**

The Employee's Compensation Appeals Board (ECAB) was created in 1946 by President Harry S. Truman in Reorganization Plan No. 2 of 1946, which

---

<sup>6</sup> U.S. U.S. Dep't of Labor, *Administrative Review Board: ARB – Rules of Practice and Procedure*, U.S. U.S. DEPT OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/arb/rules.htm>.

<sup>7</sup> 29 C.F.R. § 8.1(b).

<sup>8</sup> U.S. U.S. Dep't of Labor, *supra* note 3.

<sup>9</sup> U.S. U.S. Dep't of Labor, *Benefits Review Board: Mission Statement*, U.S. U.S. DEPT OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/brb/mission.htm>. (Black Lung Benefits Act, Title IV of the Coal Mine Health and Safety Act, 30 U.S.C. §901 et seq., and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., and its extensions, including the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et seq., the Defense Base Act, 42 U.S.C. §1651 et seq., and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 et seq).

<sup>10</sup> 33 U.S.C. § 921.

<sup>11</sup> *Id.* at §921(b)(3).

<sup>12</sup> *Id.* at §921(b)(5).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at §921(c).

<sup>16</sup> *Id.* at §921(d).

abolished the United States Employees Compensation Commission and transformed it into an appeals board.<sup>17</sup> The Board, consisting of three members, has the exclusive jurisdiction from Congress on appeals governed by the Federal Employees' Compensation Act (FECA) from determinations of the Office of Workers' Compensation Programs.<sup>18</sup> The Board must be mindful of precedent, and its final decisions are binding on the Office of Workers' Compensation Programs.<sup>19</sup> Decisions of the Board impact millions of federal employees, and sees vigorously contested cases, given the scope of how far reaching its decisions can be.<sup>20</sup> Once the Board has released a decision, there is no further administrative or judicial appeal of the decision available to the employee.<sup>21</sup>

### **Office of Administrative Law Judges:**

The Office of Administrative Law Judges (OALJ) is the DOL's administrative trial court, and it is third largest office of ALJs in the Federal government.<sup>22</sup> ALJs are appointed under U.S. Const. art. II, § 2, cl. 2 and the Administrative Procedure Act, 5 U.S.C. § 3105.<sup>23</sup> The ALJs hear cases arising from over 80 labor related statutes, regulations, and executive orders, in a wide range of subject areas.<sup>24</sup> An ALJ's decision is final unless appealed to the ARB in a timely manner.<sup>25</sup>

## **CHARACTERISTICS OF THE ADMINISTRATIVE REVIEW BOARD SYSTEM** (as ascertainable from public sources)

### **Governing Law**

---

<sup>17</sup> Harry S. Truman, *Reorganization Plan No. 2 of 1946*, THE WHITE HOUSE (May 16, 1946), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5a-node84-leaf92&num=0&edition=prelim>.

<sup>18</sup> U.S. U.S. Dep't of Labor, *Employees' Compensation Appeals Board*, U.S. U.S. DEP'T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/ecab/background.htm>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. U.S. Dep't of Labor, *Employees Compensation Appeals Board*, U.S. U.S. DEP'T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/ecab/welcome.html>.

<sup>22</sup> U.S. U.S. Dep't of Labor, *About the United States Department of Labor, Office of Administrative Law Judges*, U.S. U.S. DEP'T OF LABOR (last visited Oct. 5, 2019), <https://www.oalj.dol.gov/ALJMISSN.HTM>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* ("Cases where individuals seek benefits under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act and the Defense Base Act constitute the largest part of the office's workload.")

<sup>25</sup> 29 C.F.R. § 9.34.



<p>Procedural Law</p>	<p>Appellate procedures are governed by a variety of C.F.R.-codified procedural rules (called rules of practice and procedure),<sup>26</sup> as well as statutes and executive orders.<sup>27</sup> The Board adheres to precedent under each area of law it has jurisdiction over.<sup>28</sup></p> <p>There are guidance documents governing the adjudicative activities of the Board, but no public repository of such documents is readily available.<sup>29</sup></p> <p>The ARB is governed by a variety of rules of practice and procedure, which also provide guidance to the public.<sup>30</sup></p>
<p>Substantive Law</p>	<p>The Board follows a vast collection of regulations, statutes, and Executive Orders.<sup>31</sup> The Board adheres to rules of decision and precedent applicable to the law at issue, though it does have the power to reverse a rule of decision or overturn precedent, if necessary.<sup>32</sup> However, the Board cannot “pass on the validity of any portion of the Code of Federal Regulations, nor can it deny or grant exemptions, variations, and tolerances.<sup>33</sup> The Board was established on May 3, 1996, and has a record of decisions going back to that date.<sup>34</sup> Because the Board is a combination of several predecessor agencies, it also has those decisions as a part of its body of</p>

<sup>26</sup> U.S. U.S. Dep’t of Labor, *supra* note 6.

<sup>27</sup> See Secretary of Labor, Order 01-2019, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 84 Fed. Reg. 13072 (Apr. 3, 2019).

<sup>28</sup> *Id.* at 13073.

<sup>29</sup> See two sources, both which mention guidance that may impact the ARB, but offer no specific piece of guidance. *Id.*; U.S. U.S. Dep’t of Labor, *Administrative Review Board: Boards’ Information Quality Guidelines*, U.S. U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/arb/InfoQuality.htm>.

<sup>30</sup> Secretary of Labor, *supra* note 27 at 13074; U.S. U.S. Dep’t of Labor, *supra* note 6.

<sup>31</sup> U.S. U.S. Dep’t of Labor, *supra* note 6.

<sup>32</sup> Secretary of Labor, *supra* note 27 at 13073.

<sup>33</sup> *Id.*

<sup>34</sup> U.S. U.S. Dep’t of Labor, *Office of Administrative Law Judges: Administrative Review Board Decisions – By Date – May 1996 to Present*, U.S. U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), <https://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.HTM>

	<p>decisions.<sup>35</sup> ARB decisions are not binding legal precedent beyond the Board itself, but they can be cited as persuasive authority.<sup>36</sup></p> <p>There are guidance documents that govern the adjudicative activities of the Board.<sup>37</sup></p>
Miscellaneous	[none]

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	Hearing-level decisions are appealable. The Board cases usually arise on appeal from ALJ decisions or determinations of the Administrator of the Department’s Wage and Hour Division, though these are not the only avenues for appeal. <sup>38</sup>
Nature of Hearing-Level Proceedings	Proceedings before the ARB’s ALJs are subject to the formal hearing provisions of the APA. <sup>39</sup>
Nature of Hearing-Level Decision	The nature of the hearing-level decision depends on what regulation or statute the appeal is arising under, so the requirements of decisions vary.
Transfer of Case to Appellate Body After Hearing-Level Decision	Statutes and regulations that confer hearing jurisdiction typically provide the procedure for reviewing a judge’s decision. If the statute or regulation does not provide a procedure, the judge’s decision “becomes the Secretary’s final administrative decision.” <sup>40</sup>

<sup>35</sup> The Univ. of Iowa Law Library, *Labor & Employment Law: Cases, Arbitration & Agency Decisions*, UNIV. OF IOWA (last visited Oct. 5, 2019), <https://libguides.law.uiowa.edu/c.php?g=103036&p=668543>.

<sup>36</sup> EMPLOYER’S GUIDE TO THE FAIR LABOR STANDARDS ACT ¶ 946 (Susan Prince ed., Oct. 2019).

<sup>37</sup> See *supra* note 29.

<sup>38</sup> U.S. Dep’t of Labor, *supra* note 3.

<sup>39</sup> See The Admin. Conference of the U.S., *LABROALJ0001*, ADMIN. CONFERENCE OF THE U.S. (last visited Oct. 5, 2019), <https://acus.law.stanford.edu/scheme/labroalj0001>.

<sup>40</sup> 29 C.F.R. § 18.95

Miscellaneous	[none]
---------------	--------

### **Identity of Reviewing/Appellate Authority and Its Legal Status**

Reviewing Authority(ies)	Decisions are reviewed directly the Board. There is no intermediate appellate body. <sup>41</sup>
Legal Status of Reviewing Authority(ies)	The Board is established by regulation to act for the Secretary of Labor in review or on appeal of matters within its jurisdiction, and it has the power to issue final agency decisions. <sup>42</sup>
Miscellaneous	[none]

### **Institutional Attributes of Appellate/Reviewing Authority(ies)**

Number of Members	The Board consists of a maximum of five members. One is designated by the Secretary of Labor to serve as chair. <sup>43</sup>
Qualification Requirements	A vacancy posting for a member of the ARB listed the following qualifications for hiring: “The applicant should be well versed in law and the appeals process, as well as have the ability to interpret regulations and to come to a consensus to determine an overall appeals determination with Members of the Board. Applicants must possess a J.D. and are required to be active members of the Bar in any US State or US Territory Court under the U.S. Constitution.” <sup>44</sup>
Party Affiliation Requirement in Appointment	There are no party-affiliation requirements. <sup>45</sup>

---

<sup>41</sup> See Secretary of Labor, *supra* note 27.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 13073.

<sup>44</sup> *Id.* at 13074.

<sup>45</sup> *Id.*

Method of Appointment	Members of the Board are appointed by the Secretary of Labor. <sup>46</sup>
Term of Appointment	Members of the Board are appointed for four-year terms. <sup>47</sup> However, they may serve less than that, and the Secretary of Labor also has the discretion to extend the term of service beyond the appointment length. <sup>48</sup>
Statutory Removal Protections	The Secretary of Labor may remove any member of the Board prior to the end of their term. <sup>49</sup>
Location within Agency; Basis of Legal Authority	The Board sits at the top of the agency as the final decisionmaker for a range of employee protection laws—however there are some areas in which it is not the final decisionmaker (for example, the ECAB issues its own final decisions). <sup>50</sup> Its authority is established by regulation. <sup>51</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	The Chair of the Board has the ability to delegate the Board’s authority to three of its members, which is the normal setup for decision making. <sup>52</sup> However, appeals may be heard by the full Board, if the Chair decides it, and appeals may be heard by a single member of the Board if those bringing the appeal consent to it. <sup>53</sup>
Quorum Requirement	[none] <sup>54</sup>
Authority and Function of Appellate Authority’s Head	The Board’s chairman can assign panels and control their size, as well as preside over

<sup>46</sup> *Id.* at 13073. (The Secretary’s ability to appoint these members has been questioned and upheld, at least once. *See Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005).

<sup>47</sup> Secretary of Labor, *supra* note 27 at 13074.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> U.S. Dep’t of Labor, *supra* note 3; Dep’t of Labor, *supra* note 18.

<sup>51</sup> *See* Establishment of the Administrative Review Board, *supra* note 2.

<sup>52</sup> Secretary of Labor, *supra* note 27 at 13073.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 13074. (“Vacancies in the membership of the Board shall not impair the authority of the remaining Member(s) to exercise all the powers and duties of the Board.”)

	meetings, a Vice-Chair is designated by the Secretary, and will run meetings in the absence of the Chair. <sup>55</sup> The Vice-Chair also has operational management powers. <sup>56</sup> In the event of a vacancy, the Vice-Chair assumes the authority of the Chair. <sup>57</sup>
Internal Management Structure of Appellate Authority	There is one Chair as assigned by the Secretary, and one Vice-Chair. Up to three other members are just general members of the Board. <sup>58</sup>
Miscellaneous	[none]

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	Appeals to the ARB are discretionary. <sup>59</sup> The standard for allowance of the appeal depends on the regulation at issue, but some of the general things the Board may consider are “timeliness, the nature of the relief sought, matters of undue hardship or injustice, or the public interest.” <sup>60</sup>
How Appeal Initiated	Appeals are initiated by the filing of “petitions for review” of ALJ decisions related to the regulation at issue. <sup>61</sup>
Time For Appealing	Time to appeal depends on the regulation at issue. Some regulations only require that the appeal be “timely,” <sup>62</sup> others have an exact time period in which the petition for review must be filed. <sup>63</sup>

<sup>55</sup> *Id.* at 13073.

<sup>56</sup> *Id.* at 13072. (These are relatively new powers).

<sup>57</sup> *Id.* at 13073.

<sup>58</sup> *Id.*

<sup>59</sup> *See, e.g.*, 29 C.F.R. § 8.1; 29 C.F.R. § 7.1.

<sup>60</sup> 29 C.F.R. §7.1.

<sup>61</sup> *See, e.g.*, 29 C.F.R. § 6.20; 29 C.F.R. § 6.34; 29 C.F.R. § 6.45, 29 C.F.R. § 6.57.

<sup>62</sup> 29 C.F.R. §7.4.

<sup>63</sup> *See, e.g., supra* note 59.

If No Appeal Taken from Hearing Officer’s Decision	In some cases, an ALJ’s “decision and order is inoperative unless and until the Administrative Review Board either declines to review the decision or issues an order affirming the decision.” <sup>64</sup>
If Appeal Taken	ARB hearings limit the argument “to the facts as developed in the record, and “[t]he Board will not hear matters de novo except upon a showing of extraordinary circumstances.” <sup>65</sup> The Board may also “remand under appropriate instructions any case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence.” <sup>66</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	“The Board also shall not have jurisdiction to review decisions to deny or grant exemptions, variations, and tolerances and does not have the authority independently to take such actions.” <sup>67</sup>
Miscellaneous	[none]

### Appellate Authority’s Procedures <sup>68</sup>

Record on Review	The record consists of information on the proceedings in the hearing below, certified by an ALJ. <sup>69</sup> The record can include transcripts
------------------	---

<sup>64</sup> FRANCIS C. AMENDOLA, ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 39:293 (Sept. 2019).

<sup>65</sup> *Id.* at § 39:285

<sup>66</sup> *Id.*

<sup>67</sup> Secretary of Labor, *supra* note 27 at 13073.

<sup>68</sup> U.S. Dep’t of Labor, *Administrative Review Board: Frequently Asked Questions*, U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/arb/faqs/pregs.htm>. The ARB does *not* have its own procedural regulations—each related statute prescribes different ones. This section contains different procedural regulations from different statutes the ARB reviews. “The implementing regulations for the statute under which the complaint is filed generally include regulations that govern an appeal to the Administrative Review Board.” *Id.*

<sup>69</sup> 20 C.F.R. § 658.711(a).

	of the hearing, evidence, and the disposition of the matter below. <sup>70</sup>
Submissions by Parties in Support of Appeal	<p>There are several different procedural pathways,<sup>71</sup> but the general requirement for the submission on appeal is as follows: “(a) A petition [ . . . ] shall: (1) Be in writing and signed by the petitioner or his counsel (or other authorized representative); (2) be described as a petition for review by the Administrative Review Board; (3) identify clearly the wage determination, location of the project or projects in question, and the agency concerned; (4) state that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request; (5) contain a short and plain statement of the grounds for review; and (6) be accompanied by supporting data, views, or arguments.”<sup>72</sup> The petition must also “indicate whether or not the petitioner consents to the disposition of the questions involved by a single member of the Board.”<sup>73</sup></p> <p>The opposing officer who issued the final decision below will file a statement of position with the Board, and with the petitioners.<sup>74</sup></p> <p>Parties other than the petitioner can “submit to the Board written data, views, or arguments relating to the petition,” which</p>

<sup>70</sup> U.S. Dep’t of Labor, *ARB, BRB, ECAB, and OALJ: Information for Whistleblowers*, U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/appeals/whistleblowers.htm>.

<sup>71</sup> Secretary of Labor, *supra* note 27 at 13074. (“The rules (1) which are prescribed as of the date of this Order in 29 CFR part 7 and part 8 with respect to Sections 5(a) and 5(b), respectively, of this Order and (2) which apply as of the date of this Order to appeals and review described in Section 5(c) of this Order shall, until changed, govern the respective proceedings of the Board when it is deciding appeals described in Section 5 of this Order.”)

<sup>72</sup> 29 C.F.R. § 7.5(a).

<sup>73</sup> 29 C.F.R. § 7.5(b).

<sup>74</sup> 29 C.F.R. § 7.9(d).

	will be served on both the petitioner and other interested parties. <sup>75</sup>
Issue Preservation	The Board is an appellate agency and “will not hear matters de novo except upon a showing of extraordinary circumstances.” <sup>76</sup>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	The Board “may remand under appropriate instructions any case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence.” <sup>77</sup>
Standard of Review	Because the Board is an appellate body, it reviews cases and decides them based on the substantial evidence before it. <sup>78</sup>
Consultation with Staff and Other Agency Officials	The Board sits in 2-3 member panels, which perform all functions (hearing cases, rendering decisions) entirely as their own unit, unless the Chair decides more members need to work on a certain case. <sup>79</sup>  “The Solicitor of Labor may [ . . . ] provide legal advice and assistance to the Chair and/or Vice-Chair of the Board, as appropriate.” <sup>80</sup>
Oral Argument	Oral argument may be given by any interested party, at the discretion of the Board. <sup>81</sup> The Board may request oral argument on its own if it believes it will “to simplify the issues presented” or use it “to take up any other matters which may tend to expedite or facilitate the disposition of the proceeding.” <sup>82</sup> However, a petitioner should

---

<sup>75</sup> 29 C.F.R. § 7.7.

<sup>76</sup> 29 C.F.R. § 7.1(e).

<sup>77</sup> *Id.*

<sup>78</sup> 29 C.F.R. § 10.57(a)(2)(i).

<sup>79</sup> Secretary of Labor, *supra* note 27 at 13073.

<sup>80</sup> *Id.* at 13074.

<sup>81</sup> 29 C.F.R. § 7.14(a).

<sup>82</sup> *Id.*



	<p>request oral argument if they desire to give it.<sup>83</sup></p> <p>The Board prescribes the time, place, and time allotted for oral argument.<sup>84</sup></p>
Amicus Participation; Intervention; etc.	<p>Intervenors can participate if they show good cause.<sup>85</sup></p> <p>They must make clear their “relationship to the matters involved in the proceedings,” and “the nature of the presentation which [they] would make.”<sup>86</sup></p>
Public Access to Hearings	<p>No statute, regulation, or rule addresses public access to hearings, but the public does have access to all hearing documents that are a part of the official record.<sup>87</sup></p>
Staff’s Role in Writing Decisions	<p>A vacancy posting for the board suggests that the Board member completes the related research and writing component of their decisions.<sup>88</sup> However, nothing does say or does not say any staff cannot aid them.</p>
Deadlines for Decision	<p>None is provided for, but the Board states that its mission is to provide “timely” decisions.<sup>89</sup> Some statutes have specific timeframes.<sup>90</sup></p>
Nature of Decision	<p>Decisions are made by majority vote, and petitioners must be provided with those decisions.<sup>91</sup></p>

---

<sup>83</sup> 29 C.F.R. § 7.14(b).

<sup>84</sup> *Id.*

<sup>85</sup> 29 C.F.R. § 7.12.

<sup>86</sup> *Id.*

<sup>87</sup> 29 C.F.R. § 8.18.

<sup>88</sup> Secretary of Labor, *supra* note 27 at 13074.

<sup>89</sup> U.S. Dep’t of Labor, *supra* note 3.

<sup>90</sup> *See, e.g.*, 29 C.F.R. § 24.110.

<sup>91</sup> 29 C.F.R. § 7.8(b)-(c).

	These issuances contain factual findings, give remedial instructions for issues on remand, and put forth final decisions. <sup>92</sup>
Reconsideration, Rehearing, etc.	The ARB puts forth the final agency decision—if a party is unhappy with the result, and the case they are bringing enables them to appeal the ARB decision in federal court, that would be the next step. <sup>93</sup>  Occasionally the Board may remand with instructions for additional findings, and that case may find its way back to the Board. <sup>94</sup>
Miscellaneous	[none]

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	“The Board’s authority includes the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute.” <sup>95</sup>
Assignment of Cases	The Chair of the Board assigns the panel that will hear the case. <sup>96</sup>
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	The Board has a range of procedural rules it follows given what statute or regulation is at issue in the case. One such regulation states, “Upon its own initiative [sic] or upon motion of any interested party, the Board may consolidate any proceeding or concurrently

<sup>92</sup> U.S. Dep’t of Labor, *supra* note 34.

<sup>93</sup> U.S. Dep’t of Labor, *supra* note 3.

<sup>94</sup> 29 C.F.R. § 8.1(d).

<sup>95</sup> Secretary of Labor, *supra* note 27 at 13073.

<sup>96</sup> *Id.*

	consider two or more appeals which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or concurrent review will contribute to a proper dispatch of its business and to the ends of justice, and it will not unduly delay consideration of any such appeals.” <sup>97</sup>
Miscellaneous	[none]

### Form of Decisions, Publication, and Precedential Status

Form of Decision	The decision is made by majority vote. <sup>98</sup> The Board writes its own decision in each case. <sup>99</sup>
Signed or Per Curiam	Decisions are issued under the names of all members in the majority. They are, in effect, per curiam. <sup>100</sup>
Dissents	Members may write dissenting opinions, which immediately follow the Board’s decision. <sup>101</sup>
Publication	All decisions are made available on DOL’s Office of Administrative Law Judge’s website. <sup>102</sup> There does not appear to be a category for unpublished cases. <sup>103</sup>  The Board also provides on its website a monthly casenote summaries of its decisions. <sup>104</sup>

<sup>97</sup> 29 C.F.R. § 8.14.

<sup>98</sup> 29 C.F.R. § 8.17(a)-(b). (Unless only one member of the Board is hearing the appeal).

<sup>99</sup> U.S. Dep’t of Labor, *supra* note 34.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (However, this appears to happen infrequently. A keyword search of “dissent” in all cases brings up only 274 hits).

<sup>102</sup> *Id.*

<sup>103</sup> U.S. Dep’t of Labor, *ARB, BRB, ECAB, and OALJ: Decisions*, U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/appeals/decisions.htm>.

<sup>104</sup> U.S. Dep’t of Labor, *Administrative Review Board Decisions: September 2019*, U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), [https://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/09\\_2019.HTM](https://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/09_2019.HTM).

Where Published	Published decisions appear first in slip-opinion form on the Office of Administrative Law Judge’s website. <sup>105</sup> The decisions are also kept in physical paper “decision binders.” <sup>106</sup>
Precedential Status	“In issuing its decisions, the Board shall adhere to the rules of decision and precedent applicable under each of the laws enumerated [ . . . ] until and unless the Board or other authority explicitly reverses such rules of decision or precedent.” <sup>107</sup> The Board decisions then become the precedent, either way.
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The Board does not issue guidance documents governing ALJ adjudications.
Feedback to Adjudicators	[none]
Quality-Assurance Reviews and Related Mechanisms	[none]
Participation of Appellate Body in Substantive Rulemaking	“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the

<sup>105</sup> U.S. Dep’t of Labor, *Administrative Review Board Decisions - By Date - May 1996 to Present*, U.S. DEPT OF LABOR (last visited Oct. 5, 2019), <https://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.HTM>.

<sup>106</sup> U.S. Dep’t of Labor, *Request for Records Disposition Authority*, U.S. DEPT. OF LABOR (Nov. 21, 2005), [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-labor/rg-0174/n1-174-06-002\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-labor/rg-0174/n1-174-06-002_sf115.pdf). [cannot find if this is still the case or it is all paper now, but it was once the practice].

<sup>107</sup> Secretary of Labor, *supra* note 27 at 13073.

	Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.” <sup>108</sup>
Miscellaneous	[none]

### Miscellaneous

Alternative Dispute Resolution (ADR)	ADR is available for some cases that qualify. <sup>109</sup>
Participation of Appellate Body in Agency Decisions on Judicial Review	The Board does not participate. “The Solicitor of Labor shall have the responsibility for representing the Secretary, the Deputy Secretary, and other officials of the Department and the Board in any administrative or judicial proceedings involving agency decisions issued [. . .] including representing officials of the Department before the Board.” <sup>110</sup>
Role and Participation of Appellate Body in Writing Rules	The Board does not participate in rulemaking. It is expressly forbidden from passing judgment on regulations. <sup>111</sup>
Miscellaneous	[none]

---

<sup>108</sup> *Id.*

<sup>109</sup> U.S. Dep’t of Labor, *Alternative Dispute Resolution*, U.S. DEP’T OF LABOR (last visited Oct. 5, 2019), <https://www.dol.gov/general/topic/labor-relations/adr>.

<sup>110</sup> Secretary of Labor, *supra* note 27 at 13074.

<sup>111</sup> *Id.* at 13073.

## PUBLICLY AVAILABLE CASE STATISTICS

There is no public repository of case statistics for the Administrative Review Board, but all of their cases are publicly available and able to be condensed into a repository by an outside actor. In Fiscal Year 2013, ACUS completed a case statistics chart for the ARB. ARB filed/opened 106 cases, decided/closed 110 cases, and 108 cases were left pending by the end of the year.<sup>112</sup>

## TREATISES AND SCHOLARSHIP OF NOTE<sup>113</sup>

Debra S. Katz, *Emerging Issues in Whistleblower Law and Retaliation*, 63 PRACTICAL LAW. 37 (2017) (discussing ARB whistleblower cases and the change in whistleblower law prompted by the Board).

EMPLOYER'S GUIDE TO THE FAIR LABOR STANDARDS ACT ¶ 946 (Susan Prince ed., Oct. 2019).<sup>114</sup>

---

<sup>112</sup> The Admin. Conference of the United States, *Caseload Statistics*, Admin. Conference of the United States (last visited Oct. 5, 2019), <https://acus.law.stanford.edu/reports/caseload-statistics>. (ARB is number 55 when “appellate level procedures” is selected in the “adjudication level” dropdown menu.)

<sup>113</sup> There is a scant amount of literature on the Administrative Review Board. Most of the articles that mention the ARB have to do with whistleblower laws. Included is a recent and comprehensive law review article on the topic. Beyond that, there was one other good secondary source, a treatise.

<sup>114</sup> Contains a good but short discussion of the ARB in a certain area of employment law.

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

APPENDIX G

**Board of Veterans' Appeals:  
Review of Board of Veterans' Appeals Decisions in Veterans Benefits  
Cases**

INTRODUCTION

Congress created the Board of Veterans' Appeals (BVA or Board) in its 1958 recodification of what is now the Department of Veterans Affairs (VA).<sup>1</sup> The BVA's purpose is to adjudicate appeals from decisions made by one of the VA Regional Offices (RO).<sup>2</sup> Until 1988, the BVA was the last resort for veterans' appeals; Congress has since allowed for judicial review in the United States Court of Appeals for the Federal Circuit under the Veterans Judicial Review Act.<sup>3</sup> And unlike most agencies, the Administrative Procedure Act still does not apply to the VA.<sup>4</sup>

Adjudicative proceedings begin when a veteran submits a claim for compensation at an RO or medical facility. If the veteran is denied or unsatisfied with the RO decision, she can file a Notice of Disagreement (NOD) to appeal the decision. The two most common reasons for appealing a RO decision are

---

<sup>1</sup> PL 85-857, September 2, 1958, 72 Stat. 1105 (Act). The Board was originally established under Executive Order 6230 in 1933. *Id.*, at 39. As with much of what is now the Department of Veterans Affairs, the history of the agency is a complicated combination of different programs designed to provide benefits to veterans and their survivors. See James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253 (2010) ("During this 200-year period, various offices within the Departments of War, the Interior, and the Treasury made decisions on veterans benefits before VA was created in 1921 . . ."). It was not until 1988, through the Department of Veterans Affairs Act, that the agency received its modern Cabinet status, going from the "Veterans Administration" to the "Department of Veterans Affairs." PL 100-527, October 25, 1988, 102 Stat 2635.

<sup>2</sup> Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958, 5, [https://www.bva.va.gov/docs/VLR\\_VOL5/Ridgway.pdf](https://www.bva.va.gov/docs/VLR_VOL5/Ridgway.pdf).

<sup>3</sup> Veterans' Judicial Review Act, PL 100-687 (S 11), PL 100-687, November 18, 1988, 102 Stat 4105

<sup>4</sup> 5 U.S.C. §§ 551-59, 701-06 (West).

(1) denial of benefits for a disability believed to be related to service, or (2) believing a disability is more severe than rated by the VA.<sup>5</sup> Once the RO has reviewed the NOD, it will craft a Statement of the Case (SOC) and mail its decision to the veteran. If the veteran is still unsatisfied, she may file a Substantive Appeal with the BVA. At the veteran’s option, a hearing may then be held in front of a Veterans Law Judge (VLJ). The BVA will then mail the veteran its decision either granting, remanding, or denying the issue. If the veteran is still unsatisfied once the BVA has made its decision, she has two options. She may at any time either ask the BVA to reconsider or file an appeal to the United States Court of Appeals for Veterans Claims,<sup>6</sup> an Article I court.<sup>7</sup>

Only the veteran may appeal decisions—the Secretary of Veterans Affairs (Secretary) is prohibited from doing so by Congress.<sup>8</sup> Final BVA decisions usually consist of a “decision and order” that either grants, remands, or denies the issue. A BVA order is then implemented by the RO, if necessary.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>Appellate procedures are governed by the C.F.R.—codified procedural rules.<sup>9</sup></p> <p>Veterans that submit claims for benefits under Veterans’ Administration laws have the burden of submitting evidence “sufficient to justify a belief by a fair and impartial individual that the claim is well grounded.”<sup>10</sup></p>
----------------	--

<sup>5</sup> Overview of VA Appeals Process 3, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

<sup>6</sup> *Id.* at 12. While the appeal from the BVA to the Court of Appeals for Veterans Claims concludes the appeals process within the VA, decisions made by the Court of Appeals for Veterans Claims may then be appealed to the United States Court of Appeals for the Federal Circuit. 38 U.S.C.A. § 7292(b)(1) (West). And finally, decisions made by the United States Court of Appeals for the Federal Circuit can be reviewed by the Supreme Court of the United States. 28 U.S.C.A. § 1254 (West).

<sup>7</sup> 38 U.S.C.A. § 7251 (West).

<sup>8</sup> 38 U.S.C.A. § 7252 (West).

<sup>9</sup> 38 C.F.R. § 20.

<sup>10</sup> PL 100–687 (S 11), PL 100–687, November 18, 1988, 102 Stat 4105.



	<p>The VA must assist a claimant in developing the pertinent facts and grant “every benefit that can be supported in law” while protecting the Government’s interests.<sup>11</sup></p> <p>Reasonable doubt on any point, “will be resolved in favor of the claimant.”<sup>12</sup></p> <p>The Secretary must provide the claimant with timely notice of the decision. The notice must explain the decision and the procedure for obtaining review of the decision.<sup>13</sup></p>
Substantive Law	<p>All questions of law and fact necessary to a decision by the Secretary of Veterans Affairs affecting the provision of benefits to veterans or their dependents or survivors are subject to review on appeal. Appeals are adjudicated by the Board of Veterans' Appeals.<sup>14</sup></p> <p>The Board’s jurisdiction extends to all questions of law and fact decided by the Secretary that affect the provision of benefits to veterans or the dependents or survivors of veterans.<sup>15</sup></p> <p>The Board’s principal functions are to consider appeals, conduct hearings, evaluate the evidence, and make decisions on the appeals.<sup>16</sup></p> <p>The Board is responsible for making final decisions on the appeals for Veterans’ benefits and services that come through the Veterans Benefits Administration, Veterans Health Administration, National Cemetery</p>

<sup>11</sup> 38 C.F.R. § 3.103.

<sup>12</sup> 38 C.F.R. § 3.102.

<sup>13</sup> 38 U.S.C.A. § 5104 (West).

<sup>14</sup> 38 C.F.R. § 20.104.

<sup>15</sup> 38 U.S.C.A. § 511, 7104 (West).

<sup>16</sup> 38 C.F.R. § 20.103.

	Administration, and the Office of General Counsel (OGC). <sup>17</sup>
Miscellaneous	<p>BVA is required to proceed through the docket in numeric order but can advance cases involving interpretations of law of general application that affect other claims, where the appellant is seriously ill or is under severe financial hardship, or when other sufficient cause is shown.<sup>18</sup></p> <p>The Secretary must provide the claimant with “any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.”<sup>19</sup></p>

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	The Board reviews decisions of local VA offices that veterans have chosen to appeal by filing a Notice of Disagreement (NOD). <sup>20</sup>
Nature of Hearing-Level Proceedings	<p>VA regional office hearings can occur pre-determination or post-determination. Post-determination hearings can be conducted in connection with either legacy appeal cases, or proposed reductions or terminations when the claimant or beneficiary requested a pre-decisional hearing in an untimely manner.<sup>21</sup></p> <p>VA proceedings are ex parte (non-adversarial).<sup>22</sup></p>

<sup>17</sup> 2019 VA Functional Organization Manual Version 5 269, <https://www.va.gov/FOM-5-Final-July-2019.pdf>.

<sup>18</sup> 38 U.S.C.A. § 7107 (West).

<sup>19</sup> 38 U.S.C.A. § 5103 (West).

<sup>20</sup> 38 U.S.C.A. § 7105 (West).

<sup>21</sup>

[https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014080/M21-1.-Part-I.-Chapter-4---Regional-Office-\(RO\)-Hearings#1](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014080/M21-1.-Part-I.-Chapter-4---Regional-Office-(RO)-Hearings#1)

<sup>22</sup> 38 C.F.R. § 3.103(a).

	<p>Hearings occur at the VA field office with original jurisdiction over the claim, or the properly equipped VA office nearest to the claimant. One or more VA employees with “original determinative authority” will conduct the hearing, as well as establish and preserve the record.<sup>23</sup></p> <p>The VA employees conducting the hearing are responsible for fully explaining the issues to the claimant and suggesting that the claimant submit evidence which would help the claimant’s position but may have been overlooked.<sup>24</sup></p> <p>The hearing is meant to give the claimant an opportunity to submit any evidence (including witnesses) she considers relevant, and submit any arguments or points of contention she considers pertinent. The claimant must be present to submit evidence, and witnesses must be present to testify. All testimony is under oath or affirmation.<sup>25</sup></p>
Nature of Hearing-Level Decision	<p>VA rating agency decisions are binding on all VA field offices “as to conclusions based on the evidence on file at the time VA issues written notification.”<sup>26</sup></p> <p>A finding favorable to the claimant is binding on all subsequent adjudicators, unless rebutted by evidence showing “clear and mistakable error.”<sup>27</sup></p>
Transfer of Case to Appellate Body After Hearing-Level Decision	<p>First, the claimant must file a Notice of Disagreement (NOD) within one year of original decision.<sup>28</sup> Then, the agency of original jurisdiction (AOJ) reexamines the</p>

<sup>23</sup> 38 C.F.R. § 3.103.

<sup>24</sup> 38 C.F.R. § 3.103(d)(2).

<sup>25</sup> 38 C.F.R. § 3.103(d)(2).

<sup>26</sup> 38 C.F.R. § 3.104(a).

<sup>27</sup> 38 C.F.R. § 3.104(c).

<sup>28</sup> 38 U.S.C.A. § 7105(a)-(b)(1) (West).

	claim and provides the claimant with an explanatory Statement of the Case (SOC). <sup>29</sup> The SOC will include information on the right to file a Substantial Appeal. <sup>30</sup> If the claimant then files a timely Substantive Appeal, the AOJ “will certify the case to the Board of Veterans’ Appeals.” <sup>31</sup>
Miscellaneous	At any time after a decision is finalized, the claimant may request, or the VA may initiate, a review of the decision for “clear and unmistakable error,” and if such error is established, the decision is reversed or amended. <sup>32</sup>

#### Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	RO decisions are reviewed by the VBA, which can then be appealed to the Court of Appeals for Veteran’s Claims—another Article I court but which is outside the Department of Veterans Affairs. <sup>33</sup> Decisions appealed from the Court of Veteran’s Claims can then be appealed to the United States Court of Appeals for the Federal Circuit. <sup>34</sup> The Secretary may not seek review of a decision. <sup>35</sup>
--------------------------	---

<sup>29</sup> 38 C.F.R. § 19.26(a), (d); Overview of VA Appeals Process 6, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

<sup>30</sup> 38 C.F.R. § 19.30.

<sup>31</sup> 38 C.F.R. § 19.35.

<sup>32</sup> 38 C.F.R. § 3.105(a)(1). Clear and unmistakable error “is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. . . . Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.” 38 C.F.R. § 3.105(a)(1)(i).

<sup>33</sup> 38 U.S.C.A. § 7251 (West); Board of Veterans’ Appeals, Appeals Modernization 2019 slide 4, [https://www.bva.va.gov/docs/Decision\\_Review\\_Process\\_Slides.pdf](https://www.bva.va.gov/docs/Decision_Review_Process_Slides.pdf).

<sup>34</sup> “The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision.” 38 U.S.C.A. § 7292 (West).

<sup>35</sup> 38 U.S.C.A. § 7252 (West).

Legal Status of Reviewing Authority(ies)	The Board is the agency's final decision-making authority. <sup>36</sup>
Miscellaneous	The Board consists of Veterans Law Judges (VLJs), not Administrative Law Judges (ALJs), which some argue has contributed to the disfunction within the VA's system. <sup>37</sup>

### Institutional Attributes of Appellate/Reviewing Authority(ies)

Number of Members	The Board consists of a Chairman, a Vice Chairman, and such other members as are necessary for the Board to function properly. <sup>38</sup> At the end of Fiscal Year 2018, there were ninety-two members of the Board, twenty of which were acting members. <sup>39</sup>
Qualification Requirements	Each Board member must be a member in good standing of the bar of a State. <sup>40</sup>
Party Affiliation Requirement in Appointment	None
Method of Appointment	The Chairman is appointed by the President with the advice and consent of the Senate. <sup>41</sup>  The Vice Chairman and other Board members are appointed by the Secretary of Veterans Affairs, with the President's approval, based upon the Chairman's recommendations. <sup>42</sup>

<sup>36</sup> See Board of Veterans' Appeals, Appeals Modernization 2019 slide 4, [https://www.bva.va.gov/docs/Decision\\_Review\\_Process\\_Slides.pdf](https://www.bva.va.gov/docs/Decision_Review_Process_Slides.pdf).

<sup>37</sup> Robin J. Artz, *What Veterans Would Gain From Administrative Procedure Act Adjudications*, THE FEDERAL LAWYER 14 (August 2015), [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2015/August/Columns/Focus-on-Veterans-and-Military-Law.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2015/August/Columns/Focus-on-Veterans-and-Military-Law.aspx?FT=.pdf).

<sup>38</sup> 38 U.S.C.A. § 7101 (West).

<sup>39</sup> 2018 Report 26

<sup>40</sup> 38 U.S.C.A. § 7101A (West).

<sup>41</sup> "The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman shall be subject to the same ethical and legal limitations and restrictions concerning involvement in political activities as apply to judges of the United States Court of Appeals for Veterans Claims." 38 U.S.C.A. § 7101 (West).

<sup>42</sup> 38 U.S.C.A. § 7101A (West).

Term of Appointment	The Chairman serves a six year term, and can be reappointed. <sup>43</sup>  Board members are appointed for three-year terms, with a performance review after the third year. <sup>44</sup>
Statutory Removal Protections	The Chairman may only be removed by the President on certain grounds, such as misconduct. The removal must be preceded by “notice and opportunity for hearing.” <sup>45</sup>
Location within Agency; Basis of Legal Authority	The Board is under the administrative control and supervision of the Chairman, who is directly responsible to the Secretary. <sup>46</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	The Chairman may assign a proceeding before the Board to an individual member of the Board (other than the Chairman), or to a panel of three or more Board members. <sup>47</sup>
Quorum Requirement	[none found]
Authority and Function of Appellate Authority’s Head	In addition to the assigning authority discussed above, after the end of each fiscal year the Chairman must prepare a report on the activities of the Board, noting the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. <sup>48</sup>
Internal Management Structure of Appellate Authority	The Chairman heads a three-member panel that reviews the performance of Board members. <sup>49</sup>

<sup>43</sup> 38 U.S.C.A. § 7101(b) (West).

<sup>44</sup> 38 U.S.C.A. § 7101A (West).

<sup>45</sup> 38 U.S.C.A. § 7101 (West).

<sup>46</sup> 38 U.S.C.A. § 7101 (West).

<sup>47</sup> 38 U.S.C.A. § 7102 (West).

<sup>48</sup> 38 U.S.C.A. § 7101 (West).

<sup>49</sup> 38 U.S.C.A. § 7101A(c)(1)(A) (West).

