



INVESTIGATIVE REPORT

Cynthia V. Carrasco, Inspector General

OFFICE: INDIANA INSPECTOR GENERAL
TITLE: ADMINISTRATIVE LAW JUDGE (ALJ) CODE
CASE ID: 2014-10-0205
DATE: JANUARY 3, 2017

Inspector General Cynthia V. Carrasco reports as follows:

In 2014 the Indiana General Assembly passed a law that required the Office of Inspector General (OIG) to adopt rules under Ind. Code 4-22-2 establishing a statewide code of judicial conduct for administrative law judges (ALJs) that would apply to every person acting as an ALJ for a state agency¹. *See Ind. Code § 4-2-7-9*. The purpose of this legislation was to formulate a uniform code of conduct for ALJs within the executive branch of state government.

The legislation was codified as Ind. Code § 4-2-7-9. This law requires the OIG, in adopting the statewide code of judicial conduct for ALJs (Code for ALJs), to review both 312 IAC 3-1-2.5, which applies certain provisions of the code of judicial conduct² to ALJs within the Natural Resources Commission (NRC), and 315 IAC 1-1-2, which applies certain provisions of the code of judicial conduct³ to ALJs within the Office of Environmental Adjudication (OEA).

¹ Under Ind. Code § 4-2-7-1, “Agency” means an authority, a board, a branch, a commission, a committee, a department, a division, or other instrumentality of the executive, including the administrative department of state government. The term includes a body corporate and politic established as an instrumentality of the state.” The statute further provides that “agency” does not include the judicial or legislative departments of state government.

² 312 IAC 3-1-2.5 defines the “code of judicial conduct” as the “code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through October 15, 2009).”

³ 315 IAC 1-1-2 uses the same definition for the “code of judicial conduct” as 312 IAC 3-1-2.5.

This statute also allows the OIG to use these rules as a basis for the Code for ALJs. Ind. Code § 4-2-7-9 provides that the Code for ALJs must be enforced under Ind. Code 4-21.5, the Administrative Orders and Procedures Act (AOPA); however, the statute specifically reads that the “Inspector General is not responsible for enforcing the [Code for ALJs] or for investigating a possible violation of the [Code for ALJs].” Ind. Code § 4-2-7-9 further provides that a state agency may adopt rules to supplement the Code for ALJs within its agency, but the supplemental code must be “at least as restrictive” as the Code for ALJs.

Upon passage of this law, the OIG took several steps to fulfill the mandate to promulgate rules to adopt a statewide code of judicial conduct for ALJs. This report outlines the process the OIG used to determine what rules are needed, the challenges the OIG faced while drafting the proposed rule, the approach the OIG used to draft the proposed rule, the proposed rule’s current status, and the OIG’s legislative recommendations for future consideration.

I. Process

The OIG began the process of drafting the proposed Code for ALJs by learning how different executive branch agencies utilize ALJs and by understanding what challenges current ALJs face.

The OIG held several meetings with ALJs in 2014 and 2015, after the General Assembly passed the legislation requiring the OIG to create the Code for ALJs. The OIG first identified all of the state agencies that have ALJs and developed a contact list. On May 28, 2014, the OIG held a forum for all ALJs to discuss the Code for ALJs and obtain feedback from the stakeholders. Thirty-five individuals attended the forum who represented various groups including state agencies, the Indiana Office of the Attorney General, the Indiana Association of Administrative Law Judges, and private law firms that contract with the State to provide ALJ services.

Participants discussed numerous topics during the meeting including the OIG's approach to developing the Code for ALJs, the variances in administrative hearing processes among agencies, and the challenges related to the application of the Code for ALJs because of the variances. There also was extensive discussion related to the need for training, enforcement, and an interpretive body for the Code for ALJs. The various stakeholders questioned whether the Code for ALJs would address independence concerns that ALJs sometimes face in reviewing decisions related to their employing agencies. The OIG documented the discussion and notified the stakeholders that the OIG would develop a brief survey based on the feedback collected during that meeting and would send it out to ALJs to gain additional feedback.

