HEARING OFFICER'S MANUAL

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STATE OF ALASKA

DEPARTMENT OF LAW

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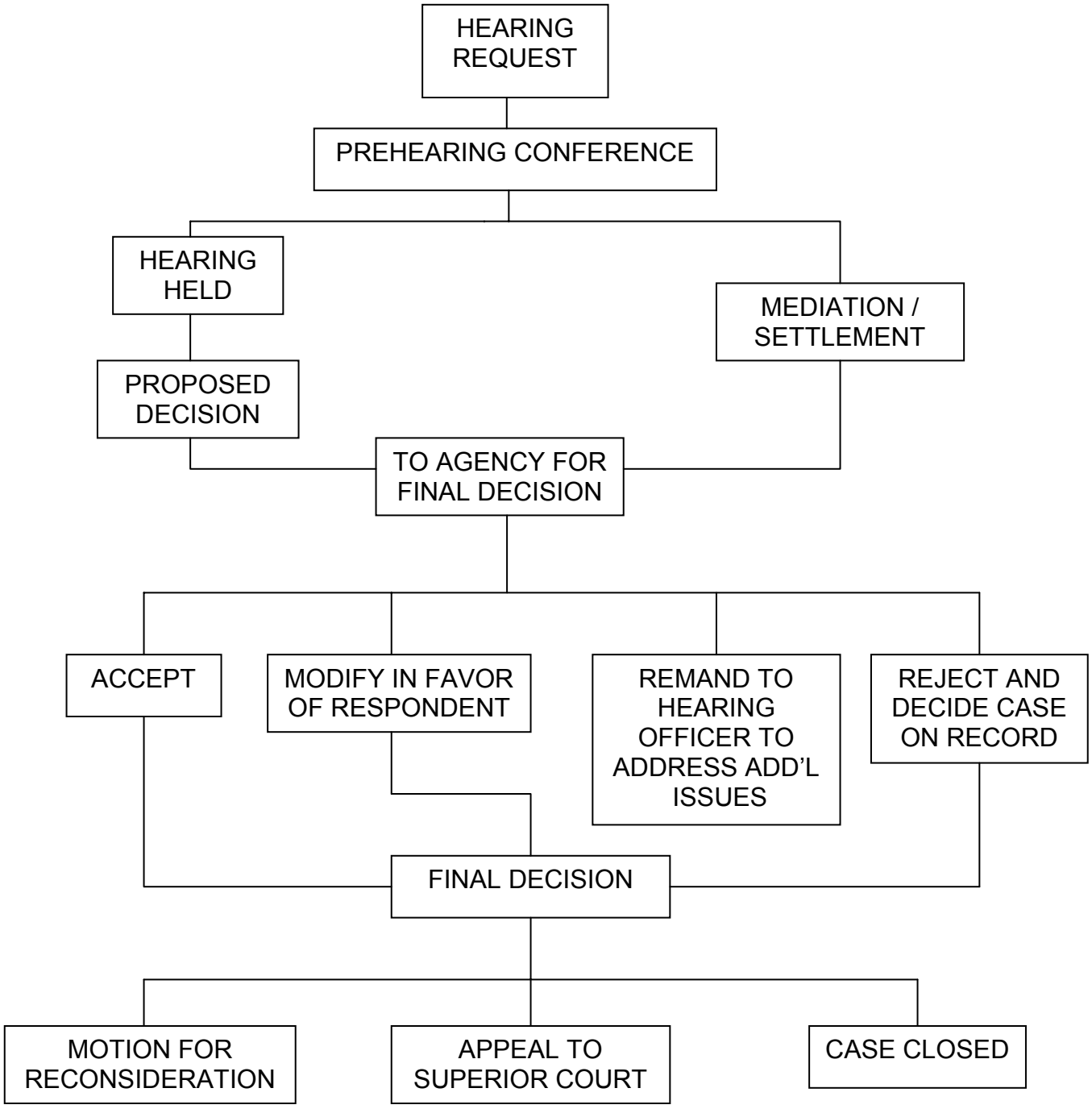

APA HEARING PROCESS

HEARING OFFICER'S MANUAL

CHAPTER 1. INTRODUCTION

A. Purpose of Manual

Government agencies conduct many different kinds of hearings. The only kind addressed in this manual are the adjudicative hearings conducted by state executive branch agencies. Thus, when this manual refers to a hearing officer, it is not referring to one appointed by a court, by an officer or committee of the legislature, or by an executive branch agency when adopting administrative regulations.[1]

This manual has several principal purposes:

- to acquaint the hearing officer with the general format of administrative hearings;
- to assist the hearing officer in resolving common procedural problems that can arise;
- to identify the major judicial decisions that affect the conduct of administrative hearings; and
- to provide the hearing officer with general principles of law that can assure parties that their hearing rights have been safeguarded and that they have received due process of law.

This manual does not attempt to provide a thorough analysis of all the issues that might confront a hearing officer. Other basic reference works include the MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981); Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE (3d ed. 1994 -); Robinson, Gellhorn, & Bruff, THE ADMINISTRATIVE PROCESS, (4th ed. 1993); Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE (2d ed. 1997 -); and Stein, Mitchell, & Mezines, ADMINISTRATIVE LAW (1993). The Judicial College also has courses and materials applicable to administrative

[1] Some other states and the federal system use titles such as “administrative law judge,” “hearing examiner,” or “referee” for those who perform similar functions to the "hearing officer" referred to in this manual.

hearings. Its courses and materials are more directed to the "administrative law judge." (See Ch. 9.C.)

This manual is not a formal opinion of the attorney general. It does not have the force of law and does not establish any legal duty for any state agency. It is simply a presentation of some recommended procedures and sample forms.

B. APA and Non-APA Hearings

This manual focuses on proceedings under AS 44.62, Alaska's Administrative Procedure Act (APA), but provides useful guidance for all administrative hearings. Appendix A contains a chart of agencies with adjudicatory functions, indicating which are under the APA. The administrative hearing procedures outlined in the APA are mandatory for those administrative bodies and programs specifically listed in AS 44.62.330(a). In addition, some agencies not listed in that subsection are made subject to some or all APA provisions under the statutes specifically relating to those agencies.[2] Any Alaska agencies conduct their adjudications and assign their hearing officers under some procedure other than the APA. Many of these "non-APA" agencies have chosen a procedure that closely follow the APA hearing procedure. Non-APA agencies are governed by their own procedures, if any, and by the dictates of due process.[3] S*ee* Ch. 2 for a general discussion of due process requirements. Some non-APA agencies may also have a set of their own internal procedures that would affect their hearings. Any such internal procedures should be reviewed by the hearing officer at the time of appointment.

Even if an agency is not required to follow the adjudicative provisions of the APA, the hearing procedures delineated in the APA and described in this manual embrace generally recognized features of a fair hearing. Therefore, to the extent that they are not contradicted by the non-APA agencies' own statutes, regulations, or internal policies, the principles described in this manual provide guidance for *all* hearing officers.

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[2] AS 44.62.330(b).

[3] Alaska Transp. Comm'n. v, Gandia, 602 P.2d 402, 404-06 (Alaska 1979); Mukluk Freight Lines v. Nabors Alaska Drilling, 516 P.2d 408, 415 (Alaska 1973).

C. Goals of the Administrative Hearing Process

The administrative adjudicatory process should be more expeditious and less expensive for all parties than a judicial proceeding. The hearing should be much less formal, consistent with the fundamentals of fairness, impartiality, and thoroughness. The hearing officer=s goal should be to develop a fair, accurate, intelligible, and concise record that can easily be reviewed, and to prepare a proposed or final (in appropriate circumstances) decision that is fair, accurate, intelligible, and concise.

CHAPTER 2. DUE PROCESS

A. Minimum Requirements

Both APA and non-APA administrative agency hearings must meet the minimum requirements of due process. Due process of law means that basic protections are in place to prevent unreasonable and abusive government action. Courts have often said that the procedures necessary to due process are somewhat flexible, but the essential elements are:

- ↑ notice of the proposed agency action must be given to the parties whose interests are affected;
- ↑ the affected parties are entitled to present arguments or evidence in support of their position; and
- ↑ the decision maker must be unbiased.

Dependant on the particular circumstances, other procedures such as a right to a formal trial-type hearing, a right to be represented by counsel, a right to cross-examine, and a right to a written or taped transcript of the hearing have been considered essential to due process.[4]

B. APA Procedures and Due Process

The APA establishes procedures, discussed in detail in this manual, which are intended to assure due process in administrative hearings. For those agencies that do not fall under the APA, due process may require something more, less, or just different from the APA procedures.

For example, the method of appointing a hearing officer described in the APA in AS 44.62.350(a) is intended to assure fairness. Due process does not require that a hearing officer be selected by this method, but it does require that the hearing officer

[4] Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 9.5 (3d ed. 1994).

assigned to the case be unbiased. AUnbiased≅ means having no personal interest in the matter that would affect the hearing officer's ability to render a fair decision. *See* Ch. 3D.

This manual can serve as a guide for non-APA hearing officers, but does not address the specifics of procedures unique to non-APA hearings. A non-APA hearing officer may rely on other sources such as the ALASKA RULES OF COURT, case law, or other sources listed in Ch. 1.

C. Separation of Functions

It is not unusual to combine within a single agency adjudicative functions and enforcement or prosecutorial functions. The Alaska Supreme Court has held that "[t]he combination of investigative and judicial functions within an agency does not violate due process. . . ."[5] However, due process does require "some separation between those persons prosecuting the complaint and those adjudicating it; the prosecutor, who has a 'probable partiality,' should not be in a position to influence the decision makers."[6]

For agencies with combined functions, there are two concerns. The hearing officer should not be under the supervision of a person who is responsible for prosecuting or developing the agency's case.[7] In addition, the hearing officer should not be advised by agency staff, including an attorney for the agency staff, who has acted as an advocate in the matter before the hearing officer.[8]

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[5] Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm'n, 711 P.2d 1170, 1180 (Alaska 1986); Earth Resources Co. v. State, Dep't of Revenue, 665 P.2d 960, 962 n.1 (Alaska 1983); In re Cornelius, 520 P.2d 76, 84 (Alaska 1974), *aff'd on reh'g*, 521 P.2d 497 (Alaska 1974).

[6] In re Walton, 676 P.2d 1078, 1082 (Alaska 1984) (quoting In re Robson, 575 P.2d 771, 774 (Alaska 1978)).

[7] *See generally* State v. Lundgren Pac. Constr. Co., 603 P.2d 889, 895-96 (Alaska 1979).

[8] Robson, 575 P.2d at 775; Newell v. State, 620 P.2d 680, 681-82 (Alaska 1980).

D. Representation of a Party

A party to an APA proceeding may appear on his or her own behalf or through a representative.[9] Generally, this representative would be an attorney, although statutes governing certain proceedings specifically allow a non-attorney representative. The Alaska Bar Association has wrestled with the question of unauthorized practice of law by a non-attorney in an administrative adjudication. It has published for comment a proposed Rule 33.3 providing that representation *for compensation* in an administrative proceeding is unauthorized practice unless the representation is "specifically authorized by Supreme Court rule, statute, administrative regulation, or ordinance." Additionally, the proposed rule would allow a non-attorney employee to represent a public agency, business, association, labor organization, or non-profit organization that is a party to the proceeding.

Although a respondent has a right to be represented by counsel, there is no right to appointed counsel in administrative proceedings.[10] Under the APA, the respondent's counsel is not limited to only advising the respondent; rather counsel must be permitted to question witnesses and make arguments on behalf of the respondent.[11] In Odom, the court noted that it was not addressing the question whether due process would require the same result if the APA did not apply.

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[9] In this manual, references to a party include that party's representative.

[10] Kalmakoff v. State, Commercial Fisheries Entry Comm'n, 693 P.2d 844, 847 n.4 (Alaska 1985).

[11] Odum v. University of Alaska, 845 P.2d 432, 435 (Alaska 1993).

CHAPTER 3. HEARING OFFICER

A. Appointment

For many hearings conducted under the APA, the governor appoints an attorney, generally in private practice, as the hearing officer.[12] Some agencies employ their own permanent hearing officers under AS 44.62.350(b).

APA hearing officers must be admitted to the practice of law for at least two years before the appointment.[13] The appointment process usually begins with a call to the prospective appointee to ensure the prospective appointee has no ethical conflicts that would prevent a fair and impartial decision, and that the person could conduct a hearing in a timely manner. The terms of the appointment are outlined in the letter of appointment. The agency then forwards a contract for the hearing officer=s services that will specify the rate of payment, the party to be billed, and the deadline for expiration of the contract. The hearing officer should clarify with the agency which costs are allowable as billable costs and which are not. The standard contract used by the Department of Law for outside counsel provides guidance on allowable costs. Because of the state=s budget process, all work must be completed within the contract period, or the contract must be amended. Billings should be submitted to the agency periodically during performance on the contract and promptly after the work is completed.

The agency should send the hearing officer a copy of the document initiating the hearing (e.g. accusation or statement of issues) and any response (e.g. notice of defense) when it receives its copy of the appointment letter. The agency must also direct the hearing officer whether to hear the case alone or with the agency.[14] The hearing officer should contact the agency for this information if it is not forthcoming.

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12 AS 44.62.350(a).

13 AS 44.62.350(c).

14 AS 44.62.450(a).

B. Role in Conducting Hearing

A hearing officer=s role is to preside over a contested case, either alone or with the agency final decision-maker[15] in attendance, and perform duties enumerated in the applicable statutes, regulations, or agency delegation. Because the role of the hearing officer may vary with the particular agency or case assignment, a hearing officer must always check the statutes and regulations applicable to the particular agency, as well the specifics of any letter of appointment or delegation.

The APA requires a hearing officer to Apreside≅ over any contested case, but does not define this responsibility with any list of specific duties. Under AS 44.62.340, an APA agency may Adelegate the power to act, to hear, and to decide, unless expressly prohibited by law.≅[16] AS 44.62.450(b) also permits an agency to delegate to the hearing officer Aall other powers relating to the conduct of the hearing.≅ Some non-APA agencies have regulations that further define or limit the role of the hearing officer.[17]

The hearing officer=s role is likely to depend greatly on whether the hearing is conducted by the hearing officer alone or with agency members in attendance. The APA and the statutes of some non-APA agencies (*e.g.* AS 42.05.171) give the agency discretion to decide whether the hearing officer will hear the case alone, or with the attendance of the agency.[18]

Under the APA, a hearing officer who hears a case alone is to exercise all powers relating to the conduct of the hearing;[19] and to prepare a proposed decision in a form adequate for adoption as the agency=s decision.[20] If the agency elects to also hear the case, the hearing officer's role is to rule on the admission and exclusion of evidence, to advise the agency on matters of law, and to exercise any delegated powers relating to the

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15 The final agency decision-maker will be defined in the governing statute: a commissioner, board, commission, or some other named entity or person.

16 In re Peterson, 499 P.2d 304 (Alaska 1972).

17 *See, e.g.*, 3 AAC 48.150 and 3 AAC 48.165.

18 AS 44.62.450(a); State, Alcoholic Beverages Control Bd. v. Malcolm, Inc., 391 P.2d 441, 442 n.2 (Alaska 1964).

19 AS 44.62.450(b).

20 AS 44.62.500(b).

conduct of the hearing.[21] When an agency that has heard the case meets to consider its decision, the hearing officer must be present and may, if requested, offer advice and assistance.[22]

In practice, when agency members attend a hearing, they take an active role: questioning witnesses extensively, or making decisions on motions and requests to exclude evidence. The agency may even act as an immediate appeal body if a party requests the full agency review a hearing officer=s ruling.[23]

C. Limits on Authority

1. Generally. A hearing officer=s powers derive from delegation by the agency. Necessarily, the hearing officer has no greater powers than does the agency with the final decision-making authority.

Additionally, the hearing officer=s powers are limited to the factual questions and issues of law pertaining to the matter referred for hearing. Outside of that scope, the hearing officer does not have the authority to issue orders or to make proposed findings. Nor should the hearing officer allow any of the parties to use the hearing to delve into issues that are outside the scope of the hearing.

2. Finding a Statute Unconstitutional. An agency does not have the authority to declare a statute unconstitutional. When an issue before the agency is the constitutionality of a statute, the hearing officer should make sure that the record establishes any factual context for later judicial review of the issue.[24] When the appeal raises both constitutional and non-constitutional issues, the agency should rule on the non-constitutional issues. *Id*.

The law has long been clear that administrative agencies may not nullify statutes.[25] The separation of powers doctrine prohibits one branch of state government from

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21 AS 44.62.450(b).

22 AS 44.62.500(a).

23 *See, e.g.* 3 AAC 48.150(c); 3 AAC 48.165(f).

24 Ben Lomond v. Municipality of Anchorage, 761 P.2d 119, 122 (Alaska 1982).

25 4 K. Davis, ADMINISTRATIVE LAW TREATISE § 26:6, at 434 (2d ed. 1983); *see, e.g.,* HOH Corp. v. Motor Vehicle Industry Licensing Bd., 736 P.2d 1271 (Hawaii 1987).

encroaching upon and exercising powers of another branch.[26] Accordingly, the Alaska Supreme Court has held that under the separation of powers doctrine, the blending of governmental powers will not be inferred in the absence of an express constitutional provision.[27] The Alaska judicial branch has been granted the sole authority to review the constitutionality of statutes.[28]

3. Finding a Regulation Invalid. Likewise, only the judicial branch can determine the constitutionality of an agency regulation. Challenges to the constitutionality of an agency regulation are beyond the power or jurisdiction of that agency.[29] As a result, a hearing officer who derives his or her powers to act from a delegation of the agency cannot determine that an agency regulation is unconstitutional and invalid.

For the same reasons, an agency and its hearing officer do not have the authority or jurisdiction to declare in an adjudicatory proceeding that a regulation exceeds statutory authority. The APA provides a formal process of public notice and comment to allow an agency to amend or repeal a regulation that the agency believes has legal problems. Also, an interested person may seek judicial declaration from the superior court on the validity of a regulation under AS 44.62.300. If a hearing officer is faced with a request to declare a regulation invalid, the hearing officer should decline to rule on the issue and should alert the parties of judicial decisions on limits of administrative authority. However, the hearing officer should make sure that the record establishes any factual context for later judicial review of the issue.

D. Disqualification

The hearing officer should conduct himself or herself in a manner that promotes public confidence in the integrity and impartiality of the administrative hearing process. Hearing officers are similar to judges in that they are expected to hear cases and render

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[26] *See* Bradner v. Hammond, 553 P.2d 1, 5-8 (Alaska 1976); Public Defender Agency v. Super. Ct., Third Judicial Dist., 534 P.2d 947 (Alaska 1975).

[27] *See* Bradner, 553 P.2d at 7.

[28] Art. IV, § 1, ALASKA CONST.; AS 22.10.020 and AS 22.10.050.

[29] Gilbert v. National Transp. Safety Bd., 80 F.3d 364, 366-67 (9th Cir. 1996); Howard v. Federal Aviation Admin., 17 F.3d 1213, 1218 (9th Cir. 1994).

decisions in an unbiased and impartial manner.[30] Although hearing officers are not subject to the CODE OF JUDICIAL CONDUCT, Canons 1 - 3 contain good guidelines to follow. [31]

A hearing officer must voluntarily disqualify himself or herself and withdraw from a case in which he or she cannot accord a fair or impartial hearing or consideration.[32] Generally, disqualification is appropriate if the hearing officer's impartiality can reasonably be questioned, such as when the hearing officer has a personal bias or prejudice concerning a party, or a personal or financial interest that could be affected by the outcome of the proceeding. Below are five general rules to keep in mind when deciding whether disqualification is appropriate:

1. a prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification;

2. similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification;

3. advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be;

4. a personal bias or personal prejudice, that is an attitude toward a person as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source; such partiality may be either animosity or favoritism; and

5. if the decision-maker stands to gain or lose by a decision, that interest may disqualify if the gain or loss to the decisionmaker would flow fairly directly from a decision and the interest is not one held by the public in general.[33]

Hearing officers who are also attorneys are required to conduct themselves according to the Alaska RULES OF PROFESSIONAL CONDUCT (1993).[34] Hearing officers who

30 AS 44.62.630.

31 *See also* AS 22.20.020 (disqualification of judicial officer for cause).