	This process determines whether members will have their status renewed. If the member does not meet the standards, the chairman can either conditionally recertify the member for no longer than one year or recommend to the Secretary that the member be noncertified. <sup>50</sup>
Miscellaneous	Board members may only serve in an active status for 270 days per year. <sup>51</sup>  During the 2018 Fiscal Year, the Board issued on average 341.2 decisions per work day. <sup>52</sup>

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	Claimants may appeal a decision of the AOJ to the Board as a matter of right. <sup>53</sup>  Claimants may appeal a decision of the Board to the Court of Appeals for Veterans Claims as a matter of right. <sup>54</sup>
How Appeal Initiated	First, the claimant must file a Notice of Disagreement (NOD). <sup>55</sup> Then, the agency of original jurisdiction (AOJ) reexamines the claim and provides the claimant with an explanatory Statement of the Case (SOC). <sup>56</sup> The claimant may then file a Substantive Appeal, and the AOJ will certify the case to the Board. <sup>57</sup> The claimant's appeal must identify the decision and issue(s) being appealed, and must state whether the claimant wants a Board hearing, and/or

<sup>50</sup> 38 U.S.C.A. § 7101A(c)(3)(A),(B) (West).

<sup>51</sup> 38 U.S.C.A. § 7101 (West).

<sup>52</sup> FY 2018 27

<sup>53</sup> 38 U.S.C.A. § 7104(a) (West); 38 C.F.R. § 20.200.

<sup>54</sup> See 38 U.S.C.A. § 7261(a) (West).

<sup>55</sup> 38 U.S.C.A. § 7105(a)-(b)(1) (West).

<sup>56</sup> 38 C.F.R. § 19.26(a), (d); Overview of VA Appeals Process 6, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf>.

<sup>57</sup> 38 C.F.R. § 19.35.

	whether the claimant wants to submit additional evidence. <sup>58</sup>
Time For Appealing	The Notice of Disagreement must be filed within one year of the original decision. <sup>59</sup> Questions of timeliness will be decided by the Board <sup>60</sup>  A notice of appeal to the Court of Appeals for Veterans Claims must be filed with the Court within 120 days of the Board's decision. <sup>61</sup>
If No Appeal Taken from Hearing Officer's Decision	Once the time for filing a Notice of Disagreement expires, the decision becomes final. <sup>62</sup>
If Appeal Taken	A claimant's appeal to the Board is placed on one of the Board's two dockets based on whether a Board hearing is requested. <sup>63</sup> Cases proceed in regular order, but may be advanced for cause. <sup>64</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	The Board may review a case on its own volition to determine whether there was a clear and unmistakable error. <sup>65</sup>
Miscellaneous	[none]

### Appellate Authority's Procedures

Record on Review	If the appellant does not request to submit additional evidence or request a hearing, then the record on review shall consist only of the evidence on the record at the time of the original decision. <sup>66</sup>
------------------	--

<sup>58</sup> 38 C.F.R. § 20.202.

<sup>59</sup> 38 U.S.C.A. § 7105(b)(1) (West).

<sup>60</sup> 38 U.S.C.A. § 7105(b)(1)(c) (West).

<sup>61</sup> 38 U.S.C.A. § 7266 (West).

<sup>62</sup> 38 C.F.R. § 20.302(a).

<sup>63</sup> 38 U.S.C.A. § 7107(a)(3) (West).

<sup>64</sup> 38 U.S.C.A. § 7107(a)(4)-(b) (West).

<sup>65</sup> 38 U.S.C.A. § 7111(c) (West).

<sup>66</sup> 38 U.S.C.A. § 7113(a) (West).



	<p>If the appellant requests a Board hearing, then in addition to the evidence on the record at the time of the original decision, the record on review will also include evidence submitted by the appellant to the Board, and any evidence the appellant submits to the Board within 90 days following the Board hearing.<sup>67</sup></p> <p>If the appellant does not request a Board hearing but does request to submit additional evidence, then in addition to the evidence on the record at the time of the original decision, the record on review will also include evidence submitted with the NOD, and evidence submitted within 90 days following the Board's receipt of the NOD.<sup>68</sup></p> <p>For the Board to consider additional evidence, the claimant must request a Board hearing or an opportunity to submit additional evidence on the Notice of Disagreement.<sup>69</sup></p> <p>To modify a NOD, the appellant must complete a new NOD and submit it within one year of the original decision, or within 60 days of the Board receiving the original NOD.<sup>70</sup></p>
Submissions by Parties in Support of Appeal	If the appellant requests a hearing, any additional evidence must be submitted by the appellant at the Board hearing, or within 90 days following the hearing. If the appellant requests to submit additional evidence but does not request a hearing, then the appellant may submit the additional evidence

<sup>67</sup> 38 U.S.C.A. § 7113(b)(1-2) (West).

<sup>68</sup> 38 U.S.C.A. § 7113(c)(1-2) (West).

<sup>69</sup> 38 C.F.R. § 20.202.

<sup>70</sup> 38 C.F.R. § 20.202.

	<p>with the NOD, or within 90 days following the NOD.<sup>71</sup></p> <p>The NOD must conform with the standard form requirements prescribed by the Secretary.<sup>72</sup></p> <p>In cases of simultaneously contested claims, the substance of the NOD is sent to the other party(ies) in interest, and they have thirty days to file a brief or argument in response to the NOD.<sup>73</sup></p>
Issue Preservation	<p>The Board liberally construes the appellant's arguments for purposes of determining whether they raise an issue on appeal, but the appeal must allege a specific error of fact or law in the determination being appealed.<sup>74</sup> In legacy cases, the failure to contest a specific fact contained in the SOC will not be viewed as agreement.<sup>75</sup></p>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	<p>The claimant decides in the NOD whether the record on appeal will be open or closed, based on whether the claimant requests a hearing and/or an opportunity to provide additional evidence.<sup>76</sup></p>
Standard of Review	<p>The Board reviews appealed decisions de novo.<sup>77</sup></p> <p>On a motion to revise from a party or the Board itself, the Board may review and revise its determination based on clear and unmistakable error.<sup>78</sup></p>

**Commented [NC1]:** I believe this is referring to a different process, through which the agency of original jurisdiction reviews supplemental claims under 38 U.S.C. § 5108, in which case it could confuse the reader to include the information here.

<sup>71</sup> 38 U.S.C.A. § 7113 (West).

<sup>72</sup> 38 C.F.R. § 20.202.

<sup>73</sup> 38 U.S.C.A. § 7105A (West).

<sup>74</sup> 38 C.F.R. § 20.202; 38 C.F.R. § 19.22.

<sup>75</sup> 38 C.F.R. § 19.22.

<sup>76</sup> 38 U.S.C.A. § 7113 (West).

<sup>77</sup> 38 C.F.R. § 20.300.

<sup>78</sup> 38 C.F.R. § 20.1400.

Consultation with Staff and Other Agency Officials	The Board may consult with the General Counsel of the Department of Veterans Affairs to obtain an opinion on legal questions concerning an appeal. <sup>79</sup>
Oral Argument	The appellant may request a hearing in the NOD. <sup>80</sup> The hearing being ex parte, only the appellant and appellant's counsel may appear and present argument. <sup>81</sup>
Amicus Participation; Intervention; etc.	[none found]
Public Access to Hearings	It is not clear whether hearings are open to the public, but all Board hearings are recorded, and retained for 12 months. <sup>82</sup>
Staff's Role in Writing Decisions	Staff attorneys review the record, conduct research, and prepare draft decisions for the VLJs. <sup>83</sup>
Deadlines for Decision	[none found]
Nature of Decision	Board decisions state the issues on appeal, and include the Board's findings, conclusions, and reasoning, on all material issues of law and fact. If any evidence was not considered due to untimeliness the decision will say so, and inform the appellant of the options available for having that evidence reviewed. The decision is accompanied by an order denying or granting the benefits sought, and dismissing or remanding the case. <sup>84</sup>
Reconsideration, Rehearing, etc.	The Chairman may unilaterally order reconsideration or do so upon a claimant's motion. The decision is then reconsidered by

<sup>79</sup> 38 C.F.R. § 20.804(a).

<sup>80</sup> 38 U.S.C.A. § 7105(a), (b)(3)(A) (West).

<sup>81</sup> 38 C.F.R. § 20.701.

<sup>82</sup> 38 C.F.R. § 20.712.

<sup>83</sup> 2019 VA Functional Organization Manual Version 5 273, <https://www.va.gov/FOM-5-Final-July-2019.pdf>.

<sup>84</sup> 38 U.S.C.A. § 7104(d) (West).

	<p>an enlarged panel of judges, excluding any judge that took part in the decision at issue. The Board may also correct obvious errors on its own motion.<sup>85</sup></p> <p>The Board may reconsider a decision based on (1) an obvious error of fact or law, (2) new evidence, or (3) allegations that false or fraudulent evidence by the appellant materially influenced the Board's decision to grant benefits.<sup>86</sup></p> <p>A motion for reconsideration may be filed at any time.<sup>87</sup> If the motion for reconsideration is allowed, and the original appeal included a hearing, then the appellant may request a rehearing. However, a rehearing requested solely for the purposes of presenting argument will not be granted without good cause.<sup>88</sup></p> <p>Revision requires clear and unmistakable error.<sup>89</sup></p> <p>Appeals may then be made to the United States Court of Appeals for Veterans Claims, and then the Federal Circuit.<sup>90</sup></p>
Miscellaneous	<p>The Board is bound by Department regulations, the Secretary's instructions, and the precedent opinions of the Department's chief legal officer.<sup>91</sup></p> <p>Decisions issued starting January 1, 1992, are available on the Board's website with personally identifiable information redacted.<sup>92</sup></p>

<sup>85</sup> 38 U.S.C.A. § 7103 (West).

<sup>86</sup> 38 C.F.R. § 20.1001.

<sup>87</sup> 38 C.F.R. § 20.1002(b).

<sup>88</sup> 38 C.F.R. § 20.1003.

<sup>89</sup> 38 U.S.C.A. § 7111 (West).

<sup>90</sup> 38 U.S.C.A. § 7252 (West); 38 U.S.C.A. § 7292 (West).

<sup>91</sup> 38 U.S.C.A. § 7104 (West).

<sup>92</sup> 38 C.F.R. § 20.1301.

--	--

**Other Case-Management Features**

Interlocutory Appeals: Availability, Procedures, Standard	No interlocutory appeals appear to exist at the agency level.
Assignment of Cases	Appeals may be assigned to an individual VLJ or a three-member panel of the Board. <sup>93</sup>
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	[none found]
Miscellaneous	The Board will stay reconsideration if the Board decision in question has been appealed to the Court of Appeals for Veterans Claims. <sup>94</sup>  Hearings may be held via teleconference. <sup>95</sup>

**Form of Decisions, Publication, and Precedential Status**

Form of Decision	The Board issues opinions consisting of an Order, a Finding of Facts, Conclusions of Law, and Reasons and Bases for Findings and Conclusion. It also includes a general statement of evidence not considered, when applicable. <sup>96</sup>
Signed or Per Curiam	Signed.
Dissents	There does not appear to be any provision for dissents.

<sup>93</sup> 38 U.S.C.A. § 7102 (West).

<sup>94</sup> 38 C.F.R. § 20.1410.

<sup>95</sup> 38 C.F.R. § 20.702.

<sup>96</sup> 38 U.S.C.A. § 7104(d) (West).

Publication	The Board mails a copy of its decision to the claimant or the claimant's representative. <sup>97</sup>
Where Published	Decisions are available on the Board's website. <sup>98</sup>
Precedential Status	Board decisions are only binding on the specific case decided but they may still be considered when deciding other cases. <sup>99</sup>
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	[none found]
Feedback to Adjudicators	[none found]
Quality-Assurance Reviews and Related Mechanisms	The Chief Counsel for the Board is in charge of quality review. <sup>100</sup>
Participation of Appellate Body in Substantive Rulemaking	[none found]
Miscellaneous	[none]

**Miscellaneous**

<sup>97</sup> 38 U.S.C.A. § 7104 (West).

<sup>98</sup> 38 C.F.R. § 20.1301; <https://www.index.va.gov/search/va/bva.jsp>.

<sup>99</sup> 38 C.F.R. § 20.1303.

<sup>100</sup> U.S. Department of Veterans Affairs, *Appeals Modernization*, at 5, (created 2019), [https://www.bva.va.gov/docs/Decision\\_Review\\_Process\\_Slides.pdf](https://www.bva.va.gov/docs/Decision_Review_Process_Slides.pdf); 2019 VA Functional Organization Manual Version 5 272, <https://www.va.gov/FOM-5-Final-July-2019.pdf>.

Alternative Dispute Resolution (ADR)	There is no codified process for ADR, but some suggest ADR could reduce the VA's case backlog. <sup>101</sup>
Participation of Appellate Body in Agency Decisions on Judicial Review	[none found]
Role and Participation of Appellate Body in Writing Rules	[none found]
Miscellaneous	[none]

---

<sup>101</sup> Richard M. Rosenbleeth, *Why Not ADR? Burdened by Backlogs, the System That Deals with Veterans' Disability Claims Needs Help*, 25 ALTERNATIVES TO HIGH COST LITIG. 131, 132 (2007).

## PUBLICLY AVAILABLE CASE STATISTICS

In Fiscal Year 2018, the BVA offered 24,046 hearings, holding 16,424.<sup>102</sup> 71% of these hearings were held by video.<sup>103</sup> 62,832 cases were formally appealed to the Board.<sup>104</sup> There were 137,383 cases pending at the end of the 2018 Fiscal Year, down from 153,513 cases pending at the beginning of the year.<sup>105</sup>

Annual reports to Congress:

[https://www.bva.va.gov/Chairman\\_Annual\\_Rpts.asp](https://www.bva.va.gov/Chairman_Annual_Rpts.asp).

## TREATISES AND SCHOLARSHIP OF NOTE

Norman G. Cooper & David W. Engel, *November 18, 1988: A Jurisdictional Bright Line in Veterans Law?*, 5 FED. CIRCUIT B.J. 91 (1995) (discussing changes resulting from the enactment of the VJRA).

James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253 (2010) (discussing the changes caused by the implementation of judicial review via the VJRA).

Jeremy Bailie, *When Time Is of the Essence: Reverse, Don't Remand*, 8 VETERANS L. REV. 1 (2016) (following veterans through the appeals process to highlight the system's flaws and strengths and arguing that in order to save time, reviewing courts should reverse, rather than remand, the Board).

Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims Is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 288 (2004) (comparing the constraints of veterans' benefits with Social Security disability claimants' rights and arguing that the "continuation of paternalism after the initial denial of benefits, as part of the administrative appellate review process, is detrimental to the interest of veterans and other eligible claimants).

Yelena Duterte, *Decision, Appeal, Repeat How Va Can Limit Wait Times, Error, and Red Tape Through Settlements*, 68 SYRACUSE L. REV. 407 (2018) (arguing that the backlog of cases can be fixed by creating a settlement mechanism).

---

<sup>102</sup> FY 2018 Report 9

<sup>103</sup> FY 2018 Report 9

<sup>104</sup> 2018 Report 22

<sup>105</sup> 2018 Report 22



Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513 (2019) (discussing changes in the way the VA processes veterans' claims)

James D. Ridgway et al., "Not Reasonably Debatable": *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1 (2016) (examining the Court of Appeals for Veterans' Claims and its single-judge decision-making authority).

James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001) (arguing for a Social Security appeals-like system for veterans' benefits).

Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343, 347 (2001) (arguing against a Social Security appeals-like system for veterans' benefits).

Rory E. Riley, *Simplify, Simplify, Simplify—An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W. VA. L. REV. 67, 70 (2010) (arguing that "the VA should eliminate one of its many levels of review and utilize attorneys at the RO level by regionalizing the BVA").

Lawrence B. Hagel & Michael P. Horan, *Five Years under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43 (1994) (looking at the veteran's perspective on the veterans benefit process before and after the passage of the VJRA).

Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23 (1994).

William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339 (2003) (proposing a simpler, streamlined review process for veterans appeals which would eliminate the BVA and replace it with administrative law judges).

Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 Veterans L. Rev. 208 (2009).

Karl Oakes, AMERICAN JURISPRUDENCE, SECOND EDITION, Veterans and Veterans' Laws (2019)

Anne E. Melley, 33 FED. PROC., L. ED. Ch. 79

18 Fed. Proc. Forms Ch. 68 Veterans and Veterans' Laws

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**APPENDIX H**

**Environmental Protection Agency Environmental Appeals Board:  
Enforcement and Permit Appeals Under Environmental Statutes**

**INTRODUCTION**

President Richard Nixon established the Environmental Protection Agency (EPA) by presidential directive in 1970. The directive transferred to the new agency functions previously performed under various statutes by the Department of Agriculture; Department of Health, Education, and Welfare; Department of the Interior; Council on Environmental Quality; and Atomic Energy Commission.<sup>1</sup>

Today, the EPA administers all or part of more than two dozen laws, including the Clean Air Act (CAA); Clean Water Act (CWA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Emergency Planning and Community Right to Know Act (EPCRA); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); Marine Protection, Research, and Sanctuaries Act (MPRSA); Resource Conservation and Recovery Act (RCRA); Solid Waste Disposal Act (SDWA); Safe Drinking Water Act (SDWA); and Toxic Substances Control Act (TSCA).<sup>2</sup>

Adjudications under those statutes include permit and enforcement decisions. A Director (typically a Regional Administrator) issues the initial decision in permit cases.<sup>3</sup> A Presiding Officer (either an administrative law judge (ALJ) or Regional Judicial Officer (RJO)) issues the initial decision in enforcement proceedings.<sup>4</sup>

---

<sup>1</sup> Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970).

<sup>2</sup> Env'tl. Protection Agency, Laws & Regulations, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (last visited Mar. 7, 2020).

<sup>3</sup> See Modernizing the Administrative Exhaustion Requirement for Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,087 (Dec. 3, 2019).

<sup>4</sup> RJOs act under a delegation from Regional Administrators. An RJO must be “an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency.” RJOs are prohibited from serving as Presiding Officers

Before 1992, the EPA Administrator was legally responsible for deciding appeals from initial permit and enforcement decisions. Through an internal manual, the Administrator delegated most appellate responsibility to two headquarters Judicial Officers. Although the Administrator retained the authority to decide certain appeals, he or she ordinarily decided those cases based on a Judicial Officer's recommendations.<sup>5</sup>

During this period, Congress expanded the EPA's authority to impose civil penalties administratively. The agency also faced a growing caseload of permit challenges. For these reasons, and because the delegation of appellate decision-making authority through an internal agency manual had caused "considerable confusion in the regulated community over the role of the Judicial Officers," EPA issued a rule in 1992 that established the three-member Environmental Appeals Board (EAB) as a "permanent body with continuing functions."<sup>6</sup>

The rule eliminated the position of Judicial Officer at EPA headquarters. For both pragmatic and separation-of-functions reasons, the rule largely divested the Administrator of any explicit adjudicative function, delegating nearly all final appellate authority to the EAB.<sup>7</sup> However, the Administrator recently affirmed his "existing authority (derived from his or her statutory authority to issue the permits in the first instance) to review or change any EAB decision" and introduced an explicit mechanism by which the Administrator, through the General Counsel, can "issue a dispositive legal interpretation in any matter pending before the EAB or an any issue addressed by the EAB."<sup>8</sup>

For any matter not expressly delegated by rule to the EAB, the Administrator may direct the EAB to "provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker."<sup>9</sup> The EAB currently considers CERCLA cleanup cost

---

in any case in which they "performed prosecutorial or investigative functions" and in any case involving a party concerning whom they "performed any functions of prosecution or investigation within the 2 years preceding the commencement of a case." RJOs are also barred from prosecuting enforcement cases and "shall not be supervised by any person [other than the Regional Counsel] who supervises the prosecution of enforcement cases." 20 C.F.R. § 22.4(b).

<sup>5</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992).

<sup>6</sup> *Id.* at 5322; see also Anna L. Wolgast, Kathie A. Stein & Timothy R. Epp, *The United States' Environmental Adjudication Tribunal*, 3 J. CT. INNOVATION 185, 186 (2010); Edward E. Reich, *EPA's New Environmental Appeals Board*, NAT. RESOURCES & ENVT. 39, 39 (Spring 1994).

<sup>7</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. at 5322.

<sup>8</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,651 (Aug. 21, 2020).

<sup>9</sup> 40 C.F.R. § 1.25(e)(2)(i).

reimbursement petitions at the Administrator’s direction and has undertaken various other functions under special delegations.<sup>10</sup>

The EAB originally consisted of three members, called Environmental Appeals Judges, designated by the Administrator.<sup>11</sup> Due to a “significant increase” in the EAB’s caseload in the 1990s, that number later grew to “no more than four.”<sup>12</sup> Judges currently fill three of the EAB’s four seats. They serve as “co-equals” without a Chief Judge.<sup>13</sup> Beginning in September 2020, each of the EAB’s four seats will have a fixed, 12-year term.<sup>14</sup>

Today, the bulk of the EAB’s workload remains appeals from enforcement, especially civil penalty, decisions issued (mostly) by ALJs, and permits issued (mostly) by Regional Administrators. The EAB also processes other case types cases, including Equal Access to Justice Act fee petitions and program fraud civil remedy cases, which are beyond the scope of this study.<sup>15</sup>

In an enforcement case, the EAB’s final decision is the “consummation of the agency’s decision-making process” and becomes effective 30 days after its issuance.<sup>16</sup> For permit cases, “final agency action occurs after administrative review procedures before the EAB have been exhausted and the Regional Administrator subsequently issues a final permit decision.”<sup>17</sup> Except where the EAB issues an order to a federal agency,<sup>18</sup> there is no provision for appeal to the Administrator. (However, nothing in the regulations “limits the Administrator’s authority to review or change any EAB decision” *sua sponte*.<sup>19</sup>)

Parties who wish to challenge an EAB decision (or final permit following an EAB decision) must instead seek review in federal court—in a district court or

---

<sup>10</sup> THE ENVIRONMENTAL APPEALS BOARD PRACTICE MANUAL 4–5 (Aug. 2013) [hereinafter EAB PRACTICE MANUAL].

<sup>11</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. at 5320; Wolgast, *supra* note 6, at 186.

<sup>12</sup> Changes to Regulations Concerning Membership of EPA’s Environmental Appeals Board, 63 Fed. Reg. 67,779 (Dec. 9, 1998).

<sup>13</sup> EAB PRACTICE MANUAL, *supra* note 10, at 5; *see also* 40 C.F.R. § 22.31.

<sup>14</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653, 51,656 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(e)(5)).

<sup>15</sup> EAB PRACTICE MANUAL, *supra* note 10, at 38–39, 60; *see also* 40 C.F.R. § 124.19(*l*).

<sup>16</sup> EAB PRACTICE MANUAL, *supra* note 10, at 6 (quoting *City of San Diego v. EPA*, 242 F.3d 1097, 1101 (9th Cir. 2001)).

<sup>17</sup> EAB PRACTICE MANUAL, *supra* note 10, at 6, 40; *see* 40 C.F.R. § 124.19(*l*)(2)(i)–(iii).

<sup>18</sup> 40 C.F.R. § 22.31(e); EAB PRACTICE MANUAL, *supra* note 10, at 33–35; CITIZEN’S GUIDE TO EPA’S ENVIRONMENTAL APPEALS BOARD 28 (July 2018) [hereinafter CITIZEN’S GUIDE].

<sup>19</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(e)(2)(iii)).

court of appeals, depending on the statutory regime.<sup>20</sup> Parties seek judicial review in less than 10% of all cases.<sup>21</sup>

In its initial years, the EAB faced a significant backlog of cases awaiting decision. During its first full fiscal year (FY), it took final action on 156 matters and received 126 new matters.<sup>22</sup> In its first four years, the EAB “handled more than 500 matters and . . . issued more than 140 formal opinions.”<sup>23</sup> In 2016, Michael Asimow reported the EAB had considered roughly 600 appeals during the previous 10 years, about 2/3 of them involving permit appeals and the remainder involving enforcement actions.<sup>24</sup> A recent study found “EAB actions are 1.5 times more likely to come from permit appeals than penalty appeals.”<sup>25</sup>

It was predicted at the time of its creation that the EAB’s caseload and jurisdiction would ebb and flow “as new programs develop and older programs become more heavily delegated to the states.”<sup>26</sup> Indeed, EAB has reportedly experienced a decrease in its permit caseload as the EPA has progressively delegated its permit functions to state and tribal authorities.<sup>27</sup> A recent study found a “clear shift” from TSCA, FIFRA, and RCRA cases in the EAB’s early years to CWA and CAA cases more recently.<sup>28</sup>

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>EPA rules define two main procedural regimes: the Consolidated Rules of Practice (or Part 22 Rules) and the Part 124 Rules.</p> <p><b>The Consolidated Rules of Practice (CROP)</b> govern most enforcement and some permit cases.</p>
----------------	---

<sup>20</sup> See Reich, *supra* note 6, at 41.

<sup>21</sup> Kelly Tzoumis & Emma Shibilski, *Environmental Decision-Making Through Adjudicatory Appeals in the United States*, 5 PEOPLE: Int’l J. Soc. Sci. 846, 862 (2019); accord MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 147–48 (2019).

<sup>22</sup> Reich, *supra* note 6, at 65.

<sup>23</sup> Nancy Firestone & Elizabeth Brown, *Ensuring the Fairness of Agency Adjudications: The Environmental Appeals Board’s First Four Years*, 2 Env’tl. Law. 291, 293 (1996).

<sup>24</sup> ASIMOW, *supra* note 21, at 147–48 (2019) (citing correspondence between EAB Judge Kathie Stein and Michael Asimow).

<sup>25</sup> Tzoumis, *supra* note 21, at 856 (2019).

<sup>26</sup> Reich, *supra* note note 6, at 65.

<sup>27</sup> Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,086 (Dec. 3, 2019); see also Reich, *supra* note note 6, at 41.

<sup>28</sup> Tzoumis, *supra* note 21, at 856.

	<p>They provide for trial-like procedures in proceedings subject to the formal-hearing provisions of the Administrative Procedure Act (APA).<sup>29</sup> The EAB may also “look to” the Federal Rules of Civil Procedure “for guidance in interpreting the CROP.”<sup>30</sup></p> <p>The CROP also apply in certain civil penalty proceedings that are not subject to the APA’s formal-hearing provisions, the main difference being that an RJO rather than an ALJ serves as the Presiding Officer in such cases.<sup>31</sup></p> <p>The <b>Part 124 Rules</b> prescribe comparatively informal procedures. They govern most decisions to issue, modify, revoke, reissue, or terminate a federally issued permit.<sup>32</sup> EPA revised the rules in 2013 “to simplif[y] the review process and promote judicial economy.” The revised rules codified procedures previously found in EAB precedent, standing orders, and guidance.<sup>33</sup></p> <p>Certain appeals are governed by other regulatory and sub-regulatory regimes. These include CAA enforcement and permit appeals, permit appeals under EPA’s Acid Rain Program, FIFRA non-enforcement proceeding appeals, MPRSA ocean dumping permit appeals, Noise Control Act appeals, residential wood heater certification appeals, and CERCLA reimbursement appeals.<sup>34</sup></p>
Substantive Law	The EAB decides appeals under all major environmental statutes that EPA administers, including the CAA, CWA, CERCLA, FIFRA,

<sup>29</sup> Wolgast, *supra* note 6, at 188–90. See 40 C.F.R. § 22.1 for proceedings where the CROP apply.

<sup>30</sup> EAB PRACTICE MANUAL, *supra* note 10, at 21–22.

<sup>31</sup> 40 C.F.R. § 22.51.

<sup>32</sup> Wolgast, *supra* note 6, at 190–91.

<sup>33</sup> Revisions to Procedural Rules To Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013); *see also* EAB PRACTICE MANUAL, *supra* note 10, at 40.

<sup>34</sup> EAB PRACTICE MANUAL, *supra* note 10, at 58–66; Aaron P. Avila, Mary Kay Lynch, Kathie A. Stein, Mary Beth Ward & Catherine Malinin Dunn, *The EPA’s Environmental Appeals Board at Twenty-Five: An Overview of the Board’s Procedures, Guiding Principles, and Record of Adjudicating Cases* 3 n.7, 14–15 (2017) [hereinafter *EAB at Twenty-Five*].

	MPRSA, RCRA, SDWA, SWDA, and TSCA. Substantive law consists of those statutes and the rules that implement them. EPA regulations are mostly codified in title 40, chapter I, of the Code of Federal Regulations.
Miscellaneous	The EAB publishes several guidance documents, including <i>A Citizens' Guide to EPA's Environmental Appeals Board</i> , the <i>EAB Practice Manual</i> , <i>Revised CERCLA 106(b) Guidance</i> , <i>Consent Agreement and Final Order Procedures</i> , and <i>Procedures for Quick Resolution of Administrative Enforcement Cases</i> . Two standing orders govern electronic filing; a third governs petitions for review of new CAA source review permits. All are available on the EAB's website. <sup>35</sup>

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	<p>The EAB reviews the initial decisions of Presiding Officers in EPA-initiated enforcement actions under the CAA, CERCLA, CWA, FIFRA, MPRSA, SDWA, TSCA, and other statutes.<sup>36</sup></p> <p>The EAB also reviews permit decisions made predominantly by EPA Regional Administrators under the CAA, CWA, RCRA, and SDWA.<sup>37</sup></p>
Nature of Hearing-Level Proceedings	<b>CROP/Part 22 Rules.</b> A hearing-level proceeding commences when an EPA regional or headquarters office files a complaint with a Regional Hearing Clerk. A respondent risks default if he or she does not file an answer within 30 days after service. Respondents also opt to resolve many cases informally or through ADR. <sup>38</sup>

<sup>35</sup> Environmental Appeals Board, [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/) (last visited Mar. 7, 2020).

<sup>36</sup> 40 C.F.R. §§ 22.1, 22.50.

<sup>37</sup> Modernizing the Administrative Exhaustion Requirement for Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,087 (Dec. 3, 2019); Wolgast, *supra* note 6, at 190.

<sup>38</sup> 40 C.F.R. §§ 22.14, 22.15, 22.17; *EAB at Twenty-Five*, *supra* note 34, at 8–9.

	<p>A hearing takes place if the respondent requests a hearing or the proceeding “presents genuine issues of material fact.” The Presiding Officer may also hold a hearing if he or she finds that the respondent raised “issues appropriate for adjudication.”<sup>39</sup></p> <p>The rules provide for a compulsory prehearing exchange of information; define motions practice, including motions for additional discovery; and permit prehearing conferences.<sup>40</sup></p> <p>Presiding Officers “admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.” Parties may examine and cross-examine witnesses; submit written witness testimony in appropriate circumstances; object; and submit proposed findings, conclusions and orders. Reporters transcribe all hearings.<sup>41</sup></p> <p><b>Part 124 Rules.</b> Lower-level permit proceedings are comparatively informal. When a Director (generally a Regional Administrator) tentatively denies a permit application, prepares a draft permit, or schedules a public hearing on a permit application, he or she must give public notice.<sup>42</sup></p> <p>A public comment period follows, which lasts at least 30 days (or 45 days in RCRA cases).<sup>43</sup> Any person may submit comments and request a public hearing.<sup>44</sup> In most cases, the Director must hold a public hearing “whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s)” and may hold a public hearing “at his or her discretion,” for instance when a hearing “might clarify one or more issues involved in the permit decision.”</p>
--	---

---

<sup>39</sup> 40 C.F.R. §§ 22.15, 22.21.

<sup>40</sup> *Id.* §§ 22.16, 22.19.

<sup>41</sup> *Id.* § 22.25.

<sup>42</sup> *Id.* § 124.10(a)(1).

<sup>43</sup> *Id.* § 22.27(c).

<sup>44</sup> 40 C.F.R. § 124.11.



	<p>If the Director grants a public hearing, the public comment period will extend through the close of the hearing and may be extended or reopened.<sup>45</sup> At the hearing, any person “may submit oral or written comments and data concerning the draft permit.” The agency records or transcribes the hearing. The recording or transcription is made publicly available and becomes part of the administrative record for decision.<sup>46</sup></p>
<p>Nature of Hearing-Level Decision</p>	<p><b>CROP/Part 22 Rules.</b> The Presiding Officer decides matters in controversy “upon a preponderance of the evidence.”<sup>47</sup> The Presiding Officer issues an initial decision that explains “findings of fact, conclusions regarding all material issues of law or discretion.”</p> <p>If appropriate, the Presiding Officer must also explain “a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action.” The Presiding Officer determines the amount of the civil penalty based on the evidence of record and any statutory and regulatory guidelines.<sup>48</sup></p> <p>The Presiding Officer’s decision becomes final 45 days after service unless a party moves to reopen the hearing or set aside a default order, a party appeals the decision to the EAB, or the EAB reviews the decision sua sponte.<sup>49</sup></p> <p><b>Part 124 Rules.</b> When the Director issues a final permit decision, he or she must explain any changes to the draft permit and respond to all “significant” comments.<sup>50</sup></p>

<sup>45</sup> *Id.* §§ 124.12, 124.13, 124.14.

<sup>46</sup> *Id.* § 124.12.

<sup>47</sup> *Id.* § 22.24; EAB PRACTICE MANUAL, *supra* note 10, at 30–31.

<sup>48</sup> 40 CFR 22.27(a)–(b).

<sup>49</sup> *Id.* § 22.27(c).

<sup>50</sup> *Id.* §§ 124.15, 124.17.

Transfer of Case to Appellate Body After Hearing-Level Decision	<p><b>CROP.</b> The Regional Hearing Clerk forwards the initial decision to the EAB. The EAB may review the case on its own initiative but typically awaits a party’s appeal.<sup>51</sup></p> <p><b>Part 124 Rules.</b> The Regional Administrator must file a certified index and relevant portions of the administrative record with the Clerk of the Board within 21 or 30 days after receiving service that a person has petitioned for EAB review.</p>
Miscellaneous	[none]

### Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	<p>Reviewing authorities are the EAB and the EPA Administrator. By rule, the Administrator has delegated all (or nearly all) appellate adjudicative functions to the EAB.</p> <p>For any matter not expressly delegated to the EAB, the Administrator may direct the EAB to “provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker.”<sup>52</sup> The Administrator has occasionally done so, for example with respect to CERCLA reimbursement petitions.</p> <p>Although nothing in the regulations “limits the Administrator’s authority to review or change any EAB decision,”<sup>53</sup> there is generally no process for review by the Administrator. There are exceptions for cases in which a federal agency requests it, a two-person EAB panel requires the Administrator to break a tie vote, or a party appeals a denied motion to disqualify an EAB Judge.<sup>54</sup></p>
--------------------------	---

<sup>51</sup> *Id.* §§ 22.27(a), 22.30.

<sup>52</sup> *Id.* § 1.25(e)(2)(i).

<sup>53</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653, 51,656 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(e)(2)(iii)).

<sup>54</sup> 40 C.F.R. §§ 1.25(e)(1), 22.4(d)(1), 22.31(e).

	<p>Although the EAB may refer any matter to the Administrator when it “deems it appropriate to do so,”<sup>55</sup> it was directed to do so “only in exceptional circumstances.”<sup>56</sup> As of 2010, the EAB had “not yet encountered a case where use of this authority was appropriate.”<sup>57</sup></p> <p>Although not acting as a separate level of review, the Administrator may limit the EAB’s authority to interpret a statute or regulation in a pending case by directing the General Counsel to file a written notice to the EAB providing a legal interpretation of the applicable regulation statute.<sup>58</sup></p>
Legal Status of Reviewing Authority(ies)	<p>The Administrator has statutory authority to review enforcement and permit decisions. Since 1992, the Administrator has delegated most final review authority to the EAB but retains authority to review or change any EAB decision.<sup>59</sup></p> <p>Because no statute explicitly authorizes the EPA Administrator to designate EAB Judges, at least one commentator has questioned the Board’s constitutionality following the Supreme Court’s decision in <i>Lucia v. SEC</i>.<sup>60</sup></p>
Miscellaneous	[none]

### **Institutional Attributes of Appellate/Reviewing Authority(ies)**

Number of Members	There are “no more than four Board Members.” <sup>61</sup> Three Judges currently sit on the EAB.
-------------------	--

<sup>55</sup> *Id.* §§ 22.4(a), 124.2.

<sup>56</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992).

<sup>57</sup> Wolgast, *supra* note 6, at 193.

<sup>58</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653, 51,656 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(e)(2)(iii)).

<sup>59</sup> *Id.*

<sup>60</sup> William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?*, 49 ENVTL. L. REV. 737 (2019); *see also* *Lucia v. SEC*, 585 U.S. \_\_\_, 138 S. Ct. 2044 (2018).

<sup>61</sup> 40 C.F.R. § 1.25(e)(1).

Qualification Requirements	An EAB Judge must be “a graduate of an accredited law school and a member in good standing of a recognized bar association of any State or the District of Columbia.” He or she may “not be employed by the Office of Enforcement, the Office of the General Counsel, a Regional Office, or any other office directly associated with matters that could come before the [EAB].” <sup>62</sup>
Party Affiliation Requirement in Appointment	[none]
Method of Appointment	The Administrator designates EAB Judges. <sup>63</sup>
Term of Appointment	There were no terms of appointment for most of the EAB’s history. <sup>64</sup> In August 2020, the Administrator amended the regulations to define 12-year terms for each of the EAB’s four seats. At the end of each term, the Administrator may renew a sitting member’s term or reassign him or her to another position within EPA. <sup>65</sup>
Statutory Removal Protections	There are no statutory removal protections specific to EAB Judges. EAB Judges are, “by custom,” career employees and members of the Senior Executive Service. <sup>66</sup>
Location within Agency; Basis of Legal Authority	The EAB is located in the headquarters-level Office of Mission Support (OMS). <sup>67</sup> It previously was located in the Office of Administration and Resources Management, and before that the immediate Office of the Administrator. <sup>68</sup>

<sup>62</sup> *Id.* § 1.25(e)(3).

<sup>63</sup> *Id.* § 1.25(e)(1).

<sup>64</sup> *EAB at Twenty-Five*, *supra* note 34, at 6.

<sup>65</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,652–53, 51,656 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(e)(5)).

<sup>66</sup> *Id.*; *see also* EAB PRACTICE MANUAL, *supra* note 10, at 5; *EAB at Twenty-Five*, *supra* note 34, at 6; Reich, *supra* note 6, at 40–41.

<sup>67</sup> Organization Chart for the Office of Mission Support, <https://www.epa.gov/aboutepa/organization-chart-office-mission-support-oms> (last visited Mar. 8, 2020).

<sup>68</sup> Reich, *supra* note 6, at 41; Nancy B. Firestone, *The Environmental Protection Agency’s Environmental Appeals Board*, 1 ENVTL. LAW. 1, 1 (1994).

Authority to Delegate to Subunit(s); Designating Official and Process	[none]
Quorum Requirement	<p>The EAB sits in three-member panels. Panels decide cases by majority vote.<sup>69</sup></p> <p>Two members constitute a quorum when “absence or recusal prevents a three-Member panel.” The Administrator breaks a two-member panel’s tie vote.<sup>70</sup></p>
Authority and Function of Appellate Authority’s Head	There is no Chief Judge or other head of the EAB. All Judges serve as “co-equals.” Judges serve in annual rotation as “lead judge for administrative matters.” <sup>71</sup> One Judge is designated “lead” for each two- or three-member panel. <sup>72</sup>
Internal Management Structure of Appellate Authority	Besides the co-equal EAB Judges, the EAB employs several staff attorneys, a Clerk of the Board, and administrative personnel. <sup>73</sup>
Miscellaneous	<p>EAB Judges must recuse themselves from cases in which they previously performed prosecutorial or investigative functions, prepared or presented evidence, or are “otherwise personally involved.”<sup>74</sup> Judges may not participate in “any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act.” Members may “withdraw from any proceeding in which [they deem themselves] disqualified or unable to act for any reason.”<sup>75</sup></p> <p>Parties can file motions to disqualify EAB Judges in particular cases. If the EAB denies a motion to</p>

<sup>69</sup> 40 C.F.R. § 1.25(e)(1).

<sup>70</sup> *Id.* § 1.25(e)(1).

<sup>71</sup> EAB PRACTICE MANUAL, *supra* note 10, at 8; *see also* Reich, *supra* note 6, at 41.

<sup>72</sup> Wolgast, *supra* note 6, at 191.

<sup>73</sup> EAB PRACTICE MANUAL, *supra* note 10, at 8; Wolgast, *supra* note 6, at 191.

<sup>74</sup> 40 C.F.R. § 1.25(e)(3).

