



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Public Availability of Information About Agency Adjudicators

#### Committee on Adjudication

#### Proposed Recommendation for Committee | November 6, 2020

1 Federal agency officials throughout the country preside over hundreds of thousands of  
2 adjudications each year.<sup>1</sup> As the Administrative Conference has previously indicated, litigants,  
3 their lawyers, and other members of the public benefit from having ready online access to the  
4 key materials associated with adjudications and the procedural rules governing them.<sup>2</sup> They also  
5 benefit from having ready online access to the policies and practices by which agencies appoint  
6 and oversee administrative law judges (ALJs) and other adjudicators. The availability of these  
7 policies and practices allows the public, among other things, to assess the impartiality of  
8 administrative adjudicators<sup>3</sup> and promotes an understanding of adjudicators' constitutional status  
9 under the Appointments Clause or other constitutional provisions.<sup>4</sup>

10 Agencies may also benefit from disclosures about agency adjudicators because it allows  
11 them to compare their own practices with the policies made publicly available by other agencies.  
12 Proactive disclosures by agencies, including those that may already be required under the  
13 Freedom of Information Act and the E-Government Act, may also be more cost-effective than  
14 agencies' responding to individual requests for information.<sup>5</sup>

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<sup>1</sup> See Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

<sup>3</sup> Cf. Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

<sup>4</sup> See, e.g., *Lucia v. SEC*, 138 S.Ct. 2044 (2018); *Arthrex v. Smith & Nephew*, 941 F.3d 1320, *reh'g en banc denied*, (Fed. Cir. 2020), 953 F.3d 760, *cert. granted*, 592 U.S. \_\_\_ (2020).

<sup>5</sup> FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (amending 5 U.S.C. § 552(a)(2)); E-Government Act of 2002, Pub. L. No. 140-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

15           The officials addressed by this Recommendation are those who preside over hearings that  
16 are governed by the formal hearing provisions of the APA or that are not so governed but are  
17 legally required by statute, regulation, or executive order, as well as officials (agency heads  
18 excluded) who review their decisions on appeal.<sup>6</sup> These adjudicators may go by a variety of titles  
19 in different agencies, including “Hearing Officer,” “Immigration Judge,” “Veterans Law Judge,”  
20 “Administrative Patent Judge,” and “Administrative Appeals Judge.”<sup>7</sup> For ease of reference, this  
21 Recommendation refers to those adjudicators as “administrative law judges” (ALJs)<sup>8</sup> or  
22 “administrative judges” (AJs). Agencies may decide to include disclosures identified in this  
23 Recommendation about other adjudicators, depending on the level of formality of the hearings  
24 over which they preside and whether they serve as full-time adjudicators. Agencies may also  
25 decide to make similar disclosures with respect to agency heads if their websites do not already  
26 provide sufficient information.

27           This Recommendation is concerned with policies and practices governing adjudicators  
28 that agencies should disclose including those addressing appointment and qualifications;  
29 compensation (including salaries, bonuses, and performance incentives); duties and  
30 responsibilities; supervision and assignment of work; position within agencies’ organizational  
31 hierarchies; methods of evaluating performance; limitations on ex parte communications and  
32 other policies ensuring the separation of functions; recusal and disqualification; the process for  
33 review of adjudications; and discipline and removal.

34           Many of the policies and practices applicable to ALJs are already publicly available in  
35 the APA, Office of Personnel Management rules, and elsewhere.<sup>9</sup> These sources regulate, among

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<sup>6</sup> The coverage of this recommendation is similar other recent ACUS recommendations regarding adjudicators. *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

<sup>7</sup> These officials work for a variety of agencies, including the Executive Office for Immigration Review, the Board of Veterans Appeals, the Patent and Trademark Office, the Merit Systems Protection Board, the Department of Agriculture, the Social Security Administration’s Appeals Council, the Department of Labor’s Benefits Review Board, and the Board of Immigration Appeals.

