

28.02.01.00¹

Title 28 OFFICE OF ADMINISTRATIVE HEARINGS

Subtitle 02 RULES OF PROCEDURE

Chapter 01 Rules of Procedure

Authority: State Government Article, §§9-1604, 9-1607, 10-205, 10-206, 10-210, 10-211, 10-212.1, 10-216, 10-217, and 10-220, Annotated Code of Maryland

28.02.01.01

.01 Scope.

- A. Applicability. This chapter applies to all proceedings before the Office of Administrative Hearings.
- B. This chapter shall be construed to ensure the fair and expeditious determination of every action.
- C. Subject to §D of this regulation, this chapter supplements the procedures required by law.
- D. Unless federal or State law requires that a federal or State procedure shall be observed, this chapter takes precedence in the event of conflict.

¹ General key:

Proposed deleted items appear in brackets ([]).

Proposed amendments/additions appear in *italics*.

28.02.01.02

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) “Affidavit” means a written statement, signed under penalties of perjury, affirming that the [statements it contains] *information contained in the statement is* [are] true:

(a) Based upon the affiant’s personal knowledge; or

(b) To the best of the affiant’s knowledge, information, and belief.

(2) “Agency” means a unit of government the action of which gives rise to:

(a) A contested case hearing under State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland; or

(b) Any other proceeding before the Office.

(3) “ALJ” means an individual:

(a) Appointed as an Administrative Law Judge pursuant to the requirements established under State Government Article, §9-1604(a)(2), Annotated Code of Maryland; or

(b) Designated as an Administrative Law Judge pursuant to State Government Article, §9-1607, Annotated Code of Maryland.

(4) “Authorized representative” means an attorney or, when permitted by applicable law, another individual.

(5) “Certified mail” means mail deposited with the United States Postal Service, postage prepaid, return receipt requested.

(6) Docket Entry.

(a) “Docket entry” means the filing of a pleading or case status report by a party to an Office proceeding, or a request for the scheduling of an Office proceeding.

(b) “Docket entry” does not include the entry or withdrawal of appearance of counsel.

(7) “Filed” means that a document is postmarked, *faxed*, or received in accordance with Regulation .04D of this chapter.

(8) *“Final decision” means a document issued pursuant to a delegation under State Government Article, §10-205(b), Annotated Code of Maryland, authorizing one or more of the following:*

(a) Final findings of fact;

(b) Final conclusions of law; or

(c) A final order.

[(8)] (9) “Final decision maker” means the person or entity authorized by law or delegation to render the final decision in a contested case or other proceeding before the Office.

[(9)] (10) “Initial pleading” means a notice of agency action, a request for a hearing on an agency action, or any other transmittal that initiates a proceeding scheduled by the Office.

[(10)] (11) “Law” means State and federal constitutions, statutes, regulations, and relevant case law.

(12) *“Material fact” means a fact that will somehow affect the outcome of the case when it is established or determined.*

[(11)] (13) “Office” means the Office of Administrative Hearings.

[(12)] (14) “Office business hours” means 8:00 a.m. to 4:30 p.m. on a day that is not a Saturday, Sunday, or holiday.

[(13)] (15) “Office proceeding” means any type or stage of legal process, remote or in person, scheduled by the Office.

[(14)] (16) “Party” means a person named or permitted to participate in a case before the Office.

[(15)] (17) “Person” means an individual, representative, corporation, or other entity, including a public or nonprofit corporation, or an agency or instrumentality of federal, State, or local government.

[(16)] (18) “Proposed decision” means a document issued pursuant to a delegation under State Government Article, §10-205(b), Annotated Code of Maryland, authorizing one or more of the following:

- (a) Proposed findings of fact;
- (b) Proposed conclusions of law; or
- (c) A proposed order.

[(17)] (19) “Remote proceeding” means any Office proceeding conducted in whole or part by telephone or other audio means, by video or other audio-visual means, or by a combination of in-person, audio, and audio-visual means.

(20) *“Self-authenticating” means a document or other tangible evidence that does not require additional or supplemental information about its authenticity to be admitted.*

(a) *Examples of self-authenticating documents include, but are not limited to, a signed order of a court that bears a seal, a certified copy of a public record, or a newspaper or other periodical.*

(b) *Self-authentication alone does not render a document admissible.*

(21) *“Served” means that a copy of the motion, response, correspondence or other paper is provided to all other parties at the time it is filed with the Office.*

28.02.01.03

.03 Transmittal of Request for Hearing.

A. Initiation. A hearing may be initiated:

- (1) On transmittal forms provided by the Office and accompanied by copies of all pertinent documents;
- (2) On forms provided by the agency; or
- (3) In any other manner permitted by law *or as designated by the Office*.