<sup>75</sup> *Id.* § 22.4(d)(1); *EAB at Twenty-Five*, *supra* note 34, at 7.

	disqualify, a party may appeal that ruling to the Administrator. <sup>76</sup>
--	--

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	<p><b>CROP/Part 22 Rules.</b> Parties may by right appeal adverse enforcement decisions to the EAB.</p> <p><b>Part 124 Rules.</b> There is no appeal as of right from a permit decision. The EAB will grant review only if the petitioner has “standing” and makes certain substantive showings.<sup>77</sup> The EAB will only “sparingly” exercise its review power.<sup>78</sup></p>
How Appeal Initiated	<p><b>CROP/Part 22 Rules.</b> To appeal an initial decision, a party must file a Notice of Appeal and brief with the Clerk of the Board. There is no standardized Notice of Appeal. The appellant must serve a copy of the notice on the Presiding Officer and copies of the notice and brief on the appropriate Hearing Clerk, all other parties, and any non-party participants.<sup>79</sup></p> <p><b>Part 124 Rules.</b> Any person who commented on the draft permit or participated in a public hearing can appeal a permit decision. Others can seek review only with respect to permit conditions that were not in the draft permit.<sup>80</sup></p> <p>A person initiates an appeal by filing a petition for review with the Clerk of the Board.<sup>81</sup> The petition must “meet a minimum standard of specificity” to ensure that the EAB does not</p>

<sup>76</sup> 40 C.F.R. § 22.4(d)(1).

<sup>77</sup> Revisions to Procedural Rules To Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013).

<sup>78</sup> EAB PRACTICE MANUAL, *supra* note 10, at 54–55; *see also* CITIZEN’S GUIDE, *supra* note 18, at 23.

<sup>79</sup> 40 C.F.R. § 22.30(a)(1); EAB PRACTICE MANUAL, *supra* note 10, at 26–27; CITIZEN’S GUIDE, *supra* note 18, at 18–19.

<sup>80</sup> 40 C.F.R. § 124.19(a)(2); EAB PRACTICE MANUAL, *supra* note 10, at 43–45; CITIZEN’S GUIDE, *supra* note 18, at 24–25.

<sup>81</sup> 40 C.F.R. § 124.19(a)(1); EAB PRACTICE MANUAL, *supra* note 10, at 49–51.

	<p>“entertain vague or unsubstantiated claims.” It must identify the nature of the petitioner’s challenge and “clearly set forth, with legal and factual support,” why the EAB should review the permit decision under its standard of review.<sup>82</sup></p>
Time For Appealing	<p><b>CROP/Part 22 Rules.</b> Parties must appeal initial decisions within 30 days after service. The EAB applies this deadline “strictly” and “will dismiss a late appeal in most cases” absent “special circumstances.”<sup>83</sup></p> <p><b>Part 124 Rules.</b> Petitioners must file for EAB review within 30 days after the Director serves notice of the permit decision.<sup>84</sup></p>
If No Appeal Taken from Hearing Officer’s Decision	<p><b>CROP/Part 22 Rules.</b> A Presiding Officer’s initial decision generally becomes final 45 days after service.<sup>85</sup></p> <p><b>Part 124 Rules.</b> A permit decision generally becomes effective 30 days after service.<sup>86</sup> If the EAB denies a petition for review, the Director issues a final permit decision.<sup>87</sup></p>
If Appeal Taken	<p><b>CROP/Part 22 Rules.</b> On appeal, the EAB can “adopt, modify, or set aside the findings of fact and conclusions of law or discretion in the decision or ordered being reviewed.” It can assess a new civil penalty; “adopt, modify or set aside any recommended compliance or corrective action order or Permit Action;” and remand to the Presiding Officer for further action.<sup>88</sup> Parties may also resolve their dispute through ADR.<sup>89</sup></p> <p><b>Part 124 Rules.</b> After the EAB issues a decision on the merits of the appeal or remands for</p>

<sup>82</sup> 40 C.F.R. § 124.19(a)(4); EAB PRACTICE MANUAL, *supra* note 10, at 45.

<sup>83</sup> 40 C.F.R. § 22.30(a)(1); EAB PRACTICE MANUAL, *supra* note 10, at 25.

<sup>84</sup> 40 C.F.R. § 124.19(a)(3); EAB PRACTICE MANUAL, *supra* note 10, at 42; CITIZEN’S GUIDE, *supra* note 18, at 24.

<sup>85</sup> 40 C.F.R. § 22.27(c).

<sup>86</sup> *Id.* § 124.15(b).

<sup>87</sup> *Id.* § 124.19(l)(2)(i).

<sup>88</sup> *Id.* § 22.30(f).

<sup>89</sup> *See infra* notes 143–144 and accompanying text.

	further proceedings, the Director issues a final permit decision. Absent later review, this decision becomes the final agency action. <sup>90</sup> Parties may also resolve their dispute through ADR. <sup>91</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	<b>CROP/Part 22 Rules.</b> The EAB may review an initial decision sua sponte within 40 days after service. It “uses this authority sparingly.” <sup>92</sup>  <b>Part 124 Rules.</b> The EAB may not review permit decisions on its own initiative. <sup>93</sup>
Miscellaneous	Parties can electronically file appeals and briefs through the EAB’s website. <sup>94</sup>

### Appellate Authority’s Procedures

Record on Review	The record consists of “the evidence that informed the decision being appealed,” including filings or evidence submitted at the lower level and the hearing recording or transcript. <sup>95</sup>  The <b>Part 124 Rules</b> define the contents of the administrative record for permit decisions. <sup>96</sup>
Submissions by Parties in Support of Appeal	<b>CROP/Part 22 Rules.</b> Appellants must submit a brief with the Notice of Appeal. Other parties and non-party participants may file a response brief within 20 days of service. <sup>97</sup>  <b>Part 124 Rules.</b> Petitioners must submit a brief with the petition for review. The Director must respond to the petition within 21 or 30 days after filing. Permit applicants and state and tribal

<sup>90</sup> 40 C.F.R. § 124.19(l).

<sup>91</sup> See *infra* notes 143 and **Error! Bookmark not defined.** and accompanying text.

<sup>92</sup> 40 C.F.R. § 22.30(b); EAB PRACTICE MANUAL, *supra* note 10, 31.

<sup>93</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,652 (Aug. 21, 2020).

<sup>94</sup> EAB PRACTICE MANUAL, *supra* note 10, 12–15; *EAB at Twenty-Five*, *supra* note 34, at 7–8.

<sup>95</sup> CITIZEN’S GUIDE, *supra* note 18, at 20–21, 35.

<sup>96</sup> 40 C.F.R. § 124.18.

<sup>97</sup> 40 C.F.R. § 22.30(a)(2); CITIZEN’S GUIDE, *supra* note 18, at 19.



	<p>authorities who wish to participate must also file a notice of appearance and a response.<sup>98</sup></p> <p>Although the rules permit petitioners to move for leave to submit a reply brief, there is a general presumption against additional briefing.<sup>99</sup></p>
Issue Preservation	<p><b>CROP/Part 22 Rules.</b> Appeal is “limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction.”<sup>100</sup></p> <p><b>Part 124 Rules.</b> Petitioners must show that each issue raised in the petition was raised during the public comment period or explain why there was no requirement to raise the issue earlier.<sup>101</sup></p>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	<p>The administrative record is generally “limited to the evidence that informed the decision being appealed,” including filings, evidence of record, and the recording or transcript of the hearing.<sup>102</sup></p>
Standard of Review	<p><b>CROP/Part 22 Rules.</b> The EAB reviews factual findings and legal and discretionary conclusions de novo.<sup>103</sup> The EAB “has long held that it will give deference to the presiding officer’s factual findings based on witness testimony, since that judge heard the witnesses’ testimony at trial, and therefore is in the best position to make determinations of witness credibility.”<sup>104</sup> The EAB also will not typically “substitute its judgment as to an appropriate penalty amount for the judgment of the ALJ unless the ALJ has made a clear error in applying any applicable</p>

<sup>98</sup> 40 C.F.R. § 124.19(b); EAB PRACTICE MANUAL, *supra* note 10, at 47; CITIZEN’S GUIDE, *supra* note 18, 26.

<sup>99</sup> 40 C.F.R. § 124.19(c); EAB PRACTICE MANUAL, *supra* note 10, at 49.

<sup>100</sup> 40 C.F.R. § 22.30(c).

<sup>101</sup> 40 C.F.R. § 124.19(a)(4); CITIZEN’S GUIDE, *supra* note 18, 25.

<sup>102</sup> CITIZEN’S GUIDE, *supra* note 18, 20–21, 35.

<sup>103</sup> 40 C.F.R. § 22.30(f) (The EAB “shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed”); EAB PRACTICE MANUAL, *supra* note 10, at 29.

<sup>104</sup> Wolgast, *supra* note 6, at 189 (2010); EAB PRACTICE MANUAL, *supra* note 10, at 29–30; *EAB at Twenty-Five*, *supra* note 34, at 9 (citing *In re Chem-Solve, Inc.*, 16 E.A.D. 594 (2015)); Reich, *supra* note 6, at 41.

	<p>penalty guidelines, has not given sound reasons for deviating from them, or has not adequately explained the penalty assessment.”<sup>105</sup></p> <p><b>Part 124 Rules.</b> The EAB reviews permit decisions under a “clearly erroneous” standard. Petitioners must demonstrate that the decision was based on a “clearly erroneous finding of fact or conclusion of law.”<sup>106</sup> The EAB only “sparingly” exercises its review authority.<sup>107</sup></p>
<p>Consultation with Staff and Other Agency Officials</p>	<p>EAB Judges “may consult with any EPA employee concerning any matter . . . provided such consultation does not violate applicable <i>ex parte</i> rules.” In particular, Judges may not communicate about the merits of a proceeding with “any agency personnel serving in a prosecutorial or investigatory role.”<sup>108</sup></p> <p>Staff attorneys, a Clerk, and other administrative personnel assist EAB Judges. An attorney is randomly assigned to each case. The attorney helps the lead judge determine, as applicable, whether the case is within the EAB’s jurisdiction, whether it is timely filed, whether oral argument would aid the EAB’s review, and whether dismissal is appropriate.<sup>109</sup></p>
<p>Oral Argument</p>	<p>Parties request oral argument by including, in their briefs, “a statement explaining why oral argument is necessary.” The EAB may order oral argument on a party’s request or sua sponte.<sup>110</sup></p>

<sup>105</sup> CITIZEN’S GUIDE, *supra* note 18, at 21–22.

<sup>106</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,651–2 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 124.19(a)(4)(i)).

<sup>107</sup> EAB PRACTICE MANUAL, *supra* note 10, at 42–43, 54–55 (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)); *see also* 40 C.F.R. 124.19(a)(4); *EAB at Twenty-Five*, *supra* note 34, at 13; Brendan C. Selby, *Internal Agency Review, Authoritativeness, and Mead*, 37 HARV. ENVTL. L. REV. 539, 550–51 (2013).

<sup>108</sup> 40 C.F.R. §§ 1.25(e)(2), 22.8; Wolgast, *supra* note 6, at 191; *EAB at Twenty-Five*, *supra* note 34, at 6–7.

<sup>109</sup> Wolgast, *supra* note 6, at 191.

<sup>110</sup> 40 C.F.R. § 22.30(d), 124.19(h).

	<p>Oral argument takes place before the panel in the EAB’s courtroom in Washington, D.C. Video teleconferencing is also available.<sup>111</sup></p> <p>In a typical oral argument, each party has “thirty minutes to present their argument, starting with counsel for the petitioning party, who generally argues his or her case for twenty-five minutes; followed by thirty minutes of argument from counsel for the responding party; and a short, five-minute rebuttal by the petitioning party. The panel members ask questions of counsel throughout the argument.”<sup>112</sup></p> <p><b>Part 124 Rules.</b> The EAB decides most permit appeals on the basis of the petition, responses, and administrative record without additional briefing or argument.<sup>113</sup> There is a presumption against oral argument in new source appeals.<sup>114</sup></p>
<p>Amicus Participation; Intervention; etc.</p>	<p><b>CROP/Part 22 Rules.</b> Persons may move for leave to intervene in a proceeding but generally must do so before the pre-hearing exchange.<sup>115</sup></p> <p>Non-parties may move for leave to file amicus briefs. Motion must identify the movant’s interest and explain the brief’s relevance to the case.<sup>116</sup></p> <p><b>Part 124 Rules.</b> Persons may file an amicus brief in any EAB appeal within 21 days after the filing of a petition for review. Amicus briefs are capped at 15 pages.<sup>117</sup></p>

<sup>111</sup> EAB PRACTICE MANUAL, *supra* note 10, at 10–11; Wolgast, *supra* note 6, at 192; CITIZEN’S GUIDE, *supra* note 18, at 35; *EAB at Twenty-Five*, *supra* note 34, at 8.

<sup>112</sup> Wolgast, *supra* note 6, at 192.

<sup>113</sup> Revisions to Procedural Rules To Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281, 5282–83 (Jan. 25, 2013).

<sup>114</sup> 40 C.F.R. § 124.19(h); EAB PRACTICE MANUAL, *supra* note 10, at 53–54; CITIZEN’S GUIDE, *supra* note 18, at 23, 27, 36.

<sup>115</sup> 40 C.F.R. § 22.11(a).

<sup>116</sup> *Id.* § 22.11(b).

<sup>117</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,652, 51,657 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 124.19(e)).

Public Access to Hearings	Oral arguments are open to the public with at least one week’s advance notice to the Clerk of the Board. <sup>118</sup> A schedule of upcoming oral arguments is available on the EAB’s website.
Staff’s Role in Writing Decisions	A staff attorney works with a panel’s lead judge to prepare a draft opinion for the panel’s “review and comment” and with all panel members to prepare a final decision. <sup>119</sup>
Deadlines for Decision	<p><b>CROP/Part 22 Rules.</b> There are currently no deadlines for decision.</p> <p><b>Part 124 Rules.</b> Under a recent rule change, the EAB must issue its decision on a permit appeal within 60 days after the submission of the final brief or the completion of oral argument, whichever is later. The EAB may grant itself an additional 60 days to issue a decision if a case’s nature and complexity require it.<sup>120</sup></p>
Nature of Decision	<p><b>CROP/Part 22 Rules.</b> The EAB may “adopt, modify, or set aside” a Presiding Officer’s findings of fact, conclusions of law or discretion, and corrective action order. It will typically issue a final opinion or an order remanding the case to a Presiding Officer for further action.<sup>121</sup></p> <p><b>Part 124 Rules.</b> When the EAB reviews a permit case, it will issue a decision on the merits or may remand the proceedings for further action.<sup>122</sup></p>
Reconsideration, Rehearing, etc.	Parties must file motions to reconsider a final order within 10 days after service along with a statement of “the matters claimed to have been erroneously decided and the nature of the alleged orders.” The EAB maintains a “high bar for

<sup>118</sup> EAB PRACTICE MANUAL, *supra* note 10, at 10; Wolgast, *supra* note 6, at 192; CITIZEN’S GUIDE, *supra* note 18, at 35.

<sup>119</sup> Wolgast, *supra* note 6, at 192.

<sup>120</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,652, 51,657 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 124.19(l)).

<sup>121</sup> 40 C.F.R. § 22.30(f); EAB PRACTICE MANUAL, *supra* note 10, at 32.

<sup>122</sup> See 40 C.F.R. § 124.19(l).

	granting motions for reconsideration.” It will only do so “to correct an obvious error, a mistake of law or fact, or a change in the applicable law.” <sup>123</sup>
Miscellaneous	Parties can electronically file appeals and briefs through the EAB’s website. <sup>124</sup>

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	<p><b>CROP/Part 22 Rules.</b> The EAB has discretion to allow appeals from “orders or rulings other than an initial decision.” A party must file a motion for interlocutory review within 10 days after service. The motion must request that the Presiding Officer forward the order or ruling to the EAB and explain the grounds for appeal.</p> <p>The Presiding Officer may recommend the EAB review the ruling or order if it “involves an important question of law or policy concerning which there is substantial grounds for difference of opinion” and “immediate appeal from the order will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.”</p> <p>If the Presiding Officer does not recommend review, the EAB may review the order or ruling on interlocutory appeal if it finds, “upon motion of a party and in exceptional circumstances, that to delay would be contrary to the public interest.”<sup>125</sup></p> <p>The <b>Part 124 Rules</b> do not provide for interlocutory appeals.</p>
Assignment of Cases	The EAB has “sole discretion” to determine which of its members will sit on a panel in a proceeding. Decisions regarding panel size and composition are “not reviewable.” <sup>126</sup>

<sup>123</sup> 40 C.F.R. § 22.32, 124.19(m); EAB PRACTICE MANUAL, *supra* note 10, at 24, 53; *see also* CITIZEN’S GUIDE, *supra* note 18, at 28.

<sup>124</sup> EAB PRACTICE MANUAL, *supra* note 10, at 12–15; *EAB at Twenty-Five*, *supra* note 34, at 7–8.

<sup>125</sup> 40 C.F.R. § 22.29.

<sup>126</sup> *Id.* § 1.25(e)(1).

	In practice, the Clerk randomly assigns cases to three-member panels and designates both the lead judge and staff attorney for a panel in rotation. <sup>127</sup> When the EAB has four members, the Judge not assigned to a panel may serve as a Settlement Judge in the case if the parties opt to participate in the EAB’s Alternative Dispute Resolution program. <sup>128</sup>
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	[none]
Aggregation	<p><b>CROP/Part 22 Rules.</b> The EAB may consolidate “any or all matters at issue in two or more proceedings” if “there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.” All parties must agree to consolidate.<sup>129</sup></p> <p><b>Part 124 Rules.</b> At least at the initial decision-making level, the Director is explicitly authorized to consolidate processing of multiple permits for a single facility or activity.<sup>130</sup></p>
Miscellaneous	The EAB “may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these [CROP] or with an order of the [EAB]. Such sanctions may include drawing adverse inferences against a party, striking a party’s

<sup>127</sup> Wolgast, *supra* note 6, at 191; Reich, *supra* note 6, at 41; *see also* EAB PRACTICE MANUAL, *supra* note 10, at 8; CITIZEN’S GUIDE, *supra* note 18, at 20, 27.

<sup>128</sup> *EAB at Twenty-Five*, *supra* note 34, at 5.

<sup>129</sup> 40 C.F.R. § 22.12.

<sup>130</sup> *See id.* §§ 124.4, 124.11.

	pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.” <sup>131</sup>
--	--

### Form of Decisions, Publication, and Precedential Status

Form of Decision	<p>The EAB issues opinions that typically include a syllabus, statement of the case, legal and factual history, analysis, conclusion, and order. “[T]he level of detail and thoroughness of analysis in [permit] opinions is not readily distinguishable from EAB review as part of formal [enforcement] adjudications required by statute.”<sup>132</sup></p> <p>Written decisions in permit appeals “should only be as long as necessary to address the specific issues presented to the Board in the appeal.”<sup>133</sup></p>
Signed or Per Curiam	EAB decisions indicate the Judge who authored the opinion.
Dissents	EAB Judges “may choose to write a concurring or dissenting opinion in lieu of joining the majority opinion.” <sup>134</sup>
Publication	<p>The EAB issues “published” decisions and “unpublished” final orders. Both are widely available.<sup>135</sup></p> <p>Although the EAB designates each final decision as a published decision or unpublished final order when it issues the decision, it may not publish a decision in the <i>Environmental Appeals Decisions</i></p>

<sup>131</sup> *Id.* § 22.4(a)(2), 124.19(n).

<sup>132</sup> Selby, *supra* note 107, at 548.

<sup>133</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,652, 51,657 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 124.19(l)(3)). The EPA abandoned a proposal to impose a word- or page-limit on EAB decisions. *See id.* at 51,652.

<sup>134</sup> Wolgast, *supra* note 6, at 192; *see also* EAB PRACTICE MANUAL, *supra* note 10, at 5; CITIZEN’S GUIDE, *supra* note 18, at 11.

<sup>135</sup> EAB PRACTICE MANUAL, *supra* note 10, at 2–3, 7–10.

	or on its website under the heading “Published Decisions” during the 15 days after its issuance. During this time, the Administrator may re-designate the decision as unpublished. <sup>136</sup>
Where Published	EAB decisions are published in the bound, multi-volume <i>Environmental Appeals Decisions</i> . <sup>137</sup> All published decisions and unpublished final orders since November 1996 are also available on the EAB’s website, Lexis, and Westlaw. <sup>138</sup>
Precedential Status	<p>EAB decisions were traditionally binding on lower-level decision makers. The EAB has also “generally adopted a philosophy of stare decisis concerning the holdings” of its own decisions.<sup>139</sup></p> <p>Following a recent rule change, “only published decisions of the EAB represent EPA’s official, authoritative position with regard to the issues addressed in such decisions.” This change was intended to “provide the Administrator, as the original source of authority for implementing and interpreting EPA’s statutes and regulations, the ability to ensure EAB opinions reflect the Agency’s official position concerning major policy or procedural issues, or other issues of exceptional importance in the situations where it is appropriate to create such positions through adjudication before the Board.”<sup>140</sup></p>
Miscellaneous	[none]

### **Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

<sup>136</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653, 51,656 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(e)(3)).

<sup>137</sup> Wolgast, *supra* note 6, at 192; CITIZEN’S GUIDE, *supra* note 18, at 38–39.

<sup>138</sup> EAB PRACTICE MANUAL, *supra* note 10, at 2–3, 7–10.

<sup>139</sup> Joseph J. Lisa, *EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice*, 24 TEMP. J. SCI. TECH & ENVTL. L. 1, 11 (2005); Wolgast, *supra* note 6, 193 (2010); *see also* CITIZEN’S GUIDE, *supra* note 18, at 12; Reich, *supra* note 6, at 41.

<sup>140</sup> Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653, 51,656 (Aug. 21, 2020) (to be codified at 40 C.F.R. § 1.25(3)).



Guidance Documents Governing Hearing-Level Adjudicators	[none]
Feedback to Adjudicators	[none]
Quality-Assurance Reviews and Related Mechanisms	[none]
Participation of Appellate Body in Substantive Rulemaking	[none]
Miscellaneous	[none]

### Miscellaneous

Alternative Dispute Resolution (ADR)	<p>The EAB “encourages parties to pursue all avenues of dispute resolution.”<sup>141</sup> Under its “opt-in” process, all parties must agree to participate in ADR.<sup>142</sup> An EAB Judge serves as a Settlement Judge assisted by a staff attorney. The Settlement Judge arranges for a status conference, the submission of issue summaries, and an initial ADR meeting.</p> <p>Parties who resolve their disputes through ADR sign a written document and file a joint motion for the EAB to dismiss the matter.</p> <p>The Settlement Judge or either party may terminate the ADR process and return the case to the EAB’s active docket. After the case is</p>
--------------------------------------	---

<sup>141</sup> EAB PRACTICE MANUAL, *supra* note 10, at 19, 56–57; CITIZEN’S GUIDE, *supra* note 18, at 28–29; *EAB at Twenty-Five*, *supra* note 34, at 5.

<sup>142</sup> EPA recently abandoned a proposal to establish a new “time-limited ADR process” for permit appeals which would convert the ADR program “from an opt-in process to an opt-out process” and would be “a precondition to judicial review.” Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,651 (Aug. 21, 2020); Modernizing the Administrative Exhaustion Requirement for Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,087 (Dec. 3, 2019).

	<p>returned, neither the Settlement Judge nor the staff counsel may participate in its disposition.<sup>143</sup></p> <p><b>CROP/Part 22 Rules</b> Parties frequently resolve their disputes at the hearing level through ADR. Parties who, in proceedings initiated at EPA headquarters, agree to settle an action before a hearing prepare a consent agreement and final order (“CAFO”) for the EAB’s signature.<sup>144</sup></p>
Participation of Appellate Body in Agency Decisions on Judicial Review	[none]
Role and Participation of Appellate Body in Writing Rules	There is no clear indication the EAB participates in substantive rulemaking. The EAB appears to have been involved in amending the rules that govern its procedures and practice. <sup>145</sup>
Miscellaneous	[none]

### PUBLICLY AVAILABLE CASE STATISTICS

Case statistics can be gleaned from the EAB’s website, which shows all active dockets and all dockets closed since March 1992. As of March 8, 2020, the website shows 13 active dockets and 11 dockets closed so far in FY 2020. The chart below displays the number of closed dockets for each of the last ten FYs.

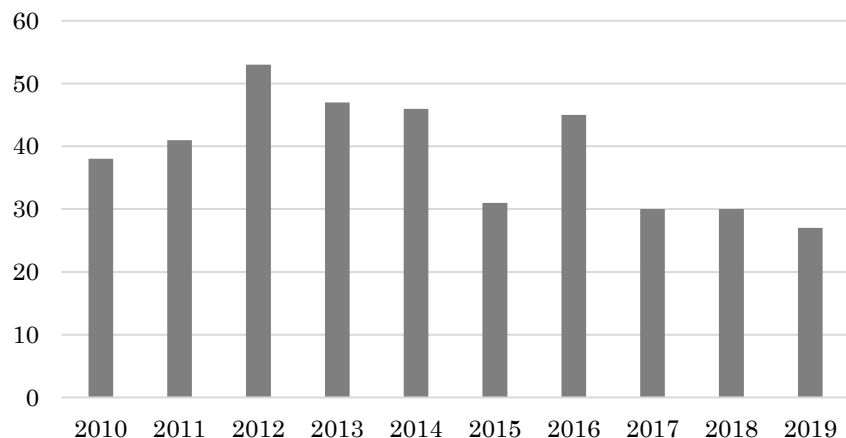
---

<sup>143</sup> Modernizing the Administrative Exhaustion Requirement for Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,087 (Dec. 3, 2019).

<sup>144</sup> 40 C.F.R. § 22.18(d); EAB PRACTICE MANUAL, *supra* note 10, at 35.

<sup>145</sup> See Revisions to Procedural Rules To Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281 (Jan. 25, 2013).

### EAB Closed Dockets by Fiscal Year



These numbers may not reflect the full extent of the EAB’s workload which, in addition to final dispositions, includes interlocutory decisions and rulings and orders on motions.

A recent study found that, at least since 2006, the EAB “has become more efficient over time in processing cases.” For the period from January 2006 to January 2019, the mean processing time was 5.5 months. From 2009 to the present, the average processing time is 3.6 months.<sup>146</sup>

### TREATISES AND SCHOLARSHIP OF NOTE

MICHAEL ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT* 143–49 (2019).

Aaron P. Avila, Mary Kay Lynch, Kathie A. Stein, Mary Beth Ward & Catherine Malinin Dunn, *The EPA’s Environmental Appeals Board at Twenty-Five: An Overview of the Board’s Procedures, Guiding Principles, and Record of Adjudicating Cases* (2017).

Nancy B. Firestone, *The Environmental Protection Agency’s Environmental Appeals Board*, 1 ENVTL. LAW. 1 (1994).

Nancy B. Firestone & Elizabeth C. Brown, *Ensuring the Fairness of Agency Adjudications: The Environmental Appeals Board’s First Four Years*, 2 ENVTL. LAW. 291 (1996).

William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?*, 49 ENVTL. L. REV. 737 (2019).

---

<sup>146</sup> Tzoumis, *supra* note 21, at 860.

Joseph J. Lisa, *EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 1 (2005).

Edward E. Reich, *EPA's New Environmental Appeals Board*, NAT. RESOURCES & ENV'T. 39 (Spring 1994).

William A. Tilleman, *Environmental Appeals Boards: A Comparative Look at the United States, Canada, and England*, 21 COLUM. J. ENVTL. L. 1 (1996).

Kelly Tzoumis & Emma Shibilski, *Environmental Decision-Making Through Adjudicatory Appeals in the United States*, 5 PEOPLE INT'L J. SOC. SCI. 846 (2019).

Richard R. Wagner, *The U.S. EPA Administrator's Assessment of Civil Penalties: A Review of the Sources of Authority and the Administrator's Regulations*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 149 (1997).

Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).

Anna L. Wolgast, Kathie A. Stein & Timothy R. Epp, *The United States' Environmental Adjudication Tribunal*, 3 J. CT. INNOVATION 185 (2010).

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

## APPENDIX I

### **Equal Employment Opportunity Commission: Review of Employment Discrimination Cases**

#### INTRODUCTION

Ending discrimination in the workplace remains a defining feature of the United States Equal Employment Opportunity Commission (EEOC). Created under the Civil Rights Act of 1964, the EEOC is the primary administrative agency tasked with policing discriminatory behavior. The Commission itself is made up of five Commissioners selected by the President with the advice and consent of the Senate, but only a maximum of three of those Commissioners can be of the same political party. The EEOC has investigating workplace discrimination in the United States since its inception.

While the EEOC has authority to investigate and identify discriminatory practices, it operates differently depending on the type of employer. Individuals may file complaints with the EEOC, but the type of employer determines the administrative procedures. For complaints against private sector employers, the EEOC does not subject parties to a complex agency adjudicatory system.<sup>1</sup> Instead, it investigates allegedly discriminatory conduct and makes recommendations on whether an individual—or the EEOC—should file a civil action against an employer in federal court.<sup>2</sup> With respect to discrimination by private employers, the EEOC has the authority to investigate allegations of discrimination and potentially file civil lawsuits on behalf of aggrieved individuals.<sup>3</sup>

---

<sup>1</sup> See 29 C.F.R. §1601.2 (borrowing the definition of “employer” from 42 U.S.C. §2000e(b) which means “any person engaged in an industry affecting commerce who has fifteen or more employees...” but does not include federal government agency employees).

<sup>2</sup> The EEOC has vast investigatory authority over private sector discrimination, *see* 29 C.F.R. §1601.15, but it cannot subject private sector employers to penalties upon a finding of discrimination. Instead the EEOC may commence a civil suit, or recommend that an individual file a civil suit, against the employer in question if there is a reason to file an employment discrimination claim. *See generally*, 29 C.F.R. §1601.6-.29. The Attorney General also may commence a civil suit against the employer if the EEOC recommends such action. *Id.*

<sup>3</sup> *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002).

When an individual alleges that a federal agency engaged in workplace discrimination, the EEOC procedures are different.<sup>4</sup> Judge Randolph Moss of the United States District Court for the District of Columbia accurately described these procedures in *Farrington v. Johnson*, 206 F.Supp.3d 634 (D.D.C. 2016). An employee of a federal agency who claims that his or her agency discriminated against him or her must first file a complaint with the employing agency.<sup>5</sup> The employing agency must then conduct an investigation into the matter and—if the employee requests a hearing as described in 29 C.F.R. §1614.106—refer it to an EEOC Administrative Judge (AJ) who then presides over the hearing.<sup>6</sup> Once either the agency concludes its investigation or the EEOC AJ issues a decision after the hearing, the employing agency must take final action with respect to the employee’s complaint.<sup>7</sup> If—in the case where an AJ issued a decision after a hearing—the employing agency’s final action does not “fully implement the decision” of the AJ, the employing agency must file an appeal with the EEOC’s appellate body, the Office of Federal Operations (OFO).<sup>8</sup> The employing agency’s final action must notify the employee of his or her right to appeal the final action to the OFO as well as his or her right to file a civil action in a federal district court.<sup>9</sup> The OFO, “on behalf of the [EEOC],” acts as the EEOC’s appellate authority.<sup>10</sup> The OFO “reviews the record, supplements it if necessary, and then issues a written decision.”<sup>11</sup>

The EEOC does not appear to have the same appellate review of agency decisions with respect to claims of private discrimination against private employers. When an individual files a claim against a federal agency employer, however, the EEOC’s internal appellate review looks like its counterparts. The OFO, acting as the EEOC’s “appellate arm,”<sup>12</sup> is a creature of regulation.<sup>13</sup> The OFO’s decisions bind federal agencies to the EEOC’s anti-discrimination policies. In both the private sector and the public sector—when the employer is a federal agency—an individual retains the right to sue his or her employer for a violation of anti-discrimination laws. The EEOC only has appellate authority when an aggrieved individual files a complaint against a federal agency employer.

---

<sup>4</sup> See Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies Over the Right to Interpret Federal Law*, 74 MISSOURI L. REV. 949, 974-76 (2009).

<sup>5</sup> *Id.* at 641 (citing C.F.R. §1614.106).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see 29 C.F.R. §1614.110 (describing a “final action”).

<sup>8</sup> *Id.* (quoting 20 C.F.R. §1614.110(a); see also 29 C.F.R. §1614.403 (describing how to appeal an AJ decision to the OFO)).

<sup>9</sup> 29 C.F.R. §1614.110(a).

<sup>10</sup> 29 C.F.R. §1614.404(a).

<sup>11</sup> *Farrington*, 206 F.Supp.3d at 641 (quoting *Scott v. Johanns*, 409 F.3d 466, 468 (D.C. Cir. 2005)).

<sup>12</sup> *Id.*

<sup>13</sup> 29 C.F.R. §1614.404(a).

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>The EEOC was created by Title VII of the Civil Rights Act of 1964.<sup>14</sup> Subsequent legislative amendments to Title VII and case law interpretations of the provision have expanded the EEOC’s investigative and enforcement authority.<sup>15</sup></p> <p>The EEOC has investigative and enforcement authority through statutory provisions under the C.F.R.<sup>16</sup> and U.S.C.<sup>17</sup> Enforcement provisions under 42 U.S.C. § 2000e-5 detail the procedural steps the EEOC must take to enforce anti-discrimination laws against an alleged offender.</p> <p>The EEOC provides guidance documents to assist staff during investigations.<sup>18</sup> Further, the EEOC Office of General Counsel provides a Regional Attorneys’ Manual that outlines procedures for investigations and enforcement.<sup>19</sup></p> <p>EEOC does not enforce certain discrimination and workplace laws.<sup>20</sup></p>
----------------	---

<sup>14</sup> See generally THE EQUAL EMP. OPPORTUNITY COMM’N, THE LAW (n.d.), <https://www.eeoc.gov/eeoc/history/35th/thelaw/index.html> (providing overview of laws governing EEOC authority).

<sup>15</sup> *Id.*

<sup>16</sup> See 29 C.F.R. § 1601.15 (providing for investigative authority).

<sup>17</sup> See 42 U.S.C.A. § 2000e-5 (providing for enforcement authority).

<sup>18</sup> See, e.g., THE EQUAL EMP. OPPORTUNITY COMM’N, COMPLIANCE MANUAL (n.d.), <https://www.eeoc.gov/laws/guidance/compliance.cfm> (detailing guidance for conducting investigations and assessing threshold issues for discriminatory practices).

<sup>19</sup> See generally OFF. GEN. COUNS., REGIONAL ATTORNEY’S MANUAL, THE EQUAL EMP. OPPORTUNITY COMM’N (April 2005), <https://www.eeoc.gov/eeoc/litigation/manual/index.cfm>.

<sup>20</sup> See generally THE EQUAL EMP. OPPORTUNITY COMM’N, WORKPLACE LAWS NOT ENFORCED BY THE EEOC (n.d.), <https://www.eeoc.gov/laws/other.cfm>.

Substantive Law	<p>The EEOC enforces federal laws that prohibit employment discrimination against statutorily protected classes.<sup>21</sup> Under 42 U.S.C. § 2000e-14, the EEOC has the authority to create policies and practices for the institutions under its authority to minimize instances of employment discrimination.<sup>22</sup> The EEOC promulgates substantive and procedural regulations incorporated annually into Title 29 of the C.F.R.<sup>23</sup> These regulations provide guidance on identifying discrimination in investigations.<sup>24</sup> The EEOC also provides Commission Decisions, which function as case law by the EEOC based on the facts of particular cases.<sup>25</sup></p> <p>The EEOC also provides a compliance manual for staff to advise them on substantive law issues during investigation and enforcement.<sup>26</sup></p>
Miscellaneous	[none]

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	Parties must allege they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information. <sup>27</sup>
------------------------------------	--

<sup>21</sup> See generally THE EQUAL EMP. OPPORTUNITY COMM'N, STATUTES AND REGULATIONS (n.d.), <https://www.eeoc.gov/federal/adr/statutes.cfm> (summarizing statutes enforced by EEOC).

<sup>22</sup> 42 U.S.C.A. § 2000e-14.

<sup>23</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, EEOC REGULATIONS (n.d), <https://www.eeoc.gov/laws/regulations/index.cfm>.

<sup>24</sup> *Id.*

<sup>25</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, COMMISSION DECISIONS (n.d.), <https://www.eeoc.gov/laws/decisions/index.cfm>.

<sup>26</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL (n.d.), <https://www.eeoc.gov/policy/docs/threshold.html>.

<sup>27</sup> 29 C.F.R. § 1614.105(a).



Nature of Hearing-Level Proceedings	An administrative judge presides over hearings for the EEOC. <sup>28</sup> Hearings may include discovery, witness testimony (limited to those having direct knowledge of the complaint, at the judge's discretion). <sup>29</sup>
Nature of Hearing-Level Decision	The administrative law judge issues a written determination of the decision within 180 days of receipt of the complaint. <sup>30</sup> This decision is the final agency action. <sup>31</sup>
Transfer of Case to Appellate Body After Hearing-Level Decision	Decisions are transferred to the appellate division when a claimant files an appeal with the Office of Federal Operations (OFO). <sup>32</sup>
Miscellaneous	All reconsiderations by the Office of Federal Operations are final. <sup>33</sup>

#### **Identity of Reviewing/Appellate Authority and Its Legal Status**

Reviewing Authority(ies)	Appeals are reviewed by the OFO, <sup>34</sup> unless issue had not previously been decided upon, in which case it is reviewed by the Commission. <sup>35</sup> In reviewing appeals, the OFO acts on behalf of the Commission. <sup>36</sup>
Legal Status of Reviewing Authority(ies)	The Commission was established by statute. <sup>37</sup>

<sup>28</sup> 29 C.F.R. § 1614.109(a).

<sup>29</sup> See 29 C.F.R. § 1614.109(d)-(f).

<sup>30</sup> 29 C.F.R. § 1614.109(i).

<sup>31</sup> *Id.*

<sup>32</sup> 29 C.F.R. § 1614.403(a).

<sup>33</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, REQUESTING RECONSIDERATION OF AN APPEAL (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/reconsideration.cfm](https://www.eeoc.gov/federal/fed_employees/reconsideration.cfm).

<sup>34</sup> 29 C.F.R. § 1614.404(a).

<sup>35</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

<sup>36</sup> 29 C.F.R. § 1614.404(a).

<sup>37</sup> See 42 U.S.C.A. § 2000e-4(a) (providing for EEOC powers).

Miscellaneous	Before an aggrieved party requests a hearing with an EEOC Administrative Judge, the employing agency must dismiss an appeal based on certain regulatory standards. <sup>38</sup>
---------------	--

**Institutional Attributes of Appellate/Reviewing Authority(ies)**

Number of Members	<p>The Commission consists of five members, “not more than three of whom shall be members of the same political party,” appointed by the President and confirmed by the Senate.<sup>39</sup></p> <p>According to a Freedom of Information Act (FOIA) request, the OFO Appellate Review Section, which adjudicates appeals, consists of:</p> <ul style="list-style-type: none"> <li>• 2 Attorney Advisors;</li> <li>• 10 Supervisory General Attorneys;</li> <li>and</li> <li>• 36 General Attorneys.<sup>40</sup></li> </ul> <p>The Director of the OFO oversees the Appellate Review Section as well as the other sections. The other sections, according to this FOIA request, consist of:</p> <ul style="list-style-type: none"> <li>• The Federal Sector Programs Section which is tasked with overseeing federal sector EEOC complaint process;<sup>41</sup></li> <li>• The Compliance and Control Division which monitors agency compliance with OFO orders;<sup>42</sup> and</li> <li>• The Special Services Staff which assists agencies with the OFO’s</li> </ul>
-------------------	--

<sup>38</sup> 29 C.F.R. § 1614.107(a)(1)-(8),

<sup>39</sup> 42 U.S.C.A. § 2000e-4(a).

<sup>40</sup> See Equal Employment Opportunity Commission Office of Federal Operations, *OFO Organization Assessment-October 2014* (2014), [https://www.governmentattic.org/34docs/EEOC-OFOorgAssess\\_2014.pdf](https://www.governmentattic.org/34docs/EEOC-OFOorgAssess_2014.pdf). The information from this document describes the OFO as of 2014. Each attorney listed in the Appellate Review Section is listed according to their General Schedule (GS) pay rank and title. Some attorneys in the Appellate Review Section have similar job titles but are separated only by their GS rank.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

	alternative dispute resolution programs.
Qualification Requirements	The Commission cannot have more than three members of the same political party. <sup>43</sup>  There is no public information on qualifications for OFO members.
Party Affiliation Requirement in Appointment	Individual membership does not have a party requirement, but no more than three of the members may be from the same party. <sup>44</sup>  There is no public information on this point for the OFO.
Method of Appointment	Members are appointed by the President with the advice and consent of the Senate, and the President designates the Commission's Chairman and Vice Chairman. <sup>45</sup>  There is no public information on the appointment methods of the OFO. <sup>46</sup>
Term of Appointment	Members of the Commission serve for five years. <sup>47</sup>  There is no public information on the length of service for the OFO.
Statutory Removal Protections	The Commission has removal authority for administrative law judges. <sup>48</sup> There do not appear to be statutory removal provisions for Commission members.

---

<sup>43</sup> 42 U.S.C.A. § 2000e-4(a).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> One scholar does note, however, that OFO attorneys “are not given life tenure” and are thus subject to the same hiring and firing criteria as most federal sector attorneys. *See* Modesitt, *supra* note 3, at 994.