<sup>8</sup> *See* 5 U.S.C. §§ 554, 556–557. The vast majority of ALJs work at the Social Security Administration.

<sup>9</sup> 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521; 5 C.F.R. part 930, subpart B; Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

36 other things, how agencies discipline, remove, compensate, and assign cases and other duties to  
37 ALJs. Nevertheless, agencies that employ ALJs can take steps to improve the public's access to  
38 this information.

39 ALJs, in any case, make up only a small portion of federal adjudicators. There are many  
40 more AJs than ALJs.<sup>10</sup> AJs are regulated by a complex mix of statutory provisions, including  
41 civil service laws; agency rules codified in the Code of Federal Regulations; and agency-specific  
42 policies that take any number of forms. Many types of information about AJs are available in  
43 these sources, but they may be difficult to find, particularly when located in the Code of Federal  
44 Regulations or the *Federal Register*.<sup>11</sup> Some relevant sources may not be publicly available,  
45 including internal administrative and personnel manuals, position descriptions, and labor  
46 agreements. This is particularly true with respect to certain kinds of policies, such as those  
47 relating to compensation and performance incentives.<sup>12</sup>

48 Agency websites are the most helpful location for agencies to make relevant policies and  
49 practices publicly available. Individuals most naturally seek information about administrative  
50 policies and practices on agencies' websites. Agencies can situate information about their  
51 adjudicators in a logical and easily identifiable place on their websites and structure their  
52 websites to synthesize policies in plain language and link to information from many different  
53 sources.<sup>13</sup>

54 This Recommendation encourages agencies to provide a clear and readily accessible  
55 description on their websites of the policies governing the appointment and oversight of ALJs  
56 and AJs. Although the Recommendation identifies which kinds of information agencies should  
57 consider providing on their websites and where and how they should do so, agencies clearly vary

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<sup>10</sup> Kent Barnett et al., *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 1* (September 24, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-1>.

<sup>11</sup> Leigh Anne Schriever, *Public Availability of Information About Adjudicators 10* (Oct. 21, 2020) (draft report to the Admin. Conf. of the U.S.).

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Cf.* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

58 in terms of how they structure their websites, the specific features of their adjudicative programs,  
59 and their institutional needs. The Administrative Conference also recognizes that some agency  
60 policies and practices may qualify for an exemption under the Freedom of Information Act,  
61 Privacy Act, or other laws and executive-branch policies. Agencies will have to tailor this  
62 Recommendation to their own needs so that they can present information in the clearest and most  
63 accessible way possible that is consistent with law and policy, given their unique circumstances.

