ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2023-5

Best Practices for Adjudication Not Involving an Evidentiary Hearing

Adopted December 14, 2023

Federal administrative adjudication takes many forms.[1] Many adjudications include a legally required opportunity for an evidentiary hearing—that is, a proceeding "at which the parties make evidentiary submissions and have an opportunity to rebut testimony and arguments made by the opposition."[2] Such proceedings also follow the exclusive record principle, in which the decision maker is confined to considering "evidence and arguments from the parties produced during the hearing process (as well as matters officially noticed) when determining factual issues."[3]

In many federal administrative adjudications, however, no constitutional provision, statute, regulation, or executive order grants parties the right to an evidentiary hearing.[4] Proceedings of this type include many agency decisions regarding grants, licenses, or permits;

[1] The term "adjudication" as used in this Recommendation refers to the process for formulating an order that is "a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program." MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 8 (2019).

[2] ASIMOW, *supra* note 1, at 10.

[3] ASIMOW, *supra* note 1, at 10. The Administrative Conference has used the term "Type A adjudications" to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is covered by the formal adjudication provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556–557. The Conference has used the term "Type B adjudications" to refer to adjudications that include an opportunity for a legally required evidentiary hearing that is not covered by the APA's formal adjudication provisions. *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

[4] The Conference has used the term "Type C" adjudication to refer to adjudications that are not subject to a legally required evidentiary hearing. *See id*.

immigration and naturalization; national security; the regulation of banks and other financial matters; requests for records under the Freedom of Information Act; land-use requests; and a wide variety of other matters.[5]

There are many policy reasons why adjudications might be conducted without a legally required opportunity for an evidentiary hearing, though such reasons are beyond the scope of this Recommendation. The stakes in disputes resolved through such adjudications vary widely, but whether the stakes are low or high, each decision matters to the parties. For those involved in or familiar with these adjudications, the most important factor in their view of government may be the way these decisions are made. Accordingly, decision making in such adjudications should be accurate, efficient, and both fair and perceived to be fair, regardless of the stakes involved.

Adjudications without an evidentiary hearing differ in fundamental ways from those that include a legally required opportunity for an evidentiary hearing. In adjudications of all types, a decision maker conducts an investigation and issues an initial, preliminary, or proposed decision. In adjudications that include an evidentiary hearing, if the private party does not acquiesce in that decision, the party is entitled to an evidentiary hearing before a neutral decision maker who, after considering the evidence and arguments, issues a decision. Typically, the private party also can seek review of that decision within the agency, often by the agency head or officials exercising authority delegated by the agency head. By contrast, in adjudications without an evidentiary hearing, often the same decision maker who issued the initial, proposed, or preliminary decision issues the decision, normally after considering input from the affected party. Typically, that party is entitled to seek review of that decision by a different decision maker within the agency. These fundamental differences are reflected in this Recommendation.

No uniform set of procedures applies to all adjudications without evidentiary hearings, nor could one be devised. Some characteristics are common, however. Such adjudications often allow for document exchanges and submission of research studies, oral arguments, public hearings, conferences with staff, interviews, negotiations, examinations, and inspections. Agencies that engage in such adjudications typically employ dispute resolution methodologies

[5] Michael Asimow, Fair Procedure in Informal Adjudication 7 (Dec. 5, 2023) (report to the Admin. Conf. of the U.S.).

without the procedures typical of evidentiary hearings, such as the opportunity to cross examine witnesses, the prohibition of ex parte communications, the separation of adjudicative functions from investigative and prosecutorial functions, and the exclusive record principle.

While not subject to the requirement that a decision be preceded by an evidentiary hearing, adjudications without evidentiary hearings may be subject to other legal requirements. The Due Process Clause of the Constitution's Fifth Amendment may require certain minimum procedures for such adjudications that involve constitutionally protected interests in life, liberty, or property.[6] In addition, agencies conducting such adjudications typically must observe certain general provisions of the Administrative Procedure Act (APA)—in particular 5 U.S.C. §§ 555[7] and 558—and are subject to other generally applicable statutes and regulations addressing the conduct of federal employees, rights of representation,[8] ombuds,[9] and other matters.[10] The procedures employed by agencies conducting these adjudications may also be subject to agency-specific statutes and procedural regulations. Finally, judicial review is available for many such adjudications.

Statutorily required procedures and judicial review, however, may be insufficient to ensure fairness, accuracy, and efficiency in adjudications without an evidentiary hearing. Due process, the APA, and other sources of law external to the agency often do not specifically prescribe the details of agency procedures, and judicial review may be unrealistic because the costs of such review exceed the value of the interests at stake.[11] For these reasons, agency-adopted policies offer the best mechanism for establishing procedural protections for parties, promoting fairness and participant satisfaction, and facilitating the efficient and effective

[6] *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Brock v. Roadway Express, Inc., 481 U.S. 252, 262–63 (1987) (applying *Mathews* principles in a Type C context); Goss v. Lopez, 415 U.S. 565 (1975) (discussing minimal procedures required for short-term suspension from public school).

[7] *See* PBG Corp. v. LTV Corp. 496 U.S. 633 (1990).

[8] *See* Asimow, *supra* note 55, at 36, for a discussion of the right to representation before agencies, including the right to lay representation under many agencies' regulations.

[9] *See* Admin. Conf. of the U.S., Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

[10] *See* Asimow, *supra* note 55, at 33.