<sup>47</sup> 42 U.S.C.A. § 2000e-4(a).

<sup>48</sup> *Id.*

Location within Agency; Basis of Legal Authority	The Commission has the final decision-making authority within the statute. <sup>49</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	Under the Reorganization Plans of 1978, the Commission may delegate preliminary determinations of discrimination to the Civil Service Commission, but the Commission retains the final determination of such issues. <sup>50</sup>
Quorum Requirement	Three members present for the Commission constitutes a quorum.  There is no public information on quorum requirements within the OFO.
Authority and Function of Appellate Authority's Head	The Commission's Chairman does not have specific adjudicative authority. The Chairman's purpose is administrative, including appointing officers, agents, attorneys, administrative law judges, and employees necessary to assist in facilitating the performance of their functions. <sup>51</sup>
Internal Management Structure of Appellate Authority	N/A
Miscellaneous	[none]

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	Aggrieved parties have the right to appeal a final agency action to the OFO. <sup>52</sup> A final
---	--

<sup>49</sup> See *id.*

<sup>50</sup> REORGANIZATION PLAN NO. 1 OF 1978, 43 F.R. 19807, 92 Stat. 3781 ("The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination . . .")

<sup>51</sup> 42 U.S.C.A. § 2000e-4(a).

<sup>52</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

	judgment is an order issued pursuant to 28 U.S.C. § 1292(a)(1) or 1292(b). <sup>53</sup>
How Appeal Initiated	Appeals are filed through the EEOC Public Portal or by submitting it to the OFO. <sup>54</sup>
Time For Appealing	Appeals must be filed within 30 days of the agency's final action. <sup>55</sup>
If No Appeal Taken from Hearing Officer's Decision	The Commission may dismiss appeals based on statutorily enumerated standards. <sup>56</sup> EEOC lawyers review all requests for appeal and the decision issued by the OFO is the official position of the EEOC. If no appeal is taken, the party can ask for a reconsideration based on a "clearly erroneous" interpretation. The decision on reconsideration is final. <sup>57</sup> A party can file a lawsuit in federal court within 90 days of the EEOC's decision on appeal. <sup>58</sup>
If Appeal Taken	EEOC attorneys review the entire file and findings of the administrative law judge and issue a decision regarding relief that is binding on the relevant agency. <sup>59</sup> EEOC will issue a decision on the appeal within 90 days of receipt of the appeal. <sup>60</sup> A party can file a

<sup>53</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, OFFICE OF GENERAL COUNSEL APPEAL PROCEDURES: CERTIFICATION OF AN INTERLOCUTORY ORDER UNDER 28 U.S.C. § 1292(b) (n.d.), [https://www.eeoc.gov/eeoc/litigation/manual/3-5-a\\_ogc\\_appeal\\_procedures.cfm#section1](https://www.eeoc.gov/eeoc/litigation/manual/3-5-a_ogc_appeal_procedures.cfm#section1).

<sup>54</sup> See 29 C.F.R. § 1614.403(a); see also THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

<sup>55</sup> See 29 C.F.R. § 1614.402(a); see also THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

<sup>56</sup> See, e.g., 29 C.F.R. § 1614.403(c); 29 C.F.R. § 1614.409.

<sup>57</sup> THE EQUAL EMP. OPPORTUNITY COMM'N, REQUESTING RECONSIDERATION OF AN APPEAL (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/reconsideration.cfm](https://www.eeoc.gov/federal/fed_employees/reconsideration.cfm).

<sup>58</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, FILING A LAWSUIT IN FEDERAL COURT (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/lawsuit.cfm](https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm).

<sup>59</sup> THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

<sup>60</sup> 29 C.F.R. § 1614.405(b).

	lawsuit in federal court within 90 days of the EEOC's decision on appeal. <sup>61</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	The Commission can reopen any decision through its own action. <sup>62</sup>
Miscellaneous	[none]

### Appellate Authority's Procedures

Record on Review	EEOC attorneys review the agency investigation, decision of the Administrative Judge, hearing transcript, and statements by parties to the appeal. <sup>63</sup> EEOC does not consider new evidence unless that evidence was not reasonably available at the time of the original agency decision. <sup>64</sup>
Submissions by Parties in Support of Appeal	Claimants may file briefs within 30 days of filing the notice to appeal. <sup>65</sup> Likewise, the agency may file a brief in support of its decision within 20 days of filing the appeal. <sup>66</sup>
Issue Preservation	Claimants may appeal agency final decisions, procedural decisions, and mixed case complaints. <sup>67</sup> Issues not raised may still be

<sup>61</sup> THE EQUAL EMP. OPPORTUNITY COMM'N, FILING A LAWSUIT IN FEDERAL COURT (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/lawsuit.cfm](https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm).

<sup>62</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm) (citing *Parnell v. Dep't of Veterans' Affairs*, EEOC Request No. 0520100031 (Dec. 7, 2009)).

<sup>63</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm); see also THE EQUAL EMP. OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>64</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

<sup>65</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

	considered adjudicated under the doctrine of res judicata. <sup>68</sup>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	Generally, the record from the hearing level is considered complete, absent some showing that it much be supplemented to “avoid a miscarriage of justice.” <sup>69</sup>
Standard of Review	These appeals are reviewed <i>de novo</i> , unless they are findings of fact by an Administrative Judge. <sup>70</sup> Those findings of fact are based on a substantial evidence standard of review. <sup>71</sup>
Consultation with Staff and Other Agency Officials	The Commission delegates appeal reviews to the OFO. <sup>72</sup> OFO staff are present at numerous levels of the appeals process. <sup>73</sup>
Oral Argument	There is scarce evidence of oral arguments for EEOC appeals. There is some evidence at the hearing level that the administrative judge may request the claimants present oral statements, but it is not required. <sup>74</sup>
Amicus Participation; Intervention; etc.	There is no public evidence that amicus briefs or intervention are permitted during the appeals process.

<sup>68</sup> See <https://www.eeoc.gov/federal/digest/xiv-4.cfm#res> (discussing effect of res judicata on issues); see *Bezelik v. National Security Agency*, EEOC Request No. 05A11104 (May 8, 2003).

<sup>69</sup> See THE EQUAL EMP. OPPORTUNITY COMM’N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>70</sup> 29 C.F.R. § 1614.405(a)

<sup>71</sup> 29 C.F.R. § 1614.405(a); see also THE EQUAL EMP. OPPORTUNITY COMM’N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>72</sup> 29 C.F.R. § 1614.404(a).

<sup>73</sup> See THE EQUAL EMP. OPPORTUNITY COMM’N, FEDERAL SECTOR QUALITY PRACTICES FOR EFFECTIVE HEARINGS, APPEALS, AND OVERSIGHT (n.d.), <https://www.eeoc.gov/federal/quality-practices.cfm> (detailing staff’s communication with claimants, review of records, review of management directives, and other tasks as required).

<sup>74</sup> The Equal Emp. Opportunity Comm’n, *An Overview of the EEO Process in the Federal Sector*, 20 THE DIGEST OF EQUAL EMP. OPPORTUNITY L. 2 (2009), <https://www.eeoc.gov/federal/digest/xx-2.cfm> (“At the close of testimony the AJ may ask or direct the parties to present oral or written closing statements.”)

Public Access to Hearings	Federal sector hearings are closed to the public. <sup>75</sup>
Staff's Role in Writing Decisions	There is no indication there are limits on the OFO's role in assisting the Commission in drafting opinions.
Deadlines for Decision	The EEOC has 180 days to complete investigations. <sup>76</sup> The Commission has 90 days to accept or dismiss a class complaint. <sup>77</sup> There is no indication there is a set timeline for appeals decisions.
Nature of Decision	Appeals decisions provide an appropriate remedy pursuant to 29 C.F.R. § 1614, subpart E. <sup>78</sup> This remedy is mandatory and binding on the relevant agency. <sup>79</sup>
Reconsideration, Rehearing, etc.	A claimant may request a reconsideration within 30 days of receiving the appellate decision, after which their brief must be filed within 20 days. <sup>80</sup> Reconsiderations are permitted for "clearly erroneous interpretation[s] of material fact or law" or decisions that "will have a substantial impact on the policies, practices, or operations of the agency." <sup>81</sup>
Miscellaneous	[none]

## Other Case-Management Features

<sup>75</sup> *Id.*

<sup>76</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, FEDERAL SECTOR QUALITY PRACTICES FOR EFFECTIVE HEARINGS, APPEALS, AND OVERSIGHT (n.d.), <https://www.eeoc.gov/federal/quality-practices.cfm>.

<sup>77</sup> 29 C.F.R. § 1614.405(b).

<sup>78</sup> 29 C.F.R. § 1614.501-.505; see also THE EQUAL EMP. OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 29 C.F.R. § 1614.405(c).



Interlocutory Appeals: Availability, Procedures, Standard	Available cases appear to indicate that interlocutory appeals by the EEOC are allowed. <sup>82</sup>
Assignment of Cases	No publicly available document addresses the assignment of cases, including the delegation of decision-making authority to OFO and Commission members.
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	The Commission and the Office of Federal Operations' procedures do not provide for aggregation. However, appeals will be consolidated and considered simultaneously when the agency and claimant file appeals based on the same complaint. <sup>83</sup>
Miscellaneous	[none]

### Form of Decisions, Publication, and Precedential Status

Form of Decision	OFO, on behalf of the Commission, issues a written decision. <sup>84</sup>
Signed or Per Curiam	Decisions are issued on behalf of the Commission and, in effect, per curiam. <sup>85</sup>  OFO decisions always contain the name of the Director. <sup>86</sup>

<sup>82</sup> See, e.g., *EEOC v. Caterpillar*, 409 F.3d 831, 833 (7th Cir. 2005); *EEOC v. Stanley Automotive Enterprises, Inc.*, No. 5-07CV0206-C (5th Cir).

<sup>83</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>84</sup> 29 C.F.R. § 1614.405(a).

<sup>85</sup> See *id.*

<sup>86</sup> *Sylvia Farrington v. Janet Napolitano*, EEOC Appeal No. 0720090011 (January 19, 2011) (decision signed by OFO Director Carlton M. Hadden); *Kathleen A. Carle v. Sean C. O'Keefe*, EEOC Appeal No. 01922369 (January 5, 1993) (decision signed by OFO Director Ronnie Blumenthal).

Dissents	There are no public official dissenting opinions. <sup>87</sup>
Publication	EEOC appeals are available online through the EEOC's portal. <sup>88</sup> The EEOC also publishes a list of "notable" decisions that it periodically updates. <sup>89</sup>
Where Published	EEOC appeals are available online through the EEOC's portal. <sup>90</sup>
Precedential Status	Decisions are binding on the applicable parties. <sup>91</sup> Decisions are issued based on EEOC precedent from prior decisions. <sup>92</sup>
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The EEOC provides guidance documents for charges filed with the Commission to determine cognizable claims, cover parties, and other threshold requirements. <sup>93</sup>
Feedback to Adjudicators	There is no public information about providing feedback to the adjudicators.

<sup>87</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, APPEALS (n.d.), [https://www.eeoc.gov/federal/fed\\_employees/appeal.cfm](https://www.eeoc.gov/federal/fed_employees/appeal.cfm).

<sup>88</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, FEDERAL SECTOR APPELLATE DECISIONS (n.d.), <https://www.eeoc.gov/federal/decisions.cfm>.

<sup>89</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, SELECTED NOTEWORTHY FEDERAL SECTOR APPELLATE DECISIONS (n.d.), [https://www.eeoc.gov/federal/selected\\_decisions.cfm](https://www.eeoc.gov/federal/selected_decisions.cfm).

<sup>90</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, FEDERAL SECTOR APPELLATE DECISIONS (n.d.), <https://www.eeoc.gov/federal/decisions.cfm>.

<sup>91</sup> THE EQUAL EMP. OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (n.d.), [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_9.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_9.cfm).

<sup>92</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, FEDERAL SECTOR QUALITY PRACTICES FOR EFFECTIVE HEARINGS, APPEALS, AND OVERSIGHT (n.d.), <https://www.eeoc.gov/federal/quality-practices.cfm>.

<sup>93</sup> See *generally* THE EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL (n.d.), <https://www.eeoc.gov/policy/docs/threshold.html#2-II-A-1-a>.

Quality-Assurance Reviews and Related Mechanisms	There is no public information about quality-assurance measures taken within the EEOC adjudications. Moreover, the Quality Guidelines published by the Commission expressly state that adjudicative proceedings are generally not covered by the quality assurance guidelines. <sup>94</sup>
Participation of Appellate Body in Substantive Rulemaking	The Commission promulgates substantive rules detailing different discriminatory actions covered under its purview. <sup>95</sup>
Miscellaneous	[none]

**Miscellaneous**

Alternative Dispute Resolution (ADR)	EEOC requires all agencies develop ADR programs that promote fairness by being voluntary, confidential, enforceable, and led by a neutral party. <sup>96</sup>
Participation of Appellate Body in Agency Decisions on Judicial Review	Nothing in the EEOC's action is intended to affect a person's right to judicial review. <sup>97</sup>

<sup>94</sup> THE EQUAL EMP. OPPORTUNITY COMM'N, GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (n.d.), <https://www.eeoc.gov/eeoc/plan/informationquality/qualityguidelines.cfm> ("Examples of information generally NOT covered by these guidelines include . . . [i]nformation collected in or relating to the EEOC's administrative and adjudicative processing . . . .")

<sup>95</sup> See, e.g., 29 C.F.R. § 1604.1-.11 (guidelines on discrimination based on sex); 29 C.F.R. § 1605.1-.3 (guidelines on discrimination based on religion); 29 C.F.R. § 1606.1-.8 (guidelines on discrimination based on national origin).

<sup>96</sup> See THE EQUAL EMP. OPPORTUNITY COMM'N, ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN THE FEDERAL SECTOR (n.d.), <https://www.eeoc.gov/federal/digest/xii-1-3.cfm>.

<sup>97</sup> See 29 C.F.R. § 1614.407 (describing right to file a claim for relief in district court under Title VII).

Role and Participation of Appellate Body in Writing Rules	The EEOC has the authority to issue rules, regulations, orders, and instructions for compliance to federal agencies. <sup>98</sup>
Miscellaneous	[none]

### PUBLICLY AVAILABLE CASE STATISTICS

In Fiscal Year (FY) 2018, the EEOC received 76,418 charges of workplace discrimination.<sup>99</sup> The majority of charges were for retaliation (51.6%), sex (32.3%), and disability discrimination (32.2%).<sup>100</sup> From these charges, EEOC filed 199 lawsuits on behalf of complainants, bringing the total number of cases on its docket to 302 cases at the end of the fiscal year.<sup>101</sup> EEOC had successful outcomes in 95.7% of its cases.<sup>102</sup> In FY 2019, the EEOC caseload decreased slightly to 72,675 charges of workplace discrimination.<sup>103</sup> A majority of these charges were for retaliation (53.8%), racial discrimination (33%), and sex discrimination (32.4%).<sup>104</sup>

### TREATISES AND SCHOLARSHIP OF NOTE

Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies Over the Right to Interpret Federal Law*, 74 MISSOURI L. REV. 949 (2009).

**Commented [S1]:** Will likely want to add some more sources here.

<sup>98</sup> See generally 42 U.S.C.A. § 2000e-4 (providing for authority and powers of the Equal Employment Opportunity Commission).

<sup>99</sup> THE EQUAL EMP. OPPORTUNITY COMM'N, EEOC RELEASES FISCAL YEAR 2018 ENFORCEMENT AND LITIGATION DATA (April 10, 2019), <https://www1.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> The Equal Emp. Opportunity Comm'n, Charge Statistics (Charges filed with the EEOC) FY 1997 Through FY 2019, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>104</sup> *Id.*

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**APPENDIX J**

**MERIT SYSTEMS PROTECTION BOARD**

**INTRODUCTION**

The Merit Systems Protection Board (“MSPB”)<sup>1</sup> is principally an adjudicatory agency<sup>2</sup> vested by statute with both original jurisdiction and appellate jurisdiction over a number of different types of claims arising from federal agencies’ personnel actions. The overwhelming number of cases adjudicated by the MSPB arise under its appellate jurisdiction.<sup>3</sup>

Original-jurisdiction cases—few in number—are those in which the MSPB adjudicates a federal employee’s (or applicant’s) claim in the first instance. The MSPB’s original jurisdiction extends to only four types of actions: (1) those brought against an agency by the Office of the Special Counsel to remediate, among other things, the agency’s retaliation against a whistleblower; (2) those brought by the Special Counsel, among things, to discipline an employee for

---

<sup>1</sup> “MSPB” is used here to refer to the agency as a whole. “Board” is used to refer to the three-member board that sits atop the agency and serves as its final adjudicative decision-maker. As explained below, the Board hears appeals from decisions of the MSPB’s hearing-level adjudicators.

<sup>2</sup> See 5 C.F.R. § 1200.1 (“The [MSPB] is an independent Government agency that operates like a court.”); see also 5 U.S.C. § 1204(a) (describing MSPB’s powers and functions as adjudicatory). Federal law also assigns MSPB limited non-adjudicatory functions. See 5 U.S.C. § 1204(a). They include reviewing the validity of certain rules of the Office of Personnel Management (OPM). See 5 U.S.C. § 1204(f). For an overview of the MSPB, see JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RES. SERV., MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW (2019) [hereinafter CRS].

<sup>3</sup> See CRS, *supra* note 2, at 1. In FY 2016, 98% of the cases decided by the Board (1,154 of 1,178) arose under the MSPB’s appellate jurisdiction. See MSPB, ANNUAL REPORT FOR FY 2016 (2017), <https://www.mspb.gov/publicaffairs/annual.htm>. That was the last complete fiscal year in which the Board had a quorum. It has not had a quorum since January 1, 2017, and hence has not decided any cases since then. See *id.* at 1. The MSPB’s hearing-level adjudicators continue to decide cases. See *id.* at 1, 13. See generally CRS, *supra* note 2, at 15–16.

engaging in certain prohibited personnel actions; (3) those brought against an agency by a member of the Senior Executive Service challenging his/her removal from the Service; and (4) those brought by an agency to discipline or remove an administration law judge (ALJ).<sup>4</sup> Hearings in original jurisdiction cases held before an MSPB administrative judge or (as is sometimes required) an ALJ.<sup>5</sup> They result in initial decisions that,<sup>6</sup> with one relatively minor exception, are appealable to the Board under the procedures governing appellate cases discussed below.<sup>7</sup>

Appellate-jurisdiction cases are those in which a federal employee petitions the MSPB to review an adverse decision by his/her employing agency following a very informal adjudication—that is, an adjudication in which a hearing is not required by statute.<sup>8</sup> The MSPB’s appellate jurisdiction covers a number of different types of cases arising under the federal civil service laws.<sup>9</sup>

They include, most notably, cases in which an agency takes an adverse action of particular seriousness—termination being the most serious of them—against a civil service employee.<sup>10</sup> Its appellate jurisdiction also covers (although the MSPB’s rules do not specifically denominate them as either “original” or “appellate”<sup>11</sup>) agency decisions otherwise appealable to the MSPB as an adverse action in which an employee alleges that his/her employing agency has discriminated on the basis race, sex, disability status, or some other federally protected characteristic.<sup>12</sup> These cases are commonly called “mixed cases.”<sup>13</sup>

---

<sup>4</sup> See 5 C.F.R. § 1201.2. For an overview, see CRS, *supra* note 2, at 6–9.

<sup>5</sup> Cases in which an ALJ, rather than an administrative judge, presides over a hearing include those in which the Special Counsel challenges an agency’s disciplinary action against an employee. See 5 C.F.R. § 1201.125.

<sup>6</sup> See 5 C.F.R. pt. 1201, subpt. D.

<sup>7</sup> See *id.* § 1201.125(b) (special counsel disciplinary cases against agency employee); *id.* § 1201.131(b) (special counsel corrective action cases against agency); *id.* § 1201.137 (action against ALJ).

<sup>8</sup> See 5 U.S.C. § 7513(b)–(c).

<sup>9</sup> See *id.* § 7701; 5 C.F.R. § 1201.3. Section 1201.3 lists the main types of cases.

<sup>10</sup> See 5 U.S.C. § 7512; 5 C.F.R. 1201.3(a); see also *Kloeckner v. Solis*, 568 U.S. 41, 44 (“The Civil Service Reform Act of 1978 (CSRA), 5 U. S. C. §1101 et seq., establishes a framework for evaluating personnel actions taken against federal employees. If (but only if) the action is particularly serious—involving, for example, a removal from employment or a reduction in grade or pay—the affected employee has a right to appeal the agency’s decision to the MSPB, an independent adjudicator of federal employment disputes. See §§1204, 7512, 7701.”) “Most” of the cases appealed to the MSPB involve adverse actions against employees. *Jurisdiction*, MSPB, <https://www.mspb.gov/About/jurisdiction.htm> (last visited Mar. 10, 2020).

<sup>11</sup> See 5 C.F.R. pt. 1201, subpt. E; see also 5 U.S.C. § 7702.

<sup>12</sup> See 5 U.S.C. § 7702.

<sup>13</sup> See, e.g., *Kloeckner*, 568 U.S. at 44.

An appellate case<sup>14</sup> begins with an employee's filing of an "appeal" of his/her agency's informal adjudicative decision (known as a "decision notice").<sup>15</sup> After a trial-like evidentiary hearing (though not one governed by the formal hearing provisions of the Administrative Procedure Act<sup>16</sup>) before a non-ALJ adjudicator called an "administrative judge," the judge issues an "initial decision."<sup>17</sup> (A very small number of cases are heard before administrative law judges.<sup>18</sup>)

The initial decision becomes the Board's final decision within 35 days of issuance unless a petition for review is filed.<sup>19</sup> The Board may deny the petition, in which case the administrative judge's initial decision becomes the Board's final decision (although it is not precedential), or grant the petition (or a cross-petition from the other party), in which case it will issue a final decision itself.<sup>20</sup> (A rule of practice, described below, sets forth the criteria for granting a petition.)

MSPB decisions are subject to judicial review under a somewhat unique system. Mixed cases aside, most final MSBP decisions are subject to review only in the U.S. Court of Appeals for the Federal Circuit.<sup>21</sup> The exception are cases involving alleged retaliation against whistleblowers and similar unlawful actions. They may be filed, at the petitioner's election, in either the Federal Court or "any court of appeals of competent jurisdiction."<sup>22</sup> (The judicial-review statutes confers the right to seek review not only an employee (or applicant for employment) adversely affected by a final Board order, but also OPM when it determines that the Board "erred in interpreting a civil service law or regulation "affecting personnel management" and the interpretation "will have a substantial impact on such a law or regulation (including a "policy directive").<sup>23</sup>)

One important feature of the judicial review system is that an employee can, in effect, bypass the Board altogether and appeal an MSPB administrative judge's decision directly to the Federal Circuit (or, in a whistleblower case,

---

<sup>14</sup> The hearing procedures for appellate cases are set forth in 5 C.F.R. pt. 1201, subpt B. There are special provisions for hearings in certain kinds of appellate cases. *See, e.g., id.* § 1209 (whistleblowing cases). Appeals to the Board in those cases are governed by the rules, *see id.* pt. 1201, subpt. C, described below. *See, e.g., id.* § 1209.3 (providing that whistleblower cases are subject to the subpart C review rules).

<sup>15</sup> *See* 5 C.F.R. § 1201.21–22.

<sup>16</sup> *See* 5 U.S.C. §§ 554, 556–557.

<sup>17</sup> 5 C.F.R. § 1201.111.

<sup>18</sup> For a list, *see id.* § 1200(g)(2).

<sup>19</sup> *See id.* § 1201.33.

<sup>20</sup> *See id.*

<sup>21</sup> *See* 5 U.S.C. § 7703(b)(1)(A).

<sup>22</sup> *Id.* § 7703(b)(1)(B).

<sup>23</sup> *Id.* § 7703(d). At least so long as OPM intervened in the case before the Board or, if it did not, petitioned the Board unsuccessfully for reconsideration. *See id.* On the procedures and time limits governing review, *see id.* § 7703(a)(1), (b)(1), (d)(1).

another circuit). That is because the administrative judge’s decision “become[s] the Board’s final decision” within 35 days of its issuance unless the employee seeks Board review,<sup>24</sup> and the administrative exhaustion provision of the MSPB’s rules do not require a petition for Board review.<sup>25</sup> This is an especially important feature at time when, as noted above, the Board does not have a quorum and hence cannot review initial decisions.

In mixed cases, the claimant may seek review of an MSPB decision before the Equal Employment Opportunity Commission.<sup>26</sup> If the claimant does not seek EEOC review or the EEOC declines to review the MSPB’s decision, the decision is subject to judicial review (de novo)<sup>27</sup> in a United States district court.<sup>28</sup>

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

NOTE: The following table covers the appeal of “appellate cases” from hearing-level adjudicators (usually administrative judges) to the three-member Board. As noted above, other cases are appealed under the same or similar procedures.

**Governing Law**

Procedural Law	<p>Board appellate procedures are governed by statute, C.F.R.-codified procedural rules, and precedential Board decisional law.<sup>29</sup></p> <p>There are no guidance documents governing the adjudicative activities of the Board.<sup>30</sup></p> <p>There are some explanatory materials on the Board’s website for litigants.<sup>31</sup></p>
----------------	---

<sup>24</sup> 5 C.F.R. § 1201.113.

<sup>25</sup> See *id.* § 1201.113(e).

<sup>26</sup> See 5 U.S.C. § 7702(b)(1); see also 5 C.F.R. § 1201.161.

<sup>27</sup> See 5 U.S.C. § 7703(a)(3); see also 5 C.F.R. §§ 1201.161–162.

<sup>28</sup> See 5 U.S.C. 7703(b)(2).

<sup>29</sup> See *id.* § 1204; 5 C.F.R. pt. 1201, subpt. C. (main appellate procedures); see also *supra* note 14 (noting the application of the subpart C appellate rules to other types of cases).

<sup>30</sup> The MSPB does maintain a handbook for administrative judges governing hearing-level procedures. See MSPB, JUDGES’ HANDBOOK (2019), <https://www.mspb.gov/appeals/appeals.htm>. The “Handbook is designed to provide supplemental guidance to the Board’s rules. The procedures in this Handbook are not mandatory, and adjudicatory error is not established solely by failure to comply with a provision of this Handbook.” *Id.* at 1.

<sup>31</sup> See, e.g., *How to File an Appeal*, MSPB, <https://www.mspb.gov/appeals/appeals.htm> (last visited March 10, 2020).



Substantive Law	<p>The substantive law is provided by various statutes (Civil Service Act, federal anti-discrimination laws), and rules promulgated by other agencies, including OPM.</p> <p>The Board’s rules are all fairly characterized as procedural.<sup>32</sup></p>
Miscellaneous	The Board may not issue advisory opinions. <sup>33</sup>

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	The Board reviews decisions of (non-ALJ) adjudicators called “administrative judges” and a very small number of decisions of administrative law judges (ALJs).
Nature of Hearing-Level Proceedings	Hearing-level proceedings held before administrative judges in appellate cases are trial-like adjudications required by statute but not governed by the formal hearing provisions of the APA (i.e., Type B cases). <sup>34</sup>
Nature of Hearing-Level Decision	The administrative judge issues at an initial decision after the record closes. <sup>35</sup> The initial decision must contain, among other things, “findings of act and conclusions of law upon all the material issues of fact and law presented on the record”; the reasons for the findings and conclusions; and an order “making final disposition of the case, including appropriate relief.” <sup>36</sup>
Transfer of Case to Appellate Body After Hearing-Level Decision	The administrative judge’s decision either becomes the Board’s final decision, or, if review is granted by the Board (see below), it is placed on the Board’s docket. In either

<sup>32</sup> See 5 C.F.R. ch. II. On the Board’s rulemaking authority, see 5 U.S.C. § 1204(h).

<sup>33</sup> See 5 U.S.C. § 1204(h).

<sup>34</sup> See 5 C.F.R. p. 1201.

<sup>35</sup> See *id.* § 1201.11(a).

<sup>36</sup> *Id.* § 1201.11(b).

	case, the administrative judge retains jurisdiction for only very limited purposes. <sup>37</sup>
Miscellaneous	“Initial decisions are not precedential.” <sup>38</sup>

### **Identity of Reviewing/Appellate Authority and Its Legal Status**

Reviewing Authority(ies)	Administrative judge’s decisions are reviewed directly by the Board. (There is no intermediate appellate adjudicator.) <sup>39</sup>
Legal Status of Reviewing Authority(ies)	The Board is established by statute as the agency’s final decision-making authority. <sup>40</sup>
Miscellaneous	[none]

### **Institutional Attributes of Appellate/Reviewing Authority(ies)**

Number of Members	The Board is composed of three members. One serves as the chairman and another as the vice chairman. <sup>41</sup> (See also rows below.)
Qualification Requirements	Board members must be “individuals who, by demonstrated ability, training, or experience are especially qualified to carry out the functions of the Board.” <sup>42</sup>
Party Affiliation Requirement in Appointment	Not more than two Board members may be “adherents of the same political party.” <sup>43</sup>
Method of Appointment	Members of the Board are appointed by the President with the advice and consent of the Senate. One member is appointed by the President, with the advice and consent of the

<sup>37</sup> See *id.* § 1201.112.

<sup>38</sup> *Id.* 1201.113.

<sup>39</sup> See *id.* §§ 1201.33; pt. 1201, subpt. C.

<sup>40</sup> See 5 U.S.C. § 7701–7702.

<sup>41</sup> See *id.* § 1201; 5 C.F.R. § 1200.2.

<sup>42</sup> 5 U.S.C. § 1201.

<sup>43</sup> *Id.*

	Senate, as the chairman; <sup>44</sup> another member is designated by the President as the vice chairman. <sup>45</sup>
Term of Appointment	Members are appointed for seven year terms. <sup>46</sup> They may serve on holdover status upon the expiration of their terms for a specific duration specified by statute. <sup>47</sup>
Statutory Removal Protections	The President may remove a Board member “only for inefficacy, neglect of duty, or malfeasance.” <sup>48</sup>
Location within Agency; Basis of Legal Authority	The Board sits at the top the MSPB as the final decisionmaker. <sup>49</sup> It is established by statute. <sup>50</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	There is no such authority (with respect to the Board’s appellate adjudicative functions). <sup>51</sup> Decisions are by majority vote. <sup>52</sup> See also “Miscellaneous” below.
Quorum Requirement	A quorum consists of two members. <sup>53</sup> See also “Miscellaneous” below.
Authority and Function of Appellate Authority’s Head	By statute, the Chairman is the chief executive and administrative officer of the Board. <sup>54</sup> Neither statute nor regulation, however, provides for any special adjudicative authority for the chairman.
Internal Management Structure of Appellate Authority	N/A. The Board does not sit in panels.

<sup>44</sup> See *id.* § 1203(a).

<sup>45</sup> See *id.* § 1203(b); 5 C.F.R. § 1200.2.

<sup>46</sup> See 5 U.S.C. § 1202(a); 5 C.F.R. § 1200.2.

<sup>47</sup> See 5 U.S.C. § 1202(c). On the filling of vacancies, see *id.* § 1202(c).

<sup>48</sup> *Id.* § 1202(d).

<sup>49</sup> See *id.* § 1204.

<sup>50</sup> See *id.* § 1201.

<sup>51</sup> See 5 C.F.R. § 1200.3(b).

<sup>52</sup> *Id.* § 1200.3(a).

<sup>53</sup> See *id.* § 1200.3(3).

<sup>54</sup> See 5 U.S.C. § 1203(a).

Miscellaneous	If, for any reason (e.g., recusal), the Board “members are unable to decide any case by majority vote”—assuming a quorum of two members (see above)—the administrative judge’s decision becomes the final decision of the Board. <sup>55</sup> The decision is not precedential. <sup>56</sup>
---------------	--

### Nature, Form, and Timing of Appeal

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	<p>The review of an initial decision is discretionary with the Board. MSPB rules provide a non-exhaustive list of “situations in which the Board may grant review”: “the initial decision contains erroneous findings of material fact” (that is, an outcome-determinative error); the initial decision is based on an outcome-determinative “erroneous interpretation of statute or regulation or . . . application of the law to the facts of the case”; the administrative “judge’s rulings during either the course of the appeal [i.e., the hearing] or the initial decisions were not consistent with required procedures or an involved an abuse of discretion and the resulting error affected the outcome of the case”; or “[n]ew and material evidence or legal argument is available that, despite the petitioner’s due diligence, was not available when the record [before the judge] closed.”<sup>57</sup></p> <p>“Notwithstanding” the above list, “the Board reserves the authority to consider any issue in an appeal before it.”<sup>58</sup></p>
---	---

<sup>55</sup> *Id.* 5 C.F.R. § 200.3(b). If, as a result of vacancy, recusal, or otherwise, the Board members cannot decide a “matter in case that does not involve a decision, recommendation or order, the Chairman may” refer the “matter to an administrative judge or other official for final disposition.” *Id.* § 12003(c).

<sup>56</sup> *Id.* § 1200.3(d).

<sup>57</sup> *Id.* § 1201.115(a).

<sup>58</sup> *Id.* § 1201.115(e).

	When the petitioner seeks review of an evidentiary determination, “there must be at least enough specified in the petition to enable the Board to ascertain whether there may be a serious evidentiary question justifying a complete review of the record. . . . Before the Board will undertake the burden of a complete review of the record, the petitioning party must, as the regulation plainly states, explain in the petition why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error.” <sup>59</sup>
How Appeal Initiated	An appeal is initiated by a petition for review or a cross-petition for review. <sup>60</sup> A petition for review is a “pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.” <sup>61</sup>
Time For Appealing	Subject to a technical exception, an appeal in the form of a petition for review must be filed within 35 days after the issuance of the initial decision. <sup>62</sup> A cross petition must be filed within 25 days of service of the petition for review.” <sup>63</sup>
If No Appeal Taken from Hearing Officer’s Decision	If no petition for review is filed within the 35-day time period, the administrative judge’s

<sup>59</sup> *How to File an Appeal (The Petition for Review Process)*, MSPB, <https://www.mspb.gov/appeals/appeals.htm> (lasted visited Aug. 16, 2020) (modifications in original) (quoting *Weaver v. Dept. of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982).

<sup>60</sup> *See* 5 C.F.R. § 1201.114(a). “No specific format is required for filing a petition for review.” *How to File an Appeal (The Petition for Review Process)*, MSPB, <https://www.mspb.gov/appeals/appeals.htm> (lasted visited Aug. 16, 2020).

<sup>61</sup> *Id.* § 1201.114(a)(1). “A cross petition for review . . . is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review.” *Id.* § 1201.114(a)(2).

<sup>62</sup> *See id.* § 1201.114(e).

<sup>63</sup> *Id.* The Board may extend the time to file a pleading upon the filing of a motion showing “good cause.” *Id.* § 1201.114(f). Any untimely pleading must be accompanied by a motion “that shows good cause for the untimely filing.” *Id.* § 1201.114(g). Even in the “absence of a motion,” however, the Board “may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the late filer an opportunity to show why the filing “should not be dismissed or excluded as untimely.” *Id.*

	initial decision “becomes the Board’s final decision 35 days after issuance.” <sup>64</sup>
If Appeal Taken	The initial decision does not become final if any part files a petition for review, <sup>65</sup> subject to the following: If the petition is denied: The initial decision “will not become the Board’s final decision” unless and until the Board “issues its last decision denying” the petition. <sup>66</sup> If the petition is granted: “If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.” <sup>67</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	The Board may hear an appeal on its own initiative—that is, in the absence of a petition for review. <sup>68</sup>
Miscellaneous	<i>Administrative remedies:</i> They are “exhausted when a decision becomes final[].” <sup>69</sup>  <i>Who may seek review?</i> A party to the proceedings before the administrative judge as well OPM, but in the latter case only if OPM believes the decision is “erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM’s jurisdiction.” <sup>70</sup> The Special Counsel may also sometimes seek review under a specific statutory provision. <sup>71</sup>

<sup>64</sup> *Id.* § 1201.113.

<sup>65</sup> *See id.* § 1201.113(a). Nor will the decision become final if, in the absence of a petition for review, any party “files a request that the initial be vacated” so that an of-record settlement agreement can be accepted. *Id.*

<sup>66</sup> *Id.* § 1201.113(b).

<sup>67</sup> *Id.* § 1201.113(c).

<sup>68</sup> *See* 5 U.S.C. § 7701(e)(1).

<sup>69</sup> 5 C.F.R. § 1201.113(e).

<sup>70</sup> *Id.* § 1201.114(c).

<sup>71</sup> *Id.* (citing 5 U.S.C. 1212(c)).

	<i>Authority of single board member:</i> A single board member may grant a petition for review or direct that a case be reviewed. <sup>72</sup>
--	---

### Appellate Authority’s Procedures

Record on Review	The rules do not specify the contents of the record.
Submissions by Parties in Support of Appeal	<p>The Board allows only the following submissions (unless it orders otherwise upon the filing of a motion<sup>73</sup>)—all called “pleadings”: a petition for review, a cross-petition for review, a response to a cross petition for review, and a reply to a petition for review.<sup>74</sup></p> <p>A petition for cross petition for review “states a party’s objection to the initial decision, including all of the party’s legal and factual arguments.”<sup>75</sup></p> <p>The Board may order the filing of briefs.<sup>76</sup></p>
Issue Preservation	MSPB rules do not address the issue.
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	As noted above, one situation that may warrant board review is the availability of “[n]ew and material [documentary] evidence . . . that, despite the petitioner’s due diligence, was not available when the record [at the hearing level] closed. To constitute new evidence the information contained in the documents, not just the documents themselves, must have been unavailable

<sup>72</sup> See 5 U.S.C. § 7701(e)(1).

<sup>73</sup> See 5 C.F.R. § 1201.114 (a)(5).

<sup>74</sup> See *id.* § 1201.114(a). A cross petition for review may be contained in the same document as a response to a petition for review. *Id.* § 1201.114(a)(3). A reply to a response to a petition “is limited to the factual and legal issues raised by another party” in response to the petition. *Id.* § 1201.114(a)(4). On the form of the submissions, see *id.* § 1201.114(h). That section notes that “a well-written petition . . . is between 5 and 10 pages.” *Id.*

<sup>75</sup> *Id.* § 1201.114(b).

<sup>76</sup> See *id.* § 1201.117(a)(3).

	<p>despite due diligence when the record closed.”<sup>77</sup></p> <p>Any such new documentary evidence should appear in a petition (or cross-petition) before the Board.<sup>78</sup> The petition “must explain “why the evidence or argument was not presented before the record below closed.”</p> <p>The record in Board-level proceeding closes at the at the conclusion of the petition-for-review stage. “No additional evidence . . . will be accepted unless it is new and material”—under the above definition—and the submitting party “shows” that it was not available when the record before the Board closed.”<sup>79</sup></p>
Standard of Review	<p>Neither statute nor rules provide for a standard of review. Under Board case law, review is basically de novo, except with respect to demeanor-based credibility determinations, which receive deference.<sup>80</sup></p> <p>See also above (“Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance”).</p>
Consultation with Staff and Other Agency Officials	<p>The MSPB has an Office of Appeals Counsel that “prepared proposed decision that recommend appropriate action by the Board”</p>

<sup>77</sup> *Id.* § 1201.115(d).

<sup>78</sup> *Id.* § 1201.114(b).

<sup>79</sup> *Id.* 1201.114(k).

<sup>80</sup> See *Weaver v. Department of the Navy*, 2 M.S.P.R. 297, 298–99 (1980) (“[I]n reviewing an initial decision, this Board is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning. . . . The presiding officials have no independent statutory jurisdiction. Under this statutory scheme, it would not be appropriate for the Board to apply customary standards of appellate review, such as “clearly erroneous” or “arbitrary or capricious,” to the findings of fact set forth in the initial decisions of its own employees.” [But when] when questions of credibility are presented, due deference must necessarily be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses.”). When the Board rejects demeanor-based credibility determinations, it must supply “sound” reasons for doing so. *Haebe v. Dept. of Justice*, 288 F.3d 1288 (Fed. Cir. 2002).



	in, among other cases, “petition for review cases.” <sup>81</sup>
Oral Argument	The Board may order oral argument. <sup>82</sup>
Amicus Participation; Intervention; etc.	<p>By statute, OPM and Special Counsel may intervene as of right, through a notice of intervention, as follows:</p> <p>By statute, OPM’s may intervene whenever it “is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation” under OPM’s jurisdiction.<sup>83</sup> (The MSPB must promptly notify . . . [OPM] whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue.”<sup>84</sup>)</p> <p>By statute, OPM must, if it wishes to participate, do so “as early in the proceeding as practicable.”<sup>85</sup> MSPB rules provide that OPM must do so within 45 days of the date a petition for review is filed, unless, upon OPM’s motion, the Board provides additional time.<sup>86</sup></p> <p>The Special Counsel “may as a matter of right intervene or otherwise participate in any proceeding before the . . . [MSBP].”<sup>87</sup> In certain cases, though, the Special Counsel may only do so with the consent of the federal employee who filed the case.”<sup>88</sup></p>

<sup>81</sup> 5 C.F.R. § 1200.10(b)(2).