The OIG developed a brief survey for all of the ALJ forum attendees to better understand how the rules adopted by the NRC in 312 IAC 3-1-2.5 and the OEA in 315-1-1-2 would conflict with or complement an ALJ's statutory or administrative mandates. The survey also asked participants to identify any anticipated challenges in implementing the Code for ALJs. Of the fifteen responses received, almost all ALJs surveyed agreed that the rules adopted by the NRC and OEA Judicial Conduct would complement their duties as an ALJ. A notable challenge those surveyed identified related to the potential conflicts that might arise between a provision in the Code for ALJs and an agency's statutory mandates, federal or otherwise. Another challenge participants identified was the need for uniform training on the Code for ALJs.

The survey also included a question related to possible enforcement mechanisms that could be utilized to enforce the Code for ALJs. Examples of possible enforcement procedures identified by the survey participants included the filing of complaints with: 1) the OIG who would follow the existing process for the filing of ethics complaints; 2) an agency representative who would conduct an investigation and report the findings to the agency appointing authority

for a final determination; or 3) a panel of pre-selected ALJs who would review the complaint and make a final determination regarding whether a violation of the Code for ALJs occurred. While survey participants provided various ideas for possible enforcement procedures, the general consensus was that an enforcement mechanism was needed.

The OIG also researched and reviewed various Codes of Conduct for ALJs. Specifically, the OIG reviewed the Model Code of Judicial Conduct for State Administrative Law Judges established by the National Association of Administrative Law Judges and the American Bar Association's 1995 Model Code for Judicial Conduct for State Administrative Law Judges serving the executive branch of state government. Of the various state ALJ Codes of Conduct that the OIG reviewed, West Virginia's ALJ Code of Conduct and ALJ Procedural Rule were noteworthy. Specifically, in 2004 the West Virginia State Legislature directed the State Ethics Commission to draft a code of conduct for ALJs. That code of conduct was developed using the Model Codes of Judicial Conduct for State Administrative Law Judges developed by the National Association of Administrative Law Judges and the American Bar Association and became effective July 1, 2005. West Virginia's ALJ Code of Conduct included specific provisions requiring its State Ethics Commission to issue advisory opinions and an enforcement mechanism that made the State Ethics Commission the adjudicating body for complaints filed alleging a violation of that Code of Conduct.

II. Challenges

Through its examination of agency ALJs, the OIG quickly discovered a wide disparity on how different executive branch agencies utilize and treat ALJs. First, what entity employs the ALJ differs from agency to agency: some executive branch state agencies employ ALJs directly as agency employees; some agencies hire independent contractors to serve as ALJs; some

agencies utilize ALJs from an independent office, such as the Office of the Attorney General; and some agencies find ALJs through multiple methods. Second, what rules apply to the ALJs differs from agency to agency: some ALJs hear administrative proceedings that are bound by the rules of Ind. Code 4-21.5, AOPA, and some ALJs hear proceedings that are exempt from AOPA; some ALJs are bound by federal law that is specific to their agency's programs; and some ALJs are bound by agency rules promulgated in the Indiana Administrative Code or by agency policy.

The wide disparity amongst agency ALJs posed unique challenges to drafting a Code for ALJs that is clear, concise, and effective. First, the OIG wanted to ensure that the Code for ALJs is clear as to who it applies to. Ind. Code § 4-2-7-9 reads that the Code for ALJs "must apply to every person acting as an administrative law judge for a state agency;" however, the statute does not define who is an ALJ for purposes of the statute. Due to the differences on how executive branch agencies treat ALJs, this application could be read differently by different agencies. Second, the OIG wanted to ensure that the Code for ALJs is easily understood, practical for all ALJs it applies to, and consistent with other rules that apply to ALJs or at least clear on what rules apply when inconsistencies occur. ALJs should know what the rules are so that they are able to comply.

A related challenge that the OIG faced when drafting a Code for ALJs was determining which provisions of the Indiana Judicial Code of Conduct, which the OIG may use as the basis for the Code for ALJs⁴, to include in the Code for ALJs. Although many of the provisions of the Indiana Code of Judicial Conduct make sense for ALJs across various state agencies, some of the

⁴ As noted in the opening section of this Report, the OIG's statutory mandate to establish a Code for ALJs requires the OIG to review 312 IAC 3-1-2.5, which is the NRC rule section for governing the code of conduct for ALJs, and 315 IAC 1-1-2, which is the OEA rule section for governing the code of conduct for environmental law judges. Both of these Indiana Administrative Code rule sections apply certain provisions of the Indiana Code of Judicial Conduct to ALJs from the NRC and the OEA. The OIG's statutory mandate allows the OIG to base the Code for ALJs on these rules.

provisions are inconsistent with the Code of Ethics rules⁵ on the same topic. As the Code of Ethics already applies to state employees that serve as ALJs; any language that the OIG adopts from the Indiana Judicial Code of Conduct must be reconciled with the Code of Ethics.