[11] *Id*. at 46.

functioning of these adjudications. The public availability of such rules also facilitates external oversight.

This Recommendation identifies a set of best practices for adjudications without an evidentiary hearing and encourages agencies to implement them through their regulations and guidance documents. Many agencies conducting such adjudications already follow these best practices. This Recommendation recognizes that agencies adjudicate a wide range of matters, have different adjudicatory needs and available resources, and are subject to different legal requirements. What works best for one agency may not work for another. Agencies must take into account their own unique circumstances when implementing the best practices that follow. Accordingly, agencies adopting or modifying procedures for adjudication without an evidentiary hearing should tailor these best practices to their individual systems.

RECOMMENDATION

Notice of Proposed Action

1. Agencies conducting adjudications without evidentiary hearings should notify parties of the initial, proposed, or preliminary decision, including the reasons for that decision.
2. Such notice should provide sufficient detail and be given in sufficient time to allow parties to contest the initial, proposed, or preliminary decision and submit evidence to support their position. This notice should provide parties with the following information, when applicable:
    a. Whether the agency provides a second chance to achieve compliance;
    b. The manner by which the party can submit additional evidence and argument to influence the agency's initial, proposed, or preliminary decision;
    c. The amount of time before further agency action will be taken; and
    d. Whether and, if so, how parties may access materials in the agency's case file.

Opportunity to Submit Evidence and Argument

3. Agencies should allow parties in adjudications without evidentiary hearings to furnish decision makers with evidence and arguments. Depending on the stakes involved, the

types of issues involved, and the agency's caseload and adjudicatory resources, the process for furnishing evidence and argument may include written submissions or oral presentations and the opportunity to rebut adverse information. Agencies should make such opportunities available in a manner that permits people with disabilities and people with limited English proficiency to take advantage of them.

4. If credibility issues are presented, the party should be permitted an opportunity to rebut adverse information.

Representation

5. When feasible, agencies should allow participants in their adjudications without evidentiary hearings to be represented by a lawyer or a lay person with relevant expertise.
6. Particularly for self-represented parties, agencies should not prevent participants in their adjudications without evidentiary hearings from obtaining assistance or support from friends, family members, or other individuals in presenting their case.
7. Agencies should make their proceedings as accessible as possible to self-represented parties by providing plain-language resources, such as frequently asked questions (FAQs), and other appropriate assistance, such as offices dedicated to helping the public navigate agency programs.

Decision Maker Impartiality

8. Agencies should tailor neutrality standards appropriately to adjudications without evidentiary hearings, which may be conducted by decision makers who engage in their own investigations or participate in investigative teams and may have prior involvement in the matter.
9. Consistent with government ethics requirements, agencies should require the recusal of employees engaged in adjudications without evidentiary hearings who have financial or other conflicts of interest in matters they are investigating or deciding.
10. Agencies should require recusal of employees who reasonably may be viewed as not impartial.

11. When adjudications without evidentiary hearings involve serious sanctions, agencies should consider adopting internal separation of investigative or prosecutorial functions and adjudicatory functions.

Statement of Reasons

12. Agencies conducting adjudications without evidentiary hearings should provide oral or written statements of reasons that follow federal plain-language guidelines setting forth the rationale for the decision, including the factual and other bases for it. The level of detail in the statement should be consistent with the stakes involved in the adjudication.

Administrative Review

13. Agencies should provide for administrative review of their decisions by higher-level decision makers or other reviewers unless it is impracticable because of high caseload, lack of available staff, or time constraints, or because of low stakes.

Procedural Regulations

14. Agency regulations should specify the procedures for each adjudication without an evidentiary hearing the agency conducts. Consistent with Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, agencies should voluntarily use notice-and-comment rulemaking for the adoption of significant procedural regulations unless the costs outweigh the benefits of doing so.
15. Agencies should ensure their regulations, guidance documents, staff manuals, procedural instructions, and FAQs addressing their adjudications without evidentiary hearings follow federal plain-language guidelines and are easily accessible on the agency's website.
16. Agencies should ensure that their notices, statements, procedural instructions, FAQs, and other documents that contain important information about their adjudications without evidentiary hearings are made available in languages understood by people who frequently appear before the agency.

Ombuds

17. Agencies with an ombuds program should ensure that their ombuds are empowered to handle complaints about adjudications without evidentiary hearings.
18. Agencies without an ombuds program should consider establishing one, particularly if their adjudications without evidentiary hearings have sufficient caseloads, significant stakes, or significant numbers of unrepresented parties. The establishment and standards of such programs should follow the best practices identified in Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*.
19. Agencies with smaller caseloads, lower stakes, or lack of available staff should consider sharing an ombuds program with other similarly situated agencies to address any resource constraints.
20. Agencies that choose not to establish or share an ombuds program should provide alternative procedures for allowing parties to submit feedback or complaints, such as through an agency portal or dedicated email address.

Quality Assurance

21. Agencies conducting adjudications without evidentiary hearings should establish methods for assessing and improving the quality of their decisions to promote accuracy, efficiency, fairness, the perception of fairness, and other goals relevant to those adjudications in accordance with Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*. Depending on the caseload, stakes, and available resources, such methods may include formal quality assessments and informal peer review on an individual basis, sampling and targeted case selection on a systemic basis, and case management systems with data analytics and artificial intelligence tools.