<sup>82</sup> *See id.* § 1201.117(a)(2).

<sup>83</sup> 5 U.S.C. § 7701(d)(1); *see also* 5 C.F.R. § 1201.114(i)(1).

<sup>84</sup> 5 U.S.C. § 7701(d)(2).

<sup>85</sup> *Id.* § 7701(d)(1)(B).

<sup>86</sup> 5 C.F.R. § 1201.114(I).

<sup>87</sup> 5 U.S.C. § 1221(c); 5 C.F.R. § 1201.114(i)(2).

<sup>88</sup> *See* 5 U.S.C. § 1221(c)(2); 5 C.F.R. § 1201.114(i)(2).

	<p>If OPM or the Special Counsel files a notice of intervention, a party to the case may file a response within 15 days.<sup>89</sup></p> <p>MSPB rules also provides for permissive intervention: Any “person, organization, or agency . . . may ask for permission to intervene.” So, too, may a person alleged to have committed a “prohibited personnel practice under 5 U.S.C. § 2302(b).”<sup>90</sup></p> <p>The Board’s appellate rules do not provide for amicus participation, but its hearing-level rules do, and those rules are seemingly applicable to appeals before the Board. They provide than an amicus (defined as a “person or organization who, although not a party to an appeal, gives advice or suggestions”) “may seek permission to file a brief,” even if the amicus does not “qualify as [an] intervenor[]; that the “Board may solicit amicus briefs on its own motion”; and that the Board may allow an amicus to participate in oral argument.”<sup>91</sup></p>
Public Access to Hearings	No statute or rule address public access to hearings.
Staff’s Role in Writing Decisions	Neither statute nor rule addresses this subject.
Deadlines for Decision	None is provided for by statute or rule.
Nature of Decision	The Board may, among other things, “[i]ssue a decision that decides the case”; “[r]emand the appeal so that the judge may take further testimony or evidence or making further findings of fact”; or “[t]ake any other action necessary for final disposition of the case.” <sup>92</sup>

<sup>89</sup> 5 C.F.R. § 1201.114(i).

<sup>90</sup> *Id.* § 1201.114(i)(3).

<sup>91</sup> *Id.* § 1201.34.

<sup>92</sup> *Id.* § 1201.117.

	<p>When issuing a decision, the Board may “affirm, reverse, modify, or vacate the initial decision of the judge, in whole or in part. The Board may issue a final decision and, when appropriate, order a date for compliance.”<sup>93</sup></p>
<p>Reconsideration, Rehearing, etc.</p>	<p>The Board “may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board’s final decision by operation of law.”<sup>94</sup> The Board will exercise this “discretion . . . only in unusual or extraordinary circumstances and generally within a short time after the decision becomes final.”<sup>95</sup></p> <p>OPM may, within 35 days after the Board’s final decision, petition the Board to reconsider the decision if OPM “determines” that the Board “erred in interpreting a civil service law, rule or regulation affecting personnel management,” or the Board’s “decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.”<sup>96</sup> OPM’s petition may be accompanied by a request to stay the Board’s decision pending the Board’s reconsideration.<sup>97</sup></p>
<p>Miscellaneous</p>	<p><i>Closing of the appellate record:</i> The record on appeal to the Board closes upon the filing of the “response to the petition for review or on expiration of the period for filing a response to the cross petition for review, whichever is later, or the brief on intervention, if any, or any other date the Board sets for this purpose.”<sup>98</sup> Upon the closing of the record, the Board will not accept any “additional</p>

<sup>93</sup> *Id.* § 1201.117(b).

<sup>94</sup> *Id.* § 1201.118.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 1201.119(c). The criteria is set forth in 5 U.S.C. § 7703(d). On the procedures governing an OPM petition for reconsideration, see 5 C.F.R. § 1201.119(c).

<sup>97</sup> *See* 5 C.F.R. § 1201.119(d).

<sup>98</sup> *See id.* § 1201.114(k).

	evidence or argument . . . unless it is new and material” and the submitting party “shows” that it was not “readily available before the record closed.” <sup>99</sup>
--	--

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	An administrative judge may certify a ruling for interlocutory appeal, either on the motion of a party or his/her own motion, <sup>100</sup> but “only if the record shows that” the “ruling involves an important question of law or policy about which there is substantial ground for difference of opinion” and “an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.” <sup>101</sup>  The Board “will” decide any certified issue. <sup>102</sup>
Assignment of Cases	No publicly available document addresses the assignment of cases.
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	The rules governing hearing-level decisions provide for “class appeals”; <sup>103</sup> the rules governing appeals to the Board do not.
Miscellaneous	By statute, “any member of the Board may request” from OPM “an advisory opinion concerning the interpretation of any rule,

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 1201.91.

<sup>101</sup> *Id.* § 1201.92. On the procedures governing a request for certification before a judge, see *id.* § 1201.93. There are no special rules governing the disposition of an interlocutory appeal before the Board.

<sup>102</sup> *Id.* § 1201.91.

<sup>103</sup> *See id.* § 1201.27.

	regulation, or other policy directive promulgated by [OPM].” <sup>104</sup>
--	---

### Form of Decisions, Publication, and Precedential Status

Form of Decision	The Board writes its own, judicial-like opinion independent of the administrative judge’s decision. Compare, e.g., Appendix – NLRB.
Signed or Per Curiam	Decisions are issued under the names of all members in the majority. They are, in effect, per curiam.
Dissents	Like a circuit-court judge, a Board member may write a dissenting or concurring opinion.
Publication	Board decisions are published.
Where Published	Decisions are published in the Merit Systems Protection Board Reporter. <sup>105</sup> All decisions are available on the MSPB’s website.
Precedential Status	<p>The Board’s decision may designate its decisions as precedential, which takes the form of an “Opinion or Order”; or non-precedential, which takes the form of an “Order.”<sup>106</sup></p> <p>A precedential decision “may be appropriately cited and referred to by any party” in a case.<sup>107</sup></p> <p>MSPB rules explain the reason for designating certain decisions as non-precedential and their effect as follows:</p>

<sup>104</sup> 5 U.S.C. § 12014(e)(1)(A).

<sup>105</sup> *MSPB Decisions*, MSPB, <https://www.mspb.gov/decisions/decisions.htm> (last visited Aug. 16, 2020).

<sup>106</sup> 5 C.F.R. § 1201.117(c); *see also id.* § 1201.117(c)(1).

<sup>107</sup> *Id.* § 1201.117(c)(1).

	<p>“A nonprecedential Order is one that the Board has determined does not add significantly to the body of MSPB case law. The Board may, in its discretion, include in nonprecedential Orders a discussion of the issue(s) to assist the parties in understanding the reason(s) for the Board's disposition in a particular appeal. Nonprecedential Orders are not binding on the Board or its administrative judges in any future appeals except when it is determined they have a preclusive effect on parties under the doctrines of <i>res judicata</i> (claim preclusion), collateral estoppel (issue preclusion), judicial estoppel, or law of the case. Parties may cite nonprecedential Orders, but such orders have no precedential value; the Board and its administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law.”<sup>108</sup></p>
Miscellaneous	<p>In select case, MSPB staff prepares and publishes on the MSPB website “case reports.” They summarize Board decisions, and federal-court decisions reviewing them, of particular importance. Among other things, each report concisely summarizes a decision's holding. The case reports on the MSPB's website go back to 2007.<sup>109</sup></p>

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The Board does not issue guidance documents governing hearing-level adjudications.
---	--

<sup>108</sup> *Id.* § 1201.120(c)(2).

<sup>109</sup> *See Case Reports*, MSPB, <https://www.mspb.gov/decisions/casereports.htm> (last visited Aug. 16, 2020).

Feedback to Adjudicators	N/A
Quality-Assurance Reviews and Related Mechanisms	N/A
Participation of Appellate Body in Substantive Rulemaking	N/A
Miscellaneous	[none]

**Miscellaneous**

Alternative Dispute Resolution (ADR)	N/A
Participation of Appellate Body in Agency Decisions on Judicial Review	N/A
Role and Participation of Appellate Body in Writing Rules	N/A: As noted above, the Board is the agency's rulemaking authority.
Miscellaneous	[none]

## PUBLICLY AVAILABLE CASE STATISTICS

As noted above, the Board has not had a quorum since January 2017. The last fiscal year in which the Board had a quorum for the entirety of the year was FY 2016. In that year, the Board received petitions for review of initial decisions in 652 cases (excluding so-called furlough cases arising from a government shutdown). The Board granted review in 15 percent of cases and denied review in 75 percent. (The other cases were settled or disposed of in some other way.)<sup>110</sup> Of the cases in which the Board granted review, it remanded the case to the hearing-level adjudicator in 89 percent of cases, reversed the initial decision in 4 percent of cases, and affirmed the initial decision in 4% of cases.<sup>111</sup>

By comparison, in FY 2015, the Board received petitions for review of initial decisions in 826 cases (again, excluding furlough cases). It denied review in 75 percent cases and granted review in 15% of cases.<sup>112</sup> Of the cases in which the Board granted review, it remanded in 75% cases, reversed in 13% of cases, and affirmed in 9% of cases.<sup>113</sup>

## TREATISES AND SCHOLARSHIP OF NOTE<sup>114</sup>

Michael Baddanow & Thomas Lanphear, *History of the Merit Systems Protection Board*, 4 FED. CIR. HIST. SOC'Y 109 (2010)

PETER BROIDA, A GUIDE TO THE MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (35th ed. 2018).

JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RES. SERV., MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW (2019)

ROBERT G. VAUGHN, MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES (2015)

---

<sup>110</sup> See MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FY 2016 29 (2017), <https://www.mspb.gov/publicaffairs/annual.htm>.

<sup>111</sup> See *id.* 30.

<sup>112</sup> See MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FY 2015 29 (2016), <https://www.mspb.gov/publicaffairs/annual.htm>.

<sup>113</sup> See *id.* 30.

<sup>114</sup> There is little scholarship on the Board's procedural law or system.



Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**APPENDIX K**

**National Labor Relations Board:  
Review of ALJ Decisions in Unfair Labor Practice Cases**

**INTRODUCTION**

Under the National Labor Relations Act (NLRA or Act), the National Labor Relations Board (NLRB or Board<sup>1</sup>) adjudicates allegations made by its General Counsel that an employer or labor organization violated the Act by committing an unfair labor practice—say, by failing to bargain collectively in good faith or discriminating against employees because of their union membership.<sup>2</sup> Adjudicative proceedings begin when the NLRB’s General Counsel—a presidentially appointed, Senate confirmed official independent of the Board—files a complaint against an employer or labor organization as the respondent. (Complaints must be supported by an unfair labor practice charge.)

The respondent employer or union is entitled to a formal (APA) hearing before an administrative law judge (ALJ). The ALJ issues a decision on the complaint that includes findings of fact, conclusions of law, and (if the ALJ finds a violation) a proposed remedy (most commonly an order that the respondent cease and desist from the conduct that gave rise to the violation).

Both the General Counsel and the respondent may appeal the ALJ’s decision by filing “exceptions” with the Board. (There is no intermediate appellate body.) Final Board disposition usually consists of the issuance of a “decision and

---

<sup>1</sup> “NLRB” is used here when referring to the agency as a whole, including its independent General Counsel (and his/her large staff) and the Division of Judges (that is, of ALJs). “Board” is used here to refer to the five-member board within the agency that has final adjudicative authority.

<sup>2</sup> The docket number for these cases (sometimes referred to as “ULP Cases”) include the letters “CA.” The NLRB also adjudicates, among other things, disputes involving union representation (sometimes referred to as “R Cases”). The docketed number for R Cases include the letters “RC.” Sometimes the Board addresses, in a consolidated-case appeal, both a ULP case and an R-case, because they are factually and procedurally intertwined. This overview is limited to CA cases.

order” that either (1) dismisses the complaint or (2) finds the respondent in violation of the Act and provides for an appropriate remedy. A Board order adverse to the respondent is not self-enforcing. The Board must seek enforcement in the U.S. Court of Appeals. The D.C. Circuit hears the majority of appeals.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>Appellate procedures are governed by the NLRA<sup>3</sup> and C.F.R.-codified procedural rules (called rules of practice),<sup>4</sup> as interpreted by the Board in precedential decisions.</p> <p>There are no guidance documents (including interpretive rules) governing the adjudicative activities of the Board.<sup>5</sup></p> <p>The NLRB’s Office of the Executive Secretary publishes online explanatory materials for the public,<sup>6</sup> and the Board’s General Counsel publishes a case-handling manual governing the litigating activities of his/her staff.<sup>7</sup></p>
Substantive Law	<p>The NLRA provides the substantive law. Largely alone among federal agencies, the Board makes policy almost exclusively through a common-law-like, case-by-case adjudicative process; with a few discrete exceptions, the NLRB does not issue</p>

<sup>3</sup> National Labor Relations Act (NLRA), as amended, 29 U.S.C. §§ 151–169. Original section numbers from the NLRA, accompanied by U.S. Code section numbers, are used below. It is customary to refer statutory provisions by using their original NLRA section numbers.

<sup>4</sup> 29 C.F.R. §§ 102.46–51.

<sup>5</sup> For an argument that the Board should issue guidance documents, see Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice & Comment Rulemaking*, 27 CARDOZO L. REV. 1117 (2005).

<sup>6</sup> See NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES (2017). [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019).

<sup>7</sup> NLRB GENERAL COUNSEL, NLRB CASEHANDLING MANUAL, PT. 1, UNFAIR LABOR PRACTICE PROCEEDINGS (2019), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/ulp-chm-may-2019.pdf> (last visited May 20, 2019).

	<p>legislative rules,<sup>8</sup> although it does have the statutory authority to do so.<sup>9</sup> As a result, Board decisions rely heavily on large body of precedential decisions that reside in sequentially numbered bound reporters that date back to the agency’s establishment in 1936. (See below for elaboration.)</p> <p>There are no guidance documents (including interpretive rules) governing the adjudicative activities of the Board.</p>
Miscellaneous	[none]

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	The Board reviews decisions of ALJs adjudicating unfair-labor-practice complaints issued by the General Counsel. <sup>10</sup>
Nature of Hearing-Level Proceedings	Proceedings before ALJs are subject to the formal hearing provisions of the APA (Type A under the Asimow typology).
Nature of Hearing-Level Decision	The ALJ issues a “decision” with “findings of fact, conclusions of law, and the reasons or grounds” for them, as well as “recommendations for the proper disposition of the case.” If the ALJ finds a violation, the

<sup>8</sup> See, e.g., NLRB, DECISIONS, <https://www.nlr.gov/news-outreach/graphs-data/decisions> (last visited July 24, 2019) (“The Board sets policy for the Agency primarily through adjudication.”); James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 234 (2005); Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991). Some commentators have argued that the Board should issue rules, if only to codify existing doctrines that reside in its decisions. See, e.g., Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board’s Unfair Labor Practice Decisions thorough the Clinton and Bush II Years*, 37 BERK. J. OF EMP. & LAB. L. 223, 288 (2016); Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking v. Adjudication*, 64 EMORY L.J. 1469 (2015); Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescription, at the NLRB*, 5 FLA. INT’L L. REV. 347, 359 (2010).

<sup>9</sup> NLRA § 6, 29 U.S.C. § 156.

<sup>10</sup> See NLRA § 10(c), 29 U.S.C. § 160(c); 29 C.F.R. § 102.46–48.

	decision must include a recommended remedy (“affirmative action”). <sup>11</sup>
Transfer of Case to Appellate Body After Hearing-Level Decision	The ALJ files the decision with the Board. The Board then enters an order transferring the case to itself. <sup>12</sup>
Miscellaneous	The Board may, after the issuance of a complaint by the General Counsel, transfer the case to itself or one of its members for a hearing and other proceedings rather than having it proceed before an ALJ. <sup>13</sup> That is rarely, if ever, done.

### Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	ALJ decisions are reviewed directly the Board. There is no intermediate appellate body.
Legal Status of Reviewing Authority(ies)	The Board is established by statute as the agency’s final decisionmaking authority. <sup>14</sup>
Miscellaneous	[none]

### Institutional Attributes of Appellate/Reviewing Authority(ies)

Number of Members	The Board consists of five members. One is designated by the President to serve as chair. <sup>15</sup>
Qualification Requirements	The NLRA does not provide for any qualification requirements.

<sup>11</sup> 29 C.F.R. § 102.45(a); *see also* NLRA, § 10(c), 29 U.S.C. § 160(c) (providing the if “the evidence is presented . . . before an administrative law judge . . . , such judge . . . shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board”).

<sup>12</sup> *Id.* § 102.45(a). On the content of the record, *see id.* § 102.45(b).

<sup>13</sup> *See* § 29 C.F.R. § 102.50. This is consistent with the APA. *See* 5 U.S.C. § 556(b) (providing that evidence may be “taken” by the agency, “one or more of its members,” or an ALJ).

<sup>14</sup> *See* NLRA § 10, 29 U.S.C § 160.

<sup>15</sup> NLRA § 3(a), 29 U.S.C. § 153.

Party Affiliation Requirement in Appointment	The NLRA does not provide for any party-affiliation requirements. <sup>16</sup>
Method of Appointment	Members of the Board are appointed by the President with the advice and consent of the Senate. <sup>17</sup>
Term of Appointment	Members of the Board are appointed for five-year terms. <sup>18</sup>
Statutory Removal Protections	The NLRA provides that the President may remove a Board member for “for neglect of duty or malfeasance in office, but for no other cause.” <sup>19</sup>
Location within Agency; Basis of Legal Authority	The Board sits at the top of the agency as the final decisionmaker. It is established by statute.
Authority to Delegate to Subunit(s); Designating Official and Process	The NLRA allows the Board to delegate its authority to three of its members. <sup>20</sup> [Identify designating official.]
Quorum Requirement	Three members of the Board constitute a quorum, unless the Board delegates its authority to three-member “group” (panel), in which case two members constitute a quorum (by statute). <sup>21</sup> The Board often does.  An important qualification: If the Board delegates its authority to a three-member group, all three members of the group must

<sup>16</sup> In practice, however, the appointment process has become highly partisan and ideologically oriented. Candidates are often nominated in “packages” agreed upon in advance between the President and Senate leaders/committee chairs. *See, e.g., Semet, supra* note \_\_\_\_, at 232.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> NLRA § 3, 29 U.S.C. § 153.

<sup>20</sup> *See* NLRA § 3(b), 29 U.S.C. § 153(c) (“The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise.”).

<sup>21</sup> *See id.* (“A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.”).

	remain on the Board for the delegation to remain valid. Hence, for example, if the Board delegates its authority to a three-member group and one departs the Board, the two remaining members may not act on behalf of the Board, notwithstanding the two-member quorum requirement. <sup>22</sup>
Authority and Function of Appellate Authority's Head	Neither the NLRA nor Board regulations vest any particular adjudicative authority in the Board's chairman. [Confirm.]
Internal Management Structure of Appellate Authority	N/A
Miscellaneous	[none]

### **Nature, Form, and Timing of Appeal**

Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance	The NLRA provides for an appeal as of right from any ALJ decision. Either the General Counsel or the respondent may appeal. <sup>23</sup>
How Appeal Initiated	Appeals are initiated by the filing of "exceptions" to the ALJ's decision. See below.
Time For Appealing	Exceptions must be filed within 28 days (unless the Board allows additional time) of the order transferring the case to the Board (see above). <sup>24</sup> Cross-exceptions must be filed within 14 days "from the last date on which exceptions . . . may be filed." <sup>25</sup>

<sup>22</sup> See *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010).

<sup>23</sup> See 29 C.F.R. § 102.46.

<sup>24</sup> 29 C.F.R. § 102.46(a).

<sup>25</sup> *Id.* § 102.46(c); see also NLRA § 10(c), 29 U.S.C. § 160(c) (providing that exceptions must be filed within 20 days after service or "within such further period as the Board may authorize").

If No Appeal Taken from Hearing Officer’s Decision	In the absence of timely exceptions, the ALJ’s decision and order becomes the Board’s decision and order. <sup>26</sup>
If Appeal Taken	The “Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board member or other Board agent or agency, or otherwise dispose of the case.” <sup>27</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	Neither the NLRA nor the Board’s procedural rules provide for review of an ALJ’s decision in the absence of an appeal by a party.
Miscellaneous	[none]

### Appellate Authority’s Procedures

Record on Review	The record consists of, among other things, the complaint, transcript of the hearing, documentary evidence, the ALJ’s decision, and any exceptions to it. <sup>28</sup>
Submissions by Parties in Support of Appeal	The appealing party files detailed “exceptions” to the ALJ’s “decision” (whether to its findings fact, conclusions of law, or procedural rulings); or, if other party has filed “exceptions,” the appealing party files “cross-exceptions.” Exceptions may be accompanied by a supporting brief. The party opposing the exceptions may file an answering brief, to which any party may file a reply brief. <sup>29</sup> (If a brief is filed, the

<sup>26</sup> The statute and the regulations are written a bit differently, but the import is the same. The statute provides that, in the absence of exceptions, the ALJ’s “recommended order” (which must be accompanied by a “report”) becomes the “order of the Board.” NLRA § 10(c), 29 U.S.C. § 160(c). The Board’s regulation provides that, in the absence of exceptions, “the findings, conclusions and recommendations” in the ALJ’s “decision . . . automatically become the decision and order of the Board and become its findings, conclusions, and order.” 29 C.F.R. § 102.48(a). When timely exceptions are not filed, “all objections and exceptions must be deemed waived.” *Id.*

<sup>27</sup> *Id.* § 102.48(b)(2).

<sup>28</sup> *Id.* 102.45(b).

<sup>29</sup> NLRA § 10(c), 29 U.S.C. § 160(c); 29 C.F.R. § 102.46.

	<p>exceptions may not contain any “argument” or “citations” to supporting authorities. They must appear only in the brief.<sup>30)</sup></p> <p>A party may call a post-briefing supplemental authority to the Board’s attention,<sup>31</sup> generally by letter.<sup>32</sup></p>
Issue Preservation	If a party fails to “except” to any “matter,” it may not raise it with the Board. <sup>33</sup>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	The Board may “take further testimony.” <sup>34</sup> It does not generally do so, but rather relies on the record in the ALJ proceedings. <sup>35</sup>
Standard of Review	The standard of review of ALJ decisions is de novo, both as to conclusions of law and findings of fact. <sup>36</sup> The exception: credibility determinations: Under long-standing precedent, the Board defers to credibility determinations unless “the clear preponderance of all the relevant evidence convinces . . . [it] that they are incorrect.” <sup>37</sup>

<sup>30</sup> 29 C.F.R. § 102.46(b)(2).

<sup>31</sup> 29 C.F.R. § 102.6.

<sup>32</sup> See NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 38–39 (2017). [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019).

<sup>33</sup> 29 C.F.R. § 102.46(f).

<sup>34</sup> NLRA § 10(c), 29 U.S.C. § 160(c). According to the Board’s procedural regulations, “the Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board member, or other Board agent or agency, or otherwise dispose of the case.” 29 C.F.R. § 102.48(b)(1). *But see* NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 38 (2017) [add parenthetical].

[https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019) (providing that, under 29 C.F.R. § 102.48(b), the Board decides cases “based on the record”).

<sup>35</sup> NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 36, 38 (2017). [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019).

<sup>36</sup> [citation]

<sup>37</sup> *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd* 188 F.2d 362 (3d Cir. 1951). The Board invariably cites *Standard Dry Wall* as the basis of the rule. *See, e.g.*, *Jamaica Car Wash*, 365 N.L.R.B. No. 106, slip op. at 1 n.1 (2017). *See generally* Semet, *supra* note \_\_\_\_\_, at 237 (noting that, under Board case law, “the Board has virtually no discretion to upset the credibility or factual judgments of the NLRB”). Professor Semet’s statement of the law is correct with respect to



Consultation with Staff and Other Agency Officials	A member may consult only with his/her legal “assistant” and other Board members about the ALJ decision under review. <sup>38</sup> (The NLRA also includes an explicit prohibition on consultation with an ALJ whose decisions is under review. <sup>39</sup> )
Oral Argument	Either party may request oral argument. Oral argument is discretionary with Board. If oral argument is allowed, each participating party gets 30 minutes. <sup>40</sup> The Board “rarely” allows oral argument. <sup>41</sup>
Amicus Participation; Intervention; etc.	Amicus briefs may be filed only with the permission of the Board upon motion. <sup>42</sup>  The Board may—and, in cases raising important questions, occasional does—solicit amicus briefs. <sup>43</sup>  Neither the NLRA nor the Board’s rules of practice provide for intervention on appeal. But “[o]n occasion when special circumstances arise, the Board has granted intervention requests to permit the filing of

credibility determinations, but not factual determinations generally. It is true, though, that empirical analyses reveal a high level of deference in practice to ALJ factual determinations. *See, e.g.,* Cole D. Taratoot, *Review of Administrative Law Judge Decisions by the Political Appointees of the NLRB, 1991–2006*, 23 J. OF PUB. ADMIN. RES. & THEORY, 551, 556–67 (2013).

<sup>38</sup> NLRA § 154, 29 U.S.C. § 154.

<sup>39</sup> *See id.*

<sup>40</sup> 29 C.F.R. § 102.46(g).

<sup>41</sup> NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 12 (2017).

[https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019).

<sup>42</sup> *Id.* § 102.46(i).

<sup>43</sup> *See id.* § 102.46(i)(5); *see also* NLRB, INVITATION TO FILE AMICUS BRIEFS, <https://www.nlr.gov/cases-decisions/filing/invitations-file-briefs> (last visited May 18, 2019) (“[The Board] occasionally invites the public to file amicus briefs in cases of significance or high interest.”). The invitations generally identify the specific questions the Board wants addressed. *See* NLRB, ARCHIVED NOTICES FOR BRIEFS AND INVITATIONS, <https://www.nlr.gov/cases-decisions/filing/invitations-file-briefs/archived-notices-briefs-and-invitations> (last visited May 18, 2019).

	exceptions by an interested party. The Board has discretion to grant intervention in special cases to such an extent and upon such terms as it deems proper.” <sup>44</sup>
Public Access to Hearings	No statute or rule address public access to hearings. [Confirm in Exec. Sec.’s overview.]
Staff’s Role in Writing Decisions	The NLRA prohibits the Board from employing attorneys to review transcripts or prepare opinions, but it does permit an attorney “assign[ed as a legal assistant to any Board member” to do so. <sup>45</sup>
Deadlines for Decision	None is provided for in the NLRA or the Board’s rules of practice.
Nature of Decision	If the Board finds that a respondent has violated the NLRA, it must “state its findings of fact” and issue an appropriate remedial order; if it finds that the respondent has not violated the Act, the Board must issue an order dismissing the complaint. <sup>46</sup>
Reconsideration, Rehearing, etc.	<p>After the Board issues a “decision or order,” a party may, “because of extraordinary circumstances move for reconsideration, rehearing, or reopening of the record, within 28 days of the Board’s order or decision (unless the Board allows additional time).<sup>47</sup></p> <p>A motion to reopen the record must be based on one of two principal grounds: “newly discovery evidence” or “evidence which has become available only since the close of the evidence.” The movant must establish that</p>

<sup>44</sup> NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 38 (2017). [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019).

<sup>45</sup> NLRA § 4, 29 U.S.C. § 154.

<sup>46</sup> NLRA § 10(c), 29 U.S.C. § 160(c).

<sup>47</sup> 29 C.F.R. § 102.48(c).

	<p>the additional evidence, if true, would “require a different result.”<sup>48</sup></p> <p>If the case is decided by a panel of the Board, a party may seek review by the full Board, but “they are rarely granted.”<sup>49</sup></p>
Miscellaneous	<p>At any time before the filing of the record with a reviewing court, the Board “may at any time, upon reasonable notice, . . . modify or set aside” any “finding” or “order.”<sup>50</sup></p>

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	<p>A party may file a request with the Board for permission to file a special appeal of any non-final decisions by the ALJ. The party must do so” promptly and within such time as not to delay the proceedings.” The appeal itself must accompany the request. Any statement in opposition must be filed within seven days thereafter. If the Board grants the request, it “may proceed immediately to rule on the appeal.”<sup>51</sup> The Board generally so proceeds.<sup>52</sup></p>
Assignment of Cases	<p>No publicly available document addresses the assignment of cases, including the delegation of decision-making authority to three-member panels. [Confirm.]</p>
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A

<sup>48</sup> *Id.* § 102.48(c)(1).

<sup>49</sup> NLRB OFFICE OF EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES 39 (2017). [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf) (last visited May 20, 2019). The reason is that before any published/precedential decision is issued by a panel, non-panel members review the decision and may join the panel. *See id.*

<sup>50</sup> NLRA § 10(d), 29 U.S.C. 160(d); *accord* 29 C.F.R. § 102.49.

<sup>51</sup> 29 C.F.R. § 102.26.

<sup>52</sup> *See, e.g.,* *Beaumont Hosp.*, 370 N.L.R.B. No. 9, at 1, 2020 WL 4754961 (Aug. 13, 2020).

Aggregation	Neither the NLRA nor the Board’s procedural rules provide for aggregation on appeal. But cases are regularly consolidated at the hearing-level stage, and when they are, they come to the Board in that posture. <sup>53</sup>
Miscellaneous	[none]

### Form of Decisions, Publication, and Precedential Status

Form of Decision	Sometimes the Board writes its own decision. Sometimes it summarily adopts all—or part of—the ALJ’s decision. <sup>54</sup> The ALJ’s decision (which is often long by agency standards) is always appended to the Board’s decision and appears in the Board’s bound volumes.
Signed or Per Curiam	Decisions are issued under the names of all members in the majority. They are, in effect, per curiam.
Dissents	Members may, and do frequently, write dissenting opinions, which immediately follow the Board’s decision.
Publication	All decisions are made available on NLRB’s website. Decisions involving the final disposition of complaints charging unfair labor practices are deemed “published”; <sup>55</sup> other decisions—usually involving interlocutory decisions (often on procedural matters)—are listed on page of NLRB’s website under the heading “Unpublished Board Decisions” (i.e., “not intended or appropriate for publication”). <sup>56</sup>

<sup>53</sup> See, e.g., 29 C.F.R. § 102.33 (consolidation of proceedings).

<sup>54</sup> One prominent federal judge has referred to the Board’s practice as “writing opinions in the form of commentaries (usually in footnotes . . .) on the administrative law judge’s always much longer and more comprehensive opinion”). *UAW v. NLRB*, 802 F.2d 969, 972 (7th Cir. 1986) (Posner, J.). The practice has drawn criticism from some federal judges. See, e.g., *id.*

<sup>55</sup> NLRB, BOARD DECISIONS, <https://www.nlr.gov/cases-decisions/decisions/board-decisions> (last visited May 19, 2019).

<sup>56</sup> NLRB, UNPUBLISHED BOARD DECISIONS, <https://www.nlr.gov/cases-decisions/decisions/unpublished-board-decisions> (last visited May 19, 2019).

	The NLRB also provides on its website a weekly summary of its decisions, and it identifies “notable decisions” there. <sup>57</sup>
Where Published	Published decisions are published, first in slip-opinion form, on the NLRB’s website; several years after their issuance, they are published in bound volumes (similar to the <i>United States Reports</i> ), which are available on the NLRB’s website. <sup>58</sup> [Volumes still printed?]  Unpublished decisions after February 4, 2011, appear on the NLRB’s website on a separate page titled “Unpublished Board Decisions.” <sup>59</sup> Unpublished decisions before that date are not available on the website.
Precedential Status	All published decisions of the Board (see above) are precedential and hence binding on the Board (as well as ALJs of course) in subsequent cases. <sup>60</sup> (When the Board issues a decision adopting the ALJ’s decision, the ALJ’s decision in effect becomes precedential as a decision of the Board, even if the Board does not write its own decision. <sup>61</sup> ) Decisions designated as “unpublished” are non-precedential (“except with respect to the parties in the specific case”). <sup>62</sup>
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

<sup>57</sup> NLRB, NOTABLE BOARD DECISIONS, <https://www.nlr.gov/cases-decisions/decisions/notable-board-decisions> (last visited May 19, 2019).

<sup>58</sup> NLRB, BOARD DECISIONS, <https://www.nlr.gov/cases-decisions/decisions/board-decisions> (last visited May 19, 2019).

<sup>59</sup> NLRB, UNPUBLISHED BOARD DECISIONS, <https://www.nlr.gov/cases-decisions/decisions/unpublished-board-decisions> (last visited May 19, 2019).

<sup>60</sup> See generally *Allentown Mack v. NLRB*, 522 NLRB 359 (1998). [Review citation.]

<sup>61</sup> [citation?]

<sup>62</sup> NLRB, UNPUBLISHED BOARD DECISIONS, <https://www.nlr.gov/cases-decisions/decisions/unpublished-board-decisions> (last visited May 19, 2019).

Guidance Documents Governing Hearing-Level Adjudicators	The Board does not issue guidance documents governing ALJ adjudications.
Feedback to Adjudicators	[none]
Quality-Assurance Reviews and Related Mechanisms	[none]
Participation of Appellate Body in Substantive Rulemaking	Substantive rules are promulgated by the Board. (As noted above, most Board rules are procedural rather than substantive.) <sup>63</sup>
Miscellaneous	[none]

### Miscellaneous

Alternative Dispute Resolution (ADR)	<p>Parties may participate in voluntary settlement discussions of cases pending before the Board with the assistance of an NLRB-appointed mediator. The mediator is usually employed by the Federal Mediation and Conciliation Service, with which the NLRB has contracted for mediation services.<sup>64</sup></p> <p>In 2018, the NLRB launched a pilot program under which its Executive Secretary “proactively engage parties” with pending cases to determinate whether there cases are “appropriate” for ADR.<sup>65</sup></p>
--------------------------------------	--

<sup>63</sup> [citation]

<sup>64</sup> NLRB, ALTERNATIVE DISPUTE RESOLUTION, <https://www.nlr.gov/about-nlr/what-we-do/decide-cases> (last visited July 24, 2019).

<sup>65</sup> Press Release, NLRB, NLRB Launches Pilot of Proactive Alternative Dispute Resolution Program (July 10, 2018), <https://www.nlr.gov/news-outreach/news-story/nlr-launches-pilot-proactive-alternative-dispute-resolution-program>.

Participation of Appellate Body in Agency Decisions on Judicial Review	The Board does not participate in decisions relating to judicial review of its decisions. Such decisions are made by the General Counsel. [Confirm. What about settlements?]
Role and Participation of Appellate Body in Writing Rules	N/A: As noted above, the Board is the agency's rulemaking authority.
Miscellaneous	[none]

## PUBLICLY AVAILABLE CASE STATISTICS

In Fiscal Year 2018, the NLRB disposed of 18,226 unfair-labor-practice charges. The General Counsel issued 1,088 complaints, which was down from 1,263 in the preceding fiscal year.<sup>66</sup> The Board issued 341 decisions.<sup>67</sup> (Nearly all of the decisions involved complaints issued in preceding years.)

[Review 2018 PAR to see if there's any additional information.]

## TREATISES AND SCHOLARSHIP OF NOTE<sup>68</sup>

Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescription, at the NLRB*, 5 FLA. INT'L L. REV. 347, 359 (2010)

Samuel Estreicher, *Depoliticizing the National Labor Relations Board: Administrative Steps*, 64 EMORY L.J. 1611 (2015)

Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Functions and Suggestion for Reform*, 58 DUKE L.J. 2013 (2009)

Charles Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking v. Adjudication*, 64 EMORY L.J. 1469 (2015)

Julius B. Getman, *The NLRB: What Wrong and Should We Try to Fix It?* 64 EMORY L.J. 1495 (2015)

---

<sup>66</sup> See NLRB, CHARGES AND COMPLAINTS, <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints> (last visited May 20, 2019).

<sup>67</sup> See NLRB, DISPOSITION OF UNFAIR LABOR PRACTICE CHARGES IN FY 2018, <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges> (last visited May 20, 2019).

<sup>68</sup> The literature on the NLRB is voluminous. Much of it focuses on the NLRB's substantive interpretations of the NLRA and its ideological predilections during particular administrations. Below is a selective list of recent scholarship on the NLRB that focuses mainly on institutional and procedural consideration, chief among them the choice between rulemaking and adjudication in policymaking and statutory interpretation. The rulemaking-adjudication questions has for decades figured prominently in scholarship about the NLRB. See, e.g., Merton C. Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); see also Antonin Scalia, *Back to Basics: Making Law without Making Rules*, 5 REGULATION 25 (1981) (“[The NLRB] . . . has been a notable holdout in the trend to rulemaking, and has achieved that distinction by the simple expedient of nonaction—declining to issue rules, so that it is left free and, indeed, compelled to establish the content of the statutory prohibition of “unfair labor practices” in the individual grievance proceedings brought before it.)



William B. Gould, IV, *Politics and the Effects of the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015)

WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRA—A MEMOIR (2000)

SECTION OF LABOR AND EMPLOYMENT LAW, AMERICAN BAR ASSOCIATION, HOW TO TAKE A CASE BEFORE THE NLRB (Brent Garren et al. ed., 9th ed. 2016)

SECTION OF LABOR AND EMPLOYMENT LAW, AMERICAN BAR ASSOCIATION, DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS Act (John E. Higgins Jr. ed., 7th ed. 2017)<sup>69</sup>

Paul M. Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. Rev. 51 (2004)

Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L.223 (2016)

Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law*, 19 GEO. MASON L. REV. 319 (2012)

Cole D. Taratoot, *Review of Administrative Law Judge Decisions by the Political Appointees of the NLRB, 1991-2006*, 23 J. PUB. ADMIN. RES. & THEORY 551 (2013)

---

<sup>69</sup> This is the only current treatise on labor law.

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

APPENDIX L

**Patent & Trademark Office – Patent Trial & Appeal Board:  
Review of Patentability Decisions**

INTRODUCTION

Under the Leahy–Smith America Invents Act (AIA or Act), the Board of Patent Appeals and Interferences was redubbed the Patent Trial and Appeal Board (PTAB).<sup>1</sup> Situated within the Patent and Trademark Office (PTO)<sup>2</sup>, the PTAB “decides appeals from the decisions of patent examiners, and adjudicates the patentability of issued patents challenged by third parties in post-grant proceedings.”<sup>3</sup> In addition to retaining jurisdiction over reexaminations and patent interferences, the AIA gave the PTAB authority over four new types of proceedings to review patent grants: Post-Grant Review (PGR), Inter Partes Review (IPR), Covered Business Method Review (CBMR), and derivation.<sup>4</sup> These new adjudicatory channels were “designed to create a cheaper, faster alternative to district court patent litigation.”<sup>5</sup> While these proceedings are presided over by panels of three administrative patent judges (APJs),<sup>6</sup> the PTAB also consists of certain statutory members, namely the Director of the PTO, the Deputy Director of the PTO, the Commissioner for Patents, and the Commissioner for

---

<sup>1</sup> 35 U.S.C. § 6(a) (2012).

<sup>2</sup> “PTO” is used here when referring to the agency as a whole; “PTAB” is used here when referring to the more discrete adjudicatory body consisting of the Director of the PTO, the Deputy Director of the PTO, the Commissioner for Patents, the Commissioner for Trademarks, and the stable of APJs.

<sup>3</sup> Janet Gongola, *The Patent Trial and Appeal Board: Who are they and what do they do?* U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/patent-trial-and-appeal-board-who-are-they-and-what> (last updated July 8, 2019).

<sup>4</sup> 35 U.S.C. § 6(b) (2012).

<sup>5</sup> Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 158 (2019).

<sup>6</sup> 35 U.S.C. § 6(c) (2012).

Trademarks.<sup>7</sup> However, unlike certain other agency adjudicatory processes, the Director of the PTO lacks direct review authority over PTAB determination.<sup>8</sup>

While these proceedings have differing eligibility and time-bar requirements,<sup>9</sup> each must occur in an adversarial, court-like hearing in which parties are entitled to oral argument and discovery.<sup>10</sup> The APJs—“persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the [Patent Office] Director,”<sup>11</sup> must (at least seemingly) render decisions based on the evidentiary record.<sup>12</sup> Parties wishing to appeal decisions rendered by the PTAB may request a rehearing<sup>13</sup> or may appeal directly to the Court of Appeals for the Federal Circuit.<sup>14</sup>

While the PTAB has always had the ability to designate one of its opinions “precedential,” the PTAB recently revised its standard operating procedures regarding such a designation.<sup>15</sup> These revisions modify the existing precedential designation process to afford the Director significantly more authority over the decision and establish a new Precedential Opinion Panel (POP) comprising the Director, the Commissioner for Patents, and the Chief Administrative Patent Judge, which rehears issues in PTAB trials.<sup>16</sup> The POP is intended to “establish binding agency authority concerning major policy or procedural issues . . . in the limited situations where it is appropriate to create such binding agency authority through adjudication before the Board.”<sup>17</sup>

---

<sup>7</sup> 35 U.S.C. § 6(a) (2012).