### RECOMMENDATION

- 64 1. Each adjudicative agency should prominently display a short, straightforward description  
65 on its website of all generally applicable policies and practices governing the  
66 appointment and oversight of ALJs and AJs, including, as applicable, those that address:  
67 a. The procedures for assessing, selecting, and appointing candidates for adjudicator  
68 positions;  
69 b. The placement of adjudicators within agencies' organizational hierarchies;  
70 c. Compensation structure and performance incentives, such as bonuses, non-  
71 monetary awards, and promotions;  
72 d. The assignment of non-adjudicative duties to adjudicators, especially duties that  
73 relate to investigation or prosecution;  
74 e. Limitations on ex parte communications, including between adjudicators and  
75 other agency officials, related to the disposition of individual cases, as well as  
76 other policies ensuring a separation of adjudication and enforcement functions;  
77 f. Standards for recusal by and disqualification of adjudicators;  
78 g. Administrative review of adjudicators' decisions;  
79 h. The supervision of adjudicators by higher-level officials;  
80 i. The procedure for assigning cases;  
81 j. The evaluation of adjudicators, including quantitative and qualitative methods for  
82 appraising adjudicators' performance; and  
83 k. The discipline and removal of adjudicators.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 84 2. On the same webpage as the information described in Paragraph 1, each adjudicative  
85 agency should provide links to key legal documents, or, when links are not available,  
86 citations. The legal documents should include the authorities for the policies described in  
87 Paragraph 1, and may include documents such as (a) federal statutes, including relevant  
88 provisions of the APA and other laws applicable to ALJs and AJs; (b) agency-  
89 promulgated rules regarding adjudicators, including Office of Personnel Management  
90 rules applicable to ALJs; and (c) publicly available agency-promulgated guidance  
91 documents relating to adjudicators, including manuals, bench books, and other  
92 explanatory materials. To the extent that some policies concerning adjudicators may be a  
93 matter of custom, each adjudicative agency should consider documenting policies in  
94 order to make them publicly accessible to the extent practicable. Agencies do not need to  
95 provide access to policies covered by a Freedom of Information Act exemption that the  
96 agency intends to invoke or which are otherwise protected by law.
- 97 3. The webpage containing the information described in paragraphs 1 and 2 should present  
98 the materials in a clear, logical, and comprehensive fashion. One possible method of  
99 presenting this information, with one model disclosure for ALJs and another for AJs,  
100 appears in Appendix A.
- 101 4. When an agency’s mission consists exclusively or almost exclusively of conducting  
102 adjudications, the agency should link to the webpage containing the information  
103 described in Paragraphs 1 and 2 on the agency’s homepage. When conducting  
104 adjudications is merely one of an agency’s many functions, the agency should link to  
105 these materials from a location on the website that is both dedicated to adjudicatory  
106 materials and logical in terms of a person’s likelihood of finding the documents in the  
107 selected location, such as an enforcement or adjudications page or the homepage for the  
108 component in which a particular category of adjudicators works. Examples of agency  
109 websites that currently provide this information in a way that makes it easy for the public  
110 to locate appear in Appendix B.

**Commented [LAS1]:** Edit based on suggestion by Jeffrey Lubbers in his comment

**Commented [LAS2]:** For Committee consideration: The Committee may wish to consider whether a template is useful to include for either or both kinds of positions. The templates included in Appendix A may help structure the discussion, but will undoubtedly require revision based on what disclosures the Committee recommends that agencies make. The Committee may also want to consider whether a separate template for AJ positions is actually helpful.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

112

APPENDIX A

113 Template Website Text for ALJs

114 **About Our Administrative Law Judges**

115 Administrative Law Judges (ALJs) at [agency name] conduct hearings and decide cases under  
116 [insert name of authorizing act]. They are part of the [agency component in which ALJs are  
117 located], which is directed by [title of office head] and has offices in [cities]. Visit [link to  
118 agency organization chart] to see how [office] relates to other offices at [agency].

119 ALJs provide a neutral forum to resolve cases involving [kinds of cases ALJs hear] in a fair,  
120 transparent, and accessible manner. Our ALJs are highly trained, impartial judges, appointed by  
121 [agency official], who [describe qualifications]. ALJs are paid according to the [pay scale for  
122 ALJs with [link to the scale](#)] scale set by another agency (with [cost-of-living adjustments](#) for  
123 ALJs' locations), the Office of Personnel Management.

124 Cases are assigned to ALJs [in each geographic office] in rotation so far as practicable. The ALJ  
125 assigned to your case is responsible for [job duties, like taking evidence, hearing objections,  
126 issuing decisions]. ALJs are required by statute to perform their functions impartially. 5 U.S.C.  
127 § 556(b). To ensure impartiality, he or she does not take part in investigative or enforcement  
128 activities, nor does he or she report to officials in the [agency]'s investigative or enforcement  
129 components, including [list investigative/enforcement component(s)]. 5 U.S.C. §§ 554(d); 3105.  
130 The ALJ assigned to your case may not communicate privately about the facts of your case with  
131 other agency officials[, and more details on [agency name]'s rules about communicating with  
132 ALJs are available [location of stronger ex parte prohibitions]].

133 By law, [agency] does not reward or discipline ALJs for their decisions. [Agency] does not  
134 evaluate ALJs' performance and can only discipline or remove an ALJ from office if another  
135 agency, the Merit Systems Protection Board, decides after a hearing that good cause supports  
136 doing so. 5 U.S.C. §§ 4301, 7521.