III. Approach to Draft Rule

A copy of the current draft of the proposed rule to establish a Code for ALJs is attached as Exhibit A.

Consistent with the OIG's statutory mandate, the OIG drafted the Code for ALJs to apply to every person acting as an ALJ for a state agency. As noted above, the statute does not define this application further. Ind. Code § 4-2-7-9 requires enforcement of the Code for ALJs to be through Ind. Code 4-21.5, AOPA. As a result, the OIG determined that the Code for ALJs should apply to any ALJ or ultimate authority acting under AOPA. Any hearing officer for a proceeding that is exempt under AOPA would not fall under the Code for ALJs.

For the substance of the rule, the OIG started by reviewing the Indiana Code of Judicial Conduct⁶. The OIG included all of these rules that involved a subject not already addressed by the Code of Ethics. Where a rule from the Indiana Code of Judicial Conduct addressed the same topic that was addressed by the Code of Ethics, the OIG drafted the proposed rule to require the ALJ to comply with the Code of Ethics rule. For example, Rule 3.13 of the Indiana Code of Judicial Conduct provides very specific rules for the acceptance and reporting of gifts, loans, bequests, benefits or other things of value. Instead of adopting this rule, the gift language in the draft Code for ALJs requires an ALJ to comply with 42 IAC 1-5-1, the Code of Ethics gifts rule. The OIG believes this approach will simplify the Code for ALJs and eliminate instances where

⁵ The Indiana Code of Ethics can be found in 42 IAC 1 and Ind. Code 4-2-6.

⁶ The OIG used Indiana Code of Judicial Conduct adopted by the Indiana Supreme Court, effective March 1, 1993, including amendments received through January 1, 2011.

the Code for ALJs may be inconsistent with certain provisions of the Code of Ethics. Where the OIG proposed adopting sections of the Code of Ethics as part of the Code for ALJs, the OIG also included language to clarify that the Code for ALJ rules would apply to ALJs that are not state employees or special state appointees, such as contract employees. The OIG also made slight changes to the applicable Indiana Code of Judicial Conduct rules so that they would be more applicable to agency ALJs.

IV. Current Status of Draft Rule

Pursuant to Financial Management Circular (FMC) #2013-03, the OIG submitted a Request to Proceed with Rulemaking to the Indiana Office of Management and Budget (OMB) in September of 2015. The Request outlines the OIG's belief that the proposed rule meets the following two exceptions to Executive Order 13-03 "Regulatory Moratorium": exception "a", which provides an exception for rules to fulfill an objective related to job creation and increasing investment in Indiana or to improve the quality of Indiana's workforce; and exception "e", which provides an exception for rules to address matters pertaining to the control, mitigation or eradication of waste, fraud, or abuse within a state agency or wasteful or abusive activities perpetrated against a state agency. The OIG will proceed with the rule promulgation process when it receives OMB's approval under the Regulatory Moratorium.

V. Legislative Recommendations

The Legislature previously placed the duty on the OIG to make recommendations regarding laws of public integrity. *See Ind. Code § 4-2-7-3(9)*. Although the OIG is careful to recognize the authority of elected officials, the OIG has an additional statutory obligation to make recommendations regarding improved management of the executive branch of state government. *See Ind. Code § 4-2-7-3(2)*. Within these limited authorities, the OIG makes the

following findings and recommendations regarding executive branch adjudication.

A.

The OIG respectfully recommends that the legislature consider adding an educational and advisory component to assist individuals in complying with the Code for ALJs. Even if the Code for ALJs provides the clearest set of rules possible, ALJs likely will still have questions on gray areas. The OIG experienced this situation with the Code of Ethics. The Code of Ethics provides practical rules that clearly apply to a defined group of people, specifically state officers, employees and special state appointees; however, individuals who want to comply with the Code of Ethics often need an interpretation of how these rules apply to their specific situation. In response to that need, the OIG and State Ethics Commission (SEC) provide an advisory component that allows individuals to ask whether a prospective action is consistent with the Code of Ethics. The advisory component is found in the OIG's informal advisory opinions, which are confidential written opinions drafted by OIG staff, and the SEC's formal advisory opinions, which are public opinions issued by the SEC at their monthly meetings.