B. A hearing request shall include and be accompanied by the following:

- (1) The name of the person requesting the hearing;
- (2) The mailing address of the person requesting the hearing;
- (3) The email address and phone number of the person requesting the hearing or an affirmative statement that this information is not available;
- (4) The notice of agency action regarding which, or the name of the party against whom, the hearing request has been filed;
- (5) An affirmative statement that the person requesting the hearing consents or declines to consent to electronic delivery of notice to the email address provided to the Office.
- (6) Additional documents and fees required by this chapter or COMAR 28.03.01; and
- (7) Other information required by law.

C. Dismissal. A case may be dismissed if an initial pleading is received without an item required by §B of this regulation.

D. Unless a case is dismissed pursuant to §C of this regulation, a hearing request received without an item required by §B of this regulation may be returned to the person requesting the hearing for resubmission with all of the required items. Return of the initial pleading under this section does not extend the time within which the initial pleading is required to be filed.

E. During the pendency of an action, a party shall notify the Office of a change in the party's mailing address, email address, and phone number.

28.02.01.04

.04 Commencement of Case; Computation of Time; Filing.

A. Unless otherwise provided for by law, *in matters in which the Office has been delegated hearing authority*, [the Office acquires jurisdiction over a matter and] a case commences when a person files a transmittal or an initial pleading with the Office:

- (1) Pursuant to a delegation of authority under State Government Article, §10-205, Annotated Code of Maryland; or
- (2) As otherwise directed by an agency.

B. Timeliness. An initial pleading is timely when it is filed:

- (1) Within the time period specified by relevant law; or
- (2) If no time period is specified, within 30 days of the date of the notice of contested action.

C. Computation of Time. Unless otherwise provided by law:

- (1) In computing *the start of* a period of time, the day of the act, event, or default [after which the designated period of time begins to run] shall not be included.
- (2) When computing a period of fewer than 8 days, intermediate Saturdays, Sundays, and holidays shall not be included.
- (3) When computing a period of time for filing a document at the Office:
 - (a) The last day shall be included;
 - (b) If the last day falls on a Saturday, Sunday, holiday, or other day on which the Office is not open the entire day during Office business hours, the period runs until the end of the next day on which the Office is open the entire day during Office business hours.

D. Filing. Unless otherwise provided by law:

- (1) An initial pleading is deemed to be filed on the earlier of the date that a request for hearing, along with all required fees, necessary documents, and other information, is postmarked or received by the:

- (a) Office, if required to be filed with the Office; or
- (b) Agency, if required to be filed with the agency;
- (2) Other pleadings are deemed to be filed on the earliest of the date on which they are:

[(a)] Addressed to the Office and postmarked *or received*.[:]

[(b)] With the permission of and in compliance with an order issued by an ALJ, emailed to and received by the Office; or

(c) Received by the Office; and]

(3) Filings may be submitted to the Office electronically through the following means:

(a) Email, only with the permission of and in compliance with an order issued by an ALJ;

(b) fax; or

(c) a portable drive.

(3) Non-postmarked documents delivered or electronically transmitted to the Office after the close of Office business hours are deemed to be filed on the next day on which the Office is open for business.

E. Verification of Accuracy of Filings

(1) Any filing made by an attorney or self-represented party shall be signed by that attorney or self-represented party, as certification that the person has read the filing and confirmed the existence and authenticity of each legal authority cited.

(2) In the event the presiding ALJ has reasonable grounds to believe a filing contains fabricated, hallucinated, or otherwise unverifiable citations, the filing party could be subject to an order for sanctions including striking the filing, imposing filing restrictions, or any other sanction deemed appropriate by the presiding ALJ.

28.02.01.05

.05 Notice.

A. Reasonable written notice of a hearing shall be provided to the parties.

B. A hearing notice provided by the Office shall contain:

(1) The nature of the hearing, [and] the date *and*[,] time *of the hearing*, and *the* physical address, *or the web address*, [remote URL location and] meeting number, *and* [or] *the* telephone number;

(2) A statement of the right to present witnesses and documents, or other evidence, and the right to cross-examine any witness that another party calls under State Government Article, §10-213(f), Annotated Code of Maryland, if applicable;

(3) A statement of the right to request subpoenas for witnesses and evidence, and specifying the costs, if any, associated with the request;

(4) A statement that a copy of the hearing procedures is available on request, and specifying the costs, if any, associated with the request;

(5) A statement of any rights, restrictions, or requirements pertaining to representation;

(6) A statement that failure to appear for the scheduled hearing may result in an adverse action against that party; and

(7) A statement that, unless otherwise prohibited by law, the parties may agree to the evidence and may waive their right to appear at the hearing.