137 The agency has adopted rules of recusal [[link](#)] that allow a participant to request that the ALJ in  
138 charge his or her case be disqualified if the participant believes the ALJ cannot fairly and  
139 impartially decide the cases.

140 If you are dissatisfied with an ALJ's decision, you can appeal that decision to [agency  
141 office/official]. Visit [[link](#)] for information on appealing an ALJ decision. [Agency  
142 office/official] may also review your case on [its/his or her] own initiative if there is an issue  
143 with the ALJ's decision.

144 ***For Further Information:***

**Commented [LAS3]:** For committee consideration: Judge Alexander Manuel suggested the following language be included somewhere in the appendix:

"The Department is committed to ensuring that all hearings and appeals are conducted in a fair and equitable manner. Petitioners are entitled to procedural due process as determined by an impartial administrative law judge or adjudicator. If you disagree with this determination, you have the right to make a timely request for reconsideration of the decision, or to appeal to the Secretary of \_\_\_\_\_, at ([link](#)). In certain cases, you have the right to appeal the ALJ's decision directly to federal court. For information on this, see ([link](#))."



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 145 • Hiring Process: [link]
- 146 • Pay rates: [link]
- 147 • How cases are assigned to ALJs: [link]
- 148 • Communicating with administrative law judges (ex parte communications): [link]
- 149 • How to handle a judge with a conflict of interest (recusal and disqualification
- 150 procedures): [link]
- 151 • How to appeal an administrative law judge decision: [link]
- 152 • Case processing goals: [link]
- 153 • How to report misbehavior by an administrative law judge and how your complaint will
- 154 be handled: [link]

155 *See also:*

- 156 • Congress's rules governing ALJs: 5 U.S.C. §§ 554, 557, 3105, 4301, 5372, 7521
- 157 • OPM's regulations governing ALJs: 5 C.F.R. §§ 930.205, 930.206, 930.207, 930.211
- 158 • Executive Orders pertaining to ALJs: [EO 13,843](#) (giving agencies control over the hiring
- 159 process of ALJs)

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**Commented [LAS4]:** Edit based on suggestion by Jeffrey Lubbers in his comment



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

161 ***Template Website Text for AJs***

162 **About Our [Insert Adjudicator Title]**

163 [Adjudicator title] at [agency name] [conduct hearings and decide cases/review appeals] under  
164 [name of authorizing act]. They are part of the [agency component in which adjudicators are  
165 located], which is directed by [title of office head] and has offices in [cities]. Visit [link to  
166 agency organization chart] to see how [office] relates to other offices at [agency].

167 [Office name] provides a neutral forum to resolve cases involving [kinds of cases] in a fair,  
168 transparent, and accessible manner. Our [adjudicator title] are highly trained, impartial decision  
169 makers, appointed by [agency official] [for terms of [number of years] years], who [describe  
170 qualifications]. [Adjudicator title] [are/are not] political appointees. [Adjudicator title] are paid  
171 according to the [pay scale for adjudicator with link to the scale] scale set [by another agency,  
172 the Office of Personnel Management/by [agency title]], and they [are/are not] eligible to receive  
173 bonuses or other performance incentives.

174 Cases are [describe how cases are assigned]. The [adjudicator title] assigned to your case is  
175 responsible for [job duties, like taking evidence, hearing objections, issuing decisions].  
176 [Description of policies (if any exist) that ensure the agency component or adjudicators remain  
177 independent from investigative or enforcement activities]. [Description of rules about ex parte  
178 communications, if any exist].

179 [Agency official or body] is responsible for evaluating the quality of [adjudicator title] decisions,  
180 and [agency official or body] conducts performance reviews of [adjudicator title]. [Agency  
181 official/entity from another agency] may remove the [adjudicator title] or [agency official or  
182 body/other entity] may discipline the [adjudicator title] by [kinds of discipline] when warranted.