<sup>8</sup> Walker & Wasserman, *supra* note 5 (noting that, although the Director “lacks final decision-making authority over PTAB decisions, [ ] she can influence PTAB outcomes by designating APJs to the PTAB panel that she hopes share her views”).

<sup>9</sup> See, e.g., 37 C.F.R. §§ 42.102, 42.202 (2018) (setting forth timing requirements for institution of IPR, PRG, respectively).

<sup>10</sup> 37 C.F.R. § 42.62 (2018).

<sup>11</sup> 35 U.S.C. § 6(a) (2012).

<sup>12</sup> See Walker & Wasserman, *supra* note 5, at 164 (PTAB decision is “[p]robably” limited to bases included in hearing record, given the requirement that “[a]ll evidence must be filed in the form of an exhibit”) (quoting 37 C.F.R. § 42.63(a) (2018)).

<sup>13</sup> 35 U.S.C. § 6(c) (2012).

<sup>14</sup> 35 U.S.C. § 141 (2012).

<sup>15</sup> See generally PAT. TRIAL & APPEAL BOARD, STANDARD OPERATING PROCEDURE 2 (REVISION 10) (2018), available at

<https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf> [hereinafter PAT. TRIAL & APPEAL BOARD, SOP 2].

<sup>16</sup> *Id.* at 4 (giving the Director wide latitude to select the members of the POP and to impanel more members than the default). This may allow the Director to ensure the POP renders a decision in line with the Director’s view.

<sup>17</sup> *Id.* at 3.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>Procedures for ex-parte appeals, inter-partes appeals, interferences,<sup>18</sup> and PGR, IPR, CBMR, and derivation proceedings<sup>19</sup> are governed by C.F.R.-codified rules promulgated by the PTO pursuant to its AIA authority.<sup>20</sup></p> <p>The PTO released a “Trial Practice Guide” in 2012, which contains additional guidance regarding practice in front of the PTAB and has been amended twice.<sup>21</sup></p> <p>The PTO also maintains a Manual of Patent Examining Procedure (MPEP) intended to “provide [PTO] patent examiners, applicants, attorneys, agents, and representatives of applicants with a reference work on the practices and procedures relative to the prosecution of patent applications and other proceedings before the [PTO].”<sup>22</sup></p>
Substantive Law	<p>The substantive requirements of the patent law are codified in 35 U.S.C. Part II, Chapters 10–18. The PTO does not appear to</p>

<sup>18</sup> These appear generally at 37 C.F.R. Part 41, entitled “Practice Before the Patent Trial and Appeal Board.”

<sup>19</sup> These appear generally at 37 C.F.R. Part 42, entitled “Trial Practice Before the Patent Trial and Appeal Board.”

<sup>20</sup> The AIA gives the PTO the power to “prescribe regulations . . . establishing and governing” PTAB proceedings as well as “the relationship of such review to other proceedings under [the Patent Act].” 35 U.S.C. §§ 316(a)(4), 326(a)(4) (2012).

<sup>21</sup> *Trial Practice Guide July 2019 Update*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/trial-practice-guide-july-2019-update> (last updated Sep. 13, 2019); U.S. PAT. & TRADEMARK OFF., TRIAL PRACTICE GUIDE UPDATE (2019), available at <https://www.uspto.gov/sites/default/files/documents/trial-practice-guide-update3.pdf>.

<sup>22</sup> U.S. PAT. & TRADEMARK OFF., FOREWORD (2018), available at <https://www.uspto.gov/web/offices/pac/mpep/mpep-0015-foreword.pdf>.

	<p>have general rulemaking authority regarding the substance of the U.S. Patent Act.<sup>23</sup></p> <p>The PTAB has recently adopted new procedures to designate opinions as precedential.<sup>24</sup> The “Precedential Opinion Panel” intends to “establish binding agency authority concerning major policy or procedural issues . . . in the limited situations where it is appropriate to create such binding agency authority through adjudication before the Board.”<sup>25</sup> It remains to be seen how the Federal Circuit will handle opinions designated by the POP as precedential.<sup>26</sup></p>
Miscellaneous	[none]

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	The PTAB reviews appeals from adverse decisions on patent applications, rejection of claims in patent reexaminations, and conducts derivation proceedings, IPRs, PGRs, and CBMRs. <sup>27</sup>
------------------------------------	---

<sup>23</sup> See, e.g., John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657, 1659 (2016) (citing *Merck & Co. v. Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996)). However, the USPTO does have a few “narrow and specific ‘islands’ of substantive rulemaking authority.” David Boundy, *The PTAB Is Not an Article III Court, Part 3: Precedential and Informative Opinions*, 47-1 AIPLA Q.J., 1, 6 (2019) (listing recognition of attorneys, fee setting, standards for substitute statements, and conduct of *inter partes* and post-grant review proceedings, among other “islands”).

<sup>24</sup> See generally PAT. TRIAL & APPEAL BOARD, SOP 2.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> See Brief for U.S. as *Amicus Curiae*, *Facebook, Inc. v. Windy City Innovations, LLC*, No. 18-1400 (Fed. Cir. Sep. 17, 2019) (contending that opinions of the PTAB designated as precedential by the POP qualify for *Chevron* deference); See also John M. Golden, *A Walk in the Deference Labyrinth: Further Comment on Facebook v. Windy City*, PATENTLY-O (Sep. 27, 2019), <https://patentlyo.com/patent/2019/09/deference-labyrinth-facebook.html> (suggesting that the Federal Circuit could hold that “the POP’s precedential statutory interpretations [merit *Chevron* deference] only for interpretations resolving questions that fall within the ambit of express statutory grants of PTO rulemaking authority”—that is, for interpretations governing procedure rather than substance). The line dividing procedure and substance, however, may be murky. *Id.*

<sup>27</sup> 35 U.S.C. § 6(b) (2012).

Nature of Hearing-Level Proceedings	Decisions of Patent Examiners during the prosecution process are the basis of appeals to the PTAB, whether “appealed” by the prosecuting party or a third party.
Nature of Hearing-Level Decision	If final rejection, the hearing-level decision will “repeat or state all grounds of rejection then considered applicable to the claims in the application, clearly stating the reasons in support thereof.” <sup>28</sup> Otherwise, the petition for review is actually in response to a patent grant.
Transfer of Case to Appellate Body After Hearing-Level Decision	Parties unsatisfied with the decision of the patent examiner must request appellate review by filing petition or requesting appeal. <sup>29</sup>
Miscellaneous	[None]

### **Identity of Reviewing/Appellate Authority and Its Legal Status**

Reviewing Authority(ies)	Appealed final examiner decisions are reviewed directly by the PTAB. There is no intermediate appellate body. <sup>30</sup>
Legal Status of Reviewing Authority(ies)	The PTAB is established by statute <sup>31</sup> It is the Agency’s final decision-making authority, although cases may be reheard at the discretion of the Director and decisions may be appealed to the Federal Circuit. <sup>32</sup>
Miscellaneous	[none]

### **Institutional Attributes of Appellate/Reviewing Authority(ies)**

<sup>28</sup> 37 C.F.R. § 1.113(b) (2018).

<sup>29</sup> *See, e.g.*, 35 U.S.C. § 134 (2012) (appealing to PTAB from final rejection by patent examiner).

<sup>30</sup> *See Id.*

<sup>31</sup> 35 U.S.C. § 6(c) (2012).

<sup>32</sup> 35 U.S.C. § 141 (2012) (allowing for appeal of PTAB decision to the Federal Circuit).

Number of Members	As of calendar year 2018, the “Board Size” was 261. <sup>33</sup>
Qualification Requirements	<p>APJs “shall be persons of competent legal knowledge and scientific ability.”<sup>34</sup> The Director must be a U.S. citizen and go through the appointment process.<sup>35</sup> The Director must also have experience in patent or trademark law.<sup>36</sup></p> <p>The Deputy Director of the USPTO is nominated by the Director, appointed by the Secretary of Commerce, and must be a U.S. citizen with a professional background in patent or trademark law.<sup>37</sup></p> <p>The Commissioners for Trademarks and Patents must be U.S. citizens with management ability and professional background in their trademarks and patents, respectively.<sup>38</sup></p>
Party Affiliation Requirement in Appointment	The AIA does not set forth any Party Affiliation Requirement.
Method of Appointment	APJs are appointed “by the Secretary [of Commerce], in consultation with the Director [of the PTO].” <sup>39</sup>

<sup>33</sup> U.S. PAT. & TRADEMARK OFF., PATENT PUBLIC ADVISORY COMMITTEE QUARTERLY MEETING: PATENT TRIAL AND APPEAL BOARD UPDATE (Nov. 8, 2018), [https://www.uspto.gov/sites/default/files/documents/20181108\\_PPAC\\_PTAB\\_Update.pdf](https://www.uspto.gov/sites/default/files/documents/20181108_PPAC_PTAB_Update.pdf) [hereinafter PTAB UPDATE (Nov. 2018)]. It is not clear whether this includes the four “statutory members” of the PTAB, or only APJs.

<sup>34</sup> 35 U.S.C. § 6(a) (2012). There is some criticism among the patent bar regarding the scientific competency of APJs. See Charles W. Shifley, “Your PTAB Judges Will Be Experts” – Right? ... *Not So Fast*, BANNER & WITCOFF: PTAB HIGHLIGHTS (July 26, 2016), available at <https://s3.amazonaws.com/documents.lexology.com/f68e5d6f-59bb-4ddd-8d53-1224ffc08cfa.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1574267270&Signature=OkMS3Jux0ooxk%2F%2Ba0NQ4w3YM70k%3D>.

<sup>35</sup> 35 U.S.C. § 3(a)(1) (2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 35 U.S.C. § 6(a) (2012).

	<p>The Director (also Under Secretary of Commerce for Intellectual Property) is appointed by the President with advice and consent of the senate.<sup>40</sup></p> <p>The Deputy Director of the USPTO is nominated by the Director and appointed by the Secretary of Commerce.<sup>41</sup></p> <p>The Commissioners for Trademarks and Patents are appointed by the Secretary of Commerce.<sup>42</sup></p>
Term of Appointment	<p>APJs do not have a definitive term of appointment.</p> <p>Commissioners are appointed for a term of 5 years.<sup>43</sup></p>
Statutory Removal Protections	<p>The Court of Appeals for the Federal Circuit recently held that APJs are unconstitutionally appointed; the Federal Circuit ruled that APJs are “principal officers” because neither the Director of the PTO nor the Secretary of Commerce exercise sufficient supervision and control over APJs to render them inferior officers.<sup>44</sup> To remedy this, the court held that the Director must be given authority to remove APJs without cause.<sup>45</sup></p> <p>The Director is removable by the President.<sup>46</sup></p> <p>[How is Deputy Director removed?]</p> <p>“The Commissioners may be removed from office by the Secretary for misconduct or</p>

<sup>40</sup> 35 U.S.C. § 3(a)(1) (2012).

<sup>41</sup> 35 U.S.C. § 3(b)(1) (2012).

<sup>42</sup> 35 U.S.C. § 3(b)(2)(A) (2012).

<sup>43</sup> 35 U.S.C. § 3(b)(2)(A) (2012).

<sup>44</sup> *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140, 2019 WL 5616010 at \*8 (Fed. Cir. Oct. 31, 2019).

<sup>45</sup> *Id.* at \*10.

<sup>46</sup> 35 U.S.C. § 3(a)(4) (2012).



	nonsatisfactory performance under the performance agreement.” <sup>47</sup>
Location within Agency; Basis of Legal Authority	The PTAB is established by statute. <sup>48</sup> The decision of the APJ panel is not necessarily “final”, as the Precedential Opinion Panel may rehear. <sup>49</sup>
Authority to Delegate to Subunit(s); Designating Official and Process	Each PTAB proceeding is presided over by a “subunit” of the entire body: a panel of “at least 3” members of the PTAB. <sup>50</sup> The Director designates the APJs on each panel (although has designated non-exclusive paneling authority to the Chief Judge). <sup>51</sup>
Quorum Requirement	[I assume that, in the case of a normal 3-judge panel, all three must be present to act on behalf of the PTAB, but I can’t find affirmative proof.]
Authority and Function of Appellate Authority’s Head	Unlike certain other agency heads, the Director of the PTO does not have exclusive final decision-making authority over decisions of the PTAB. As noted elsewhere, the Director has wide latitude to institute rehearings and to designate the members of the PTAB who will hear them, but cannot make unilateral decisions. <sup>52</sup> Additionally, the Director now may remove APJs at will, ostensibly increasing top-down authority. <sup>53</sup>
Internal Management Structure of Appellate Authority	N/A

<sup>47</sup> 35 U.S.C. § 3(b)(2)(C) (2012).

<sup>48</sup> *Id.*

<sup>49</sup> See PAT. TRIAL & APPEAL BOARD, SOP 2.

<sup>50</sup> 35 U.S.C. § 6(c) (2012). These are ostensibly 3 APJs, although it appears that the other statutory members could sit on a panel if designated by the Director.

<sup>51</sup> PAT. TRIAL & APPEAL BOARD,

STANDARD OPERATING PROCEDURE 1 (REVISION 15), at 1 (2018),

<https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf> [hereinafter PAT. TRIAL & APPEAL BOARD, SOP 1].

<sup>52</sup> Walker & Wasserman, *supra* note 8.

<sup>53</sup> *Supra*, note 43.

Miscellaneous	[none]
---------------	--------

### Nature, Form, and Timing of Appeal

<p>Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance</p>	<p>Institution of a trial is discretionary.</p> <p><i>IPR</i>: Director determines there is a <b>reasonable likelihood</b> that the petitioner would prevail with respect to at least one of the claims challenged in the petition.<sup>54</sup></p> <p><i>PGR</i>: Director determines that it is <b>more likely than not</b> that at least one of the claims challenged in the petition is unpatentable.<sup>55</sup> Or that the petition raises a novel or unsettled legal question that is important to other patents or patents applications.<sup>56</sup></p> <p><i>CBMR</i>: Standard is same as PGR. Person may not file derivation petition unless the person or person’s real party-in-interest or privy has been sued for infringement of the patent or has been charged with infringement under that patent.<sup>57</sup></p> <p><i>Derivation</i>: If Director determines that petition <b>states with particularity</b> the basis for finding that a named inventor in the earlier application derived the claimed invention from an inventor named in the petitioner’s application and, without authorization, filed the earlier application.<sup>58</sup></p>
<p>How Appeal/Proceeding Initiated</p>	<p>Appeals (from denial) are initiated by filing a notice of appeal and payment of the appeal fee by the patent owner or applicant.<sup>59</sup> IPR,</p>

<sup>54</sup> 35 U.S.C. § 314(a) (2012).  
<sup>55</sup> 35 U.S.C. § 324(a) (2012).  
<sup>56</sup> 35 U.S.C. § 324(b) (2012).  
<sup>57</sup> 37 C.F.R. §§ 42.300-302 (2018).  
<sup>58</sup> 35 U.S.C. § 135(a) (2012).  
<sup>59</sup> 37 C.F.R. § 41.31 (2018).

	<p>PRG, CBMR proceedings may be instituted by a third party filing a petition for review and paying related fee.<sup>60</sup> Derivation proceedings may be instituted by the applicant by filing a petition and paying related fee.<sup>61</sup></p>
Time For Appealing	<p><i>IPR</i>: Petition for IPR may be filed after the later of: (1) nine months after the patent's issue date, or (2) the termination date of any post-grant review that has been instituted against the patent.<sup>62</sup></p> <p><i>PGR</i>: Petition for PGR must be filed within nine months of patent's issue or reissue date, subject to certain limitations.<sup>63</sup></p> <p><i>CBMR</i>: petition for CBMR may be filed any time except that for patents having an effective filing date on or after March 16, 2013, a CBMP review may not be instituted during the period in which a petition for post-grant review could be filed for that same patent. This means that a CBMP review may not be filed during the nine-month period immediately after the issuance, or reissuance, of a patent.<sup>64</sup></p> <p><i>Derivation</i>: Must be filed within the one year of the date of the first publication of a claim to an invention that is "the same or substantially the same as the earlier application's claim to the allegedly derived invention."<sup>65</sup></p>
If No Appeal Taken from Hearing Officer's Decision	<p>Where no trial [for IPR, PGR, CBMR] is instituted, a decision to that effect will be provided. A decision will usually contain a</p>

<sup>60</sup> 37 C.F.R. §§ 42.101, 42.201, 42.302 (2018).

<sup>61</sup> 37 C.F.R. § 42.403 (2018).

<sup>62</sup> 35 U.S.C. § 311(c) (2012).

<sup>63</sup> 35 U.S.C. § 321(c) (2012).

<sup>64</sup> 37 C.F.R. § 42.303 (2018).

<sup>65</sup> 37 C.F.R. § 42.403 (2018).

	short statement as to why the standard was not met. A party dissatisfied with a decision whether or not to institute may file a request for rehearing before the Board, but the Board's determination on whether to institute a trial is final and nonappealable. <sup>66</sup>
If Appeal Taken	The Board will narrow the issues for final decision by authorizing the trial to proceed "only on the challenged claims for which the threshold standards for the proceeding have been met." <sup>67</sup> The Board will then identify, on a claim-by-claim basis, the grounds on which the trial will proceed. <sup>68</sup> And any claim or issue not included in the authorization for review will not be part of the trial. <sup>69</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	PTAB has no discretion to institute review without petition. <sup>70</sup>
Miscellaneous	[none]

### Appellate Authority's Procedures

Record on Review	The record consists of any prosecution history as well as the petition for review and record developed at the PTAB (see below).
Submissions by Parties in Support of Appeal	In general, a petition to institute IPR, PGR, or CBMR proceeding must include: The grounds for standing; identification of all claims challenged and all grounds for such challenges; a claim construction for each challenged claim; a specific explanation of the grounds for unpatentability; a specific

<sup>66</sup> Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765 (Aug. 14, 2012).

<sup>67</sup> *Id.* at 48,757.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.* 35 U.S.C. § 314(a) (2012) (stating that the Director may not institute IPR unless Director "determines that the information presented *in the petition*. . . shows that there is a reasonable likelihood that the petitioner would prevail") (emphasis added).

	explanation of the relevance of evidence relied upon; an identification of all real parties in interest, and; copies of evidence relied upon. <sup>71</sup>
Issue Preservation	N/A
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	The record is open. A party may submit evidence in the form of “affidavits, transcripts of depositions, documents, and things.” <sup>72</sup> Parties are entitled to routine discovery, <sup>73</sup> may agree to discovery, <sup>74</sup> or may move for additional discovery if it is “in the interests of justice.” <sup>75</sup>
Standard of Review	The evidentiary standard for IPR, PGR, CBMR is preponderance of the evidence. <sup>76</sup> [I can’t find it affirmatively stated, but assume that decisions of patent examiners are reviewed de novo.]
Consultation with Staff and Other Agency Officials	Communication with Board members on a specific proceeding “is not permitted unless both parties have an opportunity to be involved in the communication.” <sup>77</sup> This prohibition does not extend to “ministerial communications with support staff”, “conference calls or hearings in which opposing counsel declines to participate,” “informing the Board in one proceeding of the existence or status of a related Board proceeding,” or “reference to a pending case in support of a general proposition.” <sup>78</sup>

<sup>71</sup> See, e.g., 37 C.F.R. § 41.104 (2018) (setting forth requirements for *inter partes* review petition).

<sup>72</sup> 37 C.F.R. § 42.63 (2018).

<sup>73</sup> 37 C.F.R. § 42.51(b)(1)(i)-(iii) (2018).

<sup>74</sup> 37 C.F.R. §§ 42.51(a)(1), 42.51(b)(2)(i) (2018).

<sup>75</sup> 37 C.F.R. § 42.51(b)(2)(i) (2018).

<sup>76</sup> PETER S. MENELL ET AL., PATENT CASE MANAGEMENT JUDICIAL GUIDE, Table 14.2 (3d ed. 2016).

<sup>77</sup> 37 C.F.R. § 42.5(d) (2018).

<sup>78</sup> U.S. PAT. & TRADEMARK OFF., TRIAL PRACTICE GUIDE UPDATE, at 5 (2019), available at <https://www.uspto.gov/sites/default/files/documents/trial-practice-guide-update3.pdf>.

Oral Argument	Either party has right to an oral hearing. <sup>79</sup>
Amicus Participation; Intervention; etc.	PTAB may evidently authorize briefing from <i>amici curiae</i> upon motion or request, but this appears to be highly infrequent. <sup>80</sup>
Public Access to Hearings	<p>The PTAB hears both public and non-public hearings.<sup>81</sup> For public hearings, any member of the public is allowed, subject to security screening, room availability, and advance coordination with PTAB.<sup>82</sup> Remote viewing may also be available.<sup>83</sup></p> <p>Written transcripts are “generally” available, usually within four weeks after the hearing.<sup>84</sup> “The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered.”<sup>85</sup></p>
Staff’s Role in Writing Decisions	‘[I]t is expected that, so long as APJ1 is in the majority, APJ1 will do a significant portion of the writing, including any significant writing assignments.’ <sup>86</sup> APJs do employ law clerks, who assist in the preparation of decisions on appeal, decisions to institute AIA proceedings, decisions on motions, final written decisions, and judgments. <sup>87</sup>
Deadlines for Decision	For IPR, PGR, and CBM, the Board enters a final written decision “not more than one year from the date a trial is instituted, except

<sup>79</sup> See 35 U.S.C. § 316(a)(10) (2012) (for IPR); id. § 326(a)(10) (for PGR).

<sup>80</sup> See Dennis Crouch, *PTAB Request Amicus Support for its Decision on Immunity*, PATENTLY-O (Nov. 6, 2017), <https://patentlyo.com/patent/2017/11/request-decision-immunity.html>.

<sup>81</sup> U.S. PAT. & TRADEMARK OFF., GUIDE TO THE ADMINISTRATION OF ORAL HEARINGS BEFORE THE PATENT TRIAL AND APPEAL BOARD, at 7 (Aug. 30, 2019),

<https://www.uspto.gov/sites/default/files/documents/PTAB%20Hearings%20Guide.pdf>.

<sup>82</sup> *Id.* at 6.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 17.

<sup>85</sup> 37 C.F.R. § 42.14 (2018).

<sup>86</sup> PAT. TRIAL & APPEAL BOARD, SOP 1, at 3.

<sup>87</sup> Job Posting for Patent Attorney (Law Clerk), USAJOBS, <https://www.usajobs.gov/GetJob/ViewDetails/543995400> (last visited Nov. 20, 2019).

	that the time may be extended up to six months for good cause.” <sup>88</sup> The same goes for derivation. <sup>89</sup>
Nature of Decision	If proceedings are instituted and not dismissed, the PTAB makes a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added.” <sup>90</sup> However, there is apparently no requirement to include reasons for all material findings and conclusions. There is no explicit requirement that the decisions be made exclusively on the record, but such a requirement can be read into the fact that “[a]ll evidence must be filed in the form of an exhibit.” <sup>91</sup>
Reconsideration, Rehearing, etc.	<p>“A party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board.”<sup>92</sup> If granted, the rehearing is not heard by a higher-level body, but by the PTAB itself.</p> <p>Any party to a proceeding may recommend POP rehearing of a PTAB decision, setting forth particular reasons for such recommendation. The Screening Committee considers requests and makes a recommendation to the Director, who determines whether POP rehearing will occur. Alternatively, the Director may convene a POP rehearing of any matter before the PTAB, in his sole discretion.<sup>93</sup></p>
Miscellaneous	[none]

<sup>88</sup> Federal Register

[https://www.uspto.gov/sites/default/files/ip/boards/bpai/trial\\_practice\\_guide\\_74\\_fr\\_48756\\_081412.pdf](https://www.uspto.gov/sites/default/files/ip/boards/bpai/trial_practice_guide_74_fr_48756_081412.pdf)

<sup>89</sup> *Id.*

<sup>90</sup> See 35 U.S.C. §§ 318(a), 328(a) (2012).

<sup>91</sup> See 37 C.F.R. § 42.63(a) (2018); See also Walker & Wasserman, *supra* note 12.

<sup>92</sup> C.F.R. § 42.71(d) (2018). Such request must be filed “[w]ithin 30 days of the entry of a final decision or a decision not to institute a trial.” C.F.R. § 42.71(d)(2) (2018).

<sup>93</sup> PAT. TRIAL & APPEAL BOARD, SOP 2, at 1.

## Other Case-Management Features

<p>Interlocutory Appeals: Availability, Procedures, Standard</p>	<p>There is no interlocutory review by the Federal Circuit under the AIA for an institution decision or even after a final decision.<sup>94</sup> Notably, a decision on a motion without a judgment is <i>not</i> considered final.<sup>95</sup></p> <p>If a decision is not a panel decision, the party may request a rehearing.<sup>96</sup> When rehearing a non-panel decision, a panel will review the decision for abuse of discretion.<sup>97</sup> That panel decision will govern the trial.<sup>98</sup></p>
<p>Assignment of Cases</p>	<p>Panel assignments are made by the Director (or Chief Judge, to whom he has delegated non-exclusive authority).<sup>99</sup> APJs are assigned in a manner which attempts to balance workload, experience, technical expertise, and conflict avoidance.<sup>100</sup> Panels may be changed as a result of recusal, unavailability, or deadlines, although panel changes after the appearance of the panel are “disfavored.”<sup>101</sup></p> <p>Expanded panels (more than three members) may be impaneled, although it is “disfavored” and must be recommended by the Chief Judge and approved by the Director.<sup>102</sup></p>

<sup>94</sup> Kevin Bovard, *Ruling on an Appeal from an Inter Partes Review*, ABA PRACTICE POINTS (Feb. 17, 2015), <https://www.americanbar.org/groups/litigation/committees/intellectual-property/practice/2015/ruling-appeal-from-inter-partes-review/> (citing *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 (Fed. Cir. 2015)).

<sup>95</sup> 37 C.F.R. § 42.71(b) (2018) (“Interlocutory Decisions”). “Interlocutory panels” may hear “e.g., decisions on requests for reconsideration of non-final decisions in interferences, decisions on requests for authorization to file motions in interferences and AIA Reviews, decisions on miscellaneous motions authorized and filed in interferences, and decisions on motions authorized and filed in AIA Reviews.” PAT. TRIAL & APPEAL BOARD, SOP 1, note 2.

<sup>96</sup> 37 C.F.R. § 42.71(b) (2018).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> PAT. TRIAL & APPEAL BOARD, SOP 1.

<sup>100</sup> *See generally Id.*

<sup>101</sup> *Id.* at 13.

<sup>102</sup> *Id.* at 15. Examples



Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	N/A
Aggregation	If multiple PGR petitions are filed, the PTAB may consolidate them. <sup>103</sup> “[D]uring the pendency of an <i>inter partes</i> review, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the . . . matter may proceed, including providing for stay, transfer, <b>consolidation</b> , or termination of any such matter or proceeding.” <sup>104</sup>
Miscellaneous	[none]

### Form of Decisions, Publication, and Precedential Status

Form of Decision	If a proceeding is not instituted, the PTAB will generally write a decision detailing the reason. <sup>105</sup> If a proceeding is instituted, the PTAB “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added.” <sup>106</sup>
Signed or Per Curiam	Decisions are signed. Decisions are primarily written by “APJ 1,” but all three are expected to provide input on the decision. <sup>107</sup>
Dissents	PTAB judges have the latitude to write concurring and dissenting opinions, but it is rare for them to do so. <sup>108</sup>

<sup>103</sup> 35 U.S.C. § 325(c) (2012).

<sup>104</sup> 35 U.S.C. § 315(d) (2012).

<sup>105</sup> Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765 (Aug. 14, 2012).

<sup>106</sup> See 35 U.S.C. §§ 318(a), 328(a) (2012).

<sup>107</sup> PAT. TRIAL & APPEAL BOARD, SOP 1, at 3

<sup>108</sup> Scott McKeown, *Judicial Independence & the PTAB*, ROPES & GRAY: PATENTS POST-GRANT (Dec. 12, 2017), <https://www.patentspostgrant.com/judicial-independence-ptab/>. Between 2012 and 2017, PTAB panels issued unanimous opinions nearly 98% of the time. *Id.* An ex-PTAB judge

Publication	The file for any PTAB interference or trial is open to public inspection and copies of the file may be obtained upon payment of a fee. <sup>109</sup> PTAB also publishes representative AIA trial orders, decisions, and notices. <sup>110</sup>
Where Published	Final decisions are published on the “PTAB Bulk Data site.” <sup>111</sup> Dockets and filings for AIA proceedings are available on PTAB End to End (E2E) system. <sup>112</sup>
Precedential Status	As noted above, the PTO recently took steps to reinforce the precedential status of PTAB decisions by affording the Director increased authority over the precedential designation and by establishing a new Precedential Opinion Panel (POP). <sup>113</sup>  Any person may nominate a PTAB decision for precedential or informative status; such nomination must be considered by a Screening Committee and then by the Executive Judges Committee, which will make a recommendation to the Director, who has ultimate authority over the designation. The precedential decision is then binding in

claims that this is not because of PTAB policy or administrative pressure, but because “[t]he goal of the judges is to reach a consensus with respect to the outcome.” Ryan Davis, *Ex-PTAB Judges Say Board Policies Don't Squelch Dissents*, LAW360 (June 11, 2018), <https://www.law360.com/articles/1050995/ex-ptab-judges-say-board-policies-don-t-squelch-dissents>. *Contra* Gene Quinn, *Structural Bias at the PTAB: No Dissent Desired*, IPWATCHDOG (June 6, 2018), <https://www.ipwatchdog.com/2018/06/06/structural-bias-ptab-no-dissent-desired/id=94507/> (attributing low rate of dissent to a policy which does not count concurrences or dissents toward an APJs productivity goals unless requested and approved by Chief Judge).

<sup>109</sup> 37 C.F.R. § 1.11(b) (2018). This is subject to certain exceptions, such as if the record contains patent application information which is not otherwise publicly available.

<sup>110</sup> *Decisions*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/decisions> (last updated Nov. 7, 2019).

<sup>111</sup> Patent Trial and Appeal Board (PTAB) Bulk Data, PAT. TRIAL AND APPEAL BOARD, <https://developer.uspto.gov/ptab-web/#/search/decisions> (last visited Nov. 21, 2019). Decisions rendered before July 15, 2019, as well as all interferences, are available on the USPTO PTAB e-FOIA Reading Room at <https://e-foia.uspto.gov/Foia/PTABReadingRoom.jsp>.

<sup>112</sup> E2E Login, PAT. TRIAL AND APPEAL BOARD, <https://ptab.uspto.gov/#/login> (last visited Nov. 21, 2019).

<sup>113</sup> *See* PAT. TRIAL & APPEAL BOARD, SOP 2.

	<p>subsequent matters involving similar facts or issues.<sup>114</sup> Informative decisions create norms that “should be followed in most cases, absent justification, although an informative decision is not binding authority on the Board.”<sup>115</sup></p> <p>POP decisions (see above) are precedential by default unless otherwise noted.<sup>116</sup></p>
Miscellaneous	[none]

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

Guidance Documents Governing Hearing-Level Adjudicators	The PTO maintains a Manual of Patent Examining Procedure (MPEP) intended to “provide [PTO] patent examiners, applicants, attorneys, agents, and representatives of applicants with a reference work on the practices and procedures relative to the prosecution of patent applications and other proceedings before the [PTO].” <sup>117</sup>
Feedback to Adjudicators	Although not from the PTAB per se, “Quality assurance reviewers perform searches in a random sample of applications and provide the examiner a feedback report, which includes the reviewer’s search strategy along with feedback related to the examiner’s search to identify best practices and potential areas of improvement.” <sup>118</sup> “[In ex parte appeals,] PTAB reviews examiners’ work product and can provide feedback to the examiners. The PTAB and examiners have held multiple sessions in which the

<sup>114</sup> *Id.* at 11.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 8.

<sup>117</sup> U.S. PAT. & TRADEMARK OFF., *supra* note 21.

<sup>118</sup> *Promoting the Useful Arts: How can Congress prevent the issuance of poor quality patents?: Hearing Before the S. Comm. On the Judiciary, Subcomm. On Intellectual Prop.*, 116th Cong. at 5 (2019) (Statement of Andrew Hirschfeld, Comm’r for Pat., U.S. Pat. and Trademark Off.), available at <https://www.judiciary.senate.gov/imo/media/doc/Hirshfeld%20Testimony.pdf>.

	administrative patent judges from the PTAB provide examiners with feedback on claim interpretation and providing a proper rationale . . . .” <sup>119</sup>
Quality-Assurance Reviews and Related Mechanisms	See “Feedback to Adjudicators” above.
Participation of Appellate Body in Substantive Rulemaking	As noted above, most USPTO rules are procedural rather than substantive. <sup>120</sup>
Miscellaneous	[none]

### Miscellaneous

Alternative Dispute Resolution (ADR)	<p>The PTAB may terminate IPRs, PGRs, or CBMRs by agreement of the parties, although the PTAB is not party to the settlement and may “independently determine any question of jurisdiction, patentability, or Office practice.”<sup>121</sup> Similarly, parties may resort to binding arbitration to determine any issue after institution of derivation proceedings.<sup>122</sup></p> <p>At least as of 2015, the PTAB was “encouraging settlement by assigning a date on the Scheduling Order for an explicit ADR statement from the parties.”<sup>123</sup></p>
Participation of Appellate Body in Agency Decisions on Judicial Review	The Director has the right to intervene in appeals from a derivation proceeding under section 135 or an <i>inter partes</i> or post-grant review under chapter 31 or 32. <sup>124</sup>

<sup>119</sup> *Id.* at 7.

<sup>120</sup> See Golden, *supra* note 23.

<sup>121</sup> 37 C.F.R. § 42.74(a) (2018).

<sup>122</sup> 37 C.F.R. § 42.410(a) (2018).

<sup>123</sup> Scott McKeown, *PTAB Scheduling Orders Begin Suggesting ADR Statements*, ROPES & GRAY: PATENTS POST-GRANT (April 23, 2015), <https://www.patentspostgrant.com/ptab-alternative-dispute-resolution/>.

<sup>124</sup> 35 U.S.C. § 143 (2012).

Role and Participation of Appellate Body in Writing Rules	[I am not sure what influence the PTAB has on PTO rulemaking, although precedential decision could be considered a form of rulemaking by adjudication if they are given deference by the Federal Circuit.]
Miscellaneous	[none]

## PUBLICLY AVAILABLE CASE STATISTICS

In Fiscal Year 2018 the PTAB received 9,218 appeals. As of September 2018, the average pendency (time from receipt date to final decision) was 14.5 months. Of those appeals decided in FY 2018, 59.8% were affirmed, 10.1% were affirmed-in-part, and 28.3% were reversed, with panel remands and dismissal accounting for just under 2%. 1,613 petitions (for IPR, PGR, and CBMR) were filed in FY 2018—an almost 18% decrease from FY 2017—and institution was granted in 859 cases. 577 were denied, and the balance (decisions on institution responsive to requests for rehearing) were omitted from the statistic.<sup>125</sup>

## TREATISES AND SCHOLARSHIP OF NOTE

Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019).

John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657 (2016).

Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959 (2013).

David Boundy, *The PTAB Is Not an Article III Court, Part 3: Precedential and Informative Opinions*, 47-1 AIPLA Q.J., 1 (2019). [I assume Parts 1 & 2 are also useful, although I did not access them].

STERNE, KESSLER, GOLDSTEIN & FOX, P.L.L.C., PATENT OFFICE LITIGATION (2d ed. 2017).

PETER S. MENELL ET AL., PATENT CASE MANAGEMENT JUDICIAL GUIDE (3d ed. 2016).

UNITED STATES PATENT & TRADEMARK OFFICE: PATENT TRIAL AND APPEAL BOARD, <https://www.uspto.gov/patents-application-process/patenttrialandappealboard>

---

<sup>125</sup> PTAB UPDATE (Nov. 2018)

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

**SCHEDULE M**

**Securities and Exchange Commission**

**INTRODUCTION**

The Securities and Exchange Commission (SEC) administers federal securities laws in order to further its three-part mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. The SEC's oversight includes securities exchanges, securities brokers and dealers, investment advisors, and mutual funds, and it brings both administrative and civil enforcement actions for violations of securities laws including insider trading, accounting fraud, and the provision of false or misleading information about securities.

Established by the Securities Exchange Act of 1934 (Act), the SEC assumes a primary role in regulating securities markets, which are governed by the Act as well as a series of laws, from the Securities Act of 1933 and Investment Company Act of 1940 to, more recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>1</sup> The SEC's rulemaking, investigations, and adjudicatory authorities also derive from these laws.

As the agency head, the Commission is composed of five commissioners appointed for five-year staggered terms by the President with the advice and consent of the Senate.<sup>2</sup> No more than three commissioners may be of the same political party, and executive and administrative functions of the Commission are carried out by the Chairman, who is so designated by the President.<sup>3</sup>

---

<sup>1</sup> Additional laws governing the securities industry include: the Trust Indenture Act of 1939; the Investment Advisers Act of 1940; the Securities Investor Protection Act of 1970; the Foreign Corrupt Practices Act of 1977; the Public Company Accounting Reform and Corporate Responsibility Act of 2002 (Sarbanes-Oxley Act of 2002); and the Jumpstart Our Business Startups (JOBS) Act (enacted in 2012).

<sup>2</sup> 15 U.S.C. § 78d(a).

<sup>3</sup> 15 U.S.C. §§ 78d(a) and 78d-2.

The Commission may delegate many of its functions to an individual commissioner, administrative law judges, or employees, and it retains the authority to review any action pursuant to such a delegation, either on its own initiative or upon petition of a party.<sup>4</sup> With respect to hearings and an initial decision in administrative actions, the Commission has issued a standing delegation to administrative law judges, although the Commission must first order that a hearing be held.<sup>5</sup> The Chief Administrative Law Judge of the Commission designates the administrative law judge to preside in a particular case.<sup>6</sup>

Even prior to the commencement of proceedings, the Commission holds significant decision-making authority regarding the agency's investigations to determine whether a violation has occurred. This includes decisions to commence a formal investigation with the use of process it deems necessary, issue an order instituting administrative proceedings before the agency, initiate civil proceedings in the courts, and refer criminal matters to the Department of Justice for prosecution where there has been a willful violation.<sup>7</sup>

The Commission has adopted Rules of Practice to govern proceedings before it under the statutes it administers (including hearings and initial decisions delegated to administrative law judges), although the Commission may apply alternate procedures where it determines that doing so would serve the interests of justice and not result in prejudice to the parties.<sup>8</sup> Further, hearing procedures will vary according to the stated scope of several rules within the Rules of Practice and according to the particular statute that authorizes the proceeding, including whether or not it is to be a formal or "on the record" adjudication subject to the corresponding requirements of the Administrative Procedure Act.<sup>9</sup> The Rules of Practice are comprehensive, as they also lay out procedure for appeal to the Commission after an administrative law judge's initial decision as well as addressing other topics such as business hours, filing procedures, subpoenas, and hearing procedure.<sup>10</sup>

Initial decisions by administrative law judges, if not appealed to the Commission (or selected by the Commission for review) are deemed the final action

---

<sup>4</sup> 15 U.S.C. § 78d-1(a) and (b).

<sup>5</sup> 17 C.F.R. § 200.30-9, 201.300.

<sup>6</sup> 17 C.F.R. § 201.110; *but see* note 84 *infra* regarding commission instructions post-Lucia.

<sup>7</sup> 15 U.S.C. §§ 77s and 78u; 17 C.F.R. § 202.5; *see also* "How Investigations Work," SEC Division of Enforcement, <https://www.sec.gov/enforce/how-investigations-work.html>; Enforcement Manual of the SEC Division of Enforcement, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>; and the SEC's Office of Administrative Law Judges website, <https://www.sec.gov/page/aljsectionlanding>.

<sup>8</sup> 17 C.F.R. § 201.100 *et seq.*

<sup>9</sup> 5 U.S.C. § 551 *et. seq.*; *see also* 17 C.F.R. § 201.191.