32 AS 44.62.450(c); *see also* Code OF JUDICIAL CONDUCT, Canon 3(E) (1998).

33 Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 9.8, at 68 (3d ed. 1994). For a brief discussion of the distinction between "adjudicative facts" and "legislative facts" see McGrath v. University of Alaska, 813 P.2d 1370, 1374 n.6 (Alaska 1991).

are state employees are also subject to the Alaska Executive Branch Ethics Act, (AS 39.52), and the regulations implementing the act, 9 AAC 52. If an agency hearing officer violates the Alaska Executive Branch Ethics Act or regulations, the hearing decision may be voided and the hearing officer may be subject to penalties under the act.[35] Accordingly, if hearing the case would violate the Alaska RULES OF PROFESSIONAL CONDUCT or the Alaska Executive Branch Ethics Act, the hearing officer should disqualify him or herself.

Finally, a hearing officer may also be disqualified, if necessary, to eliminate the effect of an ex parte communication received in violation of AS 44.62.630. (*See* Part D of this Chapter; *see also* CODE OF JUDICIAL CONDUCT, Canon 3(B)(7)).

In order to request disqualification of a hearing officer under the APA, a party must file an affidavit stating with particularity the grounds for claiming that disqualification is warranted.[36] If the hearing officer is sitting with an agency, the agency determines whether disqualification is necessary; if the hearing officer is sitting alone, he or she makes that determination.[37] A hearing officer should set out the facts and reasons for the determination in written form for the administrative record, or announce them orally, during the hearing, so that they are made a part of the record.

Some non-APA hearing regulations provide similar procedures for disqualifying hearing officers.[38] In the absence of administrative hearing regulations setting out procedures for disqualifying hearing officers, the guidelines set out in this manual should be helpful.

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34 In re Cornelius, 520 P.2d 76 at 85.

35 AS 39.52.410 - 39.52.460.

36 AS 44.62.450(c). Unlike a case before a trial court, a party to an administrative hearing has no right to a peremptory challenge of a hearing officer.

37 *Id*.

38 *See, e.g.*, 15 AAC 05.030(c).

E. Ex Parte Communications

"Ex parte communication" means a contact between the decision-maker and a party, or other individual on behalf of that party, regarding the merits of a matter under adjudication made without notice and opportunity for all parties to participate.[39] The prohibition is discussed in AS 44.62.630. Department of Revenue hearing officers should follow the rules concerning ex parte communications set out in 15 AAC 05.030(d). The purposes of the prohibition are to ensure that

- ↑ no person has a special influence over, or opportunity to persuade, a decision-maker;
- ↑ all parties to a proceeding have an opportunity to rebut any facts considered by the decision-maker; and
- ↑ all facts considered by the decision-maker are on the record.

The hearing officer must not directly or indirectly receive oral information relating to the merits of the case from any person, including agency personnel, without giving all parties the opportunity to be present - either in person or telephonically - and the opportunity to respond.[40]

The hearing officer should not receive written information without ensuring that it is copied to the other parties and made part of the record. Whenever the hearing officer wishes to communicate with the parties outside of a conference or hearing, the communications should be written and sent to all parties.

The hearing officer should avoid being in the hearing room or having other contacts with only one party in order to avoid the appearance that the merits were discussed on that occasion. Additionally, the hearing officer should avoid ex parte communications even after the proposed decision is made, based on the possibility of a remand from the agency or a reviewing court.

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[39] This prohibition applies to the agency's final decision-maker as well as to the hearing officer.

[40] AS 44.62.630; *see* Louisiana Pacific Corp. v. Koons, 816 P.2d 1379, 1382-83 (Alaska 1991) (ex parte conversation with a witness).

Ex parte communications do not automatically void an agency decision but instead render the decision voidable.[41] It is often possible to cure an ex parte communication. The hearing officer should immediately

1. make a record of what was communicated;

2. disclose the communication to the other parties, giving them an opportunity to respond;

3. give the parties an opportunity to lodge a challenge against the hearing officer; and

4. take the opportunity to remind the parties of the rule against ex parte communications.

A party represented by counsel who attempts to contact the hearing officer directly should be immediately advised to contact counsel and have the counsel make the contact. The hearing officer should also advise the party's counsel and the opposing parties' counsel of the attempted contact.

F. Requests for Information from the Media and the Public

While the hearing officer should cooperate with the media or other members of the public in supplying public information about the proceeding or documents that are public records, the hearing officer should not engage in any discussions of the merits of the matter. This section addresses the hearing officer=s duty to disclose certain basic information and documents, and identifies other information that may not be disclosed.

1. Information About the Case. When a hearing is open to the public, the hearing officer should, upon request, disclose the time and place of the hearing and provide general information about how to obtain or review any public records or pleading files that are not confidential. Rule 3.6 of the ALASKA RULES OF PROFESSIONAL CONDUCT (RPC) binds lawyers to limit statements that would result in prejudicial trial publicity. This rule also provides guidance to hearing officers, whether lawyers or not, regarding public statements about an administrative matter. The commentary recognizes that "there are vital social interest served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Therefore, this rule permits the

[41] Municipality of Anchorage v. Carter, 818 P.2d 661, 666 n.13 (Alaska 1991).

following statements concerning a case in litigation or under investigation to be made **without elaboration**:

- ⊆ the general nature of the claim or defense;
- ⊆ the information contained in a public record;
- ⊆ that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- ⊆ the scheduling or result of any step in litigation; and
- ⊆ a request for assistance in obtaining evidence and information necessary thereto.

Among the subjects that a hearing officer should avoid discussing because they would constitute "the merits" are any attempted explanation of the parties' positions, any interpretation of testimony or evidence, or any expression of the hearing officer's view of the parties' positions. Canon 3B(9) of the CODE OF JUDICIAL CONDUCT provides additional guidance on topics that should not be discussed:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall take reasonable steps to maintain and ensure similar abstention on the part of court staff subject to the judge=s direction and control.

If a media request for an interview seems likely to lead to questions relating to the merits of the case, the hearing officer should not grant the interview. A hearing officer should never give "off-the-record" interviews.

2. Requests for Documents in the Case File. All documents in an agency adjudication file including the pleadings, motions and other requests filed by the parties, the hearing exhibits and transcripts, interlocutory rulings, and the proposed and final agency decisions must be disclosed under the Public Records Act[42] unless an exception

[42] AS 09.25.110 - 09.25.220.

applies. With this in mind, a hearing officer should make an effort to ensure that confidential items are obviously marked, physically sealed, or kept in a separate file, so they can easily be separated from the documents that will be disclosed if the agency or the hearing officer receives a Public Records Act request.

Documents that should be kept confidential include the hearing officer=s own notes on research, impressions of the case, ideas for incorporation into the proposed decision, and any draft decision before it is complete. Documents submitted by the parties under any claim of confidentiality (such as confidential business information, medical records, or trade secrets) should be clearly marked for nondisclosure unless the hearing officer has disallowed the claim. If there is any question whether the information sought by a member of the public or the media is confidential, the hearing officer should notify the parties of the receipt of the request and give them the opportunity to object to the information=s release or to take appropriate legal action to protect their interests before the release is made. The hearing officer should also be alert to protect potential privacy interests of persons not involved in the case, such as the patient of a health professional involved in a disciplinary action. (*See* Ch. 8.A(6).)

G. Consultation on Procedural Issues

The Alaska Supreme Court has held that it is permissible for an agency attorney to advise a hearing officer on purely procedural matters.[43] However, it is probably better practice that such procedural advice be in writing with a copy to the opposing counsel or on the record with opposing counsel present.

H. Advice to the Final Decision-Maker

The agency makes the final decision under AS 44.62.500 (unless this power has been delegated to the hearing officer under AS 44.62.340). During this stage, the final decision-maker may have questions for the hearing officer about the proposed decision. These discussions fall within the deliberative adjudicative privilege. However, the record must contain all facts considered in the decisionmaking process by the hearing officer and the final decision-maker.

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[43] Cornelius, 520 P.2d at 84.

The hearing officer may also act as the legal advisor to the agency's final decision-maker, unless the agency uses some other neutral attorney to serve this function. Sometimes the agency will use an attorney from the Attorney General's Office who does not work in the same section as any attorney representing a party to the proceeding.[44]

If the hearing officer heard the case sitting with the agency, the hearing officer who presided must be present during deliberations in order to assist and advise the agency. AS 44.62.500(a). If the hearing officer heard the case sitting alone, the agency has the discretion to receive advice and assistance from the hearing officer.[45]

The agency may adopt the proposed decision in its entirety or, if a penalty is proposed, may reduce the proposed penalty and adopt the balance of the proposed decision.[46] Alternatively, the agency may reject the proposed decision and decide the case after obtaining and reviewing the record, or may refer the case to the same or another hearing officer for further action.[47] If the agency refers a case back to a hearing officer, the hearing officer may hold additional evidentiary hearings if necessary, and must prepare a new proposed decision, based on the additional evidence and the record of the earlier hearing, and submit it to the agency.

Some of the questions posed by a final decision-maker are:

↑ What are the agency's options under AS 44.62.500? It is helpful to outline these options, especially when working with boards and commissions who have less experienced members.

↑ May a member of an adjudicatory body who has not heard all of the evidence participate in making the final decision? If the agency heard the matter with the hearing officer, a member who was not present for all or part of the

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44 A majority of states permit the Attorney General's Office to concurrently represent different or conflicting interests when the Attorney General can ensure independent representation for the competing parties. *See e.g.* State v. Klattenhoff, 801 P.2d 548, 551 (Hawaii 1990).

45 Storrs v. State Medical Bd., 664 P.2d 547, 553 (Alaska), *cert. denied*, 464 U.S. 937 (1983).

46 AS 44.62.500(b).

47 AS 44.62.500(c).

hearing must review all of the evidence that was taken during the member=s absence before participating in making the final decision. Schmidt v. Beeson Plumbing and Heating, Inc., 869 P.2d 1170, 1177 (Alaska 1994).

↑ What should be done if an agency decision-maker has received ex parte contact? *See* discussion in Ch. 3.E.

↑ When does an agency decision-maker have a conflict that requires that the individual not participate? The information discussed in Chapter 3(D) applies. If the agency is a board or commission, however, the need for a quorum may override the conflict issue. *See* AS 44.62.450(c).

↑ May the agency deliberate off record? The Open Meetings Act specifically allows an adjudicatory body to deliberate off record. AS 44.62.310(d)(1). No persons should be present during the deliberations other than the adjudicatory body and the hearing officer. If the adjudicatory body has its own attorney, that person may be present. If the agency staff is a party to the proceedings, no staff person or attorney for staff may be present. In re Robson, 575 P.2d 771, 774 (Alaska 1978). No recording should be made while the adjudicatory body is engaged in off-the-record deliberations.

↑ What written record must be made of the agency's final decision? The final decision of the agency must be in writing and signed. A sample of a form for action on the proposed decision is provided in the Appendix., Sample Form 8. A decision by a board or commission should be signed by the chair, or the chair's designee, on behalf of the board or commission; a decision by an agency should be signed by the head of the agency or that person's designee. The required and suggested contents of the decision are discussed in Chapter 12(A). The hearing officer will frequently undertake the task of reducing the agency's decision to writing. If the agency exercises its option under AS 44.62.500 to alter the hearing officer's proposed decision, the adoption order should reflect that the proposed decision has been adopted only as amended and the changes must be interlineated (and initialed) on the proposed decision. Alternatively, a new document containing the changes could be prepared.

Answers to other questions from state board members may be found in the DEPARTMENT OF LAW CIVIL MANUAL § UU (1992).

CHAPTER 4. TYPES OF PROCEEDINGS

A. Discipline / Accusation

When an agency seeks to impose restrictions on a person=s right, authority, license, or privilege, it initiates the process by filing an accusation against the "respondent."[48] The accusation must set out in Aordinary and concise language≅ the agency=s allegations and the particular statutes or regulations the respondent has allegedly violated.[49] The accusation acts like a complaint in a civil case. Third parties may file complaints with an agency and request that the agency file an accusation, but generally the agency itself actually must determine whether to file an accusation to initiate a proceeding.[50]

The agency serves the accusation on the respondent under AS 44.62.380 and then, within 15 days, the respondent must file a "notice of defense" if the respondent wants to contest the allegations.[51] The agency may amend the accusation at any time, but the respondent must be given a reasonable opportunity to prepare a defense to any new charges.[52]

B. Denials / Statements of Issues

Proceedings initiated by a statement of issues determine whether an agency correctly denied, or failed to renew, a right, authority, license, or privilege.[53] The

48 AS 44.62.360.

49 *Id.*

50 Vick v. Board of Elec. Examiners, 626 P.2d 90, 94-95 (Alaska 1981) (private individuals are not permitted to file accusations to compel agency action absent an express provision in the agency's own statutes or regulations).

51 AS 44.62.390. When the agency serves the accusation upon the respondent, it must include with it a "Notice of Defense" form which the respondent can simply sign and return to receive a hearing on the merits.

52 AS 44.62.400.

53 AS 44.62.370.

statement of issues is a written statement that informs the affected person ("respondent") of the statutes and regulations on which the agency based its action.[54]

The statement of issues is filed by the agency, not the respondent. The letter that initially informs an applicant of the adverse decision (for example, denial of a license, refusal to renew a license, etc.) may act as the statement of issues, in which case the letter itself should inform the unsuccessful applicant of the right to a hearing. Some agencies file a formal statement of issues after an unsuccessful applicant requests a hearing.

If the "informal" statement of issues does not appear to be sufficiently informative, the hearing officer should order the agency to file a more formal statement of issues. The statement should fully inform the respondent of the issues to be addressed at a hearing. If possible, the statement should specifically state the alleged facts that form the basis for the agency action. Sometimes, however, all the agency can state is that the respondent failed to satisfy particular statutory requirements; the burden then rests with the respondent to show at the hearing how the requirement was met.

C. Hearings on Shortened Time

Some agencies are required to hold certain hearings on shortened time.[55] The timelines set within the APA do not fit the requirements for expedited consideration. The hearing officer must abbreviate any prehearing procedures in a manner that is consistent with due process.

The summary suspension provisions of AS 08.01.075(c) contemplate that the hearing, to be held in seven days, will only address whether conduct occurred that justifies summary suspension pending a hearing on an underlying accusation. If an accusation has not already been filed, the hearing officer should set a deadline for the agency to file an accusation that meets the requirements of AS 44.62.360.

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[54] *Id.*

[55] *See, e.g.*, AS 08.01.075(c), which requires occupational licensing boards to hold a hearing within seven days after a summary suspension.

D. Cease and Desist Orders

Certain agencies have the power to issue cease and desist orders. For example, the commissioner of the Department of Community and Economic Development may issue a cease and desist order under AS 08.01.087(b)(1) to halt the unauthorized practice of an occupation. The procedures are set out under that paragraph.

In other circumstances, however, the procedures are more hazy. For example, under the Alaska Surface Coal Mining Act (AS 27.21), the commissioner of the Department of Natural Resources may issue a cessation order to a coal mine when there is an imminent danger to health, safety or the environment. The APA applies to proceedings after the order is issued, except as modified by regulation.[56] The applicable regulations and statute set out a non-APA procedure in which a cessation order leads first to an informal conference.[57] Following the informal conference, the permittee can request a formal hearing under the APA. The APA is not designed well for expedited resolution, so the hearing officer may choose to seek agreement from the parties for shortened times.

When the procedures for challenging a cease and desist order are not fleshed out in the statute governing that power, the hearing officer may want to look to other cease and desist procedures, such as those set out in AS 08.01.087(b)(1), to establish reasonable and speedy procedures.

E. Examples

1. Hearings under Combined APA and Non-APA Procedures. In some cases a statute may provide that an agency hearing is governed by the APA, except as provided otherwise by agency regulations or the statutes governing the agency. In those cases, it is important that the hearing officer review the unique procedures applicable to the hearing.

For example, under AS 04.11.510(c), a hearing on the revocation or suspension of a liquor license is conducted under the APA. However, the licensee may first request

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[56] AS 27.21.240(c).

[57] 11 AAC 90.613 .

an informal conference with the director or board. If an informal conference is requested, the time for filing a notice of defense under the APA is tolled until the day after the conference is held.

In proceedings such as those described above, the hearing officer should ensure that the parties received any required notices in addition to those set out in the APA. The hearing officer should also ensure that the parties have the opportunity to informally resolve the dispute. At the first prehearing conference, it is a good idea to inquire as to whether there are special notice or hearing procedures in addition to the APA and to ascertain whether those procedures were followed. If such notices and opportunities are required, and were not given by the agency, the hearing officer should give the agency the opportunity to cure the violation before proceeding with the formal hearing.

2. Examples of Non-APA Procedures.

a. *State as Proprietor / Procurement Issues.* The APA generally does not apply to hearings that involve the State as a proprietor, such as when the State is the property owner, and lease compliance is at issue. Basic due process must still be afforded and the hearing officer should review and follow any specific agency regulations. If there are no specific regulations on hearing procedures, the hearing officer should prepare a hearing memorandum for the parties that outlines the procedures that will govern the proceeding. The parties should be given an opportunity to comment on the procedures, and the hearing officer should carefully consider any objections presented. The hearing officer should request all parties to stipulate to the adequacy of the procedures to avoid a procedural challenge later.

If a hearing involves a procurement issue, the hearing officer should determine if the agency is subject to the State Procurement Code[58] and follow the procedures that apply. If an agency is exempt from the State Procurement Code, the hearing officer should follow the agency=s applicable law. If there are no regulations for the agency=s procurement hearings, basic due process should be provided and the advice outlined above for hearings on proprietary matters should be followed.

[58] AS 36.30.005 - 36.30.995.

b. *RCA, formerly APUC*. The Regulatory Commission of Alaska (RCA), formerly the APUC, is exempt from the APA but has adopted extensive regulations governing practice before it.[59] While the RCA regulations are fashioned to address complicated hearings, the regulations provide general guidance that might be of assistance for a hearing officer in the absence of applicable agency regulations. Special note should be taken of procedures for treatment of confidential records[60] and for pre-filed testimony.[61]

c. *Alaska Workers= Compensation Board*. The APA applies to board proceedings Awhere procedures are not otherwise expressly provided by the Alaska Workers= Compensation Act.≅[62] The Act contains specific hearing provisions, some of which mirror the APA while others do not. While the Act directs the board=s processes and procedures to be Aas summary and simple as possible,≅ the board=s regulations published at 8 AAC 45.010 - 8 AAC 45.900 are actually fairly extensive.

Board hearings take place before panels comprised of two appointed members of the board and either the commissioner of the Department of Labor and Workforce Development or the commissioner's Adesignated representative.≅[63] Historically, the commissioner of Labor has utilized a hearing officer as the commissioner's designated representative for hearings. Because of that representative status, workers= compensation hearing officers take part in deliberations, and vote on the outcome of the hearing, together with the appointed board members comprising the hearing panel. The hearing officer then drafts the panel=s decision and order along with any dissenting opinion which may be necessary.

Under AS 23.30.110(c) a hearing, once scheduled, cannot be canceled, postponed, or continued except for Agood cause≅ as determined by the board. The requirements for good cause are described in 8 AAC 45.074. A Acatch-all≅ provision permits action to avoid Airreparable harm≅ to a party.

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59 3 AAC 48.010 -- 3 AAC 48.188.

60 3 AAC 48.040 - 3 AAC 48.049.

61 3 AAC 48.153.

62 AS 44.62.330(a)(15).

63 AS 23.30.005(a).

AS 23.30.110(c) provides that a party may be represented by any person authorized in writing.

d. *Child Support Enforcement Division.* The Department of Revenue maintains its own staff of hearing officers to conduct Child Support Enforcement Division=s (CSED) administrative hearings. The APA does not apply to the proceedings. Instead, individual statutes and an extensive set of regulations[64] set out the parameters of CSED=s administrative processes.