The OIG finds that the advisory function of the OIG and the SEC is a valuable tool to encourage compliance with the Code of Ethics; however, the OIG acknowledges that no similar component would exist for the Code for ALJs. Currently no body exists that would have clear jurisdiction to interpret and provide advice on the Code for ALJs. The OIG is cognizant that the educational and advisory component would require additional resources, such as staff, to provide timely advice. The OIG issued over three hundred informal advisory opinions on the Code of Ethics in calendar year 2016. Although the number of requests for advice on the Code for ALJs may not be as high because the Code for ALJs would apply to a smaller number of people than the Code of Ethics, we anticipate that many ALJs would seek advice to ensure they know how to

comply with the Code for ALJs if an advisory component was available to them.

B.

The OIG respectfully recommends that the legislature consider revising the investigative or enforcement component of the Code for ALJs. Ind. Code 4-2-7 provides that the Code for ALJs shall be enforced through AOPA; however, we recommend that enforcement be removed from the current AOPA procedures and that an internal enforcement system be instituted similar to the Judicial Branch's Commission on Judicial Qualifications. *See Ind. Code 33-38-13 and Supreme Court and Discipline Rule 25.*⁷

First, the OIG finds very little or no current enforcement of the current AOPA standards with regard to ALJ conduct since the passage of AOPA in 1987.⁸ Although there are multiple appellate decisions on judicial review regarding agency action through adjudication, few decisions address the alleged misconduct of an ALJ. *E.g. Ind. Code § 4-21.5-3-10(1) (bias, prejudice or interest); Ind. Code § 4-21.5-3.10(2) (dispositions in orderly and reasonable prompt manners.)* Also, certain ALJ misconduct prohibited within AOPA could result in criminal prosecution. *E.g. Ind. Code § 4-21.5-3.11 (ex parte conduct); Ind. Code § 4-21.5-3-12(1) (public comment by ALJ.)* Yet we were unable to find evidence of past prosecutorial enforcement. Second, AOPA provides no authority for suspension or removal of an errant ALJ.

Currently no body exists that would have clear jurisdiction to investigate and enforce the

⁷ The Indiana Division of State Court Administration outlines this process on its current website as follows: The Qualifications Commission itself does not remove, suspend, or formally discipline judges; only the Indiana Supreme Court has jurisdiction to impose formal judicial discipline. The Commission's function is to investigate complaints concerning Indiana judges and to determine whether a particular complaint has merit. Serious cases may result in charges of misconduct filed with the Supreme Court after a Commission investigation. Less serious cases may result in confidential warnings from the Commission.

See: <http://in.gov/judiciary/jud-qual/2380.htm>.

⁸ We acknowledge that enforcement proceedings could have occurred and not be reflected in appellate decisions. We only report that we can find no evidence of enforcement.

Code for ALJs. Ind. Code 4-2-7 provides the OIG with clear statutory authority to investigate and file a complaint with the SEC for a violation of the Code of Ethics. Based on past experience, the OIG believes that the investigative and enforcement authority is essential to holding individuals accountable for violating the Code of Ethics and for deterring future violations of the Code of Ethics. During calendar year 2016, the OIG received over 250 requests to investigate via our hotline. These requests included matters outside of our jurisdiction as well matters within our jurisdiction, such as allegations of criminal activity or ethics violations by state workers or contractors. The OIG submitted several cases involving alleged criminal activity to prosecutors throughout the State, which resulted in three arrests in 2016. The OIG also submitted seven cases in 2016 to the State Ethics Commission for consideration.

No similar enforcement or investigative authority exists for the Code for ALJs. As noted in the opening section of this Report, Ind. Code § 4-2-7-9 specifically provides that “the inspector general is not responsible for enforcing the [Code for ALJs] or for investigating a possible violation of the [Code for ALJs].” An internal enforcement system similar to the Judicial Branch’s Commission on Judicial Qualifications could provide an avenue for individuals to submit complaints regarding an ALJ’s conduct. Although we cannot anticipate how many complaints such a system would generate, we anticipate that the number could be significant due to the adversarial nature of administrative proceedings. An internal enforcement system also could provide published opinions and reprimands for ALJs for misconduct that would assist in the prevention and deterrence of ALJ misconduct.