<sup>10</sup> 17 C.F.R. §§ 201.400 – 201.490.



of the Commission.<sup>11</sup> While statutes and regulations have specified that parties have a right of review by the Commission for certain enumerated actions (with discretionary review for all others), as a matter of practice, the Commission grants all appeals of initial decisions.<sup>12</sup> While no definitive or binding statement provides explanation for this practice, a comment included with a prior version of the Rules of Practice states that the custom of granting all appeals was “the product of a consensus over many years” that “represents a Commission determination that there is benefit to joint deliberation by the Commission when exception is taken to an initial decision.”<sup>13</sup>

The Commission also sits as an appellate body for several entities outside the SEC. For example, the Commission hears appeals from determinations made by self-regulatory organizations, and—like initial decisions by the SEC’s administrative law judges—the Commission may select unappealed determinations by the self-regulatory organizations for review as well.<sup>14</sup> Self-regulatory organizations include of the national securities exchanges (such as the New York Stock Exchange) as well as the Financial Industry Regulatory Authority (FINRA).<sup>15</sup> In addition, the Commission may review (on appeal or on its own initiative) determinations by the Public Company Accounting Oversight Board.<sup>16</sup>

Additionally, while perhaps not always considered to be the review of a prior *adjudication*, the Commission may review (on appeal and on its own initiative) the *actions* taken by the directors of the SEC’s divisions pursuant to the Commission’s delegated authority.<sup>17</sup>

Generally, final orders by the Commission may be reviewed by the United States Court of Appeals for the District of Columbia or the court of appeals where the aggrieved person resides or has their principal place of business.<sup>18</sup>

---

<sup>11</sup> 15 U.S.C. § 78d–1(b) and (c); 17 C.F.R. § 201.360(d)(2).

<sup>12</sup> 15 U.S.C. § 78d–1(b); 17 C.F.R. § 201.411(b)(1) and (2).

<sup>13</sup> Comment (a)-(b) and Comment (d) to Rule 410, Rules of Practice (July 2003), <https://www.sec.gov/about/rulesprac072003.htm>. Subsequent versions of the Rules of Practice, including the current version, do not include comments on the rules.

<sup>14</sup> 17 C.F.R. §§ 201.420 and 201.421

<sup>15</sup> A list of self-regulatory organizations is available at <https://www.sec.gov/rules/sro.shtml>.

<sup>16</sup> 17 C.F.R. §§ 201.440 and 201.441.

<sup>17</sup> 17 C.F.R. §§ 201.430 and 201.431; authorities delegated to the various division directors are at 17 C.F.R. §§ 200.30–11 through 200.30–18.

<sup>18</sup> Judicial review provisions for the respective securities laws administered by the SEC include: 15 U.S.C. § 77i; 15 U.S.C. § 78y; 15 U.S.C. § 77vvv; 15 U.S.C. § 80a–42; and 15 U.S.C. § 80b–13.

## CHARACTERISTICS OF SYSTEM

(as ascertainable from public sources)

### Governing Law

Procedural Law	Appeals to the Commission, as with initial proceedings before the SEC, are governed by the SEC's Rules of Practice. <sup>19</sup>
Substantive Law	The Securities Exchange Act of 1934 established the SEC to enforce newly-passed securities laws, and it along with several other acts provides the substantive law (including the Securities Act of 1933, Trust Indenture Act of 1939, Investment Company Act of 1940, Investment Advisers Act of 1940, Sarbanes-Oxley Act of 2002, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and Jumpstart Our Business Startups Act of 2012). <sup>20</sup> The Commission also issues regulations, interpretive releases, and policy statements. <sup>21</sup>
Miscellaneous	

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	By default, all proceedings are presided over by the Commission unless the Commission designates a hearing officer, which it has
------------------------------------	--

<sup>19</sup> 17 C.F.R. §§ 201.100 – 201.900.

<sup>20</sup> 15 U.S.C. § 78a *et seq.*; 17 C.F.R. § 200.1.

<sup>21</sup> 17 C.F.R. Chapter II (Parts 200 – 301); interpretive releases are available at <https://www.sec.gov/rules/interp.shtml>

and policy statements are available at <https://www.sec.gov/rules/policy.shtml>.

	done so by regulation designating administrative law judges (until it orders otherwise). <sup>22</sup> The Commission may then review initial decisions by hearing officers. <sup>23</sup>
Nature of Hearing-Level Proceedings	Hearings for the purpose of taking evidence are held upon order of the Commission and are to be conducted in an expeditious and orderly manner. <sup>24</sup> They are adversarial in nature. Unless involving particular confidential or sensitive matters, hearings are public and are recorded, with a written transcript prepared. <sup>25</sup>  Witnesses testify under oath. <sup>26</sup> Hearsay evidence is admissible if it is found to be relevant, material, and reliable. <sup>27</sup> Parties have the opportunity to file proposed findings and conclusions with or as part of their briefs. <sup>28</sup>
Nature of Hearing-Level Decision	The hearing officer prepares an initial decision, to be filed within a specified number of days after proceedings are complete. <sup>29</sup> The initial decision must include findings and conclusions as to material issues of fact or law, and the appropriate order or sanction, with reasons or basis. <sup>30</sup>
Transfer of Case to Appellate Body After Hearing-Level Decision	The hearing officer files the initial decision with the Secretary of the SEC, who then serves the parties and publishes a notice on the SEC website (for public proceedings only). <sup>31</sup>
Miscellaneous	

<sup>22</sup> 15 U.S.C. §§ 78d-1(a) and 78v; 17 C.F.R. §§ 200.30-9 and 201.110.

<sup>23</sup> 17 C.F.R. § 201.410(a).

<sup>24</sup> 17 C.F.R. § 201.300.

<sup>25</sup> 17 C.F.R. §§ 201.301 and 302.

<sup>26</sup> 17 C.F.R. § 201.325.

<sup>27</sup> 17 C.F.R. § 201.320.

<sup>28</sup> 17 C.F.R. § 201.340.

<sup>29</sup> 17 C.F.R. § 201.360(a)(2).

<sup>30</sup> 17 C.F.R. § 201.360(b).

<sup>31</sup> *Id.*

## Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	The Commission reviews initial decisions by hearing officers. <sup>32</sup>
Legal Status of Reviewing Authority(ies)	The Commission was established as an independent agency by the Securities and Exchange Act of 1934.
Miscellaneous	

## Institutional Attributes of Appellate/Reviewing Authority(ies)

Number of Members	5 <sup>33</sup>
Qualification Requirements	May not engage in any other employment, may not participate in transactions subject to regulation by the Commission. <sup>34</sup>
Party Affiliation Requirement in Appointment	Not more than three commissioners may be of the same political party, and appointments should alternate political parties as nearly as practicable. <sup>35</sup>
Method of Appointment	Appointed by the President, with the advice and consent of the Senate. <sup>36</sup>
Term of Appointment	5 years; terms are staggered. <sup>37</sup>
Statutory Removal Protections	Office may continue to be held by a member beyond a five-year term and until a successor is appointed and qualified; such a member may not serve beyond the next full session of Congress. <sup>38</sup>
Location within Agency; Basis of Legal Authority	The five commissioners serve as the agency head; established by the Securities Exchange Act of 1934 (15 U.S.C. § 78a <i>et seq.</i> ).

<sup>32</sup> 17 C.F.R. § 201.411.

<sup>33</sup> 15 U.S.C. § 78d(a); 17 C.F.R. § 200.10

<sup>34</sup> 15 U.S.C. § 78d(a).

<sup>35</sup> 15 U.S.C. § 78d(a); 17 C.F.R. § 200.10.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 15 U.S.C. § 78d(a).

<p>Authority to Delegate to Subunit(s); Designating Official and Process</p>	<p>The Commission may delegate its functions including hearing, determining, and ordering with respect to any matter, to a division of the Commission, an individual commissioner, an administrative law judge, or an employee or employee board (does not supersede requirements for those presiding over evidentiary hearings required by 553 or 554 of the Administrative Procedure Act).<sup>39</sup> The Commission retains a discretionary right to review such delegated actions either on its own initiative (by vote of one commissioner) or upon petition of a party or intervenor, although parties adversely affected by specified actions (including adjudications not required to be on the record) are entitled to review.<sup>40</sup></p>
<p>Quorum Requirement</p>	<p>Three commissioners, or the total number of commissioners in office if fewer than three commissioners are in office, or two commissioners where the number of commissioners in office minus those who are disqualified as to a matter of business is two.<sup>41</sup></p>
<p>Authority and Function of Appellate Authority's Head</p>	<p>The Chairman carries out the executive and administrative functions of the Commission, including appointment and supervision of Commission employees, distribution of business among personnel and administrative units, and use and expenditure of funds.<sup>42</sup></p>
<p>Internal Management Structure of Appellate Authority</p>	<p>As to substantive work, the Chairman also exercises functions for the Commission relating to assignment of personnel (including individual commissioners) to perform functions delegated by the Commission.<sup>43</sup></p>
<p>Miscellaneous</p>	

<sup>39</sup> 15 U.S.C. § 78d-1(a); 5 U.S.C. § 556(b).

<sup>40</sup> 15 U.S.C. § 78d-1(b).

<sup>41</sup> 17 C.F.R. § 200.41.

<sup>42</sup> Reorganization Plan No. 10 of 1950, 64 Stat. 1266; 15 U.S.C. § 78d-2.

<sup>43</sup> 15 U.S.C. § 78d-2.

## Nature, Form, and Timing of Appeal

<p>Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance</p>	<p>Of Right: Upon petition, the Commission must review initial decisions for any adjudication <i>not</i> required to be on the record as defined by the APA (5 U.S.C. 554(a)), as well as specifically enumerated determinations found in 17 C.F.R. 201.411(b)(1), including effective dates of registration statements and trading suspensions.<sup>44</sup></p> <p>Discretionary Review: Includes any other decision not enumerated above, where the petition makes a reasonable showing that prejudicial error was committed in the conduct of the proceeding, or the decision contains a finding or conclusion of material fact that is clearly erroneous, a conclusion of law that is erroneous, or an exercise of discretion or decision of law or policy that is important and that the Commission should review.<sup>45</sup> However, available sources suggest that the Commission grants nearly all petitions for review.<sup>46</sup> The Commission may also elect to limit the issues on appeal.<sup>47</sup></p>
--	---

<sup>44</sup> 15 U.S.C. § 78d-1(b); 17 C.F.R. § 201.411(b)(1).

<sup>45</sup> 15 U.S.C. § 78d-1(b); 17 C.F.R. § 201.411(b)(2).

<sup>46</sup> In its adoption of the 2016 amendments to the Rules of Practice, the SEC responded to a comment (expressing concern about appeals not of right) by quoting a Commission decision which stated: "...we are unaware of any case in which the Commission has declined to grant a procedurally proper petition for review." 81 Fed. Reg. 50,212, 50,228 (July 29, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-07-29/pdf/2016-16987.pdf>. In a prior version of the Rules of Practice, comments were included alongside the rules themselves, stating: "Under these standards, the Commission grants a petition for review in virtually all cases. The product of a consensus over many years, this result represents a Commission determination that there is benefit to joint deliberation by the Commission when exception is taken to an initial decision." Another comment states: "The Commission has rarely found grounds for denial of a petition for review under its long-standing standards for determining whether to grant review, now set forth in Rule 411(b). Therefore, routine opposition to a petition for review serves little purpose." Comment (a)-(b) to Rule 410, Rules of Practice (July 2003), <https://www.sec.gov/about/rulesprac072003.htm>. Subsequent versions of the Rules of Practice, including the current version, do not include comments on the rules.

<sup>47</sup> 5 U.S.C. § 557(b).

How Appeal Initiated	Filing with the Commission a petition for review of the initial decision by the hearing officer. The petition must not exceed three pages. <sup>48</sup>
Time for Appealing	21 days after service of the initial decision (or order resolving a party motion to correct an initial decision), except for good cause shown. <sup>49</sup>
If No Appeal Taken from Hearing Officer's Decision	If a party does not timely file a petition for review of the initial decision, and if the Commission does not order review on its own, the Commission will issue an order that the decision has become final, and that decision will be deemed the action of the Commission. <sup>50</sup> A petition for review of an initial decision to the Commission is a prerequisite to judicial review of a final order entered pursuant the decision. <sup>51</sup>
If Appeal Taken	If a party timely files a petition for review of an initial decision (or if the Commission itself orders review), the initial decision shall not become final as to that party. <sup>52</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	The Commission may order review of any initial decision within 21 days after the period of filing a petition for review. The vote of one member is sufficient for Commission review. <sup>53</sup>
Miscellaneous	

## Appellate Authority's Procedures

Record on Review	The record on review consists of all items that were part of the record before the hearing officer, along with petitions for review, cross-petitions, and all briefs,
------------------	---

<sup>48</sup> 17 C.F.R. § 201.410(b) and (c).

<sup>49</sup> 17 C.F.R. § 201.360(b); 201.410(b).

<sup>50</sup> 15 U.S.C. § 78d-1(c); 17 C.F.R. § 201.360(d)(2).

<sup>51</sup> 17 C.F.R. § 201.410(e).

<sup>52</sup> 17 C.F.R. § 201.360(d)(1).

<sup>53</sup> 17 C.F.R. § 201.411(c).

	<p>motions, submissions, and other papers filed on appeal or review.<sup>54</sup> The record below includes, among other items, the order instituting proceedings, motions, stipulations, transcripts of testimony, items admitted into evidence, written communications, proposed findings and conclusions, and written orders issued by the hearing officer.<sup>55</sup></p>
<p>Submissions by Parties in Support of Appeal</p>	<p>Parties file opening briefs specifying particular issues to be filed within 30 days of the date of the briefing schedule order issued by the Commission. Opposition briefs are to be filed within 30 days of opening briefs, and reply briefs are to be filed within 14 days of opposition briefs.<sup>56</sup> Briefs are to be confined to the particular matters at issue, and exceptions to the findings or conclusions shall be supported by citation to relevant portions of the record and by concise argument.<sup>57</sup> Opening and opposition briefs shall not exceed 14,000 words, and reply briefs shall not exceed 7,000 words.<sup>58</sup></p>
<p>Issue Preservation</p>	<p>Exceptions to a hearing officer's ruling on the admission or exclusion of evidence will be deemed waived on appeal to the Commission unless raised pursuant to interlocutory review, raised in a proposed finding or conclusion, or raised in a petition for Commission review of an initial decision.<sup>59</sup> Beyond the Commission, federal courts will not consider an objection to the order of the Commission unless it was urged before the Commission.<sup>60</sup></p>
<p>Open or Closed Record on Appeal? Submission and</p>	<p>The Commission may allow the submission of additional evidence on its own motion or motion of a party, where the additional</p>

<sup>54</sup> 17 C.F.R. § 201.460(a).

<sup>55</sup> 17 C.F.R. § 201.350(a).

<sup>56</sup> 17 C.F.R. § 201.450(a).

<sup>57</sup> 17 C.F.R. § 201.450(b).

<sup>58</sup> 17 C.F.R. § 201.450(c).

<sup>59</sup> 17 C.F.R. § 201.321(a).

<sup>60</sup> 15 U.S.C. §§ 77i(a) and 78y(c)(1).



Consideration of New Evidence on Appeal	evidence is material and there were reasonable grounds for failure to offer it previously. The Commission may accept or hear the additional evidence or remand the proceeding to consider the new evidence. <sup>61</sup>
Standard of Review	Initial decisions are subject to de novo review by the Commission.
Consultation with Staff and Other Agency Officials	SEC officers and employees engaged in investigative or prosecutorial functions for the Commission in a proceeding may not, in that proceeding, participate or advise in the decision, except as a witness or counsel. <sup>62</sup> Additionally, for proceedings required to be determined by the Commission on the record, members must affirmatively make the determination solely upon the record and the arguments of parties and counsel during proceedings. <sup>63</sup>
Oral Argument	Upon motion by a party, other aggrieved person, or the Commission, oral argument may be ordered. Oral argument with respect to initial decisions by a hearing officer are granted unless “exceptional circumstances” make it impractical. <sup>64</sup> Unless ordered otherwise by the Commission, not more than a half hour is allotted per side. <sup>65</sup>
Amicus Participation; Intervention; etc.	Generally in enforcement proceedings, disciplinary proceedings, and proceedings to review self-regulatory organization and Public Company Accounting Oversight Board determinations, no person may intervene as a party.  In any other proceeding, persons may either move to participate as a non-party on a limited basis or to intervene as a party, with party intervention allowed only where non-party participation is determined to be inadequate for the protection of the person’s

---

<sup>61</sup> 17 C.F.R. § 201.452.  
<sup>62</sup> 17 C.F.R. § 201.121.  
<sup>63</sup> 17 C.F.R. § 200.62.  
<sup>64</sup> 17 C.F.R. § 201.451(a).  
<sup>65</sup> 17 C.F.R. § 201.451(c).

	interests. However, persons who are the subject of a security exchange that the Commission is authorized to approve are entitled to participate as a non-party, and motions to participate as a non-party by DOJ and state prosecutorial authorities requesting a stay of proceedings during the pendency of a criminal prosecution arising out of the same or similar facts are favored. <sup>66</sup>
Public Access to Hearings	Unless one of the enumerated exceptions is met, oral arguments before the Commission are open to the public. <sup>67</sup>
Staff's Role in Writing Decisions	The SEC General Counsel is responsible for assisting members of the Commission in the preparation of Commission opinions. <sup>68</sup>
Deadlines for Decision	The Commission does not have mandated decisional deadlines. The Commission, through the Rules of Practice, has issued non-binding guidelines which encourage the Commission to complete a decision with respect to an appeal from an initial decision within eight months, although the Commission may extend this period as it deems appropriate. <sup>69</sup>
Nature of Decision	Commission decisions must include the reasons for the action taken and contain a clear showing that no serious argument of counsel has been disregarded or overlooked. <sup>70</sup>
Reconsideration, Rehearing, etc.	Motions for reconsideration of a final order issued by the Commission may be filed by a party or person aggrieved by the determination within 10 days after service of the order complained of, or within a longer period prescribed by the Commission if a motion to extend the time for filing is made within the initial 10-day period. <sup>71</sup>
Miscellaneous	

<sup>66</sup> 17 C.F.R. § 201.210.

<sup>67</sup> 17 C.F.R. §§ 200.21(c), 200.400, and 200.402; Section 2 of the *Government in the Sunshine Act*, P.L. 94-409, as codified at 5 U.S.C. § 552b.

<sup>68</sup> 17 C.F.R. §§ 200.21(b) and 201.900(b).

<sup>69</sup> 17 C.F.R. § 201.900(a).

<sup>70</sup> 17 C.F.R. § 200.63.

<sup>71</sup> 17 C.F.R. § 201.470.

## Other Case-Management Features

<p>Interlocutory Appeals: Availability, Procedures, Standard</p>	<p>The Commission may direct any matter be submitted to it for review at any time, although petitions by parties for interlocutory review are disfavored and to be granted by the Commission only in “extraordinary circumstances.”<sup>72</sup> A ruling generally may not be certified by a hearing officer upon application of a party unless the hearing officer finds that the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate review may materially advance the completion of the proceeding.<sup>73</sup></p>
<p>Assignment of Cases</p>	<p>As delegated by the Commission (until it orders otherwise), the Chief Administrative Law Judge selects the administrative law judge that will preside.<sup>74</sup></p>
<p>Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right</p>	<p>There do not appear to be special case selection techniques. Available sources suggest that the Commission grants all petitions for review.<sup>75</sup></p>
<p>Aggregation</p>	<p>The Commission (as well as hearing officers below) may consolidate proceedings involving a common question of law or fact, and may make appropriate orders to avoid unnecessary cost or delay. The Commission alone may sever proceedings where a settlement offer is pending or there is otherwise good cause.<sup>76</sup></p>
<p>Miscellaneous</p>	

<sup>72</sup> 17 C.F.R. § 201.400(a).

<sup>73</sup> 17 C.F.R. § 201.400(c).

<sup>74</sup> 17 C.F.R. §§ 200.30-10(a)(2) and 201.110; *but see* note 84 *infra* regarding the Commission’s order affecting adjudicator assignments following *Lucia v. SEC*.

<sup>75</sup> *See* note 46 *supra*.

<sup>76</sup> 17 C.F.R. § 201.201(a).

## Form of Decisions, Publication, and Precedential Status

Form of Decision	There do not appear to be requirements for the Commission's opinions other than that the decisions must include the reasons for the action taken and a clear showing that no serious argument of counsel has been disregarded or overlooked. <sup>77</sup>
Signed or Per Curiam	Decisions are signed by the Secretary of the Commission or other person authorized by the Commission. Where a dissenting opinion is issued, the majority opinion identifies which commissioners joined it and which commissioners issued dissenting opinions. <sup>78</sup>
Dissents	Dissenting opinions are permitted and are issued separately. <sup>79</sup>
Publication	Commission opinions and orders are published.
Where Published	<a href="https://www.sec.gov/litigation/opinions.shtml">https://www.sec.gov/litigation/opinions.shtml</a>
Precedential Status	Commission opinions are precedential.
Miscellaneous	

## Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below

Guidance Documents Governing Hearing-Level Adjudicators	The Commission occasionally issues orders applicable to all hearing-level proceedings or agency-wide, as well as interpretive releases and policy statements. <sup>80</sup>
---	---

<sup>77</sup> 17 C.F.R. § 200.63.

<sup>78</sup> 17 C.F.R. § 201.140(a); for an example of a dissenting opinion, see note 79, *infra*.

<sup>79</sup> A recent dissent occurred in 2015, with *In the Matter of Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr.*, available at <https://www.sec.gov/news/statement/dissenting-opinion-gallagher-piwowar.html>. The decision in that case is available at <https://www.sec.gov/litigation/opinions/2015/34-75837.pdf>.

<sup>80</sup> 15 U.S.C. § 78w(a) and (c); for examples of caseload-wide prospective orders, see *In re: Pending Administrative Proceedings* (Aug. 22, 2018), at note 84 *infra* (relating to compliance with *Lucia v. SEC*), and *In re: Pending Administrative Proceedings* (Mar. 18, 2020), Securities Act of 1933 Release No. 10767 (relating to electronic filing), <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.

Feedback to Adjudicators	There does not appear to be individualized feedback for adjudicators other than through orders by the Commission in a particular case.
Quality-Assurance Reviews and Related Mechanisms	There does not appear to be a quality-assurance function in practice.
Participation of Appellate Body in Substantive Rulemaking	The Commission, as the head of the SEC, considers and adopts rules to implement the laws governing the securities industry. The Commission is vested with the power to make rules and regulations as necessary. <sup>81</sup>
Miscellaneous	

**Miscellaneous**

Alternative Dispute Resolution (ADR)	The Commission will engage in Alternative Dispute Resolution only after determining that it is appropriate in a particular instance. The Commission has designated the General Counsel as the agency Dispute Resolution Specialist, with authority to develop dispute resolution policy and procedures. <sup>82</sup>
Participation of Appellate Body in Agency Decisions on Judicial Review	The Commission receives judicial remands. The Rules of Practice specify that the Commission issue a briefing schedule order within 21 days of receipt of a judicial remand and recommends issuance of a Commission decision on remand within 8 months. <sup>83</sup> The Commission may still refer a remanded case to an administrative law judge for the

Interpretive releases are available at <https://www.sec.gov/rules/interp.shtml> and policy statements are available at <https://www.sec.gov/rules/policy.shtml>.

<sup>81</sup> 15 U.S.C. § 78w(a) and (c).

<sup>82</sup> Alternative Dispute Resolution Policy Statement, Release No. 34-40306, 63 Fed. Reg. 42891 (Aug. 11, 1998), <https://www.sec.gov/rules/policy/34-40306.htm>.

<sup>83</sup> 17 C.F.R. § 201.450(a)(2)(iv); 17 C.F.R. § 201.900(a)(1)(iii).

	consideration of additional evidence or other proceedings as it directs. <sup>84</sup>
Role and Participation of Appellate Body in Writing Rules	The Commission, as the head of the SEC, considers and adopts rules to implement the laws governing the securities industry.
Miscellaneous	

**PUBLICLY AVAILABLE CASE STATISTICS**

Per Rule 900(c) of the Rules of Practice, the Secretary publishes biannual reports containing the statistical information about adjudicatory proceedings over the prior six months.<sup>85</sup> Among other items, this report includes increases and decreases in cases pending before administrative law judges and the Commission, median case age at the time of decision for each category of decision, and median elapsed time from briefing before the Commission to issuance of the Commission’s decision.

**TREATISES AND SCHOLARSHIP OF NOTE**

HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES LAW HANDBOOK (2020).

HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES & FEDERAL CORPORATE LAW (2020).

LARRY D. SODERQUIST & GARY M. BROWN, SODERQUIST ON THE SECURITIES LAWS (5th ed. 2006).

THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION (7th ed. 2016).

THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION (7th ed. 2017).

---

<sup>84</sup> 17 C.F.R. §§ 201.110 and 201.452. For an example where the Commission was actively involved in directing compliance with a court remand in multiple cases, see the Commission’s orders following *Lucia v. SEC*, 138 S. Ct. 2044 (2018). In *In re: Pending Administrative Proceedings* (Aug. 22, 2018), the Commission cited *Lucia* and ordered that all pending proceedings be reassigned to an ALJ who had not previously participated in the decision, among other orders. Securities Act of 1933 Release No. 10536, <https://www.sec.gov/litigation/opinions/2018/33-10536.pdf>. For an example of a Commission remand to an administrative law judge following court remand in an individual case, see *In the Matter of Mark Feathers*, Securities Exchange Act of 1934 Release No. 87226 (Oct. 4, 2019), <https://www.sec.gov/litigation/opinions/2019/34-87226.pdf>.

<sup>85</sup> 17 C.F.R. § 201.900(c). These reports are available at [https://www.sec.gov/reports?aId=edit-tid&year=All&field\\_article\\_sub\\_type\\_secart\\_value=All&tid=55](https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=All&tid=55).

DONALD C. LANGEVOORT, INSIDER TRADING: REGULATION, ENFORCEMENT, AND PREVENTION (2020).

LOUIS LOSS ET AL., SECURITIES REGULATION (2020).

LOUIS LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION (7th ed. 2019).

A. A. SOMMER, JR., FEDERAL SECURITIES ACT OF 1933 (Matthew Bender, rev. ed. 2020).

A. A. SOMMER, JR., FEDERAL SECURITIES EXCHANGE ACT OF 1934 (Matthew Bender, rev. ed. 2020).

MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW (7th ed. 2018).

David Zarin, *Enforcement Discretion at the SEC*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT 271 (Nichola R. Parillo ed., 2017)

Administrative Conference of the United States

*Agency Appellate Systems*

Christopher W. Walker  
Matthew Lee Wiener

APPENDIX N

**Social Security Administration Appeals Council:  
Review of ALJ Decisions in Claims Filed Under Titles II and XVI of the  
Social Security Act**

INTRODUCTION

The Social Security Administration (SSA) administers a variety of benefits under the Social Security Act (Act), including old-age, survivors, and disability insurance benefits under title II of the Act and supplemental security income under title XVI of the Act.<sup>1</sup>

The Act directs the Commissioner of Social Security to “make findings of fact, and decisions as to the rights of any individual applying for a payment” under title II or XVI of the Act.<sup>2</sup> The Act also directs the Commissioner to periodically redetermine whether beneficiaries who were previously found entitled to or eligible for benefits on the basis of a disability continue to be disabled.<sup>3</sup> Individuals who disagree with a decision of the Commissioner may request a hearing before the Commissioner.<sup>4</sup> If a hearing is held, the Commissioner “shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner’s findings of fact and such decision.”<sup>5</sup>

The Act authorizes the Commissioner to delegate to “any member, officer, or employee of the Social Security Administration designated by him” the responsibility to hold hearings.<sup>6</sup> The Act also authorizes the Commissioner to “make rules and regulations” and “establish procedures” and to “adopt reasonable

---

<sup>1</sup> SSA also administers Special Benefits for Certain World War II Veterans under title VIII of the Act. For more information, see 20 C.F.R. pt. 408.

<sup>2</sup> 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A) (2019).

<sup>3</sup> *Id.* §§ 421(i), 1383b(c), 1483b(e).

<sup>4</sup> *Id.* §§ 405(b)(1), 1383(c)(1)(A).

<sup>5</sup> *Id.* §§ 405(b)(1), 421(i), 1383(c); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

<sup>6</sup> *See* 42 U.S.C. §§ 405(l), 902(a)(7).



and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits.”<sup>7</sup>

The regulations establish an administrative review process by which SSA determines individuals’ rights under titles II and XVI of the Act.<sup>8</sup> First, a federal or state agency makes an initial determination.<sup>9</sup> If an individual is dissatisfied with an initial determination, she may ask the federal or state agency to reconsider it.<sup>10</sup> If an individual is dissatisfied with a reconsideration determination, she may request an evidentiary hearing before an administrative law judge (ALJ) appointed under the Administrative Procedure Act (APA).<sup>11</sup> If an individual is dissatisfied with an ALJ’s decision, she may request that the Appeals Council (AC) review the decision.<sup>12</sup> The AC’s decision, or the ALJ’s decision if the AC denies an individual’s request for review, becomes the final decision of the Commissioner.<sup>13</sup> If an individual is dissatisfied with the agency’s final decision, she may request judicial review by filing an action in federal district court.<sup>14</sup>

SSA conducts proceedings at all levels of the administrative review process “in an informal, non-adversarial manner.”<sup>15</sup> The Act specifically provides that “[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.”<sup>16</sup> No government representative currently participates as a party in proceedings before an ALJ or the AC.

In most cases, an ALJ issues a written decision following an oral hearing which gives “the findings of fact and the reasons for the decision” based on “the preponderance of the evidence offered at the hearing or otherwise included in the record.”<sup>17</sup> If a preponderance of the evidence supports a finding that is fully

---

<sup>7</sup> *Id.* §§ 405(a), 902(a)(5); *see also id.* § 1383b(a).

<sup>8</sup> 20 C.F.R. §§ 404.900(a), 416.1400(a).

<sup>9</sup> *Id.* §§ 404.900(a)(1), 416.1400(a)(1).

<sup>10</sup> *Id.* §§ 404.900(a)(2), 416.1400(a)(2).

<sup>11</sup> *See id.* §§ 404.900(a)(3), 416.1400(a)(3).

<sup>12</sup> *Id.* §§ 404.900(a)(4), 416.1400(a)(4).

<sup>13</sup> *Id.* §§ 404.981, 416.1481.

<sup>14</sup> 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.900(a)(5), 416.1400(a)(5); *Smith v. Berryhill*, 587 U.S. \_\_\_ (2019).

<sup>15</sup> 20 C.F.R. §§ 404.900, 416.1400; *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1152 (2019); *Richardson v. Perales*, 402 U.S. 389, 400–01 (1971).

<sup>16</sup> 42 U.S.C. § 405(b)(1).

<sup>17</sup> 20 C.F.R. §§ 404.953(a), 416.453(a). SSA regulations permit the AC to “assume responsibility for holding a hearing by requesting that the [ALJ] send the hearing request to it.” *Id.* §§ 404.956, 416.1456. While it is unclear that the AC has ever exercised this authority, SSA proposed rules in 2019 that would clarify the use of this authority. *Hearings Held by Administrative Appeals Judges of the Appeals Council*, 84 Fed. Reg. 70,080 (Dec. 20, 2019).

favorable to all parties on every issue, an ALJ may be able to issue a decision without conducting an oral hearing<sup>18</sup> or enter an oral decision at the hearing.<sup>19</sup> The regulations also permit non-ALJ attorney advisors to issue decisions when a preponderance of the evidence supports a finding that is fully favorable on the issue of disability.<sup>20</sup> However, a party may still request a hearing before an ALJ if an attorney advisor issues a decision.<sup>21</sup> In limited situations, an ALJ may dismiss a request for hearing without holding a hearing or issuing a decision on the merits of a claim.<sup>22</sup>

If an individual is dissatisfied with an ALJ's decision or dismissal, she may request that the AC review the decision.<sup>23</sup> The AC "may deny or dismiss a request for review, or it may grant the request and either issue a decision or remand the case to an [ALJ]."<sup>24</sup> The AC may also review an ALJ decision or dismissal on its own motion, either to remand the case to an ALJ or issue its own decision.<sup>25</sup> If the AC issues its own decision, it bases its decision on the preponderance of the evidence.<sup>26</sup>

If an individual is dissatisfied with an ALJ's decision or dismissal following court remand, she may submit written exceptions to the AC.<sup>27</sup> The AC will either decline jurisdiction or assume jurisdiction, in order to remand the case to an ALJ or issue a decision.<sup>28</sup> The AC may also assume jurisdiction on its own motion.<sup>29</sup> If the AC issues its own decision, it bases its decision on the preponderance of the evidence, and that decision becomes the final decision of the Commissioner.<sup>30</sup> If the AC does not assume jurisdiction, the ALJ's decision becomes the final decision of the Commissioner subject to judicial review.<sup>31</sup>

Administrative appeals judges (AAJ) comprise the AC's membership.<sup>32</sup> The regulations authorize individual AAJs to dismiss requests for review, deny

---

<sup>18</sup> *Id.* §§ 404.948, 416.1448.

<sup>19</sup> *Id.* §§ 404.953(b), 416.1453(b).

<sup>20</sup> *Id.* §§ 404.942(a), 416.1442(a). SSA regulations permit an "adjudication officer" to issue a decision under limited circumstances. *Id.* §§ 404.943, 416.1443. SSA does not currently exercise this authority.

<sup>21</sup> *Id.* §§ 404.942(d), 416.1442(d).

<sup>22</sup> *Id.* §§ 404.958, 416.1458.

<sup>23</sup> *Id.* §§ 404.900(a), 416.1400(a).

<sup>24</sup> *Id.* §§ 404.967, 416.1467.

<sup>25</sup> *Id.* §§ 404.969, 416.1469; Social Security Ruling (SSR) 82-13.

<sup>26</sup> 20 C.F.R. §§ 404.979, 416.1479.

<sup>27</sup> *Id.* §§ 404.984(b), 416.1484(b).

<sup>28</sup> *Id.* §§ 404.984(b), 416.1484(b).

<sup>29</sup> *Id.* §§ 404.984(c), 416.1484(c).

<sup>30</sup> *Id.* §§ 404.984(c), 416.1484(c).

<sup>31</sup> *See id.* §§ 404.984(d), 416.1484(d).

<sup>32</sup> *See* 20 C.F.R. § 422.205; *see also* Final Rule, Organization and Procedures; Procedures of the Office of Hearings and Appeals; Authority of Appeals Officers To Deny a Request for Appeals Council Review, 60 Fed. Reg. 7117, 7118 (Feb. 7, 1995).

requests for review, decline to assume jurisdiction in court remand cases, and deny reopening requests.<sup>33</sup> The regulations authorize panels of two or three AAJs to grant requests for review, review ALJ actions on the AC's own motion, and assume jurisdiction in court remand cases.<sup>34</sup> The regulations also authorize appeals officers (AO), who traditionally assisted and served as legal clerks to AAJs, to deny certain requests for review.<sup>35</sup> AOs are “[o]rganizational . . . a part of the [AC].”<sup>36</sup> While SSA regulations permit the AC to decide cases en banc,<sup>37</sup> it rarely does so.

Separate, adversarial procedures apply in cases in which SSA's Office of General Counsel initiates a proceeding against an attorney or non-attorney representative to suspend or disqualify that an individual from acting in a representational capacity before SSA.<sup>38</sup> This case study does not examine the procedures that ALJs and the AC follow in representative sanction cases.

**CHARACTERISTICS OF SYSTEM**  
(as ascertainable from public sources)

**Governing Law**

Procedural Law	<p>The Social Security Act and regulations issued by the Commissioner under the Act provide the procedural law.<sup>39</sup></p> <p>Social Security Rulings (SSR) and Acquiescence Rulings (AR) issued by the Commissioner and published in the <i>Federal Register</i> provide additional guidance on procedure.<sup>40</sup></p> <p>The Office of Appellate Operations (OAO), which includes the AC and its staff, maintains the Hearings, Appeals, and</p>
----------------	---

<sup>33</sup> See 20 C.F.R. § 422.205(b)-(c).

<sup>34</sup> 20 C.F.R. § 422.205(b).

<sup>35</sup> 20 C.F.R. § 422.205(c).

<sup>36</sup> 60 Fed. Reg. at 7118; see also HEARINGS, APPEALS, AND LITIGATION LAW MANUAL § I-3-0-1 B [hereinafter HALLEX].

<sup>37</sup> 20 C.F.R. § 422.205(e).

<sup>38</sup> *Id.* at §§ 404.1700 *et seq.*, 416.1500 *et seq.*

<sup>39</sup> 42 U.S.C. § 405(a).

<sup>40</sup> 20 C.F.R. §§ 402.35; HALLEX § I-3-3-50.

	Litigation Law manual (HALLEX). <sup>41</sup> HALLEX “conveys guiding principles and procedures to hearing level and Appeals Council adjudicators . . . and to their support staff.” <sup>42</sup>
Substantive Law	The Social Security Act and regulations issued by the Commissioner under the Social Security Act provide the substantive law.  SSRs and ARs issued by the Commissioner and published in the <i>Federal Register</i> provide additional guidance on the substantive law. <sup>43</sup>  While HALLEX primarily provides procedural guidance, it provides some guidance on the application of substantive law. AC adjudicators and staff may also consult the agency’s Program Operations Manual System (POMS) for guidance. <sup>44</sup>
Miscellaneous	[none]

### Hearing-Level Proceedings in Appellate System

Hearing-Level Decisions Appealable	The AC reviews ALJ decisions that determine individuals’ rights under titles II and XVI of the Act. <sup>45</sup> The AC also reviews ALJ dismissals.
Nature of Hearing-Level Proceedings	Agency proceedings under titles II and XVI of the Act are conducted in “an informal, non-adversarial manner.” <sup>46</sup> While the Act requires the Commissioner to provide hearings to individuals dissatisfied with a

<sup>41</sup> HALLEX § I-1-0-5 A. HALLEX is available on SSA’s website at *Hearings, Appeals, and Litigation Law Manual*, SOC. SEC. ADMIN., [https://www.ssa.gov/OP\\_Home/hallex/hallex.html](https://www.ssa.gov/OP_Home/hallex/hallex.html) (last visited Aug. 7, 2019).

<sup>42</sup> *Id.* § I-1-0-3.

<sup>43</sup> 20 C.F.R. § 402.35.

<sup>44</sup> *See POMS Home*, Soc. Sec. Admin, <https://secure.ssa.gov/apps10/poms.nsf/Home> (last visited Aug. 7, 2019).

<sup>45</sup> *Id.* §§ 404.966-96, 416.1466-96, 422.205.

<sup>46</sup> *Id.* §§ 404.900(b), 416.1400(b).

	determination, the Supreme Court has not definitively decided “whether the APA has general application to social security disability claims.” <sup>47</sup> The rules of evidence that apply in federal court proceedings are not applicable in SSA hearings. <sup>48</sup>
Nature of Hearing-Level Decision	<p>In most cases, an ALJ issues a written decision that “gives the findings of fact and the reasons for the decision” based on “the preponderance of the evidence offered at the hearing or otherwise included in the record.”<sup>49</sup> In appropriate situations, an ALJ may enter a fully favorable oral decision into the record at hearing,<sup>50</sup> issue a recommended decision,<sup>51</sup> or dismiss a request for hearing.<sup>52</sup></p> <p>In some circumstances, a non-ALJ attorney advisor may issue a fully favorable decision that “state[s] the basis for the decision and advise[s] all parties that they may request that an [ALJ] reinstate the request for hearing if they disagree with the decision for any reason.”<sup>53</sup></p>
Transfer of Case to Appellate Body After Hearing-Level Decision	<p>A party who is dissatisfied with an ALJ decision or dismissal may request review by the AC.<sup>54</sup> A party who is dissatisfied with an ALJ decision following court remand may file written exceptions with the AC.<sup>55</sup></p> <p>The AC may also review an ALJ decision or dismissal, or the final decision of an ALJ</p>

<sup>47</sup> See Perales, 402 U.S. at 409. *But see* Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 279 (2002).

<sup>48</sup> 42 U.S.C. § 405(b)(1).

<sup>49</sup> 20 C.F.R. §§ 404.953(a), 416.1453(a); HALLEX § I-2-8-25.

<sup>50</sup> 20 C.F.R. §§ 404.953(b), 416.1453(b); HALLEX § I-2-8-19.

<sup>51</sup> 20 C.F.R. §§ 404.953(d), 416.1453(d); HALLEX § I-2-8-15.

<sup>52</sup> 20 C.F.R. §§ 404.957, 416.1457; HALLEX ch. I-2-4.

<sup>53</sup> 20 C.F.R. §§ 404.942, 416.1442; HALLEX § I-5-3-21; *see also* Final Rule; Making Permanent the Attorney Advisor Program, 83 Fed. Reg. 40,451 (Aug. 15, 2018).