The CSED provides administrative procedures for the establishment and disestablishment of paternity;[65] to administratively establish or modify the amount of a person=s child support obligation;[66] to consider challenges of the use of administrative orders to garnish wages or seize other assets of a child support debtor.[67] The agency also has authority to administratively revoke driver=s licenses and occupational licenses of those who refuse to pay child support.[68]

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64 15 AAC 05.010 *et seq*. and 15 AAC 125.010 *et seq*.

65 AS 25.27.165 and 25.27.166.

66 *See* AS 25.27.135, 25.27.140, 25.27.160, 25.27.170, 25.27.180, 25.27.190, 25.27.195, and 25.27.200.

67 *See* AS 25.27.150.

68 *See* AS 25.27.244 and 25.27.246.

CHAPTER 5. GETTING STARTED

A. Communicating with the Parties

Taking into consideration the prohibition on ex parte communications (*see* Ch. 3(E)), the hearing officer should make communication between the parties, and between the parties and the hearing officer, as easy as possible. The hearing officer should encourage the use of fax, e-mail, telephone conferencing, and other modern modes of communication.

Pro se parties frequently forget the necessity to copy the opposing parties with communications with the hearing officer. The hearing officer should be diligent to ascertain that each communication received has been copied to opposing parties.

Occasionally, a party represented by counsel will attempt to contact the hearing officer directly. When that happens, the party should be immediately advised that contacts may only be made through counsel. The hearing officer should advise the party's counsel of the client=s attempted contact. If the communication is in writing, the hearing officer should copy all parties with the communication.

B. Interested Parties

Sometimes “interested parties,” other than parties, may actively participate in and receive documents from an administrative hearing. A hearing officer should consult the statutes, regulations, and case law relevant to the particular kind of case to determine if there is a definition of “affected persons≅ who would have special rights.

C. Compliance with the Americans with Disabilities Act (ADA)

At the beginning of every administrative proceeding, the hearing officer should provide a notice[69] to parties such as the following in order to comply with the Americans with Disabilities Act of 1990, 42 U.S.C. ∋ 12101 *et seq.* (ADA):

[69] This notice would generally be in the order or letter setting up the prehearing conference.

> If you are a person with a disability who may need a special accommodation in order to participate in the hearing, please contact [hearing officer, or agency contact person, with telephone number] no later than [date (a date in advance of the first proceeding, such as the prehearing conference)] to make any necessary arrangements.

If a hearing participant requests a special accommodation under the ADA, the hearing officer should refer this request to the ADA coordinator for the state agency for which the hearing officer is conducting the hearing. If a request for a special accommodation is made, the hearing officer should work with the ADA coordinator to provide accommodations to make the hearing accessible.

D. Initial Conference

The hearing officer should generally conduct a prehearing conference. Although not mentioned by the APA, a prehearing conference greatly assists in streamlining and organizing the administrative adjudication process. The prehearing conference can be used to explore settlement possibilities, clarify issues, set deadlines, determine the order of presenting evidence, and resolve discovery and other prehearing issues.

The purpose of the prehearing conference is to simplify and expedite the proceedings, not to complicate or prolong them. The conference must be tailored to the type of case presented, and should not be allowed to become a complicated proceeding itself with costs disproportionate to the case. In a very simple case, a prehearing conference may simply consist of a telephone conference setting the time and place for hearing. The more complex the case, the more necessary and advantageous it will be to hold at least one prehearing conference. (*See* Ch. 7B for prehearing conferences in complex cases.)

1. Notice. The hearing officer sets the date, time, and place of the prehearing conference, and may do so after conferring with the parties. The hearing officer should give the parties reasonable advance notice of the conference. The notice may include an agenda for the conference. (*See* Appendix C, Sample Form 3A)

2. Agenda. The hearing officer should prepare, and may circulate to the parties in advance, a list of the topics to be addressed.

a. *Narrow Issues.* The parties and the hearing officer should identify the issues in dispute to be resolved at the hearing. The possibility of fact stipulations should be explored, as well as whether some or all of the issues are appropriate for resolution by summary judgment or other dispositive motion. (*See* Ch. 7.A.)

b. Settlement Possibilities. The hearing officer may want to discuss whether the parties have explored alternative dispute resolution possibilities, such as mediation or arbitration. If the parties agree to use one of these alternatives, the hearing can be stayed until that process is complete, and then resumed if necessary. A schedule should be set for any of the settlement procedures that are used. (*See* Ch. 10.) If any statutory deadlines exist for resolution of the administrative proceeding, the hearing officer should obtain written waiver by the parties of those deadlines.

c. Deadlines for Prehearing Activities. The conference is a good time to set deadlines for the exchange of discovery, filing witness lists, filing fact stipulations, submission of dispositive motions, and submission of any briefs. The hearing officer should determine whether all exhibits should be exchanged in advance of the hearing, or whether they can be presented at the hearing. In establishing the requirements and deadlines, the hearing officer should keep in mind the overall goal of an administrative proceeding: to be more expeditious and less expensive for the parties than a judicial proceeding.

d. Procedural Rules for the Hearing. The hearing officer can use a prehearing conference to set out the procedure for the hearing including the sequence and manner of presenting evidence, burden of proof, cross-examination, argument, and pre- or post-hearing briefing (if warranted).

e. Establishing Time and Place of the Hearing. The hearing officer should set the time and place of the hearing at the conference (unless additional prehearing conferences are scheduled). (Chapter 8(A)(1) addresses the location of the hearing.) If the hearing is by telephone and the hearing affects an interest protected by due process (e.g., revocation of a driver's license or an occupational license), the hearing officer should provide an opportunity for the parties to

request an in-person hearing. If credibility of a witness is a material issue, the hearing officer must grant the request. Whitesides v. State, 20 P.3d 1130 (Alaska 2001); Brown v. State, 20 P.3d 586 (Alaska 2001).

3. Conference Report or Order. The hearing officer should take good notes or tape record the prehearing conference. Following the conference, the hearing officer should prepare a report or order incorporating the matters determined at the prehearing conference. The report should include all rulings, agreements, scheduling (including any additional conferences), and any other matters decided. It should be sent to all parties to the hearing. (*See* Sample Form 3B.) Similarly, a written record should be kept of any other prehearing determinations.

4. Notice of Hearing. Under the APA, a notice of hearing, containing certain information, must be sent to all parties at least ten days before the hearing.[70] (A sample notice is appended as Sample Form 4.)

[70] AS 44.62.420.

CHAPTER 6. PREHEARING ACTIVITY

A. Discovery

When a party has discovery rights under the APA or agency statutes, or when due process requires some opportunity to investigate the adversary=s case, the hearing officer has broad discretion to determine what discovery mechanisms should be allowed. The discovery mechanisms set out in the ALASKA RULES OF CIVIL PROCEDURE (such as depositions, interrogatories, requests for production or inspection, and requests for admission) may be considered, but will not always be appropriate.

In dealing with requests for discovery, a hearing officer should remember the basic policy that administrative hearings should be kept less complicated than judicial proceedings.[71] As a general proposition, therefore, discovery for administrative proceedings should be less expansive than under the ALASKA RULES OF CIVIL PROCEDURE. If it is necessary to consider motions to compel, or rule on objections or other discovery disputes, the hearing officer should keep in mind that the purpose of discovery is to exchange information legitimately needed by the parties to prepare for hearing. The goal should be to do so in an expeditious and efficient way rather than to comply with all formalities of the civil rules. The hearing officer should act to deter Ahide-the-ball≅ tactics or unreasonably burdensome requests.

Ordinarily, the hearing officer should require the agency to produce the entire file and all other relevant non-privileged material.[72] If there is a dispute over confidentiality of agency documents, the hearing officer may order them produced for the hearing officer's *in camera* examination. If there is a dispute over relevance of documents, the underlying problem is often really the difficulty or cost of producing voluminous materials. The hearing officer should then devise an appropriate method of inspection to minimize the cost, and order the appropriate party to bear the cost. For example, if a party seeks

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[71] *Cf.* AS 44.62.460(d) (hearing need not be conducted according to technical rules of evidence).

[72] A party in administrative litigation with an agency should request public records through the discovery process, rather than making a public records request under 6 AAC. See AS 09.25.122.

voluminous agency files kept in another city, the hearing officer may order production in the place where the records are located, requiring the requesting party to bear the cost of travel.

If the hearing officer permits a party to inspect agency documents, the order granting permission should provide that inspection be done under the immediate supervision of an agency employee or some other designee, to ensure that nothing is defaced, removed from, or altered in the agency records.

B. Depositions

Among the discovery mechanisms permitted by the civil rules, only depositions are specifically addressed in the APA. Before 1995, AS 44.62.440(a) permitted depositions only when a petition showed that the witness would be unavailable at the hearing. The APA was amended in 1995 to expand the permissible use of depositions. The current version allows depositions Awith good cause shown or upon stipulation of the parties≅ -- still a more limited use than permitted by the civil rules. The hearing officer should therefore reject the thinking, common in judicial litigation, that adequate preparation for trial requires a deposition of every potential witness. An example of Agood cause≅ for ordering a deposition could be the expectation that a witness's testimony will be so specialized or technical that the adverse party needs to know the substance in advance of hearing to prepare a rebuttal.

AS 44.62.440 empowers only agencies to order depositions, and also requires the agency to seek a court order when the agency orders the deposition of a witness outside the state. Ordinarily, the hearing officer will act for the agency under a delegation of the agency=s authority in ruling on requests for depositions.[73] When the hearing officer approves a deposition of a witness in a location outside the state,[74] the party seeking

[73] AS 44.62.340; AS 44.62.450(b).

[74] *See* State v. Thompson, 612 P.2d at 1016 n.2 (AS 44.62.440(b) was intended to apply where a deposition is taken outside Alaska, not where an out-of-state resident is to be deposed in Alaska).

that deposition will have to obtain the order of the local court, if necessary to compel the witness.[75]

If a deposition is ordered, the civil rules provide a good guide for the manner in which it should be taken.[76]

C. Prehearing Motions

As in judicial litigation, prehearing motions can address many topics. The "motion" may be in some other form such as a petition or letter request. A party should address the motion to the hearing officer and serve copies on all other parties. The hearing officer should make a decision promptly, and furnish that order to the parties.

Unless the ruling is self-explanatory, or is expressly based on the grounds stated in support of the motion, the order should include a statement of the grounds for the ruling. Many motions may be disposed of without a formal order, as long as a record is made of the disposition. Unless a statute requires a particular format, a ruling can be in the form of a notice, letter, or statement made on the record that advises the parties and other affected persons of the resolution and the reasons for it.

If the motion is one on which the hearing officer does not have authority to rule, the hearing officer must promptly notify the parties. For example, administrative agencies do not have the power to declare statutes unconstitutional. (*See* Ch. 3.C for limits on a hearing officer=s authority.) If the constitutionality of a statute is at issue in a hearing, the parties may simply wish to preserve the question for appeal, or may wish to present evidence and develop a record.

D. Deadlines

Other than the hearing notice deadline in AS 44.62.420 (a), the APA provides no deadlines for administrative action. It is the hearing officer=s responsibility to move matters along and to set deadlines. The hearing officer has the responsibility to issue prompt decisions on procedural issues and respond timely to parties' inquiries. Generally, deadlines for such matters as amendment of the accusation or statement of

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[75] AS 44.62.440(b).

[76] *See* ALASKA R. CIV. P. 26-32.

issues[77], exchange of witness lists and exhibits, permissible discovery, or prehearing motions are set at a prehearing conference. (*See* Ch. 5.C.) If faced with a party failing to meet deadlines, the hearing officer will have some discretion to devise an appropriate consequence. As a matter of fairness, the hearing officer should try to devise a penalty that does not impose a burden on parties who have met the deadlines.

[77] Under AS 44.62.400, the agency may file an amended accusation at any time before the submission of the matter for decision. After that time, amendment is governed by AS 44.62.490. The respondent must be given a reasonable opportunity to defend against any new charges.

CHAPTER 7. HANDLING COMPLEX PROCEEDINGS

When an administrative proceeding may be lengthy or involve difficult or technical subject matter, some procedural tools are available to simplify the proceedings and make them more manageable. The procedures described in this chapter can help to assure the hearing is conducted efficiently, allowing adequate time for evidence on disputed issues, and eliminating discussion of irrelevant matters.

A. Narrowing the Issues

Stipulations of fact and for admission of certain evidence are useful for narrowing the issues that will be presented at the hearing. The hearing officer should encourage parties to determine subjects that are not in dispute and would be suitable for stipulation. Setting a deadline several days in advance of the hearing for filing stipulations will encourage the parties to meet to discuss the issues and focus their presentations.

Dispositive motions may also narrow the issues. The hearing officer, by setting a deadline for filing of dispositive motions, may encourage the parties to narrow the issues in a complex case. Where facts are stipulated or undisputed, part or all of the case can be decided by summary judgment.[78] "A statutory right to a hearing does not require development of facts through an evidentiary hearing in the absence of a factual dispute."[79]

In some cases, the number of issues in dispute may be reduced if identical issues were resolved in prior adjudications. Though the doctrines of res judicata and collateral estoppel developed in a judicial setting, the Alaska Supreme Court has held that the doctrines may be applied to administrative adjudicative determinations.[80] Therefore, if an identical issue was decided in a prior agency adjudicative determination, a party to the first hearing may be precluded from raising the issue again in the current proceeding.

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78 ALASKA R. CIV. P. 56.

79 Smith v. State, Dep't of Revenue, 790 P.2d 1352, 1353 (Alaska 1990).

80 McKean v. Municipality of Anchorage, 783 P.2d 1169, 1171 (Alaska 1989) (res judicata applies to administrative proceedings although not as rigidly as with judicial proceedings); Jeffries v. Glacier State Tele. Co., 604 P.2d 4, 8 (Alaska 1979).

Res judicata and collateral estoppel would also preclude relitigation in an administrative proceeding of issues previously decided in a judicial proceeding. Res judicata and collateral estoppel can be raised by a party in a dispositive motion, or by the hearing officer.

B. Prehearing Conferences

The hearing officer may conduct a more structured and formal prehearing conference in a complex case and tape-record the conference or have it recorded by a court reporter. The record may assist the hearing officer to prepare an accurate prehearing order that summarizes all of the decisions made. In a complex case, additional conferences may be scheduled as needed to resolve specific issues. For example, the hearing officer may set an additional prehearing conference date to discuss discovery problems. Additional prehearing conferences can also be set to resolve procedural issues. Additional conferences should be held only when necessary, to avoid unnecessary delay and expense to the parties.

The prehearing conference could include, in addition to those items discussed in Ch. 5.C:

1. Agenda. The hearing officer should circulate a tentative agenda before the conference. The parties should be asked if they have additional issues to discuss at the conference.

2. Opening Statement. The hearing officer should begin the prehearing conference by introducing the case, his or her name, and a tentative agenda for the conference.

3. Participation and Appearances. The hearing officer should ask each of the parties and their representatives to introduce themselves for the record. The hearing officer should rule on requests to intervene or to participate on some other basis. If appropriate, the hearing officer should inform those present of their rights (or lack of rights) to participate in the hearing.

C. Evidence

When the testimony or evidence anticipated at an administrative hearing is complex, technical, or of a kind that requires advance study to understand or to prepare cross-examination, the hearing officer may wish to require pre-filed testimony or evidence. One form of pre-filed testimony is affidavit testimony filed in accordance with AS 44.62.470.

If pre-filed testimony (including supporting documents) seems warranted, the hearing officer should discuss with the parties what prefiling procedures should be used and whether pre-filed testimony may be in other than written form, such as by audio or video recording. The hearing officer may permit pre-filed testimony to be submitted simultaneously by both parties, or in alternating rounds, beginning with the party with the burden of proof. Whether simultaneous or not, the hearing officer may order prefiling of direct testimony only, or may permit additional rounds of rebuttal testimony. A need for multiple rounds of pre-filed testimony may be reduced if the administrative action has been initiated with detailed documentation about the requesting party=s position, such as a rate request filing supported by audited cost data, or a claim for additional compensation supported by documentation of the claimed costs.

D. Organizing the Hearing

The hearing officer should establish the order of oral presentations in the prehearing order or by other notice well before the hearing.

E. Hearing Briefs

The hearing officer may require the parties to file prehearing briefs stating their principal contentions, applicable law, the evidence they will present, and what the evidence will establish that is relevant to the dispute. Well written briefs can assist the hearing officer to absorb the hearing evidence in complex cases by showing the parties= views of how the evidence will work together to prove their case. The briefs may also present any research the hearing officer has requested on particular legal or technical questions. The hearing officer may instruct each party to address any arguments made on procedural motions and requests. The hearing officer should indicate the length of brief and level of detail of discussion that will be helpful. The hearing officer may require an opening statement by the parties in addition to, or instead of, a hearing brief. If one

party files a brief that was not requested, the other party should be given a fair opportunity to respond.

F. Proposed Findings of Fact and Conclusions of Law

When dealing with complex proceedings or technically challenging factual evidence, the hearing officer may choose to request that the parties file proposed findings of fact and conclusions of law. This practice can be particularly effective in providing a clear and specific outline of the precise issues that are critical in deciding the case. The inclusion of proposed findings and conclusions in the record has been found to be of great value both in providing concise information to agency officials who do not participate in the hearing yet have the duty of rendering the final decision, and in providing a proper record for consideration in the case of an appeal of the final agency decision.

It may be helpful in accomplishing the purposes described above for the hearing officer to substantially follow the process suggested by the Revised Model State Administrative Procedure Act[81], and by the Federal Administrative Procedure Act[82]. Those models provide that if the parties submit proposed findings and conclusions in accordance with agency rules, the decision of the hearing officer must include a ruling accepting or rejecting each of the proposed findings, with an explanation of the reasons for any rejections. This requirement for individual rulings on each proposed finding applies only to findings on pertinent factual issues. The hearing officer may thus make a preliminary determination that a particular proposed finding is irrelevant, immaterial, or cumulative, and therefore does not require an individual substantive review and response.

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81 Model State Administrative Proc. Act 1961, Sec. 12.

82 Federal Administrative Procedure Act, Sec. 8(b).

CHAPTER 8. HEARING

A. Mechanics of the Hearing

There is no standard model for a formal administrative hearing. It should have dignity and order similar to a judicial proceeding, but should be conducted less formally. The organization and form of a hearing depends on the type of case, the relevant statutes and regulations, the issues, the number of witnesses, agency past practice, and the hearing officer=s preference. The goal is to develop a fair, accurate, and concise record. The hearing should move as rapidly as possible, consistent with the fundamentals of fairness, impartiality, and thoroughness. Upon the parties' mutual agreement, the hearing or the testimony of individual witnesses may be teleconferenced.[83]

1. Hearing Location and Facilities. AS 44.62.410(a) provides that the agency shall determine the city within the state at which the hearing will be located. That section establishes guidelines for the selection. A hearing may also be conducted telephonically, unless the hearing officer determines that a telephonic hearing would substantially prejudice the rights of a party[84] or violate due process.[85]

Comfortable and functional hearing facilities assist in developing a good record. The hearing should be held in a location convenient to the public, including the public with disabilities. If possible, the hearing officer should inspect the hearing room before the hearing. The hearing officer should check the noise level, heating or air conditioning, lighting, furniture arrangement, seating facilities, and sound system. The witness chair should be arranged so that everyone in the room can see and hear the witnesses, and the recording device (or reporter) should be placed where it can accurately record the

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83 AS 44.62.410(b); s*ee also* AS 44.62.635.

84 AS 44.62.410(b)

85 If an important interest is at stake, and witness credibility is a material issue, denial of an in-person hearing violates due process. Whitesides v. State, 20 P.3d 1130 (Alaska 2001) (considering telephonic revocation of a driver's license); *see also* Brown v. State, 20 P.3d 586 (Alaska 2001).

testimony of all witnesses and the comments of all participants. A nearby location where persons can confer in private is also helpful.

The hearing officer should make sure the hearing room and furniture stays in the condition in which they are received. Smoking in the hearing room should be prohibited regardless of whether the hearing is in session.

If the hearing officer wants the agency to arrange for the hearing facility or for recording (*see* A(4) of this chapter), the hearing officer should promptly notify the agency.

