

# ADMINISTRATIVE LAW AND PROCESS

SECOND EDITION

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*University Textbook Series*

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SECOND EDITION

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opposing evidence and to cross-examine opposing witnesses, resolution of factual issues based exclusively on evidence admitted at trial, and written findings and conclusions.

### § 6.4.3a The central role of the Administrative Law Judge

All formal adjudications must be presided over by (1) the agency; (2) one or more members of the body which comprises the agency; or, (3) one or more Administrative Law Judges (ALJ).<sup>153</sup> As a practical matter, the presiding officer almost always is an ALJ, simply because most agencies have far too many cases to designate either the agency (usually a cabinet officer, commissioner or collegial body) or a member of the agency (usually one of several commissioners in a collegial body) to preside over any single adjudication.

The ALJ presides over the entire trial stage of an adjudication, with the agency assuming a role roughly analogous to that of an appellate court. The ALJ regulates the course of the proceeding, including scheduling, resolution of procedural and evidentiary disputes, and ultimate issuance of an initial decision.

Administrative law judges are almost entirely independent of the agencies at which they preside. Their pay is prescribed by the Office of Personnel Management independent of any evaluations or recommendations made by the agency.<sup>154</sup> An agency can take no action against an ALJ without convincing a separate agency that good cause exists for doing so. The agency must use a formal adjudicatory proceeding to resolve the good cause issue.<sup>155</sup> ALJ's are assigned to cases by rotation, and an agency can omit the initial decision of the ALJ assigned to a case only if the ALJ becomes unavailable or the agency finds "that due and timely execution of its functions imperatively and unavoidably so requires".<sup>156</sup> Finally, an ALJ cannot be subject to supervision or direction by any agency employee with investigative or prosecutorial functions and cannot consult any person on any fact at issue in a proceeding without providing all parties notice and opportunity to participate.<sup>157</sup>

In short, ALJ's are very nearly as independent of federal agencies as federal trial judges are of the executive branch. This high degree of independence of ALJ's from agencies is designed to protect the rights of individuals affected by agency adjudicatory decisions from any potential sources of bias. The high degree of

153. 5 U.S.C. § 556(b).

154. 5 U.S.C. § 5372.

155. 5 U.S.C. § 3105.

156. 5 U.S.C. §§ 557(b)(2), 557(d), 3105.

157. 5 U.S.C. § 554(d).

independence of ALJs also can cause serious problems of inter-ALJ inconsistencies in decision-making, however.<sup>158</sup>

### § 6.4.3b Notice

All persons potentially affected by an agency's resolution of a formal adjudication must be given notice of the time and place of the hearing, the legal and jurisdictional authority for the hearing, and the matters of fact and law asserted.<sup>159</sup> Opposing parties then must be given an opportunity to indicate the factual and legal issues they intend to contest. Again, the analogy to a judicial trial is nearly perfect. The agency files a pleading in the nature of a complaint, and the respondent files a pleading in the nature of an answer.

### § 6.4.3c Presentation of evidence

A party to a formal adjudication can appear in person or through counsel and can present evidence in oral or documentary form.<sup>160</sup> A party must be permitted "to conduct such cross-examination as may be required for a full and true disclosure of the facts".<sup>161</sup> This language seems to provide an ALJ some flexibility to limit cross-examination of opposing witnesses, but in practice ALJs rarely exercise this authority for fear of reversal of the agency's final decision on procedural grounds.<sup>162</sup>

Agencies are not required to use the rules of evidence applicable to courts. Indeed, one of the reasons Congress allocates certain types of disputes to agencies instead of to courts is to eliminate some of the excessively technical aspects of court litigation. Compliance with all the technical formalities of proof would impose a substantial burden on agencies with large caseloads. Moreover, many of the rules of evidence are far more valuable in jury trials than in agency proceedings. Thus, for instance, agencies can admit and rely on hearsay evidence to a greater extent than courts.<sup>163</sup> In addition, agencies frequently permit or require parties to submit direct testimony in "canned" or pre-drafted written form.<sup>164</sup> An agency is not entirely unfettered in its discretion to admit or

158. See Pierce, *Political Control versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U.Chi.L.Rev. 481 (1990).

159. 5 U.S.C. § 554(b).

160. 5 U.S.C. §§ 555(b), 556(d).

161. 5 U.S.C. § 556(d).

162. See, e.g., *Reilly v. Pinkus*, 338 U.S. 269 (1949).

163. See, e.g., *NLRB v. Remington Rand*, 94 F.2d 862, 873 (2d Cir.1938), cert. denied 304 U.S. 576 (1938).

164. See Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 Duke L.J. 1, 37.