

Comment from Wendy Blake on *Precedential Decision Making in Agency Adjudication*
November 4, 2022

Paragraph 6 provides “Agencies should consider implementing procedures for interlocutory appeal and the issuance of precedential decisions by the appellate body, at the referral by hearing-level adjudicators or at the request of parties.” We wanted to clarify the goal of Paragraph 6. Is the goal of the recommendation that agencies have an interlocutory review process whereby the Presiding Officer or a party could seek interlocutory review of a particular order or ruling prior to the Presiding Officer’s disposition of the matter? Or is the goal of the recommendation that adjudicative appellate bodies determine whether decisions rendered upon interlocutory review are precedential, or is it both? It wasn’t entirely clear to us from the current draft language.

Paragraph 7 provides “Agencies should consider soliciting input—from adjudicators, other agency officials, the parties to the case, and the public—on whether to designate existing appellate decisions as precedential.” Could you clarify whether this recommendation seeks input from the public and others on generic criteria to consider in evaluating whether an opinion is precedential? Or is the recommendation that every time a decision is issued, agencies should seek broad input, including from the public, on whether that decision should be precedential. The latter approach could lead to uncertainty and confusion for the parties and the public for an indeterminate period. It could also provide the non-prevailing party another opportunity to attempt to re-litigate its issues in the context of whether to make the decision precedential.

Thanks for considering our input on the draft recommendations.