2. Hours. Many hearing officers customarily hold hearings for five hours a day, five days a week; for example, 10:00 a.m. to 12:30 p.m. and 2:00 p.m. to 4:30 p.m., Monday through Friday. A five hour schedule has several advantages. First, it permits the hearing officer, counsel, and the parties time during the evening and morning to review the previous day's hearing and prepare for the next. Without adequate preparation, a party's examination might be disorganized, rambling, and ineffective. Second, counsel often need a few business hours each day to handle other matters. Finally, the constant attention required while a hearing is in session is mentally fatiguing. After approximately five hours, a party's examination is likely to become less articulate and concise, and the risk of confusing, ambiguous, or mistaken answers is increased. It is also difficult for the hearing officer to absorb more than five hours of testimony in a day.

The hearing hours may coincide with local court hours (for example, in Anchorage, 8:00 a.m. to 1:30 p.m.), or can be set whenever is convenient for the hearing officer and parties. Hearings should be scheduled evenings or weekends only in extraordinary circumstances. The hearing officer may extend or shorten the regularly scheduled sessions as convenience requires. For example, an afternoon session may be extended to permit an out-of-town witness to finish his or her testimony and return home. When it appears possible to complete the hearing in a single day, the hearing officer, after consultation with the parties, may begin the hearing earlier and shorten the

lunch recess. The hearing officer also has the power to grant continuances for good cause.[86]

3. Recesses and Promptness. Short recesses should be taken whenever some time off the record will make the hearing progress more smoothly. For example, when the participants tire, or to allow an expert witness to set up an exhibit. Hearings usually have a minimum of one recess in the morning and one in the afternoon. The hearing officer should call a recess if a witness or counsel need a break from the proceeding to regain composure and participate more effectively.

The hearing officer should establish times for convening each session and enforce them. The hearing officer should also notify the parties that they are responsible for scheduling witnesses so that the allotted hearing time is fully utilized.

The times fixed for recess or adjournment should be more flexible. For example, if a witness finishes his or her testimony five or ten minutes before the scheduled adjournment time for lunch, it might be convenient to recess; if counsel is in the midst of a complicated cross examination at the end of the day, adjournment may be postponed.

4. Recording. All APA hearings must be Areported by a phonographic reporter or recorder, or other adequate means of assuring an accurate record."[87] Although any type of recording may be used (shorthand, stenotype, etc.), tape recording is usually the least expensive method, and is therefore quite commonly used. In many administrative proceedings, a tape recorder is operated by the hearing officer, who assures that an accurate record is kept of the full proceeding. A hearing officer may discuss other arrangements with the agency. Some agencies provide the recording device and an operator, while other agencies contract for court reporting services. If a court reporter would be helpful, but the agency cannot afford the cost, the parties sometimes will pay the cost of a hearing officer themselves.

To make certain that the record is complete, the hearing officer should announce when the reporting is interrupted for a change in tape, or a recess, and should announce

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[86] AS 44.62.580.

[87] AS 44.62.450(d).

when the proceedings are resumed. If a person continues to speak after the reporting stops, the hearing officer should catch the speaker=s attention, and then ask the speaker to repeat the portion that was lost after the reporting resumes. The hearing officer may frequently have to ask participants to speak louder. The hearing officer should always speak in a tone audible throughout the hearing room.

If matters of substance happen to be discussed off-record, the hearing officer should memorialize those discussions on record.

5. Use of Interpreters. If a party or witness has requested assistance of an interpreter, the hearing officer should discuss the request with the agency and make appropriate arrangements. Generally, the party requesting foreign language interpretive services would be expected to bear the expense of the interpreter. If the request is made to accommodate a disability, the hearing officer should review Chapter 5(B) in this manual on the Americans with Disabilities Act requirements.

The hearing officer, or reporter, if any, should administer an interpreter oath such as the following:

> Do you solemnly swear or affirm that you will truthfully and accurately translate all questions put and all answers given, to the best of your ability?

Hearing officers should give specific instructions to an interpreter, on the record, such as the following:

- ↑ the interpreter is to give word-for-word translations of only that which is asked and that which is answered;
- ↑ the interpreter is not to engage in discussions with the witness in order to clarify what the witness means or for any other reason; and
- ↑ the interpreter should interrupt long passages in order to translate several shorter statements rather than one long one.

The parties should also be directed to ask their questions directly to the witness (*e.g.* "Did you go to the store?") rather than giving the interpreter directions as to what to ask (*e.g.* "Ask him if he went to the store.").

6. Public Hearings / Privacy Issues. Although nothing in the APA or in Alaska case law specifically requires public hearings, administrative proceedings should be open unless a statutory provision or a balancing of privacy interests supports closure of the hearing or other protective measures. The Alaska Supreme Court established in ALASKA RULES OF ADMINISTRATION, R. 21(a) a strong preference for keeping judicial proceedings open to the public:

> So far as practicable, all judicial business involving the trial of causes and conferences with members of the Bar or litigants shall be on the record and transacted in open court.

Generally, courts apply the rule of openness to administrative as well as judicial proceedings.[88] The importance of publicly conducting an administrative agency hearing should also be inferred from the legislature=s strong policy statements accompanying the Open Meetings Act[89] and the Public Records Act.[90] In particular, AS 44.62.312(a) states the policy that

> (1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;
> (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;[91]

A party to an administrative hearing may occasionally request that the hearing be closed to the public, that the testimony of certain witnesses be taken *in camera,* that exhibits be sealed or redacted, or that other measures be used to protect privacy interests. These questions involve a balancing of rights of privacy against an important public interest in open governmental proceedings. Even in criminal cases, when there is a constitutional right to a public trial, the Alaska Court of Appeals recognized that "it is

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88 *See*, Bernard Schwartz, ADMINISTRATIVE LAW, Section 6.7 (2d ed., 1984); Federal Communications Comm'n v. Schreiber, 381 U.S. 279 at 292-93 (1965).

89 AS 44.62.310 - 44.62.312.

90 AS 09.25.110 -09.25.220.

91 Adjudicative deliberations are excepted. AS 44.62.310(d).

well accepted that the right is not absolute. . . . It may be limited by some other overriding interest."[92]

If privacy interests do justify limiting public access to some or all portions of an administrative proceeding, the hearing officer should devise an appropriately narrow protective order. For example, in medical professional licensing cases, patient information is usually relevant, but the patients are not parties who have waived their rights to confidentiality. The hearing officer should require that such persons be identified in some way that does not compromise their confidentiality, for example, by initials or some other coding system. If documentary evidence is privileged, such as protected proprietary information or medical records, those documents should be sealed.

If a person with privacy interests is made a witness, it may be appropriate for the hearing officer to consider making a protective order to close the hearing when that witness testifies, though not the entire hearing. If a portion of a hearing is closed, the parties and counsel must be allowed to attend. It may also be necessary to include experts attending the entire hearing to assist a party. Young witnesses or other witnesses feeling the need may wish to select a support person to attend. Tapes and transcripts of a closed portion of a hearing should be kept separately from public portions and marked as sealed or confidential.

B. Witnesses

Witnesses may appear in person or telephonically. For the rules allowing telephonic participation, see AS 44.62.410(b).

1. Evidence by Affidavit. A party may introduce hearing evidence by affidavit. (*See* G(1) of this chapter.) The affidavit is treated as oral evidence - with the right to cross examine waived - unless the other party timely requested an opportunity to cross examine the affiant. AS 44.62.470 sets out the procedure for evidence by affidavit.[93]

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92 Renkel v. State, 807 P.2d 1087, 1091 (Alaska App. 1991).

93 This procedure was impliedly upheld in Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 822-23 (Alaska 1974).

A pro se party may not fully understand that an affidavit from a witness is not sufficient if another party wishes to cross examine the affiant's testimony. The affiant must be produced for cross-examination, or the affidavit must be withdrawn.[94] In some cases, a pro se party may need to be informed by the hearing officer to subpoena a witness whose affidavit, alone, will not suffice.

2. Compelling Testimony / Subpoenas.

a. *Who Issues.* In APA proceedings, subpoenas are governed by AS 44.62.430.[95] AS 44.62.430(a) provides that before the hearing begins, the *agency* shall issue subpoenas (including subpoenas duces tecum) at the request of a party, in accordance with the rules of civil procedure.[96] After the hearing begins, either the agency hearing the case or a hearing officer sitting alone may issue subpoenas.

The precise time when a "hearing begins" is not made clear in the APA. If the phrase is read as referring to the entire hearing process rather than just the actual hearing - a reasonable construction - the hearing officer will have the authority to issue subpoenas in advance of the actual hearing.[97] At any rate, an agency can (and often does) delegate its subpoena authority to the hearing officer under AS 44.62.340 and AS 44.62.450(b).

b. When Appropriate. A subpoena may only be used to compel testimony, or the production of documents, at the hearing or at a scheduled deposition.

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94 Commercial Union Co. v. Smallwood, 550 P.2d 1261, 1266 (Alaska 1976).

95 While proceedings under the APA do not have specific limitations regarding the subpoena of witnesses, some agencies have developed internal procedures requiring a showing of necessity in order to obtain a subpoena. For example, Department of Labor, Employment Security Appeals regulations require that witnesses may be subpoenaed only upon a showing of necessity. 8 AAC 85.153(j); Smith v. Sampson, 816 P.2d 902, 907 (Alaska 1991).

96 *See* ALASKA R. CIV. P. 45 for subpoena provisions. *See also*, Sample Forms 5A and 5B.

97 Alternatively, the hearing officer may have the power to convene the hearing at a prehearing conference, and then recess it until the parties are prepared to present their evidence.

A party may not use a subpoena to directly obtain documents without notice to the other parties and scheduling a records deposition.

A subpoena for appearance at the hearing is generally issued at the request of one party, without advance notice to, and opportunity for argument by, any other parties. However, if the subpoena is for a person not on a required witness list, or the hearing officer has already determined that the witness may not be called, the hearing officer may refuse to issue the subpoena unless opposing parties have notice and an opportunity to object. Otherwise, the hearing officer need not discuss the issuance of a subpoena with other parties before it is served.

Occasionally, a party requests a subpoena for a person to testify about matters that are confidential by statute. If the superior court has authority to override the statute for good cause, the party may bring a proceeding under the procedures under (e) of this section to obtain court review. (The term "contempt" clearly does not apply in this circumstance, but the proceeding would apply despite the misnomer.) Before issuing such a subpoena, or endorsing a need for enforcement, the hearing officer should first determine that the evidence requested is material to some issue in the administrative case. In the absence of court authority to override a statutory privilege, the hearing officer should decline to issue, or participate in the enforcement of, a subpoena of confidential information.

Sometimes a subpoena will be requested for material that the hearing officer has previously ruled need not be produced. If the hearing officer observes this, the hearing officer should deny the request unless there is some reason to change the earlier ruling. It is not worthwhile, however, for the hearing officer to search the record of a lengthy prehearing conference or hearing to determine whether the matter has already been considered. The opposing party or the subpoenaed person can later move to quash the subpoena on that ground.

c. Distant Witnesses. AS 44.62.430(b) provides that agency subpoenas under AS 44.62.430(a) extend throughout the entire state, but there is a limitation on the travel required of witnesses unless a special showing of necessity is

made. A subpoenaed witness does not have to travel outside the election district[98] in which the witness resides unless the place of hearing is less than 100 miles from the witness's residence. However, if the party requesting the subpoena provides an affidavit Ashowing that the testimony of the witness is material and necessary,≅ the agency (and presumably, the hearing officer) Amay endorse on the subpoena an order requiring the attendance of a witness.≅ There is no case law interpreting the apparently broad discretion given by this subsection, or the effect of an endorsement.

Since agency subpoenas issued under AS 44.62.430(a) do not extend outside the state, AS 44.62.440(b) provides a method for obtaining testimony by deposition of witnesses located outside the state. The fairly complex procedure begins with an agency order authorizing the out-of-state witness=s deposition. With the agency order in hand, the party seeking this testimony must get a court order by Afiling a petition for the taking of the deposition in the superior court nearest to the principal office of the agency.≅ The Alaska court order must then be presented to the local court where the witness resides or is found.[99]

d. Witness Costs. The party requesting the subpoena must pay to the subpoenaed witness the fees, transportation expenses, and food and lodging expenses allowed under AS 44.62.430(d).

e. Enforcing A Subpoena. In proceedings covered by the APA, AS 42.62.590 allows the superior court in the judicial district where the hearing is being held to use the court=s contempt powers to enforce a hearing officer=s subpoena or other lawful order. The agency prepares a written certification setting out the details of the alleged subpoena violation. The person seeking to compel the subpoena initiates the enforcement proceeding by filing a petition requesting enforcement of the subpoena and including the written certification. The court will then issue an order to show cause why the person failing to honor the subpoena should not be held in contempt.[100]

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98 Because AS 44.62.430 was enacted in 1959, the "election districts" referred to in subsection (b) are those described in Art. XIV, § 3 of the Alaska Constitution.

99 *See* ALASKA R. CIV. P. 45.

100 *See also* ALASKA R. CIV. P. 45(g).

f. Lack of Subpoena Power. Hearing officers may lack subpoena power under some non-APA hearing statutes.[101] In that case, a hearing officer may order witnesses within the control of a party (e.g. employees of the party) to testify or produce documents. However, if a non-party witness is outside of the control of the parties and refuses to testify or produce documents, the hearing officer does not have authority to compel document production or witness attendance at the hearing. In such cases, the hearing officer may choose to send a letter to the non-party explaining the need for the testimony or documents and requesting their cooperation.

3. Presumptions from Failure to Testify / Claim of Privilege.

a. *Refusal to Testify.* If a witness refuses to answer a question, or to testify at all, the hearing officer should ask the parties for their input as to what actions are appropriate. Before taking any action, the hearing officer should first determine whether the evidence sought is relevant and non-duplicative. Among the hearing officer's options is to suggest the party seeking the testimony to request superior court assistance to compel the testimony. If the witness refuses to answer questions on cross-examination, the hearing officer can choose to strike the witness's direct testimony.[102] If the witness is a party, or a person within the party's control, the hearing officer may choose to make a presumption that the testimony on that point would be adverse to the party.

b. Claim of Privilege. With one possible exception, the exercise of an evidentiary privilege may not be commented upon by a party or the hearing officer and no inference may be drawn it. [103] The exercise of the privilege against self-incrimination by a party to the hearing may be the one exception.

ALASKA R. EVID. 512(d) permits a negative inference to be drawn against a party who asserts the Fifth Amendment in a civil action.[104] The negative inference may not, by

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101 *See e.g.* AS 36.30.670(b).

102 *See* United States v. Panza, 612 F.2d 432, 438 (9th Cir. 1979) *cert. denied*, 447 U.S. 925 (1980).

103 *See* ALASKA R. EVID. 512(a); Home Indem. Co. v. Lane Powell Moss and Miller, 43 F.3d 1322, 1328 (9th Cir. 1995).

104 *See* Commentary to Rule. ALASKA R. EVID. 512 was adopted by the Alaska

itself, be used to determine the outcome of the administrative proceeding.[105] If a party asserts the privilege against self-incrimination, the hearing officer should invite briefing from the parties before deciding whether or not to draw a negative inference.

When a non-party witness refuses to answer a question during cross examination, on the grounds that to do so would incriminate the witness, a hearing officer has discretion to strike any, or all of the witness's previous testimony.[106] When exercising this discretion, the hearing officer should draw a distinction between situations where the assertion of privilege merely precludes inquiry into collateral matters which only bear on the credibility of the witness, and those cases in which the assertion prevents inquiry into the matters about which the witness testified on direct examination.

4. Witness Exclusion. Upon motion of a party or upon the hearing officer's own motion, a prospective witness may be excluded from the hearing room while another witness is testifying. The testimony of a prospective witness may be more credible if that witness has not heard another witness testifying about the same or similar matters. However, a party to the proceeding should never be excluded. If the party is an entity, such as an agency, the hearing officer can require the party to designate one person (other than the party's attorney) who will not be excluded.

Unless the hearing officer finds that a party would be unfairly prejudiced, a witness whose presence is shown by a party to be important to the presentation of that party=s case (*e.g.* certain experts)should not be excluded.

C. Handling of Exhibits

It is a good idea to have the parties furnish the hearing officer and each other with copies of their exhibits in advance of the hearing so that objections and other matters

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Supreme Court in 1979. Two years earlier, the same court held that it was unconstitutional for a hearing officer to draw a negative inference against a party because the party exercised his privilege against self-incrimination. Hersher v. State, Dep't of Commerce, 568 P.2d 996, 1006-07 (Alaska 1977).

105 John W. Strong, MCCORMICK ON EVIDENCE 126 (4th ed. 1992).

106 5 John H. Wigmore, EVIDENCE IN TRIALS OF COMMON LAW § 1391 (Chadburn rev. 1974)

can be dealt with, thus saving time at the hearing. Exchange of the exhibits will also avoid surprise and delay at the hearing.

1. Marking the Exhibits. The hearing officer should establish a method for exhibit identification. Exhibits may be marked using any logical system that will allow easy retrieval of the exhibits during the hearing and will also allow a reviewing court to easily retrieve and review the exhibits and understand which party submitted them. One method would be that set out in ALASKA R. CIV. P. 43.1 and the administrative bulletin that follows. Additionally, the hearing officer should require each party to submit an exhibit list with the party's proposed exhibits.

In cases where there are a large number of exhibits, the hearing officer may require the parties to consult to prevent duplicate exhibits. The hearing officer may wish to require that documentary evidence be tabbed and placed in three-ring binders, or otherwise provided in a manageable form. At the hearing, enough copies of the documentary exhibits should be available so that the hearing officer, the witness, and each party have a separate copy.

If sufficient copies of an exhibit are not available at the hearing, the original should be given to the party offering it so that it can be reproduced and returned to the hearing officer, with copies to all parties. If this course is taken, it should be clearly reflected on the record.

2. Demonstrative Exhibits. A demonstrative exhibit is not "real" evidence in the sense that it is not a document prepared during an event in question. However demonstrative exhibits are useful in analyzing or illustrating other evidence. Demonstrative evidence includes charts and drawings prepared by a witness while testifying. Before the witness is excused, the hearing officer should inquire whether the party intends to have the document received into the record as demonstrative evidence. The hearing officer has greater discretion to determine whether to admit demonstrative evidence, as opposed to "real" evidence. The hearing officer should admit the exhibit if it is more helpful than not, taking into consideration accuracy, confusion, and unfair surprise to opposing parties. Demonstrative exhibits should be marked and admitted in the same manner as other exhibits.

3. Receipt of Exhibits. Simply marking an exhibit for identification does not make the exhibit part of the record. It must be admitted into evidence. If objections or other questions involving an exhibit have been resolved before the hearing, then the hearing officer should expressly admit the exhibit during the hearing officer's opening statement. If all objections have not been resolved, then the party proposing to add an exhibit to the record must attempt to do so at the hearing and any opponent must be given an opportunity to object at the time the exhibit is offered. The hearing officer should record whether each exhibit is "admitted" or "rejected" by writing on the exhibit list or on the exhibit itself.

When an exhibit is offered into evidence, the hearing officer should consider any objections. The hearing officer should take careful note of the material objected to and the basis of objection. A party should be permitted to respond to the objection. The hearing officer should weigh the arguments, perhaps during a short recess, and rule on the admissibility of all challenged material. Motions to strike an exhibit may be entertained later if required by further developments at the hearing.

As an alternative to the above procedure, in cases involving large numbers of documents or other exhibits, the hearing officer may provide by prehearing order that all exhibits referred to or used in the hearing will be deemed admitted unless specific objection to admission is made by one of the parties at the hearing. If such a procedure is used, the hearing officer should also order an exchange of exhibits between the parties well in advance of the hearing so that the parties will be prepared to offer objections. This procedure shortens the hearing time and allows for a smoother presentation of evidence.

If a party has pre-filed an exhibit, but not offered it into evidence, the exhibit may be returned to the party or destroyed. It is not part of the agency record. The exhibit list should be notated that the exhibit was withdrawn or not offered.