183 The agency has adopted rules of recusal [link] that allow a participant to request that the  
184 [adjudicator title] in charge his or her case be disqualified if the participant believes the  
185 [adjudicator title] cannot fairly and impartially decide the cases.

186 If you are dissatisfied with an [adjudicator title] decision, you can appeal that decision to [agency  
187 office/official]. Visit [link] for information on appealing an [adjudicator title] decision. [Agency  
188 office/official] may also review your case on [its/his or her] own initiative if there is an issue  
189 with the [adjudicator title]’s decision.

190 ***For Further Information:***

- 191 • Hiring Process: [link]
- 192 • Pay rates: [link]
- 193 • Bonuses and Performance Incentives: [link]
- 194 • How cases are assigned to [adjudicator title]: [link]

**Commented [LAS5]:** For committee consideration: Not all of the provisions in this template will apply to all AJs. This is intended to be a comprehensive list of the types of things that *might* apply to AJs, but the agency will need to tailor it based on how its program is structured. The committee may also want to consider whether policies governing AJs are so heterogenous that it’s not worth including a model disclosure of this type.





## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 195 • Communicating with [adjudicator title] (ex parte communications): [link]
- 196 • How to handle a judge with a conflict of interest (recusal and disqualification
- 197 procedures): [link]
- 198 • How to appeal an [adjudicator title] decision: [link]
- 199 • Case processing goals: [link]
- 200 • How to report misbehavior by an [adjudicator title] and how your complaint will be
- 201 handled: [link]

### 202 *See also:*

- 203 • Congress's provisions regarding [adjudicator title]: [statutory citations]
- 204 • Agency regulations governing [adjudicator title]: [C.F.R. provisions]

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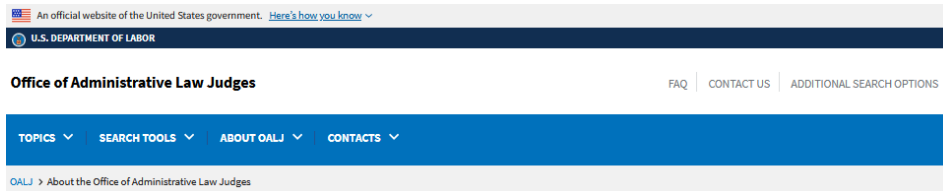
## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

206

### APPENDIX B

207 *Figure 1 – Department of Labor’s Office of Administrative Law Judges*

208 The Office of Administrative Law Judge’s website provides an example of how to include some  
209 of the relevant information about adjudicators in plain-language text with citations. It is also  
210 intuitively located in the Department of Labor’s website because a link to it is placed on the  
211 home page for the Office of Administrative Law Judges.



## About the Office of Administrative Law Judges

The Office of Administrative Law Judges (OALJ) is the administrative trial court for the United States Department of Labor. OALJ conducts hearings nationwide. The Department of Labor has the third largest administrative law judge (ALJ) office in the Federal government. OALJ is headquartered in Washington, DC, and has judges and staff located in eight district offices. ALJs are appointed under the U.S. Const. art. II, § 2, cl. 2 and the Administrative Procedure Act, 5 U.S.C. § 3105.

### Mission

OALJ’s mission is to provide a neutral forum to resolve labor-related administrative disputes before the Department of Labor in a fair, transparent and accessible manner, and to promptly issue sound decisions correct in law and fact.

Department of Labor ALJs adjudicate complaints and claims in a wide variety of cases. 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. ALJs also hear and decide cases arising from over 80 other labor-related statutes, Executive Orders, and regulations, including such diverse subjects as: whistleblower complaints involving corporate fraud and violations of transportation, environmental and food safety statutes; alien labor certifications; actions involving the working conditions of migrant farm laborers; grants administration relating to preparation of workers and job seekers to attain needed skills and training; prohibition of workplace discrimination by government contractors; minimum wage disputes; child labor violations; mine safety variances; OSHA formal rulemaking proceedings; federal contract disputes; civil fraud in federal programs; certain recordkeeping required by ERISA; and standards of conduct in union elections.