<sup>54</sup> 20 C.F.R. §§ 404.967, 416.1467; HALLEX §§ I-3-1-1, I-3-1-2.

<sup>55</sup> 20 C.F.R. §§ 404.984(a)-(b), 416.1484(a)-(b); HALLEX § I-4-8-25.

	<p>following court remand, on its own motion.<sup>56</sup> Own motion cases in non-court remand cases are ordinarily identified through random or selective sampling or based on a referral from another component responsible for examining or effectuating decisions.<sup>57</sup></p> <p>In limited situations, an ALJ may send a case to the AC with a recommended decision.<sup>58</sup></p>
Miscellaneous	An ALJ may dismiss a hearing request for under certain enumerated circumstances. <sup>59</sup>

### Identity of Reviewing/Appellate Authority and Its Legal Status

Reviewing Authority(ies)	ALJ decisions and dismissals are reviewable by the AC. <sup>60</sup> There is no process for review by the Commissioner of Social Security.
Legal Status of Reviewing Authority(ies)	The Act permits the Commissioner to delegate the authority to hold hearings and issue decisions. <sup>61</sup> The Commissioner has delegated the authority to hold hearings and render decisions to APA-qualified ALJs and the authority to review ALJ actions to the AC. <sup>62</sup>
Miscellaneous	[none]

### Institutional Attributes of Appellate/Reviewing Authority(ies)

<sup>56</sup> 20 C.F.R. §§ 404.969, 404.984(c), 416.1469, 404.984(c); HALLEX ch. I-3-6.

<sup>57</sup> *Id.* §§ 404.969, 416.1469; SSR 82-13; HALLEX § I-3-6-1.

<sup>58</sup> *Id.* at §§ 404.953(c), 416.1453(c).

<sup>59</sup> 20 C.F.R. § 404.957, 416.1457.

<sup>60</sup> *Id.* §§ 404.900(a), 404.1780, 416.1400(a), 416.1580.

<sup>61</sup> *See* 42 U.S.C. 405(l); *see also id.* § 902(a)(7).

<sup>62</sup> *Id.* §§ 404.900(a), 404.981, 416.1400(a), 416.1481; HALLEX §§ I-2-0-2 A, I-3-01 B; *see also* SSA ORGANIZATION MANUAL chs. TL, TQE (2019), *available at* <https://www.ssa.gov/org/orgOARO.htm> [hereinafter SSA ORGANIZATIONAL MANUAL].

Number of Members	The AC consists of more than 100 AAJs, who are members of the AC, and AOs, who are organizationally part of the AC. <sup>63</sup>
Qualification Requirements	Neither the Act nor SSA regulations specify qualification requirements for AAJs or AOs. SSA hires AAJs and AOs through internal postings on USAJOBS. Recent postings indicate that AAJs must have seven years of relevant experience, including “one year at a level of difficulty comparable to the GS-14 grade level or equivalent in the Federal service,” and must be a member of a bar. <sup>64</sup> AOs must have 52 weeks of specialized experience at the GS-13 level, and be an active member of a bar. <sup>65</sup>
Party Affiliation Requirement in Appointment	There are no party affiliation requirements for the appointment of AAJs or AOs.
Method of Appointment	AAJs and AOs are employees of the agency. On July 16, 2018, the Acting Commissioner ratified the appointment of AAJs and approved their appointments as her own. <sup>66</sup>
Term of Appointment	AAJs and AOs are employees of the agency without terms of appointment.
Statutory Removal Protections	AAJs and AOs are members of the excepted service. There are no specific statutory removal protections for AAJs or AOs.
Location within Agency; Basis of Legal Authority	The AC and its staff constitute OAO. <sup>67</sup> OAO is a subcomponent of the Office of Analytics, Review, and Oversight (OARO), which is headed by a Deputy Commissioner who is a

<sup>63</sup> *Brief History and Current Information about the Appeals Council*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/about\\_ac.html](https://www.ssa.gov/appeals/about_ac.html) (last visited Aug. 5, 2019).

<sup>64</sup> *Attorney-Examiner (General) (Administrative Appeals Judge)*, USAJOBS, <https://www.usajobs.gov/GetJob/ViewDetails/479582900> (last visited Aug. 5, 2019).

<sup>65</sup> *Attorney-Adviser (General) (Appeals Officer)*, USAJOBS, <https://www.usajobs.gov/GetJob/ViewDetails/495300500/> (last visited Aug. 6, 2019).

<sup>66</sup> SSR 19-1p, 84 Fed. Reg. 9582 (Mar. 15, 2019).

<sup>67</sup> SSA ORGANIZATIONAL MANUAL ch. TQE; HALLEX § I-3-0-1.

	<p>member of the Senior Executive Service.<sup>68</sup> The Deputy Commissioner reports to the Commissioner of Social Security.<sup>69</sup> The presidentially-nominated and Senate-confirmed Commissioner serves a set six-year term and may be removed from office “only pursuant to a finding by the President of neglect of duty or malfeasance in office.”<sup>70</sup></p>
<p>Authority to Delegate to Subunit(s); Designating Official and Process</p>	<p>Although the regulations permit the AC to meet en banc to consider a case, individual AAJs and AOs and panels of two or three AAJs issue nearly all AC notices, orders, and decisions.<sup>71</sup></p> <p>Adjudicators are “designated in the manner prescribed by the Chairman or Deputy Chairman of the Council.”<sup>72</sup> In practice, adjudicators are semi-randomly assigned to cases based on claimants’ Social Security numbers.</p>
<p>Quorum Requirement</p>	<p>A single AAJ or AO may deny a party’s request for review of an ALJ decision; a single AAJ may deny a request for review of an ALJ dismissal, dismiss a request for review, or deny a reopening request; and two AAJs must agree to review an ALJ action.<sup>73</sup> Three AAJs are required in cases in which two AAJs disagree or a party appears before the AC for oral argument.<sup>74</sup></p>
<p>Authority and Function of Appellate Authority’s Head</p>	<p>A Chairperson serves as the AC’s head.<sup>75</sup> Under the regulations, cases are assigned to adjudicators “in the manner prescribed by the Chairman or Deputy Chairman of the Council.”<sup>76</sup> If two AAJs disagree as to whether to review an ALJ action, “the</p>

<sup>68</sup> SSA ORGANIZATIONAL MANUAL ch. TQ.

<sup>69</sup> SSA ORGANIZATIONAL CHART, <https://www.ssa.gov/org/ssachart.pdf> (July 30, 2019).

<sup>70</sup> 42 U.S.C. § 902(a)(1).

<sup>71</sup> See 20 C.F.R. § 422.205.

<sup>72</sup> 20 C.F.R. § 422.205.

<sup>73</sup> 20 C.F.R. § 422.205; HALLEX §§ I-3-2-5 C, I-4-8-25 (procedures for court remand cases).

<sup>74</sup> 20 C.F.R. § 422.205(b); HALLEX § I-3-2-5 C.3.

<sup>75</sup> See 20 C.F.R. § 422.205.

<sup>76</sup> *Id.* § 422.205(b).



	<p>Chairman or Deputy Chairman, or his delegate, who must be a member of the Council,” participates as a third panel member.<sup>77</sup></p> <p>The Chairperson may call a meeting of the AC en banc or a representative body of AC members to consider a case.<sup>78</sup> The Chair may also designate ALJs to serve as members of the AC for temporary assignments.<sup>79</sup></p> <p>The Executive Director of OAO serves as the Chairperson.<sup>80</sup> The Executive Director is “responsible for the day-to-day operations of OAO.”<sup>81</sup> She is “directly responsible to the Deputy Commissioner for Analytics, Review, and Oversight to carry out OARO and OAO’s mission and provide general supervision to the major components of OAO.”<sup>82</sup></p>
<p>Internal Management Structure of Appellate Authority</p>	<p>OAO consists of the Executive Director, the Deputy Executive Director, the Immediate Office of the Executive Director, and up to 11 divisions that report to a Director of Operations.<sup>83</sup> The Divisions of Program Adjudication “oversee[] and coordinate[] activities of the Disability Program Branches and the Retirement and Survivors Insurance Supplemental Security Income Branches.”<sup>84</sup> The Division of Civil Actions “is responsible for certain actions on cases in which a claimant has filed a civil action.”<sup>85</sup> The Division of Quality Review exercises the AC’s quality review responsibilities.<sup>86</sup></p>

<sup>77</sup> *Id.*

<sup>78</sup> 20 C.F.R. § 422.205(e).

<sup>79</sup> 20 C.F.R. § 422.205(e)-(f); HALLEX § I-3-0-1 B.

<sup>80</sup> SSA ORGANIZATIONAL MANUAL ch. TQE; HALLEX § I-3-0-30.

<sup>81</sup> HALLEX § I-3-0-30.

<sup>82</sup> SSA ORGANIZATIONAL MANUAL ch. TQE.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> HALLEX § I-3-0-25; *see also* HALLEX § I-4-0-2; SSA ORGANIZATIONAL MANUAL ch. TQE.

<sup>86</sup> SSA ORGANIZATIONAL MANUAL ch. TQE; HALLEX § I-3-0-20.

	<p>Adjudicators in each division are led by a Division Chief AAJ.<sup>87</sup> DCAAJs are also “involved in training and in broad management decisions.”<sup>88</sup> Although the AC’s staff are also organized into the same Divisions under a separate hierarchy, the DCAAJs “help[] establish the culture and direction of each division,” and communication between the DCAAJs and the Executive Director’s Office “create[s] an additional channel for ideas to flow from the staff to the front office, helping executives more quickly identify and resolve operational problems.”<sup>89</sup></p>
Miscellaneous	<p>Federal law sets the rate of basic pay for AAJs at “not less than the minimum rate of basic pay for level AL-3” and “not greater than the maximum rate of basic pay for level AL-3” under 5 U.S.C. § 5372.<sup>90</sup></p>

### Nature, Form, and Timing of Appeal

<p>Nature of Appeal: Discretionary Versus as of Right; If Discretionary, Standards for Allowance</p>	<p>The AC will review a case if (1) “[t]here appears to be an abuse of discretion by the [ALJ];” (2) “[t]here is an error of law;” (3) “[t]he action, findings, or conclusions of the [ALJ] are not supported by substantial evidence;” (4) “[t]here is a broad policy or procedural issue that may affect the general public interest;” or (5) the AC “receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.”<sup>91</sup> The AC may review an ALJ</p>
--	--

<sup>87</sup> Ray & Sklar, *supra* note 104, at 11; *see also* SSA OFFICE OF THE INSPECTOR GEN., A-12-13-13039, REQUEST FOR REVIEW WORKLOADS AT THE APPEALS COUNCIL, Appendix B 2-4 (2014).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> 5 U.S.C. § 5372b(c); *see also* *Fact Sheet: Administrative Appeals Judge Pay System*, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-appeals-judge-pay-system/> (last visited Aug. 5, 2019).

<sup>91</sup> 20 C.F.R. §§ 404.970(a), 416.1470(a); HALLEX ch. I-3-3.

	<p>decision or dismissal on its own initiative according to the same standard.<sup>92</sup></p> <p>In court remand cases, the AC “may assume jurisdiction based on written exceptions” or on its own initiative.<sup>93</sup></p>
How Appeal Initiated	<p>Parties request AC review by filing a Form HA-520 “or by any other writing specifically requesting review” in any SSA office.<sup>94</sup></p> <p>Parties may also request AC review online through SSA’s website.<sup>95</sup></p>
Time For Appealing	<p>A party who wishes to request that the AC review an ALJ decision or dismissal must submit a request for review within 60 days after the date she receives notice of the hearing decision or dismissal unless the AC grants her request for an extension of time or she shows she had good cause for missing the deadline.<sup>96</sup></p> <p>A party who wishes to request that the AC review the final decision of an ALJ following court remand must submit written exceptions within 30 days of the date she receives the ALJ’s decision unless the AC grants an extension of time.<sup>97</sup></p>
If No Appeal Taken from Hearing Officer’s Decision	<p>With limited exceptions, an ALJ decision or dismissal becomes the final decision of the Commissioner unless a party requests AC review or the AC reviews an ALJ decision or dismissal on its own motion.<sup>98</sup> The decision of an ALJ after a court remand ordinarily becomes the final decision of the</p>

<sup>92</sup> See 20 C.F.R. §§ 404.969, 416.1469; SSR 82-13; HALLEX I-3-6-1 C.

<sup>93</sup> 20 C.F.R. §§ 404.984, 416.1484.

<sup>94</sup> 20 C.F.R. §§ 404.968, 416.1468, 422.205(a).

<sup>95</sup> *Appeal a Decision*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/disability/appeal.html> (last visited Aug. 6, 2019).

<sup>96</sup> 20 C.F.R. §§ 404.968, 416.1468; HALLEX § I-3-1-1

<sup>97</sup> 20 C.F.R. §§ 404.984, 416.1484.

<sup>98</sup> 20 C.F.R. §§ 404.955, 404.959, 416.1455, 416.1459.

	Commissioner unless a party submits written exceptions. <sup>99</sup>
If Appeal Taken	If the AC denies a request for review, the ALJ's decision or dismissal becomes the final decision of the Commissioner. <sup>100</sup> If the AC grants a request for review or reviews a case on its own motion, it will remand the case to an ALJ or issue a decision. If the AC issues a decision, the AC's decision becomes the final decision of the Commissioner. <sup>101</sup>
Review of Decisions on Own Initiative (Without Request of a Party)	SSA regulations authorize the AC to review decisions and dismissals on its own initiative anytime within 60 days after their issuance. <sup>102</sup> A 1980 statute required the then-agency head to “implement a program of reviewing, on his own motion, decisions rendered by [ALJs] as a result of hearings” under the disability determination provisions of title II of the Act. <sup>103</sup> OAO re-established its quality review process in 2010. <sup>104</sup>  Today, the AC's Division of Quality Review uses random and selective sampling to identify cases for potential quality assurance review. <sup>105</sup> The AC “randomly selects closed hearing level cases, based on a sample size that will yield statistically valid results at a regional level.” <sup>106</sup> The AC uses selective sampling “to identify cases that exhibit problematic issues or fact patterns that

<sup>99</sup> 20 C.F.R. §§ 404.984(d), 416.1484(c).

<sup>100</sup> 20 C.F.R. §§ 404.955(b), 404.981, 416.1455(b), 416.1481.

<sup>101</sup> 20 C.F.R. §§ 404.981, 416.1481.

<sup>102</sup> 20 C.F.R. §§ 404.969(a), 416.1469(a).

<sup>103</sup> Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 456 (1980); *see also* SSR 82-13.

<sup>104</sup> HALLEX § I-3-0-20 A. For more information, see GERALD K. RAY & GLENN SKLAR, AN OPERATIONAL APPROACH TO ELIMINATING BACKLOGS IN THE SOCIAL SECURITY DISABILITY PROGRAM 24 (2019); SSA OFFICE OF THE INSPECTOR GEN., A-12-16-50106, OVERSIGHT OF ADMINISTRATIVE LAW JUDGE DECISIONAL QUALITY (2017); SSA OFFICE OF THE INSPECTOR GEN., A-12-15-50015, PRE-EFFECTUATION REVIEWS OF FAVORABLE HEARING DECISIONS (2017).

<sup>105</sup> 20 C.F.R. §§ 404.969(b)(1), 416.1469(b)(1).

<sup>106</sup> HALLEX § I-3-6-1 B.

	<p>increase the likelihood of error.”<sup>107</sup> Neither sampling procedure “identif[ies] cases based on the identity of the decisionmaker or the identity of the office issuing the decision.”<sup>108</sup> The AC also reviews cases on its own motion based on referrals from components that conduct case examinations or effectuate favorable decisions.<sup>109</sup></p> <p>The AC may also assume jurisdiction of the final decision of an ALJ issued after a court remand any time within 60 days after the date of the ALJ’s decision.<sup>110</sup></p> <p>As part of its quality assurance role, the AC also conducts “focused reviews of specific subjects, including but not limited to hearing offices, individuals, subject matters, policies, or procedures.”<sup>111</sup> Unlike own motion review cases, focused reviews occur after decisions are effectuated and do not affect the outcome of an ALJ’s decision or the payment of benefits.<sup>112</sup></p>
Miscellaneous	[none]

### Appellate Authority’s Procedures

Record on Review	<p>The official record consists of the ALJ’s decision or dismissal; “all evidence upon which the [ALJ] relies for the decision . . . , either directly or by appropriate evidence,” “the applications, written statements, certificates, reports, affidavits, medical records, and other documents used in making the decision;” all “exhibits introduced as evidence;” “a verbatim recording of all</p>
------------------	--

<sup>107</sup> 20 C.F.R. §§ 404.969(b)(1), 416.1469(b)(1); HALLEX § I-3-6-1 B.

<sup>108</sup> 20 C.F.R. §§ 404.969(b)(1), 416.1469(b)(1).

<sup>109</sup> 20 C.F.R. §§ 404.969(b)(2)-(c), 416.1469(b)(2)-(c); HALLEX § I-3-6-10.

<sup>110</sup> 20 C.F.R. §§ 404.984(c), 416.1484(c).

<sup>111</sup> HALLEX § I-3-0-20 C.

<sup>112</sup> See Ray & Sklar, *supra* note 104, at 25.

	testimony offered at the hearing;” and “any prior initial determinations or decisions on [the] claim.” <sup>113</sup>
Submissions by Parties in Support of Appeal	<p>The AC provides parties “a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.”<sup>114</sup> Parties are also advised to submit “any evidence you wish to have considered by the [AC] with your request for review.”<sup>115</sup> However, the AC will only consider additional evidence under limited circumstance (see below).</p> <p>In court remand cases, parties may submit “a written statement to the [AC] setting forth your reasons for disagreeing with the decision of the [ALJ].”<sup>116</sup></p>
Issue Preservation	There is generally no issue preclusion in non-adversarial Social Security proceedings. <sup>117</sup>
Open or Closed Record on Appeal? Submission and Consideration of New Evidence on Appeal	<p>In general, a party must inform SSA about or submit all evidence no later than five business days before the date of the hearing before an ALJ unless a party has a good reason for missing the five-day deadline.<sup>118</sup> The AC will only consider additional evidence if a party shows good cause for missing the five-day deadline and the additional evidence is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.<sup>119</sup></p>

<sup>113</sup> 20 C.F.R. §§ 404.951(b), 416.1451(b).

<sup>114</sup> 20 C.F.R. §§ 404.975, 416.1475.

<sup>115</sup> 20 C.F.R. §§ 404.968, 416.1468.

<sup>116</sup> 20 C.F.R. §§ 404.984(b), 416.1484(b).

<sup>117</sup> *Sims v. Apfel*, 530 U.S. 103 (2000).

<sup>118</sup> 20 C.F.R. § 404.935, 416.1435; HALLEX §§ I-2-6-58, I-2-6-59.

<sup>119</sup> 20 C.F.R. §§ 404.970, 416.1470; HALLEX § I-3-3-6.

Standard of Review	<p>The AC will review a case if (1) “[t]here appears to be an abuse of discretion by the [ALJ];” (2) “[t]here is an error of law;” (3) “[t]he action, findings, or conclusions of the [ALJ] are not supported by substantial evidence;” (4) “[t]here is a broad policy or procedural issue that may affect the general public interest;” or (5) the AC “receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.”<sup>120</sup></p> <p>The AC may review an ALJ decision or dismissal on its own initiative according to the same standard.<sup>121</sup> In court remand cases, the AC “may assume jurisdiction based on written exceptions” or on its own initiative.<sup>122</sup></p> <p>If the AC issues a decision, it bases its decision on the preponderance of the evidence.<sup>123</sup></p>
Consultation with Staff and Other Agency Officials	<p>An attorney or non-attorney analyst conducts a procedural and substantive review of every case in which a request for review is filed and prepares a recommendation for review by an AO or AAJ, as appropriate.<sup>124</sup></p> <p>The AC may refer a case to its Medical Support Staff when it needs medical advice or a medical assessment of a claimant’s ability to perform work-related activities.<sup>125</sup></p>
Oral Argument	Parties may request to appear before the AC to present oral argument. The AC will grant

<sup>120</sup> 20 C.F.R. §§ 404.970(a), 416.1470(a); HALLEX ch. I-3-3.

<sup>121</sup> See 20 C.F.R. §§ 404.969, 416.1469; SSR 82-13; HALLEX I-3-6-1 C.

<sup>122</sup> 20 C.F.R. §§ 404.984, 416.1484.

<sup>123</sup> 20 C.F.R. §§ 404.979, 409.984(b)(3)-(c), 416.1479, 416.1484(b)(3)-(c).

<sup>124</sup> HALLEX §§ I-3-2-1, I-3-2-3, I-3-2-5, I-4-8-25.

<sup>125</sup> HALLEX § I-3-2-11.

	a request if it decides that a case “raises an important question of law or policy or that oral argument would help to reach a proper decision.” <sup>126</sup> Parties rarely appear before the AC to present oral argument. <sup>127</sup>
Amicus Participation; Intervention; etc.	There is no provision for amicus participation or intervention.
Public Access to Hearings	Under the regulations, an ALJ hearing is “open to the parties and to other persons the [ALJ] considers necessary and proper.” <sup>128</sup> No regulation provides explicit guidance regarding oral arguments before the AC. <sup>129</sup>
Staff’s Role in Writing Decisions	Analysts play an integral role reviewing case files; preparing recommendations that the AC take particular actions; and drafting notices, orders, and decisions. <sup>130</sup>
Deadlines for Decision	None is provided for in the Social Security Act or SSA regulations.
Nature of Decision	If the AC issues a decision, it affirms, modifies, or reverses the ALJ decision based on the preponderance of the evidence. <sup>131</sup>
Reconsideration, Rehearing, etc.	SSA regulations permit the AC to reopen and revise an otherwise final and binding determination or decision, upon a party’s request or on its own initiative, under limited circumstances. <sup>132</sup> The AC may reopen a determination or decision for any reason within 12 months of the date of the notice of the initial determination; within four years of the date of the notice of the initial

<sup>126</sup> 20 C.F.R. §§ 404.976, 416.1476; HALLEX § I-3-8-12.

<sup>127</sup> Oral arguments are more common in representative conduct cases, which are not addressed in this report. *See* 20 C.F.R. §§ 404.1780, 416.1580.

<sup>128</sup> 20 C.F.R. §§ 404.944, 416.1444.

<sup>129</sup> Oral arguments are more common in representative conduct cases, which are not addressed in this report. *See* 20 C.F.R. §§ 404.1780, 416.1580.

<sup>130</sup> HALLEX § I-3-2-5.

<sup>131</sup> 20 C.F.R. §§ 404.979, 404.984(b)(3)-(c), 416.1479, 416.1484(b)(3)-(c).

<sup>132</sup> 20 C.F.R. §§ 404.987, 416.1487.



	determination on a title II claim and within two years of the date of the notice of the initial determination on a title XVI claim for good cause; and at any time under enumerated circumstances, such as where a determination or decision “was obtained by fraud or similar fault.” <sup>133</sup> Good cause exists if (1) “[n]ew and material evidence is furnished;” (2) “[a] clerical error was made;” (3) “[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made.” <sup>134</sup>
Miscellaneous	The AC may dismiss a request for hearing if (1) a party “did not file [the] request within the stated period of time and the time for filing has not been extended,” (2) all parties to a proceeding file a written request for dismissal, or (3) all parties have died and “the record clearly shows that dismissal will not adversely affect any other person who wishes to continue the action.” <sup>135</sup>

### Other Case-Management Features

Interlocutory Appeals: Availability, Procedures, Standard	There is no provision for interlocutory appeals.
Assignment of Cases	No publicly available document addresses the assignment of cases to adjudicators.
Special Case-Selection Techniques (e.g., Artificial Intelligence) When Appeal Is Not as of Right	The AC uses random and selective sampling techniques to identify cases for quality assurance reviews and potential own motion review. <sup>136</sup>

<sup>133</sup> 20 C.F.R. §§ 404.988, 416.1488.

<sup>134</sup> 20 C.F.R. §§ 404.989, 416.1489.

<sup>135</sup> 20 C.F.R. §§ 404.971, 416.1471.

<sup>136</sup> 20 C.F.R. §§ 404.969, 416.1469; HALLEX ch. I-3-6. For more information, see SSA OFFICE OF THE INSPECTOR GEN., A-12-15-50015, PRE-EFFECTUATION REVIEWS OF FAVORABLE HEARING DECISIONS (2017).

Aggregation	There is no provision for aggregation.
Miscellaneous	<p>OAo relies on its electronic case management system, the Appeals Review Processing System (ARPS), to collect data on hearing- and appeals-level decision making. SSA uses this data to inform decisions about substantive and procedural policies as well as for training and feedback purposes.<sup>137</sup></p> <p>The AC has developed data analytical, natural language processing, and other artificial intelligence techniques to assist in the assignment of cases to analysts and to support the AC’s substantive review of ALJ decisions.<sup>138</sup></p>

### Form of Decisions, Publication, and Precedential Status

Form of Decision	<p>The “primary purpose of an AC decision is to dispose of all issues in a case,” including those not previously considered by an ALJ.<sup>139</sup> The decision must be “legally sufficient” and “defensible” and its “rationale must support and fully explain the conclusion.”<sup>140</sup> An AC decision “generally has four basic sections: procedural history, rationale, findings, and decisional paragraph.”<sup>141</sup></p>
Signed or Per Curiam	Decisions are issued under the name of the AAJ or AO for one-member actions and the

<sup>137</sup> See generally Felix F. Bajandas & Gerald K. Ray, Implementation and Use of Electronic Case Management Systems in Federal Agency Adjudication 42-52 (May 23, 2018) (report to the Admin. Conf. of the U.S.); Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575 (2015).

<sup>138</sup> Ray & Sklar, *supra* note 104, at 16-23, 31-34.

<sup>139</sup> HALLEX § I-3-8-1 B.

<sup>140</sup> HALLEX § I-3-8-20 A.

<sup>141</sup> *Id.*

	name of the AAJs for two- and three-member actions. <sup>142</sup>
Dissents	There is no provision for dissenting opinions.
Publication	The AC does not make its decisions publicly available unless they are deemed precedential and published as Social Security Rulings in the <i>Federal Register</i> and on SSA's website. <sup>143</sup> The most recently published AC decision still in effect dates from 1990. <sup>144</sup>
Where Published	See above.
Precedential Status	See above.
Miscellaneous	<p>HALLEX empowers the AC to issue Appeals Council Interpretations (ACI) to (1) “[s]urface and resolve issues arising from gaps in policy or unclear statements of policy to facilitate the adjudication of individual cases coming before the Council for consideration;” (2) “[p]romote greater consistency and uniformity in policy and its application both at the hearings and appeals levels and throughout the adjudicatory process;” (3) “[e]stablish precedents at the hearings and appeals levels of adjudication upon which claimants and their representatives may rely;” and (4) “[e]nhance service to the public by identifying and resolving conflicts and inconsistencies in adjudicatory policy, and by identifying and surfacing to SSA policymakers conflicts or inconsistencies in program policy.”<sup>145</sup></p> <p>In theory, this mechanism arises from the AC's authority to review a case if “[t]here is a broad policy or procedural issue that may</p>

<sup>142</sup> HALLEX § I-3-2-5 C.

<sup>143</sup> See 20 C.F.R. § 402.35(b)(1); see also Daniel J. Sheffner, *Access to Adjudication Materials on Federal Agency Websites*, 51 AKRON L. REV. 447, 494-98 (2017).

<sup>144</sup> See SSR 90-4a.

<sup>145</sup> HALLEX § II-5-0-1.

	<p>affect the general public interest.”<sup>146</sup> In practice, ACIs do not present as the AC’s decision in particular cases. Most, if not all, ACIs take the form of general guidance rather than adjudicatory orders. Although ACUS has encouraged the AC to make greater use of ACIs,<sup>147</sup> the AC only infrequently issues them. As of 2020, there are only 13 published ACIs. Nine relate to “administrative” (i.e., procedural) matters, one relates to “retirement and survivors insurance and supplemental security income matters,” and three relate to “disability matters.”</p> <p>When the AC issues an ACI, it does so en banc after consultation with “the appropriate program policy office.”<sup>148</sup></p>
--	---

**Extra-Adjudicative Activities of Appellate Authority to Direct or Review Activities of Adjudicators Below**

<p>Guidance Documents Governing Hearing-Level Adjudicators</p>	<p>HALLEX “communicates guiding principles and procedures to hearing level and [AC] adjudicators, i.e., [ALJs], attorney advisors, [AAJs], and [AOs], and to their support staff.”<sup>149</sup></p> <p>OAO maintains HALLEX.<sup>150</sup> OAO also serves as the “national coordination point for HALLEX issuances” and “[d]evelops policies, standards, and procedures for maintaining HALLEX;” “[m]ay initiate and coordinate updates and revisions in any Division of HALLEX;” “[r]eviews all proposed issuances for conformity and consistency with established standards, policies, and</p>
--	--

<sup>146</sup> *Id.*; see also 20 C.F.R. §§ 404.970, 416.1470.

<sup>147</sup> Admin. Conf. of the U.S., Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudications*, ¶ 3(a), 78 Fed. Reg. 41,352, 41,354 (July 10, 2013); see also Admin. Conf. of the U.S., Recommendation 87-7, *A New Role for the Social Security Appeals Council*, ¶ 1(a)(2), 52 Fed. Reg. 49,143 (Dec. 30, 1987).

<sup>148</sup> HALLEX § II-5-0-1.

<sup>149</sup> HALLEX § I-1-0-3 A.

<sup>150</sup> HALLEX § I-1-0-5 A.

	<p>procedures;” and “[m]aintains records of published HALLEX issuances.”<sup>151</sup></p> <p>The Office of the Chief ALJ “may notify OAO of the need to develop and update HALLEX” and is responsible for writing and revising relevant HALLEX sections.<sup>152</sup></p>
Feedback to Adjudicators	<p>OAO decision-making data is used to provide ALJs with “timely and direct feedback on remanded cases,” including relevant “policy guidance and in-depth training material related to the reasons their cases were remanded.” The How MI Doing? (HMID) tool also “allows ALJs to monitor their personal workloads and compare their performance to other ALJs in their hearing office, their region, and nationally.”<sup>153</sup></p>
Quality-Assurance Reviews and Related Mechanisms	<p>Quality assurance has become a core responsibility of the AC.<sup>154</sup> Although SSA regulations have permitted the AC own-motion review since the 1940s, OAO re-established its quality review process in 2010,<sup>155</sup> and in 2017, SSA combined OAO with several other quality assurance components to form the Office of Analytics, Review, and Oversight (OARO). OARO “supports the agency’s mission, goals, and service principles by reviewing program quality and effectiveness; making recommendations for program improvement using feedback from the adjudication of cases,</p>

<sup>151</sup> HALLEX § I-1-0-5 A.

<sup>152</sup> HALLEX § I-1-0-5 B-C.

<sup>153</sup> SSA OFFICE OF THE INSPECTOR GEN., A-12-16-50106, OVERSIGHT OF ADMINISTRATIVE LAW JUDGE DECISIONAL QUALITY 9 (2017); *see also* Ray & Sklar, *supra* note 104, at 26.

<sup>154</sup> *See generally* Ray & Sklar, *supra* note 104, at 24-27; SSA OFFICE OF THE INSPECTOR GEN., A-12-16-50106, OVERSIGHT OF ADMINISTRATIVE LAW JUDGE DECISIONAL QUALITY (2017); SSA OFFICE OF THE INSPECTOR GEN., A-12-15-50015, PRE-EFFECTUATION REVIEWS OF FAVORABLE HEARING DECISIONS (2017); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-37, SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES AND EVALUATION NEEDED TO ENHANCE ACCURACY AND CONSISTENCY OF HEARINGS DECISIONS (2017); SSA OFFICE OF THE INSPECTOR GEN., A-12-13-13039, REQUEST FOR REVIEW WORKLOADS AT THE APPEALS COUNCIL 13 (2014).

<sup>155</sup> HALLEX § I-3-0-20 A.

	<p>predictive modeling, and advanced data analytics; coordinating the agency’s detection and prevention of fraud; and responding to recommendations of external monitoring authorities.”<sup>156</sup></p> <p>Core quality assurance-related activities include pre- and post-effectuation quality assurance reviews and the use of ARPS data for policy, feedback, and training purposes, as discussed above.</p>
Participation of Appellate Body in Substantive Rulemaking	Substantive rules are promulgated by the Commissioner. <sup>157</sup> OAO may participate in the development of rules related to the responsibilities of the AC. <sup>158</sup>
Miscellaneous	[none]

### Miscellaneous

Alternative Dispute Resolution (ADR)	There is no provision for ADR.
Participation of Appellate Body in Agency Decisions on Judicial Review	OAO’s Division of Civil Actions (DCA) is “responsible for certain actions on cases in which a claimant has filed a civil action.” <sup>159</sup> These responsibilities include: “[a]pproving extensions of time to file a civil action;” “[p]reparing the certified administrative record;” “[p]reparing affidavits and declarations used to support motions to dismiss;” “[c]onducting supplemental reviews of pending court cases, including recommendations to defend on the record, seek voluntary remand, or seek appeal when a court issues a decision that is adverse to the

<sup>156</sup> SSA ORGANIZATION MANUAL ch. TQ (2019).

<sup>157</sup> 42 U.S.C. §§ 405(a), 902(a)(5).

<sup>158</sup> See, e.g., Final Rule, Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 90,987 (Dec. 16, 2016).

<sup>159</sup> HALLEX § I-4-0-1.

	Commissioner;” “[a]cting on remand orders from the court;” and “[h]andling appeals of [ALJ] decisions issued following a court remand.” OAO also works with SSA’s Office of General Counsel “to evaluate and formulate litigation management strategy.” DCA “track[s] and analyze[s] court case trends in order to . . . [g]uide adjudicators with respect to case law; [i]mplement an effective appeals strategy; and [i]dentify and make recommendations to develop or clarify policies, to develop or clarify regulations, or to seek clarifying legislation.” <sup>160</sup>
Role and Participation of Appellate Body in Writing Rules	See above.
Miscellaneous	[none]

### PUBLICLY AVAILABLE CASE STATISTICS

SSA provides public access to hearings and appeals data on its website.<sup>161</sup> In fiscal year (FY) 2018, the AC received 152,888 requests for review, issued 155,959 request for review dispositions, and granted 21,909 requests for review (of which 18,444 were remands). 18,252 new court cases were filed following AC action in FY 2018.

### TREATISES AND SCHOLARSHIP OF NOTE<sup>162</sup>

---

<sup>160</sup> HALLEX § I-4-0-2.

<sup>161</sup> *Public Data Files*, SOC. SEC. ADMIN., , <https://www.ssa.gov/appeals/publicusefiles.html> (last visited Aug. 8, 2019).

<sup>162</sup> The literature on the SSA hearings and appeals system is voluminous. It includes the treatises and scholarship of note listed in this section as well as practice guides—such as the *Social Security Practice Guide* published by the National Organization of Social Security Claimants’ Representatives and available through Lexis—and textbooks—such as FRANK S. BLOCH & JON C. DUBIN, *SOCIAL SECURITY LAW AND PRACTICE* (1st ed. 2016). The Administrative Conference of the United States has also made specific recommendations and statements related to the AC on several occasions, including Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudications*, 78 Fed. Reg. 41,352 (July 10, 2013); Statement #17, Comments on the Social Security Administration’s Proposal on Reengineering the SSA Disability Process, 59 Fed. Reg. 44,704 (Aug. 30, 1994); Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990); Recommendation

ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE: PART 3: SOCIAL SECURITY BOARD, S. Doc. No. 10, 77th Cong. (1941).

Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267 (2003).

Jo Anne B. Barnhart, *The Social Security Administration's Disability Service Improvement Process*, 66 SOC. SEC. BULL. 41 (2005/2006).

Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003).

Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235 (2007).

Ernest R. Burton, *The Appeals System in Old-Age and Survivors Insurance*, 9 SOC. SEC. BULL. 4 (1946).

Ernest R. Burton & Irving Ladimer, *Experience in Appeals Under Old-Age and Survivors Insurance*, 4 SOC. SEC. BULL. 18 (1941).

John C. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds with One Stone or Pigeon-Holding Claimants*, 42 MD. L. REV. 329 (1983).

Deborah A. Chassman & Howard Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801 (1980).

Fred Davis & James Reynolds, *Profile of a Social Security Disability Case*, 42 MO. L. REV. 541 (1977).

ROBERT G. DIXON JR., *SOCIAL SECURITY DISABILITY AND MASS JUSTICE* (1973).

---

87-7, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987); and Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978). These recommendations and the associated consultant reports provide additional information about SSA's hearings and appeals process.



Jonah Gelbach & David Marcus, A Study of Social Security Litigation in the Federal Courts (July 28, 2016) (report to Admin. Conf. of the U.S.), <https://www.acus.gov/report/report-study-social-security-litigation-federal-courts>.

Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965 (1991).

Timothy H. Gray, Note, *Manual Override? Accardi, Skidmore, and the Legal Effect of the Social Security Administration's HALLEX Manual*, 114 COLUM. L. REV. 949 (2014).

Carl H. Harper & Bernard M. Niezer, *Appeals Procedure Under Old-Age and Survivors Insurance*, 16 IND. L.J. 440 (1941).

William F. Hessmer IV, Comment, *Own Motion Review of Disability Benefit Awards by the Social Security Administration: The Improper Use of an Important Procedure*, 2 ADMIN. L. J. 141 (1988).

CHARLES A. HORSKY & AMY RUTH MAHIN, THE OPERATION OF THE SOCIAL SECURITY ADMINISTRATION HEARING AND DECISIONAL MACHINERY (1960).

Charles H. Koch, Jr., & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199 (1990).

Irving Ladimer, *Hearing and Review of Claims and Wage-Record Cases Under Old-Age and Survivors Insurance*, 3 SOC. SEC. BULL. 21 (1940).

Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461 (1990).

Frank R. Lindh, *An Examination of the Proposed Closed Record Administrative Law Judge Hearing in the Social Security Disability Program*, 6 W. NEW ENG. L. REV. 745 (1984).

Fanney N. Litvin, *Adjudication by the Department of Health, Welfare and Education Under the Social Security Act of 1939, as Amended*, 10 ADMIN. L. BULL. 27 (1958).

Jessica A. Magaldi, *The Social Security Administration's Appeals Council's Use of Medical Support Staff in Evaluating Disability Benefits Claims: The Fourth Bite at the Apple Denies Claimants Due Process*, 4 DETROIT COLL. OF LAW AT MICH. STATE U. L. REV. 1061 (1997).

JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1981).

JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS (1978).

*Plan for a New Disability Claim Process*, 57 SOC. SEC. BULL. 42 (1994).

Robert E. Rains, *A Response to Bloch, Lubbers & Verkuil's The Social Security Administration's New Disability Adjudication Rules: A Case for Optimism . . . and Concern*, 92 CORNELL L. REV. 249 (2007).

Robert E. Rains, *A Specialized Court for Social Security – A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1 (1987).

Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575 (2015).

GERALD K. RAY & GLENN SKLAR, AN OPERATIONAL APPROACH TO ELIMINATING BACKLOGS IN THE SOCIAL SECURITY DISABILITY PROGRAM 24 (2019).

Jerome Smith, *Social Security Appeals in Disability Cases*, 28 ADMIN. L. REV. 13 (1976).

SOC. SEC. ADVISORY BD., CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE (2001).

STAFF OF H. SUBCOMM. ON SOC. SEC., 94TH CONG., APPEALS PROCESS: AREAS OF POSSIBLE ADMINISTRATIVE OR LEGISLATIVE ACTION (Comm. Print 1975).

STAFF OF H. SUBCOMM. ON SOC. SEC., 94TH CONG., BACKGROUND MATERIAL ON SOCIAL SECURITY HEARINGS AND APPEALS (Comm. Print 1975).

STAFF OF H. SUBCOMM. ON SOC. SEC., 94TH CONG., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS (Comm. Print 1975).

STAFF OF H. SUBCOMM. ON SOC. SEC., 96TH CONG., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER (Comm. Print 1979).

STAFF OF H. SUBCOMM. ON SOC. SEC., 97TH CONG., SOCIAL SECURITY HEARINGS AND APPEALS: PENDING PROBLEMS AND PROPOSED SOLUTIONS (Comm. Print 1981).

STAFF OF S. COMM. ON FINANCE, 96TH CONG., ISSUES RELATED TO SOCIAL SECURITY ACT DISABILITY PROGRAMS (Comm. Print 1979).

STAFF OF S. COMM. ON FINANCE, 97TH CONG., STAFF DATA AND MATERIALS RELATED TO THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (Comm. Print 1982).

Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003).

Robert M. Viles, *The Social Security Administration Versus the Lawyers...and Poor People Too*, 40 MISS. L.J. 24 (1969).