4. Excluded Evidence. Excluded material should not be physically removed from the record. Instead, after it is marked "rejected," it should be attached to the record but segregated from admitted material so that there is no confusion or inadvertent consideration of rejected material. This rejected material is not a part of the record to be considered by the agency except to rule on the correctness of its exclusion. The hearing

officer should direct the parties to mark “rejected” on their own copies of offered exhibits as well.

5. New Exhibits. If a party brings in new, surprise exhibits that should have been exchanged before the hearing, the hearing officer should determine whether it would be more fair to exclude the evidence, or to allow the opposing party a continuance to review the evidence before proceeding.

D. Opening Statements

1. Hearing Officer's Opening Statement. The hearing officer should call the hearing to order, identify himself or herself, and give any preliminary instructions concerning decorum, procedure, and hearing hours. In addition, a basic opening statement should include the following:

- the title of case;
- the date, time, and place of hearing;
- the persons present at the hearing or by telephone; and
- the statutes and regulations under which the hearing is being conducted (APA or agency statutes and regulations).

The opening should be adapted to the type of case and the circumstances. If all affected persons are represented by knowledgeable and experienced counsel, the opening statement may be brief. If members of the public are present, some counsel are unacquainted with the hearing procedure, or one or more parties are not represented by counsel, the hearing officer should briefly describe the subject of the case and the procedures to be followed.

If any issues have been resolved in prehearing motions, or the parties have stipulated to facts or the admission of exhibits, that should be noted at the beginning of the hearing on the record. Any materials of which the hearing officer will take official notice should also be cited.

2. Parties’ Opening Statements. The party may be required or permitted to make an opening statement. That statement is not subject to cross examination.

Opening statements should normally be permitted unless waived. The hearing officer may place a reasonable time limit on opening statements. What constitutes a reasonable time limit depends upon the complexity of the case and the number of issues involved.

Pro se parties often misunderstand the function of an opening statement. At the prehearing conference, it may be helpful to explain to the pro se party that the opening statement is merely intended as an outline of the party=s case, what testimony and documents that the party expects to introduce, and what facts the party intends to prove.

E. Motions During Hearing

At the beginning of the hearing, the hearing officer should explicitly request any preliminary motions and either dispose of them or take them under advisement. Motions relating to hearing procedures, such as a motion concerning order of presenting evidence, should be disposed of promptly.

When, during a hearing, a motion is made or an objection to evidence is raised, the hearing officer may permit oral argument in support of, and in opposition to, the motion or objection. In some circumstances, the hearing officer may also request written memoranda on disputed points. In allowing argument or requesting briefing, however, the hearing officer should try very hard to avoid unnecessary expense and delay.

F. Development of Record

1. Burden of Proof / Standard of Proof. AS 44.62.460(e) provides:

> (e) Unless a different standard of proof is stated in applicable law, the
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> (1) petitioner has the burden of proof by a preponderance of the evidence if an accusation has been filed under AS 44.62.360 or if the renewal of a right, authority, license, or privilege has been denied;
>
> (2) respondent has the burden of proof by a preponderance of the evidence if a right, authority, license, or privilege has been initially denied or not issued.

The statute follows the general rule that "[o]rdinarily the party seeking a change in the status quo has the burden of proof."[107] Some agencies, such as the Alaska Commission on Human Rights, have special rules under which the burden of proof shifts after the complainant is able to establish a prima facie case.

The ALASKA CIVIL PATTERN JURY INSTRUCTIONS, at ∋ 2.22, define the term "preponderance of the evidence":

> Something is more likely than not true if you believe that the chance that it is true is even the slightest bit greater than the chance that it is false. In more familiar language, something is more likely than not true if you believe there is a greater than 50% chance that it is true. 51% certainty is sufficient; no more is required for you to decide that something is more likely than not true.
>
> If you believe that the chance that something is true is 50/50 or less, you must decide that it is false. In other words, when you find something to be more likely than not true, you are to accept it as true; when you find otherwise, you accept it as false.

2. Order of Presentation. Generally, the party with the burden of proof goes forward first. However, there are occasions when it may make sense for the hearing officer to vary the order of presentation. For example, if a license has been denied, the agency might go first to "set the stage" by producing evidence showing the basis for denial. Changing the order of presentation does not change the burden of proof to the agency. The hearing officer should explain the order of presentation well in advance of the hearing, so that the parties are not taken by surprise.

3. Witness Testimony.

a. *Witness Order*. The party presenting its case calls witnesses, who are then sworn in by the hearing officer.[108] The hearing officer, among others, may administer oaths. Direct examination should then begin. Exhibits identified by the

[107] State, Alcoholic Beverages Control Bd. v. Decker, 700 P.2d 483, 485 (Alaska 1985).

[108] *See* AS 44.62.620. Oral evidence may be taken only on oath or affirmation. AS 44.62.460(a). The following form for administering the oath is suggested:

> Do you solemnly swear or affirm that the testimony you will give will be the truth, the whole truth, and nothing but the truth?

witness should be offered in evidence before the witness is released for cross examination. Cross examination and redirect examination would then follow until that witness' testimony is presented in full. A witness should be excused after giving testimony, subject to recall at the hearing officer's discretion.

Normally, all of a party's witnesses (except rebuttal witnesses as discussed below) should be called and examined before the next party begins to call witnesses. The hearing officer may allow witness testimony to be taken out of order to adjust to scheduling needs. In multi-party proceedings, witnesses for a category of parties may be heard as a group or in any other convenient sequence.

b. *Cross examination*. Cross examination is the questioning of one party's witness by an opposing party or that party's counsel. If there are several parties, the hearing officer should determine the order of cross examination that will develop the most concise and clear record. Ordinarily, priority is given to the party who will have the most extensive cross examination or who has the greatest interest in the direct testimony. Generally, a party should not be permitted to interject questions during cross examination by another party. However, the hearing officer may permit this when clarification would be time-saving.

The Alaska Supreme Court has explained that, even though the APA authorizes informal administrative proceedings, the Act was never intended to, and could not, abrogate the right to cross examine in an adjudicative proceeding.[109] The right to cross examine is absolute.[110]

Parties have the statutory right to cross examine opposing witnesses on all relevant matters whether or not covered in the direct examination.[111] In addition, even if the respondent does not testify on the respondent's own behalf, another party may call the respondent and examine the respondent as if under cross examination.[112]

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109 Employers Commercial Union Ins. Group v. Schoen, 519 P.2d at 823-24.

110 *Id*.

111 AS 44.62.460(b)(3).

112 AS 44.62.460(c).

c. *Redirect.* Following cross examination, redirect examination by the party who initially called the witness should be permitted, but confined to matters brought out on cross examination. A short conference between a party and the witness may be allowed before the redirect examination.

d. *Rebuttal Witnesses.* After the conclusion of the respondent's evidence, the petitioner may rebut adverse evidence.[113] Rebuttal testimony should be limited to new issues raised in the respondent's evidence. AS 44.62.460(b)(5). Evidence that could have been introduced in a party's direct case should not be introduced in rebuttal. After the petitioner presents rebuttal evidence, the hearing officer should allow the respondent to rebut factual issues raised for the first time in the petitioner's rebuttal. The hearing officer may recess the hearing briefly to permit a party to prepare to rebut the new matters.

4. Actions by the hearing officer to Develop the Record. Throughout the proceeding, the hearing officer should take action to develop an accurate record. The hearing officer may call attention to gaps in the evidence and ask whether they will be filled. The hearing officer should direct the parties to discuss, in oral argument or by brief, any points the hearing officer thinks germane, and may direct them at any time to research a question of law or policy. It is very important to develop a complete record of the proceedings for any further review.[114] The hearing officer may assist when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when, for some other reason, assistance is needed to assure orderly development of the record. The hearing officer may question the witness to clarify any confusing or ambiguous testimony or to develop additional facts that the hearing officer considers are necessary to decide the case.

A hearing officer may go so far as to request that particular evidence, including testimony from particular witnesses, be provided. When making such a request, the hearing officer should note the necessity for the evidence on the record. If evidence is not produced after being requested, an adverse inference may be drawn in some

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[113] AS 44.62.460(b)(5).

[114] Interior Paint Co. v. Rogers, 522 P.2d 164, 169 n.7 (Alaska 1974).

circumstances.[115] The Alaska Supreme Court expressed its approval of a hearing officer's participation in the development of the record in Tachick Freight Lines v. State, Dep't of Labor, 773 P.2d 451, 453 (Alaska 1989). In that case, the appellant alleged that the hearing officer evidenced a lack of impartiality because of his "pointed questioning" of one party at the hearing. The court found no merit to this contention; the hearing officer's job was to help develop the facts, and the questioning did not show that there was any predisposition to find against any party. *Id*. Another case regarding questioning by the hearing officer is Thorne v. Dep't of Pub. Safety, 774 P.2d 1326, 1333-34 (Alaska 1989). In that case, the court held that no bias was indicated when the hearing officer questioned the respondent's witnesses and noted that, especially when the agency was unrepresented, the hearing officer needed to question witnesses to flesh out the story and assess credibility.[116]

Pro se parties may not understand the specifics involved in presenting direct evidence. One technique that may assist in the development of the record by a pro se party is to allow the presentation of a narrative, guided by occasional questions from the hearing officer. A hearing officer may also find it necessary to ask questions to develop testimony on a particular issue or clarify conclusory statements or opinions. It may also be appropriate to intervene with clarifying questions when testimony is ambiguous or unclear. A pro se party also should be discouraged from asking leading questions, but the party may not easily be able to correct the practice. The hearing officer may need to assist in rephrasing questions so that they elicit independent and reliable responses.

On the other hand, the hearing officer should not become the advocate for any party. The party should be expected to meet whatever burden on proof is placed on the party. The hearing officer should avoid any appearance of non-neutrality.

G. Rules of Evidence

The APA substantially relaxes the strict application of the rules of evidence to administrative hearings, by expressly providing that

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[115] Grimes v. Haslett, 641 P.2d 813 (Alaska 1982).

[116] The agencies involved in Tachick Freight Lines and Thorne were the employment security division and the motor vehicle division. Neither agency is required to conduct its hearings under the APA.

> [R]elevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action.[117]

However, the statute retains all privilege rules applicable to civil actions and empowers the hearing officer to exclude irrelevant and unduly repetitious evidence.

The statutes of some non-APA agencies also relax the use of technical evidence rules.[118]

1. Affidavits. Use of affidavit testimony as direct evidence is permitted under the APA, if it is mailed or delivered to the opposing party at least ten days before the hearing, together with a notice that the party may specifically request an opportunity to cross examine the affiant.[119] The notice must be substantially in the form set out in AS 44.62.470(b). If the opposing party requests cross examination at the hearing and the affiant is not made available, then the testimony provided in the affidavit testimony is considered as hearsay. (*See* B(1) of this chapter.)

2. Hearsay. Under the APA, hearsay evidence may be admitted if it is considered reliable and useful. A hearing officer should exclude hearsay evidence if it appears untrustworthy.[120]

AS 44.62.460(d) limits the use of hearsay evidence. It may be used to supplement or explain direct evidence but it is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.[121] This limitation on the use

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117 AS 44.62.460 (d).

118 *See e.g.* AS 42.05.151(b); AS 21.06.210(c).

119 AS 44.62.470(a).

120 Whaley v. Alaska Workers' Compensation Bd., 648 P.2d 955, 957-58 (Alaska 1982).

121 AS 44.62.460 (d). This concept is known as the "legal residuum rule" because it requires that an administrative finding be supported by a "residuum" of legal evidence. John W. Strong, MCCORMICK ON EVIDENCE 354 (4th ed. 1992).

of hearsay testimony can present a challenge for the hearing officer. In the typically informal administrative hearing, a party may not realize the need to state a hearsay objection. But the Alaska Supreme Court has held that, in the absence of a hearsay objection, hearsay evidence is competent evidence which may be considered.[122] Therefore, in an APA proceeding, the hearing officer should instruct the parties about their obligation to object to each item of hearsay testimony. If hearsay objections are then made, the hearing officer must rule and state whether the testimony is admitted 1) as an exception to the civil hearsay rule (and may be used for any purpose); or 2) solely under the APA's relaxed hearsay rule (and therefore considered only to supplement or explain other evidence).

3. Authentication. The authenticity of documents should be presumed unless a challenge is made. Generally, a duplicate is equally admissible as an original unless there is good reason to question it.

If a genuine question is raised about the authenticity of a document or if it would be unfair under the circumstances to admit the duplicate, the party may be required to establish that an exhibit is what the party claims it to be. Often it will be possible to avoid disputes over the admission of documents if the parties can stipulate to their authenticity before the hearing.

4. Exclusion of Evidence to Limit Scope of Hearing. Rulings on the admission and exclusion of evidence are a part of a hearing officer's function. A hearing officer may appropriately limit the scope of a hearing to only those matters that are within the jurisdiction of the agency.[123] Similarly, evidence that is unduly repetitious or cumulative should be excluded from the record.

5. Privileges. A claim of privilege may be asserted if information is sought about the substance of confidential communications. Evidentiary rules protected privileged communications are effective in an administrative proceeding to the same extent they are applicable in a judicial proceeding.[124] ALASKA R. EVID. 501-512 set out

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122 *See, e.g.*, Smith v. Sampson, 816 P.2d at 907.

123 Stein v. Kelso, 846 P.2d 123, 127 (Alaska 1993).

124 AS 44.62.460(d).

a series of privileges which are protected in court. For example, ALASKA R. EVID. 505 protects a spouse from being forced to testify for or against the other spouse. Relevant sections of the Commentary to ALASKA RULES OF EVIDENCE may be helpful in evaluating the assertion of a privilege. (*See* B(3) of this chapter regarding comments on a claim of evidentiary privilege.)

6. Self-Incriminating Testimony. The Fifth Amendment right against self-incrimination is applicable to administrative proceedings.[125] Failure to assert the Fifth Amendment's protection, however, may constitute a waiver. (*See* B(3) of this chapter regarding the issue of commenting or drawing an inference from a fifth amendment assertion.)

7. Official Notice. AS 44.62.480 states that official notice may be taken of a generally accepted technical or scientific matter within the agency's special field, or of a fact that is judicially noticed in the courts of the state (*see* ALASKA R. EVID. 201 and 202). It is important to provide notice to the parties and provide an opportunity to rebut the "noticed" facts. The hearing officer should attempt to provide written notice before the hearing or oral notice during the hearing of the facts to be officially noticed. Otherwise, written notification, allowing each party sufficient time to object, may be accomplished after the hearing and before the closing of the record.

8. Ruling on Objections. In order to address objections to proffered evidence, it is helpful to be familiar with the court's rules of evidence. Generally, if an objection to evidence is not made at the time of the hearing, it is considered waived. The hearing officer can require the proponent of the evidence to "lay a foundation" for the admissibility of the evidence by, for example, asking preliminary questions.

A hearing officer must remember that if a decision is appealed, the court will examine the record to determine whether the evidence supports the agency's factual findings. The court generally will not reweigh the evidence, but will make a determination as to whether there is substantial evidence on the record to support the findings.[126] The hearing officer's rulings on admissibility of evidence will be examined in

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125 Spevack v. Klein, 385 U.S. 511 (1967).

126 Handley v. State, Dep't of Revenue, 838 P.2d 1231, 1233 (Alaska 1992).

the court's inquiry. However, a ruling that admits or excludes evidence will not likely result in a finding of abuse of discretion unless a substantial right of a party is affected.[127]

The following principles are useful in ruling on some common objections:

a. *Relevance or Materiality*. Relevant evidence is evidence that has some tendency to prove or disprove an issue of fact in the case. A hearing officer may exclude irrelevant or immaterial evidence in order to make a clear record or to avoid weighing irrelevant evidence when deciding a case.

b. *Cumulative or Repetitive Evidence*. The probative value of repetitive or cumulative evidence is minimal and it can cause undue delay or waste of time. AS 44.62.460 clearly allows the hearing officer to exclude unduly repetitious evidence.

c. *Lack of Foundation.* A lack of foundation objection may arise if the evidence offered has not been shown to be based upon personal knowledge or expertise. If the witness does not have personal knowledge or expertise regarding a factual question in the case, necessarily that witness cannot provide evidence on which "reasonable persons are accustomed to rely in the conduct of serious affairs."

H. Bringing the Hearing to a Close

1. Closing Argument. The hearing officer may permit or require oral argument on the merits of the entire case or on specific issues. Oral arguments may be heard at the close of the hearing or before or after the filing of any post-hearing briefs, as the hearing officer directs. In most instances, the hearing officer should set time limits for closing argument. The hearing officer should set a reasonable time limit, considering the complexity of the case and the amount of evidence and testimony presented.

2. Closing the Record. The record may be closed at the conclusion of the oral hearing. However, if additional evidence is to be submitted after the hearing, the hearing officer should announce (at the hearing, by letter or by other written communication) the date that the record will close. For extraordinary reasons, such as

[127] Stein v. Kelso, 846 P.2d at 126-27.

newly discovered evidence, the record may be reopened for additional hearing or to receive additional stipulated material.

CHAPTER 9. TECHNIQUES OF PRESIDING

The hearing officer must develop a record so concise and clear that the agency can easily review the entire case de novo. The hearing officer must also control the hearing to give all parties an opportunity to present their cases, while preventing the hearing from becoming burdensome due to length or complexity. While administrative adjudication must provide due process, it is intended to be less formal, less time-consuming, and less expensive than judicial litigation. Consequently, the techniques of presiding are among the most important of the hearing officer's skills.

A. When the APA (Or the Applicable Agency Statute) Is Silent

Use common sense. Consider the ALASKA RULES OF CIVIL PROCEDURE and procedures used by other agencies[128] for guidance, but do not follow them blindly if the result is unfair or unnecessarily burdensome to any party.

B. Preparation and Concentration

The hearing officer must know the case. Before opening the hearing, the hearing officer should study the pleadings, the evidence that has been stipulated to by the parties, and any hearing briefs. The hearing officer should analyze any anticipated legal, policy, or procedural problems.

The hearing officer should have handy copies of the pertinent statutes, regulations, procedures, and precedents so that quick consultation can be made during the course of the hearing. A current calendar should also be on hand, as well as calendars for relevant preceding years, in order to accurately pinpoint dates that are involved in the hearing.

If a hearing officer must make any lengthy statement during the course of the proceedings, a detailed outline should usually be written out in advance. Such a presentation is less likely to contain errors and will be easier to understand.

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[128] *E.g.*, the Regulatory Commission of Alaska, formerly the Alaska Public Utilities Commission (3 AAC 48.010-188) and the Alaska Commission on Human Rights (6 AAC 30.410-590).

C. Judicial Attitude, Demeanor, and Behavior

The hearing officer=s demeanor sets the tone for the hearing. The hearing officer should focus on the hearing and listen attentively. The hearing officer should, if possible, arrange the hearing officer's schedule to avoid interrupting the hearing for personal business. The hearing officer should treat all participants with respect. Each witness should be addressed formally, for example, Mr. Jones or Ms. Smith. The hearing officer should not argue with participants.

Alaska has purposively not adopted the “administrative law judge” (ALJ) style of hearing officer. An ALJ is more likely to wear robes and to be referred to as “judge” or “your honor.” Alaska administrative proceedings are intended to be more informal and less threatening to the participants. A hearing officer should rely on calm authority and impartial decision-making to take command of a proceeding, rather than undue formality.

D. Controlling the Hearing

The hearing officer must control the hearing. The hearing officer has functions and responsibilities analogous to a trial judge:

> The deciding officer in an administrative hearing has the responsibility to conduct a trial-like adjudication in a fair manner and to make decisions needed to expedite the adjudication, including regulating the conduct of discovery and ruling on the admission and exclusion of evidence. . . . The deciding officer's functions and responsibilities are analogous to those of a trial judge. . . .[129]

For example, the hearing officer may place reasonable time limits on the presentation of evidence.[130] As soon as the subject under inquiry is exhausted or fully developed, the hearing officer should stop the party or the witness and direct him or her to go to other matters. If the question or answer is irrelevant or improper, the hearing officer should strike it without waiting for an objection.

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[129] Stein v. Kelso, 846 P.2d at 126.

[130] Childs v. Copper Valley Elec. Ass'n, 860 P.2d 1184, 1990 (Alaska 1993).