If the statute is amended to provide the OIG with authority to investigate allegations of violations of the Code for ALJs, the OIG could investigate these allegations and bring

complaints to the State Ethics Commission so that the Commission could adjudicate these complaints, similar to how West Virginia enforces its ALJ Code of Conduct and how Indiana currently enforces its Code of Ethics. Due to the anticipated increase in complaints the OIG and State Ethics Commission would likely receive as a result of having enforcement jurisdiction over the Code for ALJs, the OIG anticipates that the OIG and State Ethics Commission would need a significant increase in resources, including staffing, to screen, investigate and adjudicate the additional complaints.

C.

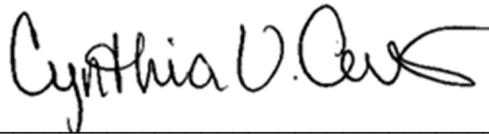
The OIG respectfully recommends that the General Assembly continue to consider improvements to the overall structure of ALJs in the executive branch of state government. In the 2016 Legislative Session, the General Assembly passed a law to establish an Administrative Law Study Commission (the Commission), which was tasked with studying and evaluating whether ALJs and environmental law judges should be replaced by an administrative court that conducts administrative hearings and other duties currently conducted by ALJs and environmental law judges. *See Ind. Code 2-5-40*. The Commission met on several occasions as part of the Interim Study Committee on Corrections and Criminal Code and voted on a final report concerning the Commission's findings and recommendations on October 13, 2016, which is attached as Exhibit B. We commend the Commission for their work in considering this complex issue, and we support the Legislature's efforts to look for ways to improve the overall operation of ALJs across state government.

D.

For all of the above reasons, the OIG respectfully submits for consideration these recommendations.

Dated this 5th day of January, 2017.

APPROVED BY:

A handwritten signature in black ink, appearing to read "Cynthia V. Carrasco", with a stylized flourish at the end.

Cynthia V. Carrasco, Inspector General

Exhibit A

**PROPOSED RULE
LSA Document # 15-XXX**

TITLE 42

ARTICLE 2. ADMINISTRATIVE LAW JUDGE CODE OF CONDUCT

Rule 1. General Provisions

42 IAC 2-1-1 Purpose

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 1. The purpose of this article is to promote integrity through a uniform code of conduct for administrative law judges who participate in adjudications that are subject to IC 4-21.5 within the executive branch of Indiana government.

42 IAC 2-1-2 Application

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7; IC 4-21.5-3-29

Sec. 2. This article applies to:

(a) an administrative law judge when participating in an adjudication within the executive branch of Indiana government; and

(b) an ultimate authority exercising authority under IC 4-21.5-3-29.

This article does not apply to clerical assistance.

Rule 2. Definitions

42 IAC 2-2-1 Application of Definitions

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7; IC 4-21.5-1-4; IC 4-21.5-2-5

Sec. 1. The definitions in this rule apply throughout this article.

42 IAC 2-2-2 “Adjudication” defined

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7; IC 4-21.5-1-4; IC 4-21.5-2-5

Sec. 2. “Adjudication” means any of the following:

- (1) The whole or part of an order;**
- (2) The failure to issue an order;**
- (3) An agency’s performance of, or failure to perform, any other duty, function, or activity under IC 4-21.5;**

- (4) Any decision involving the whole or part of an order, the failure to issue an order or the agency’s performance of or failure to perform any other duty, function or activity under IC 4-21.5.**

42 IAC 2-2-3 “Administrative law judge” defined

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 3. “Administrative law judge” means a person making decisions involving an adjudication within the executive branch of Indiana government. It includes a fact finder and a hearing officer. It does not include a person who solely provides clerical assistance to an administrative law judge.

42 IAC 2-2-4 “Clerical assistance” defined

Authority: IC 4-2-7-9

Affected: IC 4-2-7

Sec. 4 “Clerical assistance” means activity that does not engage in any discretionary decision, recommendation or drafting regarding the merits of an adjudication.