### Values

- **Respect** – We treat everyone with dignity and respect.
- **Expertise** – Our decisions are based upon the competent application of the law to the facts of the case.
- **The Rule of Law** – We administer equal justice under the law and do equal right to the poor and to the rich by consistent and even application of the law to all.
- **Integrity** – We hold ourselves to the highest level of ethical standards.

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## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

214 Figure 2 – Department of Health and Human Service’s Office of Medicare Hearings and  
215 Appeals

216 The Office of Medicare Hearings and Appeals’ website shows a clear and intuitive way to  
217 organize information about adjudicators. The “About OMHA” page is linked on the main page  
218 for the Office of Medicare Hearings and Appeals, so it is easy to find for an individual who is  
219 aware the agency exists.

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**Operating Plan**  
Office of Medicare Hearings and Appeals (OMHA)  
Operating Plan for FY 2015 - 2016 (Dollars in Millions)

Activities	FY 2015	FY 2016
OMHA	\$7.381	\$7.381
OMHA Total	\$7.381	\$7.381

**Organizational Chart**  
See how our office is structured and find information on key personnel.

**Workload Information and Statistics**  
Find data about OMHA's current workload, including decision statistics and average processing time.

**Health Data Sets**  
Find data sets on receipts by fiscal year, appeal category, procedure, and state.

**Special Initiatives**  
Learn how OMHA is working to improve the Medicare appeals process through pilot programs and other special initiatives.

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222 *Figure 3 – Internal Revenue Service’s Independent Office of Appeals*

223 The Independent Office of Appeal’s website presents an example of how agencies can use  
224 website text reassure the public about their independence and impartiality in plain language. The  
225 IRS website has a link to the Independent Office of Appeals webpage on its main page and the  
226 page shown below is hyperlinked in the first sentence on the landing page for the Office.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

234 *Figure 4 – Federal Labor Relations Authority*

235 The Federal Labor Relations Authority website provides a good example of how an agency can  
236 create an easily-located page that is linked to from the main page and that provides some  
237 information about the appointment and job duties of the adjudicators.

The screenshot shows the FLRA.gov website. At the top left is the FLRA logo and the text "FLRA.gov" and "U.S. FEDERAL LABOR RELATIONS AUTHORITY". To the right are "RSS FEEDS" and a search bar. A navigation bar below contains links for "ABOUT", "COMPONENTS & OFFICES", "CASE TYPES", "DECISIONS", and "RESOURCES & TRAINING", along with an "eFiling Available Here" button. The breadcrumb trail reads "Home / Components & Offices / Offices / Office of Administrative Law Judges".

## Office of Administrative Law Judges

### What we do

FLRA Administrative Law Judges conduct hearings and issue recommended decisions on cases involving alleged unfair labor practices. Administrative Law Judges also render recommended decisions involving applications for attorney fees filed under the Back Pay Act and the Equal Access to Justice Act.

The Authority appoints Administrative Law Judges under [§ 7105\(d\)](#) of the Federal Service Labor-Management Relations Statute.

To learn more, please see our page on [procedures](#) relevant to cases before Administrative Law Judges, and our page on the [Settlement Judge Program](#).

### Contact information

**Office of Administrative Law Judges**  
Federal Labor Relations Authority  
1400 K Street, NW  
Washington, DC 20424  
Phone: (202) 218-7950  
Fax: (202) 482-6629

#### IN THIS SECTION

- [Office of Administrative Law Judges](#)
  - [Settlement Judge Program](#)
  - [Overview of Procedures](#)
- [Office of Case Intake and Publication](#)
- [Office of the Executive Director](#)
- [Office of Inspector General](#)
- [Office of Legislative Affairs and Program Planning](#)
- [Office of the Solicitor](#)

#### Resources

- [Authority Decisions](#)
- [Administrative Law Judge Decisions](#)

238

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