Prompt rulings on motions and objections are essential. A hearing officer can take a brief recess to make a decision, if necessary. If the hearing officer believes that an earlier ruling was unsound, the hearing officer should correct the ruling.

Sometimes one party or a group with the same interests will have several counsel in attendance. The hearing officer should insist that only one attorney examine each witness at one time and that the hearing officer's permission be obtained before co-counsel takes over the examination.

If tempers become short and an altercation threatens to disrupt the hearing, the hearing officer should call a recess, go off the record, and restore order. If a participant in the hearing becomes unruly or offensive in remarks or manner, the hearing officer should express disapproval of the conduct and warn against a repetition. The hearing officer should require all participants to address each other, and the witnesses, respectfully.

The hearing officer sets the tone of the hearing through use of calm authority. The hearing officer should not engage in arguments with the parties or witness, but should listen to objections made, decide, and then move on.

E. Sanctions and Attorney Fees

1. Sanctions. The APA provides no authority for a hearing officer to impose monetary or contempt sanctions upon a party to a proceeding, but instead provides for jurisdiction of the superior court to consider civil contempt charges raised by an agency against a person involved in the administrative proceedings.[131] Grounds for contempt include; disobeyance of a lawful order, refusal to respond to a subpoena, witness refusal to take oath or affirmation, witness refusal to be give testimony, and misconduct which obstructs the hearing. A contempt action is initiated through the agency's certification of facts filed with the superior court. The hearing officer should assist in the preparation of the certificate.

[131] AS 44.62.590.

2. Attorney=s Fees. Unless specifically authorized by statute, attorney's fees are not recoverable for administrative adjudications.[132]

F. Taking Notes

The extent to which the hearing officer should take notes depends on his or her own temperament, ability, and work habits. Some hearing officers take no notes, feeling that it distracts them from the immediate task of controlling the hearing. Others prepare a simple topical index, and still others take detailed notes of the testimony of each witness, which might later be typed possibly with transcript references. The hearing officer's notes are not part of the record.

G. Pro Se Parties

A hearing officer often encounters pro se parties in an administrative adjudication. At the hearing officer's discretion, the hearing officer may provide a copy of Appendix B of this manual to pro se parties to assist them in presenting their cases.

It is the hearing officer=s responsibility to ensure that pro se parties have a fair opportunity to present their case, but it is not the hearing officer=s role to become an advocate for the pro se litigant in presenting his or her case. The hearing officer should carefully explain the procedures to a pro se litigant, and make him or herself available to answer procedural questions.

H. Safety / Security Issues

Most administrative hearings involve matters that are routine, ordinary, and have no emotional stakes. However, there are certain subject matters that involve very personal matters that are highly emotional and may result in hostile or violent behavior among hearing participants. Occasionally a non-participant may attempt to use the proceeding as a "forum" to address unrelated grievances.

The best rule of advice to the hearing officer is to be prepared. Discuss security arrangements with the agency contact person. In extreme circumstances, the state troopers will provide security. At a minimum, the hearing officer should have access to a

[132] Stepanov v. Homer Elec. Ass'n, 814 P.2d 731, 737 (Alaska 1991); State v. Smith, 593 P.2d 625, 630-31 (Alaska 1979).

telephone and number to call for any needed assistance. If the hearing officer anticipates problems, the hearing officer should announce some “ground rules” for the conduct of the participants. For example, the hearing officer can require that the participants address each other and the hearing officer with courtesy; that the participants remain seated during the hearing; and that participants keep silent, except when making appropriate objections, during another participant’s presentation. The hearing officer may exclude a non-participant who continues to be disruptive after being warned. If person at a hearing appears to be getting out of control, or disrupting the proceeding, the hearing officer should call a recess for a “time-out” and may seek assistance at that time. A hearing officer should never attempt to personally break up a physical encounter.

CHAPTER 10. SETTLEMENT / ALTERNATIVE DISPUTE RESOLUTION

A. Settlement

If the parties wish, the hearing officer can have a role acting as a "settlement judge." Alternatively, the parties may wish to attempt mediation or to retain another attorney who regularly acts as a hearing officer to fill this role. In certain agencies, there are multiple hearing officers on staff. One of the hearing officers not assigned to the matter could act as a settlement "judge."

Hearing officers should use caution before participating in a settlement conference that involves disputed facts. It is difficult to segregate information one hears in a settlement conference from the evidence actually presented later at a hearing. It is much more appropriate to take this role if the facts are basically undisputed and the question is the legal outcome of those facts.

Any settlement must be approved by the agency. If the settlement is rejected by the agency, the matter will be referred back to the hearing officer. The parties should agree that presentation of the settlement stipulation to the hearing officer and agency does not constitute grounds for disqualification. The parties file the settlement document with the hearing officer, who reviews it to make certain that the proposed settlement complies with the powers and duties of the agency. If so, the hearing officer should forward the settlement to the agency with a proposed order adopting the settlement as the agency's final decision. *See* Sample Form 7C. If the agency is a board or commission, the parties should be advised to be available during the board or commission's meeting on the proposed settlement to answer questions.

In Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989), the court held that a public agency could not circumvent the public records law (AS 09.25.110 - 09.25.125) by agreeing to keep secret the terms of a lawsuit settlement agreement. Presumably this ruling would extend to settlements of administrative adjudicative matters.

B. Alternative Dispute Resolution

The methods of alternative dispute resolution are as myriad as the imaginations of the parties and the intermediary they choose. A list of mediators is available in the ALASKA DIRECTORY OF ATTORNEYS, or the parties may know of a person to use. Generally, the parties, and not the agency, will bear the costs of mediation.

CHAPTER 11. DEFAULT PROCEEDINGS

In AS 44.62.530, the APA provides:

> If the respondent does not file a notice of defense or does not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent. If the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence. Nothing in this chapter may be construed to deprive the respondent of the right to make a showing by way of mitigation.

If the respondent does not file a notice of defense, no hearing officer will be appointed and the agency will proceed on its own. A hearing officer will be involved in default proceedings when the respondent files a notice of defense, but then fails to appear at the hearing. Often, the respondent has failed to keep the agency informed of his or her whereabouts and the hearing officer has no means to contact the respondent.

The initial service on the respondent is proved by the respondent=s notice of defense.[133] The notice of hearing required under AS 44.62.420 is not required to be sent by certified mail. Make certain, however, that the notice of hearing was mailed to the correct address, as shown on the notice of defense or more recent change of address.

[133] Although the respondent will have received a Notice of Defense form with the accusation or statement of issues, occasionally the respondent submits a letter or other type of document that is less clear whether the respondent wishes a hearing. If it is unclear whether that is the respondent□s request, the hearing officer should make sure that issue is clarified before further proceedings take place. One way to do so is to write the respondent and ask the respondent to fill out an enclosed notice of defense form if the respondent wishes a hearing.

If the hearing arises from the *initial denial* of a right, authority, license, or privilege, then the hearing officer merely notes that the respondent has defaulted and that the denial is the final agency decision. (*See* Sample Form 6.)

If the hearing arises from the denial of *renewal* of a right, authority, license, or privilege, or from an *accusation*, the hearing officer should require the petitioner to file documents or affidavits that support the factual basis for the requested action. The hearing officer may conduct an evidentiary hearing as needed. The hearing officer should also determine whether the agency has statutory authority to take the requested action. (*See* Sample Form 7D.)

In a case of non-renewal, the hearing officer should issue a decision that states: 1) that the respondent has defaulted; 2) whether the evidence and legal authority of the agency supports non-renewal; and 3) whether the non-renewal decision is upheld. If the hearing arises from an accusation, then the hearing officer should further make a recommendation as to whether and what nature of discipline, in the form of revocation, suspension, limitation, or condition, is warranted. In making this recommendation, the hearing officer should first seek the petitioner=s position on the question of discipline as well as the petitioner=s rationale and legal authority for the position.

CHAPTER 12. THE PROPOSED DECISION

A. Preparation

In a contested case heard by a hearing officer alone, the hearing officer (following the conclusion of the hearing and receipt of all supplemental material and briefs) must timely prepare a proposed written decision in a form that may be adopted by the agency as the final decision of the case.[134] The proposed decision must outline all of the relevant issues presented, provide specific findings of fact and conclusions of law on each of the issues, and propose penalties if any.[135] (*See* Sample Form 7B).

The importance of preparing a clear, reasoned, complete decision is paramount. The Alaska Supreme Court, in a related context,[136] outlined the various "salutary purposes" served by carefully producing a complete decision.

> It facilitates judicial review by demonstrating those factors which were considered. It tends to ensure careful and reasoned administrative deliberation. It assists affected parties in determining whether to seek judicial review. And it tends to restrain agencies from acting beyond the bounds of their jurisdiction."[137]

The hearing officer should bear these purposes in mind when writing the proposed decision.

The decision must contain findings of fact.[138] The decision is not required to be in a special format, but must be sufficiently detailed to enable the courts to give meaningful

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134 AS 44.62.500(b). If heard before the agency, the agency prepares the decision with assistance and advice of the hearing officer. AS 44.62.500(a).

135 AS 44.62.510.

136 The court was reviewing a *non*-adjudicatory action of an administrative body that resulted in a "decision document."

137 Southeast Alaska Conservation Council v. State, 665 P.2d 544, 549 (Alaska 1983) (footnote omitted).

138 *See* Hewing v. Alaska Workmen's Compensation Bd., 512 P.2d 896, 898 (Alaska 1973); Brown v. Northwest Airlines, 444 P.2d 529, 531-32 (Alaska 1968); Manthey v. Collier, 367 P.2d 884, 889 (Alaska 1962) (where board's written decision did not contain

review.[139] The decision should inform the court and the parties of both the grounds of the decision and the essential facts upon which it is based.[140] The basis for the decision - the agency's or the hearing officer's reasoning process - must be clear.[141]

The following suggestions for the format of the written decision might be helpful:

↑ the opening paragraphs should describe succinctly the nature of the case and the applicable statutes and regulations;

↑ the prehearing procedural history should be outlined; for example, if a motion to dismiss or a motion for summary judgment was brought, the decision should note that, as well as any ruling on the motion;

↑ although the relief requested by the parties may be described, their detailed contentions should not be recited in the opening paragraphs; including detailed contentions in the opening unnecessarily lengthens the decision, since they must be repeated in discussing the merits;

↑ the decision should contain a summary of the principal findings of fact and conclusions of law; if submission of proposed findings and conclusions has been requested, the hearing officer's ruling on each of them should be apparent from the decision, and the decision should preferably include a ruling accepting or rejecting each relevant proposal, with an explanation of the reasons for each rejection; a preliminary review may establish that a proposal is irrelevant, immaterial or cumulative, which finding can obviate the need for more substantive review and ruling;

↑ the decision should include specific findings on all the major facts in issue without going into unnecessary detail; it is not necessary to list all the

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findings of fact, the board abused its discretion).

[139] Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. and Pub. Facilities, 685 P.2d 715, 717-18 (Alaska 1984); White v. Alaska Commercial Fisheries Entry Comm'n, 678 P.2d 1319, 1322 (Alaska 1984).

[140] Ship Creek, 685 P.2d at 717.

[141] White, 678 P.2d at 1322.

evidence submitted by each party; all of the ultimate findings should be separately numbered and framed in the applicable statutory language;

↑ the decision should set out the relevant standard of proof, which in administrative proceedings is the "preponderance of the evidence" standard unless otherwise stated in the relevant statute, regulation, or case law;[142]

↑ the hearing officer should apply the law to the facts and explain the decision;[143] rulings on credibility of witnesses should be specifically indicated if significant, because those findings will be given deference by a reviewing court;[144]

↑ footnotes may be used for such material as citations of authority and cross references but not for substantive discussion;

↑ citations must be sufficiently detailed to enable the researcher to find the source without difficulty (this can be assured by compliance with Harvard Law Review Ass'n, A UNIFORM SYSTEM OF CITATION (16th ed. 1996) (the "Blue Book");

↑ maps, charts, technical data, procedural details, and other germane background material too lengthy to be included in the text may be attached as appendices;

↑ an order for adoption by the agency should be attached (see Sample Form 8); the final order must clearly indicate that the document is a final decision and that the claimant has 30 days to appeal.[145]

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142 AS 44.62.460(e).

143 It will often be helpful for the hearing officer to look at earlier agency decisions. Agencies should maintain copies of past decisions.

144 Delaney v. Alaska Airlines, 693 P.2d 859, 865 n.3 (Alaska 1985), *rev'd on other grounds,* Wade v. Anchorage Sch. Dist., 741 P.2d 634, 638-39 (Alaska 1987) .

145 ALASKA R. APP. P. 602(a)(2); Manning v. Alaska R.R. Corp., 853 P.2d 1120, 1124 (Alaska 1993).

As in court procedures, the hearing officer should keep planned actions confidential until made known to both parties. Unless and until a draft or proposed decision is to be circulated to the parties or released, the hearing officer should not reveal it to anyone other than his or her staff and associates (who are subject to the same rules).

B. Filing

If a case is heard by a hearing officer alone (i.e., without the agency members being present), the hearing officer must submit the proposed decision to the agency.[146] Once the hearing officer has submitted the proposed decision to the agency, it acquires a life of its own. Under AS 44.62.500(b), the agency files the proposed decision with the lieutenant governor and serves it on each party and each party's attorney. The hearing officer may wish to communicate with the agency to remind it of the filing and service requirements, or undertake to perform those duties him or herself.

C. Objections

In a complex or controversial case, a hearing officer may wish to submit a draft decision to the parties for their critique. The hearing officer can then allow the parties a short period of time to file any suggested corrections, so that the hearing officer can make any necessary corrections before submitting the proposed decision to the agency. The hearing officer should make it clear that the draft has not been “file” with the agency and is not to be regarded as the "proposed decision."

If a hearing is conducted by a hearing officer sitting alone, a period of time exists after the hearing officer issues a proposed decision and before the agency deliberates on the proposed decision. During this time, one or both of the parties may wish to file objections to the proposed decision.

The APA is silent regarding this issue. Due process does not require an agency to entertain arguments or objections to a proposed decision issued under AS 44.62.500(b).[147] The APA=s silence, however, should not be interpreted as a

[146] AS 44.62.500(b).

[147] Storrs v. State Medical Board, 664 P.2d at 553-54.

prohibition against such objections.[148] 664 P.2d at 553 (absence of explicit permission under AS 44.62.500(b) for the hearing officer to be present to assist and advise an agency when it deliberates on a proposed decision is not a prohibition to the hearing officer=s presence during agency deliberations). Of interest is the Alaska Supreme Court's earlier decision in In re Peterson. At the time when bar admission proceedings were under the APA, the Court held that:

> In the future, we would require that the Board . . . allow the applicant to respond to the proposed decision submitted to the Board by the hearing officer. The applicant, upon request, should be allowed to appear before the Board.

499 P.2d at 307 n.16.

The hearing officer=s primary concern, should a party file an objection to a proposed decision, is to ensure fairness in consideration of the objection. To that end, the hearing officer should make sure that the party submitting the written objection has also served the objection on all other parties. Once this has been accomplished, the hearing officer should afford the opposing party an opportunity to respond to the written objection. The hearing officer can then decide whether to suggest to the final decision-maker modifications to the proposed decision based on the merits of the objections, or whether to just refer the objections to the agency. The hearing officer should never attempt to block the final decision-maker from receiving the objections. After the proposed decision is filed, jurisdiction over the proceedings shifts from the hearing officer to the final decision-maker.

At some time during the proceeding, the hearing officer may wish to set deadlines for any objections to the proposed decision and for response to any objections. The parties should be reminded that any objection must be based on the record and any legal argument; no new evidence can be allowed unless and until the final decision-maker makes a decision to reopen the evidence. Objections can be confined to grounds similar to those set out in ALASKA R. CIV. P. 77(l),

[148] Consider that the APA is also silent regarding dispositive motions, yet that silence is not construed to prohibit motions for summary judgment in administrative proceedings.

The hearing officer should avoid reacting defensively if errors are pointed out; mistakes are only human. The hearing officer is generally in the best position to respond to suggested corrections to a proposed decision. By doing so, the hearing officer would relieve the agency from the burden of considering motions for reconsideration under AS 44.62.540 based upon easily cured problems in a proposed decision.

D. Reconsideration of Final Decision

Once the agency adopts a final decision, the agency may order reconsideration on all or part of the case on its own motion or any party may petition the agency for reconsideration.[149] The petition should be filed with the agency itself, not the hearing officer. The hearing officer should forward to the agency any motion filed directly with the hearing officer.

The party petitioning for reconsideration must file the petition within 15 days of delivery or mailing of the decision. The agency must act within 30 days of delivery or mailing of its decision; its power to act expires after that time. If the agency takes no action within the 30 days, the petition is deemed denied. The APA does not require a party to petition for reconsideration in order to perfect an appeal to superior court.[150]

E. Effective Date

The final decision is generally effective 30 days after it is mailed or delivered to the respondent.[151] In the decision, the agency can designate a sooner or later date.

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149 AS 44.62.540.

150 AS 44.62.560(a).

151 AS 44.62.520

CHAPTER 13. APPEAL OF THE FINAL AGENCY DECISION

All final administrative decisions must clearly indicate that (1) the decision is a final decision, and (2) the parties have 30 days to appeal the decision to the superior court.[152] Part VI of the ALASKA RULES OF APPELLATE PROCEDURE govern appeals from administrative agencies to the superior court. The court rules supersede the procedures set out in AS 44.62.560.[153]

As mentioned previously, a hearing officer must remember that if a decision is appealed, the reviewing court will examine the record to determine whether the evidence supports the hearing officer's factual findings.[154] The court should not reweigh the evidence, but should make a determination as to whether there is substantial evidence on the record to support the findings.

The hearing officer's rulings on admissibility of evidence may be examined in the court's inquiry to determine if the hearing officer abused his or her discretion. However, a ruling that admits or excludes evidence will not likely result in a finding of abuse of discretion unless a substantial right of a party is affected.[155]

It is the agency's province to weigh witnesses' credibility and competing inferences from the testimony.[156] Accordingly, the hearing officer should specify when findings are made in whole or in part based on credibility of a witness.

Questions of law involving Aspecial agency expertise, or the determination of fundamental policies within the scope of the agency=s statutory function,≅ are reviewed

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152 ALASKA R. APP. P. 602(a)(2); Manning v. Alaska R. R. Corp., 853 P. 2d at 1124.

153 Owsichek v. State, Guide Licensing and Control Bd., 627 P.2d 616, 622 n. 9 (Alaska 1981).

154 Handley v. State, Dep't of Revenue, 838 P.2d at 1233.

155 *See* Stein v. Kelso, 846 P.2d at 126-27.

156 Wade v. Anchorage Sch. Dist., 741 P.2d at 639; Delaney v. Alaska Airlines, 693 P.2d at 865 n. 3.

by a court under the rational basis test.[157] The court may substitute its judgment for the agency when the issue presented is a question of law not involving Aagency expertise or where the agency=s specialized knowledge and experience would not be particularly probative.≅[158]

The “reasonable and not arbitrary “ test applies when the court is reviewing an agency interpretation of its own regulations.[159] The standard of review is deferential because the “agency is best able to discern its intent in promulgating the regulation at issue.”[160] Applying this test the court will sustain the agency action unless arbitrary, unreasonable or an abuse of discretion.[161]

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157 Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co., 746 P.2d 896, 903 (Alaska 1987) (citations omitted).

158 *Id*.

159 Handley v. State, Dep't of Revenue, 838 P.2d at 1233.

160 Rose v. Commercial Fisheries Entry Comm'n, 647 P.2d 154, 161 (Alaska 1982).

161 North Slope Borough v. LeResche, 581 P.2d 1112, 1115 (Alaska 1978).

CHAPTER 14. AGENCY DECISION FILE

Neither the APA nor the public records law[162] requires an agency to establish a decision file. However, the systematic collection and publication of decisions has many advantages. It increases public confidence in the agency by allowing the public to examine the reasoning and conclusions of agency decisions, the amount or nature of penalties imposed by the agency, or other patterns that should be consistent or fair to all members of the public coming into contact with the agency=s administrative processes. A systematic collection of an agency=s prior decisions can be helpful to a hearing officer for the same reason.