42 IAC 2-2-5 “Office of the inspector general” defined

Authority: IC 4-2-7-9

Affected: IC 4-2-7; IC 4-2-6

Sec. 5 “Office of the inspector general” means the office established under IC 4-2-7-2.

42 IAC 2-2-6 “Order” defined

Authority: IC 4-2-7-9

Affected: IC 4-2-7

Sec. 6 “Order” has the meaning set forth in IC 4-21.5-1-9.

42 IAC 2-2-7 “Prejudice” defined

Authority: IC 4-2-7-9

Affected: IC 4-2-7; IC 4-21.5-5-14(d)

Sec. 7 “Prejudice” means a preconceived judgment found without a factual basis or a strong bias and includes a judgment that is any of the following:

- (1) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law;**
- (2) contrary to constitutional right, power, privilege, or immunity;**
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;**
- (4) without observance of procedure required by law; or**
- (5) unsupported by substantial evidence.**

42 IAC 2-2-8 “Relative” defined

Authority: IC 4-2-7-9

Affected: IC 4-2-7

Sec. 8 “Relative” has the meaning set forth in IC 4-2-6-1 (a)(16).

42 IAC 2-2-9 “Ultimate authority” defined

Authority: IC 4-2-7-9

Affected: IC 4-2-7; IC 4-21.5-3-15; IC 4-21.5-3-29

Sec. 9 “Ultimate authority” has the meaning set forth in IC 4-21.5-1-15.

Rule 3. Rules of conduct

42 IAC 2-3-1 Promoting Confidence in the Adjudication Process

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 1 (a) An administrative law judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of an administrative adjudication.

(b) An administrative law judge shall avoid impropriety and the appearance of impropriety.

42 IAC 2-3-2 Avoiding Abuse of the Position of Administrative Law Judge

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 2 (a) An administrative law judge shall not abuse the prestige of his or her position to advance his or her personal or economic interests or the personal or economic interests of others, or allow others to do so.

(b) An administrative law judge shall not use or attempt to use his or her position to gain personal advantage of any kind.

42 IAC 2-3-3 Impartiality and Fairness

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 3 (a) An administrative law judge shall uphold and apply the law and shall perform all duties of his or her position fairly and impartially.

(b) Although each administrative law judge comes to the position with a unique background and personal philosophy, an administrative law judge must interpret and apply the law without regard to whether the administrative law judge approves or disapproves of the law in question.

(c) If an administrative law judge makes good-faith errors of fact or law when

applying and interpreting the law, it is not a violation of this section.

(d) If an administrative law judge makes a reasonable accommodation for a pro se litigant so that a matter may be fairly heard, it is not a violation of this section.

42 IAC 2-3-4 Bias, Prejudice, Harassment

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 4 (a) An administrative law judge shall perform the duties of his or her position, including administrative duties, without bias or prejudice.

(b) An administrative law judge shall not, in the performance of his or her position, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to, bias, prejudice, or harassment based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status or political affiliation, and shall not permit individuals subject to the administrative law judge's supervision to do so.

(c) An administrative law judge shall require lawyers in proceedings before the administrative law judge to refrain from bias or prejudice, or engaging in harassment, based upon the attributes, including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers or others.

(d) The restrictions in subsections (b) and (c) do not preclude administrative law judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

(e) Harassment, as referred to in subsections (b) and (c) is verbal or physical conduct that denigrates or shows hostility or aversion towards a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

42 IAC 2-3-5 External Influences on Conduct of an Administrative Law Judge

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 5 (a) An administrative law judge shall not be swayed by public clamor or fear of criticism.

(b) An administrative law judge shall not permit family, social, political, financial or other interests or relationships to influence the administrative law judge's judicial conduct or judgment.

(c) An administrative law judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the administrative law judge.

42 IAC 2-3-6 Competence, Diligence and Cooperation

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 6 An administrative law judge shall perform judicial and administrative duties competently, diligently, and promptly.

42 IAC 2-3-7 Ensuring the Right to be Heard

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 7. (a) An administrative law judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(b) An administrative law judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

42 IAC 2-3-8 Responsibility to Decide

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 8 An administrative law judge shall hear and decide matters assigned to the administrative law judge, except when disqualification is required by section 12 of this rule or other law.

42 IAC 2-3-9 Decorum and Demeanor

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 9 (a) An administrative law judge shall require civility and decorum in proceedings before him or her.

(b) An administrative law judge shall be patient, dignified, and courteous to litigants, witnesses, lawyers, and others subject to the administrative law judge's direction and control.

42 IAC 2-3-10 Statements on Pending and Impending Cases

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 10 (a) An administrative law judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in an administrative proceeding or make nonpublic statements that might substantially interfere with a fair hearing.

(b) An administrative law judge shall not, in connection with cases, controversies, or issues that are likely to come before him or her, make pledges, promises, or commitments that are inconsistent with the impartial performance of the duties of an

administrative law judge.

(c) An administrative law judge shall require all individuals subject to the administrative law judge's direction and control to refrain from making statements that the administrative law judge would be prohibited from making in this section.

(d) Notwithstanding the restrictions in subsection (a), an administrative law judge may respond directly or through a third party to allegations in the media or elsewhere concerning the administrative law judge's conduct in a matter.

42 IAC 2-3-11 Supervisory Duties

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 11. (a) An administrative law judge shall require office staff and others subject to the judge's supervision to act in a manner consistent with the judge's obligations under this rule.

(b) An administrative law judge with supervisory authority for the performance of other administrative law judges shall take reasonable measures to ensure that those administrative law judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

42 IAC 2-3-12 Disability and Impairment

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 12. An administrative law judge having a reasonable belief that the performance of a lawyer or another administrative law judge is impaired by drugs, alcohol, or a mental, emotional, or physical condition shall take appropriate action, which may include a confidential referral to an assistance program.

42 IAC 2-3-13 Responding to Judicial and Lawyer Misconduct

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 13. An administrative law judge having knowledge that another administrative law judge has committed a violation of this rule that raises a substantial question regarding the administrative law judge's honesty, trustworthiness, or fitness as an administrative law judge in other respects shall inform the agency head.

42 IAC 2-3-14 Cooperation with Disciplinary Authorities

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 14. (a) An administrative law judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(b) An administrative law judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of an

administrative law judge or a lawyer.

42 IAC 2-3-15 Outside Employment or Professional Activity

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 15. An administrative law judge shall comply with IC 4-2-6-5.5 regardless of whether the administrative law judge is a state officer, state employee, or special state appointee.

42 IAC 2-3-16 Coercive Conduct

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 16 An administrative law judge shall not engage in conduct that would appear to a reasonable person to be coercive.

42 IAC 2-3-17 Use of State Property

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 17 An administrative law judge shall comply with IC 4-2-6-17 regardless of whether the administrative law judge is a state officer, state employee, or special state appointee.

42 IAC 2-3-18 Confidential Information

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 18. An administrative law judge shall comply with 42 IAC 1-5-10 and 42 IAC 1-5-11 regardless of whether the administrative law judge is a state officer, state employee, or special state appointee.

42 IAC 2-3-19 Conflict of Economic Interests

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 19. An administrative law judge shall comply with IC 4-2-6-9 regardless of whether the administrative law judge is a state officer, state employee, or special state appointee.

42 IAC 2-3-20 Gifts, travel expenses, waivers

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 20. An administrative law judge shall comply with 42 IAC 1-5-1 regardless of whether the administrative law judge is a state employee or special state appointee.

42 IAC 2-3-21 Political Activity

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 21. An administrative law judge shall comply with 42 IAC 1-5-4 regardless of whether the administrative law judge is a state employee or special state appointee.

42 IAC 2-3-22 Ghost Employment

Authority: IC 4-2-7-9; IC 4-2-7-3(6)

Affected: IC 4-2-7

Sec. 22. An administrative law judge shall comply with 42 IAC 1-5-13 regardless of whether the administrative law judge is a state officer, state employee, or special state appointee.