The hearing officer should encourage the agency to establish and maintain an indexed file of agency decisions, and should cooperate if the agency requests a decision in an particular format (such as a computer disk). The decisions of some agencies, such as the Commercial Fisheries Entry Commission, are bound and indexed. Others are maintained in a formal reporter such as the Alaska Public Utilities Reporter. With increasing computerization, it is now common for state agencies to maintain a decision database accessible by computer. Some electronically published decisions are available on the Internet. The state law libraries are also willing, upon request, to maintain notebooks of agency decisions.

[162] AS 09.25.110 - 09.25.125.

CASE CITATIONS

AGENCIES WITH ADJUDICATORY FUNCTIONS

I. BOARDS AND COMMISSIONS

UNDER APA	NOT UNDER APA
Alaska Coastal Policy Council	Alaska Commission for Human Rights
Alaska Commission on Postsecondary Education (regulation of institutions, permanent fund dividend claims only)	Alaska Commission on Postsecondary Education (loan denials)
Alaska Oil and Gas Conservation Commission	Alaska Housing Finance Corporation (unsafe housing)
Alaska Police Standards Council	Alaska Labor Relations Board
Alaska Public Offices Commission	Alaska Workers' Compensation Board
Alcoholic Beverage Control Board	Board of Education
Athletic Commission	Commercial Fisheries Entry Commission
Board of Fisheries	Commission on Judicial Conduct
Board of Game	Fisherman's Fund Advisory and Appeals Council
Occupational Licensing Boards and Commissions (*See Note 1*)	Local Boundary Commission
Professional Teaching Practices Commission	Mental Health Trust Authority
Real Estate Commission	Occupational Safety and Health Review Board
	PERS / TRS Boards
	Personnel Board
	Railroad Labor Relations Agency
	Regulatory Commission of Alaska (formerly APUC)
	State Assessment Review Board
	State Board of Parole
	Telecommunications Information Council
	Violent Crimes Compensation Board

Note 1 - Bds. of: Pub Accountacy; Architects, Engineers and Land Surveyors; Barbers and Hairdressers; Chiropractic Examiners; Dental Examiners; Cert. Direct-Entry Midwives; Dispensing Opticians; Marine Pilots; Marital & Family Therapy; Nursing; Optometry; Pharmacy; Physical Therapy & Occupational Therapy; Professional Counselors; Psychologist & Psychological Assoc. Examiners; Cert. Real Estate Appraisers; and Veterinary Examiners; Real Estate Comm'n; Athletic Comm'n; Alaska Medical Bd

II. SINGLE FINAL DECISION-MAKER

UNDER APA	NOT UNDER APA
ADMINISTRATION	- Division of Motor Vehicles - Longevity bonus program - Municipal insurance plans - Non-procurement claims - Office of Tax Appeals - State Procurement Code
COMMUNITY AND ECONOMIC DEV. - Alaska Securities Act - Fish processor license - Licensing (*See Note 2*) - Mobile home warranties - Small Loans Act - Subdivision sales	- - Banking code - BIDCO's - Corporations, partnerships, limited partnerships - Financial institututions - Insurance
CORRECTIONS	- Disciplinary proceedings
COURTS	- Bar discipline / admissions - Procurement code
EDUCATION AND EARLY DEV. - child care licensing (after 7/1/00)	- School district - child w/ disabilities placement
ENVIRONMENTAL CONSERVATION - Air and water quality - Food and cosmetic safety - Master permit applications - Pollution abatement - Tourist facility regulation	
FISH AND GAME - Habitat protection fish and game	- Loan default w/ permit as collateral
GOVERNOR	- Removal of certain board members
HEALTH AND SOCIAL SERVICES - Drug safety - Certificate of need - Certified nurse's aide licensing - Foster care / assisted living / substance abuse / hospice / hospital / children's facility licensing - Health facility medicaid payment rates	- Nursing facility / emergency medical services licensing - Public assistance / medical benefits programs - Reimbursement of medical benefits

Note 2 - Licensing of acupuncturists, audiologists, big game guides and transporters, collection agencies, concert promoters, construction contractors, electrical and mechanical administrators, professional geologists, hearing aid dealers, mobile home dealers, morticians, naturopaths, and nursing home administrators

LABOR AND WORKFORCE DEV. - Blind and handicapped vendor's licenses - Boiler safety - Radiation abatement - Recreational devices (05.20.080) - Reemployment of state militia - Wage claims and labor standards	- Boiler inspectors - Employment agencies - Employment security - Local hire - OSHA variance - Vocational rehabilitation
MILITARY AND VETERANS AFFAIRS	- Allocation of disaster relief funds
NATURAL RESOURCES - Alaska grain reserve program - Alaska Lands Act - Mining reclamation - Mining safety - Surface coal mining permits	- Dam safety - Forest Practices Act - Mining permits - Oil and gas leasing/activity - Water Use Act
PUBLIC SAFETY - Concealed gun permits - Racing events - Security guard license	
REVENUE - Fish buyer or processor license	- Charitable gaming - Child support enforcement - Permanent fund dividend appeals - Unclaimed property
TRANSPORTATION AND PUBLIC FACILITIES - Aeronautics - Communications	- Construction procurement - Local control of public works - Local control of transportation corridors

INFORMATION REGARDING ADMINISTRATIVE ADJUDICATION FOR PRO SE PARTIES

Parties often choose to represent themselves without an attorney in an administrative adjudication. This Appendix is directed to pro se parties in a proceeding under the Administrative Procedure Act; the hearing officer may photocopy this section and provide it to pro se parties.

I. Introduction.

This material has been prepared for individuals who choose to represent themselves in a hearing before a state agency. It is intended to give the reader an overall description of the process and an explanation of some of the terms and principles involved in a state administrative adjudication. Legal requirements for hearings are generally set out in Alaska's Administrative Procedure Act (AS 44.62.330 - 44.62.650), which will be referred to in this document as the "APA."

This document does not cover all circumstances involved in an administrative adjudication. Its contents do not limit a hearing officer's discretion in conducting a hearing.

If a party is a person with a disability, or intends to call a witness with a disability, who may need a special accommodation in order to participate in the hearing, the party should contact the hearing officer's staff as soon as possible to make appropriate arrangements.

II. What is a state administrative adjudication?

A state administrative adjudication is a method for resolving disputes between a member of the public and a state administrative agency. In court, the process by which evidence is presented and arguments are considered is called a trial. In a state administrative adjudication, it is called a hearing. *See* AS 44.62.450 - 44.62.490.

The purpose of an adjudication is to provide a fair procedure for determining questions of law and fact. In a hearing, evidence is presented in a formal, trial-like setting, but the strict rules of evidence that govern trials do not apply. *See* AS 44.62.460

III. How does an adjudication work?

The basic stages of a state administrative adjudication are

A. Initiation. An administrative adjudication may begin in a number of ways, including

1. a request for a hearing after the denial of an application, a permit, or other state benefit (*see* AS 44.62.370 - 44.62.390); or

2. filing a notice of defense after receiving an accusation which would take away a license, permit, or other state benefit from the respondent (*see* AS 44.62.380 - 44.62.390)

B. Prehearing Conference. An informal conference (often telephonic) among the parties and a hearing officer to discuss the

1. date of the hearing;

2. number of witnesses anticipated by each party;

3. estimated length of time for the hearing;

4. what issues are actually in dispute;

5. need for, means of, and deadlines for discovery;

6. deadlines for filing motions that would "decide the case" without the need to take evidence, and oppositions and replies to those motions;

7. deadline for exchanging exhibits, exhibit lists, or both;

8. filing and exchange of preliminary and final witness lists;

9. the necessity of prehearing briefing; and

10. Other issues that would aid in resolving the issues in the proceeding.

The prehearing conference is usually the first opportunity for the parties to meet and discuss the scope of the proceeding. It is often the point at which negotiations for a settlement of the case begin between the parties. However, settlement negotiations should not take place at the prehearing conference in front of the hearing officer.

C. Discovery. Discovery is the process by which the parties find out about the evidence that supports each other's claim or position. Examples of methods of discovery are:

1. informal or formal request for production of documents from another party;

2. informal written questions, or formal interrogatories, to other parties;

3. depositions (formal oral, or testimonial, statements from other parties or witnesses); and

4. formal requests for admissions from other parties.

D. Filing of Witness Lists. The hearing officer may set a deadline by which the parties must file a list of witnesses that each party intends to call to testify at the hearing.

E. Subpoenas. In order to ensure that a witness listed on the witness list attends the hearing, a party may request that a subpoena be issued for that witness. If a witness is not subpoenaed, and does not attend the hearing, the hearing will not be delayed or rescheduled to accommodate that witness, or the party calling the unsubpoenaed witness.

F. Filing of Exhibit List and Exchange of Exhibits. Prior to the hearing, the parties must file an exhibit list and exchange copies of exhibits to be used. The hearing officer will set deadlines for these activities.

G. Hearing. A state administrative adjudication is quite similar to a trial in a court in that opposing parties present their evidence and arguments before an impartial official. In court, the official is a judge. In a state administrative adjudication, the official is called a hearing officer. The hearing officer generally presides over a hearing alone. The agency decision-maker, however, may occasionally hear a matter in conjunction with the hearing officer. See AS 44.62.350.

A hearing officer acts like a judge by deciding procedure and what evidence can be admitted. Unlike a judge, however, the hearing officer generally cannot issue a binding decision but, instead, makes a proposed decision to a agency decision-maker for final approval. See AS 44.62.500. In situations where a state agency hears a matter together with a hearing officer, the hearing officer makes evidentiary and procedural rulings, and assists the agency decision-maker in drafting a final decision.

IV. The Hearing

The hearing is generally conducted in the following order:

A. Hearing Officer's Preliminary Statement. The hearing officer will call the hearing to order, announce the title of the case, and describe how the hearing will be conducted.

B. Appearances. Each party will identify himself or herself on the record. Since each hearing is tape-recorded it is necessary for each voice to be clearly identified in case the hearing is transcribed at a later date. At this time, each party has the opportunity to raise any questions that need to be resolved before the hearing begins.

C. Opening Statements. Each party is entitled to make a brief statement (in the time allotted by the hearing officer) describing what the party intends to prove. The

opening statement is not evidence and is not subject to cross examination. A party may make an opening statement at the beginning of the hearing or may reserve the opening statement for presentation at the beginning of that party's case (before calling the party's first witness).

D. Case Presentation.

1. Burden of Proof. The parties will proceed in the order determined by the hearing officer. The party having the burden of proof will usually go first and then last. The party seeking to "change the status quo" has the burden of proof. For example, a person who does not have a license has the burden of proof to show that a license should be issued. If an agency seeks to take away a license, it has the burden of proof to show that it should be taken away. The party who has the burden generally starts first at the hearing and has an opportunity to present rebuttal evidence after the opposing party's case is presented.

2. Exhibits. In presenting a case, a party should have each exhibit that the party wants to have included in the record marked for identification. Each party should bring sufficient copies of the exhibits for the hearing officer, all other parties, and the witness. The party offering the exhibit should indicate whether the exhibit is proposed for admission at the beginning of the hearing or whether the exhibit will be offered for admission in conjunction with the testimony of a witness. An opposing party has an opportunity to object to the admission of an exhibit at the time it is offered for admission.

3. Direct Examination. After a party's exhibits are marked, the direct examination begins. A party identifies and calls a witness to testify. The hearing officer administers an oath or affirmation to the witness and then the party may ask questions of the witness. The party must ask the witness to answer questions and not merely verify statements made by the party asking

the question. The party should not argue or debate with the witness. While hearsay testimony

is permitted in administrative proceedings to support other direct evidence, the testimony must be relevant and trustworthy. An opposing party may object to any question asked of a witness and the hearing officer will rule on whether the question is permissible.

4. Cross-Examination and Re-Direct. After a party is finished questioning a witness, each opposing party may conduct cross examination of the witness by asking questions. The party asking questions on direct examination may then have an opportunity to re-direct and ask a few additional questions on matters discussed in cross examination followed by re-cross examination which is limited to the matters discussed during re-direct examination. Re-direct and re-cross examination should be short, as the opposing parties should fully discuss most of the issues with a witness in direct and cross examination.

   A hearing officer, or the agency decision-maker, if present, may also ask questions of a witness at any point in the proceeding. When this occurs, the hearing officer will generally allow the parties to ask follow-up questions of the witness.

5. Rebuttal evidence. Rebuttal evidence on behalf of the party with the burden of proof may be allowed by the hearing officer. Rebuttal testimony will only be allowed if new issues or facts are raised by the opposing party that need response.

E. Closing Argument. After the evidence has been submitted each party is usually given an opportunity to make a brief closing argument. The party with the burden of proof first summarizes that party's case followed by the opposing party's argument and then rebuttal argument by the party with the burden of proof. Closing argument is not evidence and is not subject to cross examination. The hearing officer may require briefs in the place of oral argument.

F. Closing the Record. After closing arguments, the hearing officer will generally close the record. This means that no further evidence will be permitted. The hearing officer may extend the record closing date, however, to a specified date to receive specific documents.

G. Preparation of Proposed Decision. After the record is closed, the hearing officer will prepare a proposed decision for submittal to the agency decision-maker. If the agency decision-maker was present with the hearing officer during the proceedings, the hearing officer will assist the agency decision-maker in preparing a final decision. In either event, it will generally take several weeks for a decision, or proposed decision, to be drafted depending on the length and complexity of the matter and the hearing officer's workload in other cases. The parties will receive a copy of the hearing officer's proposed decision.

H. Agency Final Decision . After the proposed decision is submitted to the agency by the hearing officer, the agency decision-maker will consider the proposed decision. Because the parties have each had the opportunity to present their cases fully before the hearing officer, including rights of cross examination, the agency is not required to afford the parties an opportunity to present additional testimony or argument before the agency decision-maker. However if all parties are present, the final decision-maker may schedule a time to allow a presentation by the parties or to ask questions of the parties.

In considering a proposed decision the agency decision-maker has several options under the APA. Those options are listed below.

1. Approve the decision.

2. Reduce a proposed penalty and otherwise approve the decision.

3. Send the matter back to the same or another hearing officer for further consideration or to take additional evidence.

4. Make an independent decision after reviewing the record.

Once a final decision has been signed by the agency decision-maker, the parties will be sent a copy of the final decision and will be notified of the rights of reconsideration and appeal.

V. What if a Party Feels that the Agency's Final Decision is Wrong?

A party has two non-exclusive options if that party feels that an agency's final decision is incorrect:

A. Request a Reconsideration (see AS 44.62.540). If a party believes that a decision by an agency is incorrect, that party has only 15 days from the date of the decision to ask the agency to reconsider the decision. The agency's power to order reconsideration expires 30 days after the date the decision is sent to a party. A party may, but is not required to, file a motion for reconsideration before exercising option B, below.

B. File an Appeal (see AS 44.62.560 and ALASKA R. APP. P. 602 of the ALASKA RULES OF CIVIL PROCEDURE). A party may appeal a final agency decision in the Alaska Superior Court. A party's right to appeal is governed by ALASKA R. APP. P. 602 (a)(2) and AS 44.62.560, both of which should be consulted as the right of appeal may be lost if the appeal is not timely filed with the superior court.

VI. May a Party Be Represented by an Attorney?

A party may choose to be represented by an attorney throughout the hearing process. The party must retain and pay for the attorney. The hearing officer may not recommend an attorney. In looking for an attorney, the party should talk to persons who had had similar cases and ask them for recommendations. The Yellow Pages list attorneys by category of practice as does the Alaska Bar Association Lawyer Referral Service program. The toll-free phone number for the Lawyer Referral Service program is 1-800-770-9999. Alaska does not certify specialists as such, but does list attorneys by the field of practice in which they are most often engaged.

If a party wishes to be represented by an attorney, the party should act quickly to retain an attorney. The hearing date and procedural deadlines are established to accommodate, as much as possible, the schedules of the parties, their attorneys, the hearing officer, witnesses, and the agency. Attorneys need time to prepare for legal representation. If a party delays in seeking legal representation, the attorney may need to ask for additional time to prepare. If delay would result in added costs, inconvenience, or unduly burden the other parties, a postponement or continuance will not be granted by the hearing officer.

VII. Common Errors.

A. Contacting the Hearing Officer. The hearing officer acts in a quasi-judicial capacity and cannot talk to a party to an administrative adjudication without all other parties being present. Inquiries concerning scheduling should be directed to the hearing officer's staff. Inquiries may be directed to the hearing officer if the hearing officer does not have staff.

B. Asking the Hearing Officer or the Hearing Officer's Staff for Legal Advice. An administrative adjudication is an adversarial proceeding in which the hearing officer must remain neutral in all respects. The hearing officer's staff does not have authority to give legal advice to the parties in an adjudication.

C. Failure to Provide Copies of Filings to Other Parties. The hearing officer may not consider documents filed by a party that have not been served on the other parties. On each document filed with the hearing officer, the party must certify that all other parties have received a copy.

D. Failure to Submit Subpoena Forms. If a party wishes to require a witness to attend, the party must complete a subpoena form. Forms are available from the hearing officer. If the party wishes the witness to bring certain documents, the party can obtain a form entitled a “subpoena duces tecum” from the hearing officer. After completing the form, the party must then obtain the hearing officer’s signature on the

form. The party may then serve the subpoenas by certified mail, return receipt requested, or by a process server.

E. Interrupting or Arguing with Witnesses. At a hearing, a party may directly, or through an attorney, object on evidentiary or procedural grounds to questions that an opposing party asks their witnesses, or to the answers given. It is not proper to interrupt witnesses or argue with them. Each party has an opportunity to cross examine each witness testifying for an opposing party.

F. Testifying While Cross Examining a Witness. A party, directly or through an attorney, may question any witness called to testify for an opposing party. It is not proper for the party asking questions to try to testify during cross examination. Such a response should be given during the questioner's own testimony.

G. Not Being Prepared To Give Own Testimony. A person representing him or herself will not have the benefit of questions and answers to remind the party of the evidence intended to be included. The pro se party should prepare an outline in advance of the hearing that lists the subjects to be addressed.

VIII. Glossary.

Administrative Adjudication - The legal process for resolving a dispute at the agency level.

Administrative Procedure Act (APA) - The Alaska statutory law, set out in AS 44.62.330 - 44.62.650, governing how many state administrative adjudications, or hearings, are to be conducted.

Admit into Evidence - A ruling by the hearing officer that a document, item, or statement will be considered as part of the record for the purpose of making findings of fact.

Affidavit - A written statement that is given under oath before a notary public or other official qualified to administer an oath.

Agency Decision-maker - Depending upon the statute governing the case, a board or commission, the director **of a division of state government, a commissioner of a department of state government, or some other named entity or person.**

APA - Same as Administrative Procedure Act. See definition above.

Appeal - The formal review of a decision in an administrative adjudication by a court of law at the request of a party. See AS 44.62.560.

Brief - A written statement setting forth a party's position on a question of law or fact.

Closing Argument - A statement, usually oral, at the close of a hearing summarizing the evidence and legal points that a party feels have been established, and pointing out what the opposing party has failed to establish.

Closing the Record - The deadline for submitting evidence to the hearing officer -- usually when the hearing is adjourned unless the hearing officer specifically provides for later supplementation of the record.

Continuance - A postponement, made in the discretion of the hearing officer, of a scheduled hearing or deadline to a later date.

Cross Examination - The questioning of a witness by an opposing party after the witness has testified upon direct examination. See definition of “direct examination,” below.

Direct Examination - The questioning of a witness by the party who called the witness to testify.

Discovery - The process by which one party finds out about the opposing party's case and the evidence that supports it. Discovery includes interviews with opposing parties and their witness, and obtaining all relevant documents and exhibits. Formal discovery includes requests for admissions, depositions, interrogatories, and other items that are governed by the APA and the ALASKA RULES OF CIVIL PROCEDURE.

Dismiss - To discontinue or dispose of an adjudication or case.

Dispositive Motion - A motion, such as a motion to dismiss a case or a motion for summary judgment (see definition), in a case that, if granted, would result in a decision without the necessity of conducting an evidentiary hearing.