Exhibit B

INTERIM STUDY COMMITTEE ON CORRECTIONS AND CRIMINAL CODE



**Indiana Legislative Services Agency
200 W. Washington Street, Suite 301
Indianapolis, Indiana 46204**

Monday, October 3, 2016

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INTERIM STUDY COMMITTEE ON CORRECTIONS AND CRIMINAL CODE

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Staff

Mark Goodpaster
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FINAL REPORT

Corrections and Criminal Code, Interim Study Committee on

I. LEGISLATIVE DIRECTIVE

Legislative Council assigned two topics to this Committee:

- (1) Whether administrative law judges and environmental law judges should be replaced by an administrative court that conducts administrative hearings and other duties currently conducted by administrative law judges and environmental law judges. If an administrative court is established:
 - (A) the average number of cases the administrative court would hear in a calendar year;
 - (B) the process that should be used to select judges for the administrative court;
 - (C) the appropriate number of judges and staff persons that would be required to serve the administrative court based on the caseload of the court;
 - (D) the proper procedures for the operation of the administrative court;
 - (E) issues concerning the transition from the use of administrative law judges and environmental law judges to the establishment of an administrative court; and
 - (F) any other issues the committee considers relevant to the establishment of an administrative court.(Source: SEA 1-2016, SECTION 1)
- (2) Expanding authority of courts to issue civil protection order requiring the use of Global Positioning System (GPS) usage with victim notification capabilities in domestic violence cases. (Source: SR 40)

II. SUMMARY OF WORK PROGRAM

The Committee met three times during the interim:

- The first meeting took place on September 21, 2016, in the State House, Indianapolis.
- The second meeting took place on September 28, 2016, in the State House, Indianapolis.
- The third meeting took place on October 13, 2016, in the State House, Indianapolis.

At the first meeting, the Committee examined the issue of whether an administrative court should be established. It heard testimony from LSA staff, Office of the Attorney General staff, and several attorneys who were familiar with the adjudicative law process in Indiana.

At the second meeting, the Committee examined the merits of expanding the authority of courts to issue civil protection orders requiring GPS usage. It also heard LSA staff reports that answered members' questions from the September 21 meeting.

At the third meeting, the Committee heard testimony from representatives of three state agencies that have adjudicative law procedures about the difficulties of transferring cases from their agencies to an administrative law court. It also heard testimony from a group representing regulated parties.

The minutes of the meetings can be accessed at:

https://iga.in.gov/legislative/2016/committees/i_corrections_and_criminal_code_interim_study_committee_on

To access the video for a particular meeting:

(1) Download the minutes.

(2) Click on this link within the downloaded minutes:

https://iga.in.gov/information/archives/2016/video/committee_i_corrections_and_criminal_code_interim_study_committee_on/

(3) After opening the linked web page, select the date of the meeting to begin viewing the video.

III. FINDINGS AND RECOMMENDATIONS

The Committee finds that the role of administrative law judges (ALJs) in making administrative decisions is primarily a function of the executive branch of government. Accordingly, the General Assembly should seek the counsel of the executive branch prior to a substantial rework of the ALJ system. This is not feasible in an election year where the election for Indiana Governor has no incumbent. It would also be unfair to a new Governor to be saddled with the legislative recommendations of a predecessor. That being said, the Committee finds that there does exist at least perceived unfairness in the relationship between some ALJs and the agencies employing them and that this topic should be revisited in the future by the new administration and a special Committee. The Committee also notes that there are a wide variety of ALJs in Indiana, not all agencies would be served by independent ALJs, and that a rework of this area of the law would be a substantial undertaking. Finally, the Committee is also cognizant that the Inspector General will soon adopt rules to implement a statewide code of judicial conduct for administrative law judges (IC 4-2-7-3) and that this could help to correct some issues raised before the Committee.

The Committee makes no recommendation concerning courts requiring use of a GPS tracking device if the court issues a civil protection order and if no violation of the civil protection order occurred. The proposal raises substantial practical and constitutional concerns that requires more study.

The final report was approved by voice vote with no opposition.

IV. WITNESS LIST

Linda Baechle, North Central YMCA
Laura Berry, Indiana Coalition Against Domestic Violence
Randy Fearnow, Attorney at Law
Mark Goodpaster, Legislative Services Agency
Andrew Hedges, Legislative Services Agency
Linda Klain, Attorney at Law
Daniel McNery, Indiana State Bar Association
David Miller, Office of the Attorney General
Chetrice Moseley, Indiana Utility Regulatory Commission
Beth Roads, Indiana Utility Regulatory Commission
Joseph Rompala, Attorney at Law
Tim Rushenberg, Indiana Energy Association
Nikki Schultz, Indiana State Bar Association
Dan Shackle, Office of the Attorney General
Kate Shelby, Department of Workforce Development
Parvonay Stover, Department of Child Services