Evidence - Proof presented by a party to establish a finding of fact. Examples of evidence include testimony, documents, and objects.

Exhibit - A document or object that is marked for identification and offered as proof at a hearing. The hearing officer will decide whether the exhibit can be admitted into evidence. Exhibits offered by the petitioner are generally marked numerically (1, 2, 3, etc.) and exhibits offered by the respondent are generally marked alphabetically (A, B, C, etc.). "Exhibit" also refers to attachments to documents filed with the hearing officer.

Ex Parte Communication - A contact made, without opportunity for all parties to participate, between the hearing officer or final agency decision-maker and a party, or other individual representing that party, regarding the merits of a matter under adjudication.

Expert Witness - A witness who has specialized education or training to give an opinion on a subject involved in a hearing. Opinion testimony is only admissible if the hearing officer rules that the witness offering the opinion is a qualified expert.

Final Decision - A decision by an agency decision-maker (see definition) that is the final agency decision on the issues in dispute and the rights of the parties. A final decision may be appealed to the Alaska Superior Court. *See* AS 44.62.560.

Hearing – A proceeding like a trial, but less formal, in which the hearing officer receives evidence and argument from the opposing parties to the dispute.

Hearing Officer - The official that presides over an administrative proceeding in a similar manner to a judge in a judicial proceeding.

Hearsay Evidence – A statement made outside the hearing that is presented as evidence to prove the truth of the matter asserted.

Motion - A request to the hearing officer for a ruling on procedure or an issue in dispute.

Opening Statement - A party's brief summary of that party's position regarding the dispute and an outline of what the party intends to prove during the hearing.

Opposing Party - A person or entity (e.g., the state or a company) whose interest in a state administrative adjudication is opposed to that of another party.

Order - A directive or decision by the hearing officer or final agency decision-maker.

Overrule - The hearing officer's rejection of an evidentiary or procedural objection by a party at a hearing. Overrule is the opposite of “sustain,” which is defined below.

Party - An individual, a person, or entity designated as a claimant, applicant, petitioner, or respondent in an administrative adjudication. See AS 44.62.640(4).

Petitioner - The individual, person, or entity (generally a state official), who initiates an administrative adjudication.

Pleading - The formal allegations and defenses of the parties set out in writing. Accusations, statements of issues, notices of defense, and answers are all pleadings.

Prehearing Conference - A brief conference, often telephonic, at which the parties and the hearing officer discuss scheduling and other preliminary matters.

Proposed Decision - A hearing officer's recommendations for findings of fact, conclusions of law, and a decision made to an agency decision-maker under AS 44.62.500.

Rebuttal - Evidence which explains or opposes evidence given by an adverse party.

Reconsideration - The re-examination of a decision by an agency decision-maker. See AS 44.62.540, 44.62.560.

Record - The pleadings, documents, and exhibits that were filed in the proceedings, and transcripts or tapes of the proceedings. Only information contained in the record may be the basis for a decision in the matter.

Remand - The return of a matter from a court to the agency, or from the agency to a hearing officer, for additional proceedings or consideration.

Respondent - The individual, person, or entity against whom an accusation, statement of issues, petition, claim, or request is filed. *See* AS 44.62.640(5).

Rules of Court - The ALASKA RULES OF COURT, adopted by the Alaska Supreme Court, include the ALASKA RULES OF CIVIL PROCEDURE, the ALASKA RULES OF EVIDENCE, and the ALASKA RULES OF APPELLATE PROCEDURE. The ALASKA RULES OF CIVIL PROCEDURE and the ALASKA RULES OF EVIDENCE govern civil court procedures and the admission of evidence in those proceedings. Hearing officers may look to the court rules when the APA does not specifically govern a procedural or evidentiary issue. Section VI of the

ALASKA RULES OF APPELLATE PROCEDURE govern appeals of administrative adjudicative decisions to the superior court.

Service - The official delivery of a document to a party in an administrative adjudication. Each document filed with the hearing officer by a party must also be served on all opposing parties.

Settlement - A voluntary agreement of the parties to resolve the dispute underlying an administrative adjudication. Settlements must generally be approved by the hearing officer and the agency.

Stay - An order by the hearing officer that puts an administrative adjudication on "hold." Unlike a dismissal, a stay does not terminate a proceeding.

Stipulation - An agreement by the parties to resolve one or more issues, either legal or factual.

Strike - A decision by the hearing officer to remove a statement or evidentiary fact or item from the record for failure to comply with evidentiary rules or other law.

Subpoena - A formal legal document under official authority commanding an individual to attend a proceeding. See AS 44.62.430.

Subpoena Duces Tecum or Subpoena for the Production of Documents - A formal legal document commanding an individual to appear and to bring certain specified documents or items. *See* AS 44.62.430.

Summary Judgment - A decision that there are no genuine issues of material fact and, therefore, the decision can be based solely upon the legal issue in dispute. See Alaska R. Civ. P. 56.

Sustain - A decision of the hearing officer to uphold or approve an evidentiary or procedural objection by a party at a hearing.

Transcript - A typed document setting out the testimony and argument that occurred during a hearing.

Witness - An individual with information relevant to an administrative adjudication who testifies at the hearing.

Witness List - A list prepared by each party to an administrative adjudication showing the names of all witnesses that party intends to call to testify at the hearing.

STATE OF ALASKA

BEFORE THE____①_____

IN THE MATTER OF THE	)	
_____②_____ Against:	)	
	)	
_____ ,	)	Case No. _____
	)	
Respondent	)	
_____	)	

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① Name of Agency
② Accusation/License Denial/Other

CERTIFICATE OF SERVICE

I certify that on _____, _____, a true and correct copy of this document was mailed or delivered to the following:

_____①
_____
_____

Dated this _____ day of _____, _____.

_____

① Insert the names of all parties to the appeal.

CAPTION

NOTICE OF PREHEARING CONFERENCE AND PRELIMINARY ORDER

1. **Designation of Hearing Officer.** The above-captioned case has been assigned to Hearing Officer _____.

2. **Prehearing Conference.** A Prehearing Conference will be held on the _____ day of _____, _____ at _____ _ .m. Alaska Time. All counsel and parties are expected to be available for a prehearing conference at that time to discuss all prehearing matters. Failure to be available may result in action adverse to your interest in this proceeding.

3. **Telephonic Participation.** If you wish to participate by telephone, please advise the Hearing Officer before the date set for the hearing the appropriate telephone number to be used at the scheduled time.

4. **Access.** If you are a person with a disability who may need a special modification in order to participate in the conference, please contact _____② no later than _____ to make any necessary arrangements.

5. At the prehearing conference, the parties should be prepared to discuss the following:

a. proposed date and location for administrative hearing;
b. estimated length of time for the hearing;
c. need for and schedule of discovery;
d. deadlines for submission of dispositive motions;
e. estimated number of witnesses;
f. which issues are in dispute;
g. necessity of prehearing briefing and dates for submission of briefs; and
h. possibility of settlement
i. any other matters that may aid in resolving the issues in this proceeding.

6. **Service of Documents.** Please note that a party filing a written communication with the Hearing Officer must mail or deliver a copy of the communication to each party to the proceeding at the addresses of record. The document filed with the Hearing Officer must show proof of service on all parties.

7. **Communications with Hearing Officer.** The Hearing Officer may not discuss the

①

substance or merits of this matter with any party unless the other parties are also present. Requests for scheduling and other procedural matters should be directed to _____.

8. **Change of Address:** It is essential that you notify the Hearing Officer and other parties of any change in your mailing address or contact telephone number during the course of these proceedings.

Dated this _____ day of _____, _____.

_____
HEARING OFFICER

CERTIFICATE OF SERVICE

① Insert the name and telephone number of a member of the hearing officer's staff.

② Allow sufficient time to accommodate a need for a special modification.

CAPTION

PREHEARING CONFERENCE ORDER

The parties shall adhere to the following prehearing schedule:

1. The parties shall file and exchange a list of witnesses expected to testify at the hearing, and noting any of the witnesses who will testify as experts, by:

preliminary) _____(final) _____.

2. All discovery must be completed by _____. By _____, the parties shall exchange, or describe and provide the other parties access to, all documents and computer data that are relevant to the disputed facts alleged in the _____. The parties may also conduct the following types of discovery, using the Alaska Rules of Civil Procedure as guidelines: / / depositions; / / interrogatories; / / requests for admissions.

3. All dispositive motions including motions to dismiss and motions for summary judgment must be filed by _____.
Oppositions will be due: _____; replies will be due:_____.

4. Any stipulated statement of undisputed facts must be filed by_____.

5. Prehearing memoranda on the subjects of _____ must be filed and exchanged by _____.

6. The parties shall file exhibit lists by_____.

7. The parties shall mark and exchange exhibits by _____ _____.

8. Additional: _____②_____.

DATED: _____

HEARING OFFICER

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OF SERVICE

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① Initiating document (e.g. "Accusation" or "Statement of Issues")

② Insert any additional scheduling information, as appropriate.

HEARING OFFICER'S MANUAL
* * * * *
SAMPLE FORM 4 – NOTICE OF HEARING

CAPTION

NOTICE OF HEARING

TO: All Parties

PLEASE TAKE NOTICE that a hearing in the above-captioned matter will be held commencing on the _____ day of _____, _____ at _____ _.m. Alaska Time.

At the hearing, the Hearing Officer will receive evidence regarding this matter. You may be present at the hearing, either in person or by telephone.

If you wish to participate in person, you must appear at the following location:

_____
_____

If you wish to participate orally by telephone, you must advise the office of the Hearing Officer at least _____ days before the hearing the phone number where you can be reached at the scheduled time. A party participating by telephone must pay the telephone cost.

If you are a person with a disability who may need a special modification in order to participate in the hearing, please contact the office of the Hearing Officer at least _____days before the hearing to make any necessary arrangements.

The hearing will be conducted under the Administrative Procedure Act (APA), Alaska Statutes 44.62.330 - 44.62.650.

You may be, but you are not required to be, represented by an attorney. You may offer any relevant evidence you may have. You will be given full opportunity to cross-examine all witnesses testifying against you.

You may request the Hearing Officer to issue subpoenas to compel the attendance of witnesses and production of books, documents or other things pertaining to this matter.

Note: All subpoenas should be submitted in final form by the requesting party to the Hearing Officer for the Hearing Officer's signature not less than _____ days before the date set for hearing. The requesting party has the responsibility to serve the subpoena and to pay the appropriate witness fees. Each party shall pay the telephone cost of any witness called to testify telephonically. Telephonic witness charges should be billed to a calling card, or the home or office telephone number of the party.

Following the hearing, the Hearing Officer will prepare a written Proposed Decision with Findings of Fact and Conclusions of Law, which will be submitted to the ___①_____. The agency may adopt the Proposed Decision, reduce the proposed penalty, remand the case back to the Hearing Officer for the taking of additional evidence, or decide the case after review of the record.

Dated this _____ day of _____, _____.

_____
HEARING OFFICER

CERTIFICATE OF SERVICE

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① Title of final agency decision maker

HEARING OFFICER'S MANUAL
* * * * *
SAMPLE FORM 5A - SUBPOENA

CAPTION

SUBPOENA

TO: ①

YOU ARE COMMANDED under the authority of AS 44.62.430 to appear telephonically② at _____③_____, _____, Alaska, at the hearing commencing on _____④_____, _____ to testify in the above-captioned matter. Failure to comply may result in legal action against you.

ISSUED this _____day of _____, _____.

_____
HEARING OFFICER

Requested by:

_____⑤_____

Contact person: _____⑥_____ Telephone Number: ⑦_____

* Call the contact person named above before the hearing to obtain a more precise time.

Enclosure: Witness fee (if required by AS 44.62.430(b))

HEARING OFFICER'S MANUAL

* * * * *

SAMPLE FORM 5A - SUBPOENA

TO BE COMPLETED BY PARTY REQUESTING

① Insert the full name of the witness subject to this subpoena.
② Include, if will testify telephonically.
③ Insert the complete physical location where the witness is to appear.
④ Insert the date the hearing commences.
⑤ Insert the name of the party requesting that the subpoena be issued.
⑥ Insert the name of the contact person for the party requesting.
⑦ Insert the phone number of the contact person for the party requesting.

HEARING OFFICER'S MANUAL
* * * * *
SAMPLE FORM 5B - SUBPOENA DUCES TECUM

CAPTION

SUBPOENA DUCES TECUM

TO: ①

YOU ARE COMMANDED under the authority of AS 44.62.430 to appear at _____②_____, _____, Alaska, at the hearing commencing ③ on _____, _____ to testify in the above-captioned matter. Failure to comply may result in legal action against you ④. You must bring with you the following:

ISSUED this _____day of _____, 19__.

_____
HEARING OFFICER

Requested by:

_____⑤_____

Contact person: ⑥ Telephone Number: ⑦

_____ _____

* Call the contact person named above before the hearing to obtain a more precise time.

Enclosure: Witness fee (if required by AS 44.62.430(b))

HEARING OFFICER'S MANUAL

* * * * *

SAMPLE FORM 5B - SUBPOENA DUCES TECUM

TO BE COMPLETED BY PARTY REQUESTING

① Insert the full name of the witness subject to this subpoena.

② Insert the complete physical location where the witness is to appear.

③ Insert the date the hearing commences.

④ Insert a description of the documents or other items that the witness is to bring.

⑤ Insert the name of the party requesting that the subpoena be issued.

⑥ Insert the name of the contact person for the party requesting.

⑦ Insert the phone number of the contact person for the party requesting.

CAPTION

DISMISSAL ORDER

The adjudicative proceedings in the above-captioned matter are dismissed based upon

/ / the failure of the respondent to appear at the hearing scheduled in this matter;

/ / the failure of the respondent to provide the hearing officer with a current address to which the hearing officer may send a notice of hearing;

/ / the respondent's request to withdraw the request for a hearing.

Under AS 44.62.530, the agency's previous denial action stays in place as the agency's final action.

DATED: _____

HEARING OFFICER

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See Ch.11

HEARING OFFICER'S MANUAL

* * * * *

SAMPLE FORM 7A - COVER MEMO FOR PROPOSED DECISION-MAKER

FROM:
TO:
DATE:
RE: PROPOSED DECISION

I am submitting this proposed decision under AS 44.62.500 of the Administrative Procedure Act (APA). In considering this proposed decision, you are acting in your adjudicative (quasi-judicial) capacity and are restricted in deliberations to the hearing record.

Under AS 44.62.630, you should also refrain from discussing this case with anyone other than the hearing officer during the formal consideration of this proposed decision.

ADDITION IF BOARD OR COMMISSON IS FINAL DECISIONMAKER

If a member of the board or commission deciding this matter has been exposed to information not in the hearing record that would make it difficult for that member to make a fair and impartial decision in this matter, then that member should disclose the conflict and request a voluntary disqualification and withdrawal from the deliberations on this case under AS 44.62.450(c) and 44.62.630. The member will not be allowed to withdraw if a quorum will not exist in the member's absence.

CAPTION

PROPOSED DECISION

I. INTRODUCTION

The respondent requested a hearing on _____, ____. The undersigned Hearing Officer was assigned on _____, _____. The respondent has been represented by _____ throughout these proceedings. The petitioner has been represented by _____, Assistant Attorney General.

II. FINDINGS OF FACT

Based on the record and the evidence presented by the parties at the hearing, the hearing officer makes the following proposed findings of fact:

1.

2.

III. CONCLUSIONS OF LAW

The hearing officer makes the following proposed conclusions of law:

1. _____ has the burden of proof in this matter. That party must prove by a preponderance of the evidence that the action requested is supported by the evidence.

2. Under ____①____, the agency has authority to ____②____ when ____③____.

RECOMMENDATION

The hearing officer recommends that ____④____.

_____ _____
DATED HEARING OFFICER

① Authorizing statute.
② Action requested (e.g. "deny renewal of a license," "impose sanctions against a license," etc.
③ Legal basis argued by petitioner for proposed action.
④ Recommended action (e.g. license renewal be denied; license be renewed; license be suspended, revoked, conditioned, etc.; no licensing action; etc.)

CAPTION

PROPOSED DECISION ON SETTLEMENT

By agreement of the parties, the stipulation of the parties for settlement of this matter is adopted as the hearing officer's proposed decision, findings of fact, and determination of the issues presented under AS 44.62.510(a).

DATED: _____

HEARING OFFICER

HEARING OFFICER'S MANUAL
* * * * *
SAMPLE FORM 7D – PROPOSED DECISION ON DEFAULT

CAPTION

PROPOSED DECISION ON DEFAULT

I. INTRODUCTION

This Proposed Decision is submitted to the final agency decision-maker under AS 44.62.500 of the Administrative Procedure Act (APA). In considering this Proposed Decision, the final agency decision-maker is acting in its adjudicative (quasi-judicial) capacity and is restricted in its deliberations to the hearing record.

II. FINDINGS OF FACT

Based on the record and the evidence presented by the petitioner at the hearing, the hearing officer makes the following proposed findings of fact:

1. On _____, the respondent requested a hearing in the above-captioned matter.

2. In accordance with AS 44.62.420, a notice of hearing was sent to the respondent on the address provided on the respondent's _____.

3. The respondent failed to appear at the scheduled hearing that commenced on _____.

4.

5.

III. CONCLUSIONS OF LAW

The hearing officer makes the following proposed conclusions of law:

1. The petitioner has the burden of proof in this matter. The petitioner must prove by a preponderance of the evidence that the action requested is supported by the evidence.

2. The respondent has defaulted under the provisions of AS 44.62.530.

3. Under ②_____, the agency has authority to ③_____ when ④_____.

RECOMMENDATION

The hearing officer recommends that ⑤_____.

_____ _____
DATED ⑥
HEARING OFFICER

① Source of address (e.g. request for hearing ; most recent change of address; etc.)
② Authorizing statute.
③ Action requested (e.g. "deny renewal of a license," "impose sanctions against a license," etc.)
④ Legal basis argued by petitioner for proposed action.
⑤ Recommended action (e.g. license renewal be denied; license be renewed; license be suspended, revoked, conditioned, etc.; no licensing action; etc.)

⑥ Typed name

CERTIFICATE OF SERVICE

STATE OF ALASKA)
) ss
_____ JUDICIAL DISTRICT)
_____)

I, _____, certify that on _____, ____, I mailed, postage prepaid, first class mail, true and accurate copies of the Proposed Decision in this matter to the following:

_____①
_____
_____
Lt. Governor's Office

Dated this _____ day of _____, _____.

_____
②

① Insert the names of all parties to the appeal.
② Printed or typed name

HEARING OFFICER'S MANUAL
* * * * *
SAMPLE FORM 8 – FINAL AGENCY DECISION-MAKER ACTION ON PROPOSED DECISION

CAPTION

ACTION ON PROPOSED DECISION

The __①_____ having reviewed the Proposed Decision of the hearing officer in the above captioned case, hereby

/ / **Option 1:** adopts the Proposed Decision in its entirety under AS 44.62.500(b) as its final decision. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of the mailing or distribution of this decision.

/ / **Option 2:** reduces the proposed penalty to _____ and adopts the balance of the Proposed Decision under AS 44.62.500(b). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of the mailing or distribution of this decision.

/ / **Option 3:** remands this case under AS 44.62.500(c) to the same/different hearing officer for further proceedings on the following issues: _____
_____.

/ / **Option 4:** rejects the Proposed Decision under AS 44.62.500(c) and directs the preparation of the record for the agency to decide the case on the record.

Date: _____ By: _____

_____②_____

③

① Title of Final Decision-maker (e.g. Commissioner, Board, Commission, etc.)
② State title. If Board or Commission, include "Chairperson" or similar title of person signing on behalf of body.
③ Certificate of service – use Form 8B if option 1 or 2 checked. Use Form 2 if option 3 or 4 checked.

CERTIFICATE OF SERVICE

STATE OF ALASKA)
) ss
_____ JUDICIAL DISTRICT)
_____)

I, _____, certify that on _____, ____, I personally delivered or mailed by **certified mail**, postage prepaid, true and accurate copies of the Final Decision in this matter to the following:

_____①
_____
_____

Dated this _____ day of _____, _____.

_____
②

① Insert the names of all parties to the appeal.
② Printed or typed name