C. Method of Giving Notice.

(1) Except as otherwise required by law, a notice issued by the Office shall be sent to the parties by United States mail, by personal delivery, by courier delivery at their addresses on record with the Office, or, with the consent of the party, electronically.

(2) If notice is given by United States mail, the notice is effective at the end of the 5th day after its deposit in the mail.

(3) Proof that notice has been given may be made by the dated file copy in the case file.

28.02.01.06

.06 Expedited Hearings.

A. A motion for an expedited hearing may be filed by any party. The motion shall set forth the reasons for expediting the hearing.

B. Any response to the motion shall be filed within 10 days of the date the motion is filed.

C. Motions.

(1) A motion for expedited hearing shall be granted only if the moving party establishes good cause.

(2) The Office shall notify all parties of the decision on a motion for expedited hearing and, if granted, shall schedule the hearing as soon as practical.

D. Unless the parties agree to a longer period, or a shorter period is required by law, the ALJ shall render the proposed or final decision within 30 days after the close of the record.

28.02.01.07

.07 Venue.

A. Hearings shall be conducted at the site designated by the Office [in accordance with applicable law.] *unless:*

(1) Applicable law requires the hearing to be conducted elsewhere; or

(2) The ALJ determines that for convenience of the parties or the interests of justice the hearing shall be conducted at some other reasonable location.

B. A request for change of location of the hearing must be in writing and state the reasons why the requested action is reasonable.

C. A determination on a request for change of location shall be made in accordance with the provisions of Regulation .20 of this chapter.

28.02.01.08

.08 Representation of Parties at Hearings.

A. In all Office proceedings:

- (1) An individual may *be self-represented* [represent himself or herself]; and
- (2) A person may be represented by an attorney authorized to practice law in Maryland.

B. When authorized pursuant to State Government Article, §9-1607.1, Annotated Code of Maryland, or otherwise by law, a person may appear through or be represented by an individual who is not an attorney.

C. Power of Attorney.

- (1) An employee of a business entity who is representing that business entity in accordance with State Government Article, §9-1607.1, Annotated Code of Maryland, shall provide the Office with a power of attorney.
- (2) The Office shall accept any properly executed power of attorney meeting the requirements of State Government Article, §9-1607.1, Annotated Code of Maryland.
- (3) The Office may provide a form for a power of attorney.
- (4) A power of attorney required by this regulation may be:
 - (a) Kept on file with the Office;
 - (b) Provided to the ALJ:
 - (i) At the outset of a hearing in which the power of attorney is required; or
 - (ii) In the discretion of the ALJ, before the close of the record.

D. A party's representative shall enter or withdraw the representative's appearance with the Office. *The filing of any paper in the proceeding by the party's representative constitutes an entry of appearance in the proceeding. During the pendency of an action, a representative shall notify the Office of a change in their mailing address, email address, or phone number.*

E. A party's representative of record shall be served with all notices, pleadings, and other correspondence.

28.02.01.09

.09 Appointment of Interpreter; Request for Accommodations.

A. Upon request of a party, witness, or representative who cannot hear, speak, or understand the spoken or written English language, the Office shall provide a qualified interpreter during the Office proceeding in which the party, witness, or representative is participating.

B. An interpreter shall take an oath or affirmation that the interpreter will accurately interpret the proceedings.

C. If a party, witness, or representative requests an accommodation, the Office shall provide a reasonable accommodation as required by the Americans with Disabilities Act.

28.02.01.10

.10 Service.

A. *A party who files [copy of] any pleading, motion, response, correspondence, or other paper filed in any proceeding shall provide a copy of the filing to all other parties at the time it is filed with the Office [be served promptly on all other parties to the proceeding by the party making the filing].*

B. Unless otherwise required by law, service on other parties may be made:

- (1) By United States mail;
- (2) By personal or courier delivery;
- (3) Electronically; or
- (4) As otherwise agreed to by the parties.

C. Proof of Service.

[(1)] *Other than the initial pleading, all [All other] materials filed with the Office, and all correspondence with the Office, shall contain or be accompanied by a signed statement specifying the: [certificate of service.]*

[(2)] The certificate of service shall be signed and shall contain the:]

[(a)] (1) Date of service;

[(b)] (2) Manner of service;

[(c)] (3) Name of each person served; and

[(d)] (4) Address at which each person was served.

D. [Whenever a party has a right, or is required, to do some act within a prescribed period after notice to or service upon the party, and delivery of notice or service upon the party is made by United States mail, 3 days shall be added to the prescribed period.] *When a party has the right to, or is required to, act within a specified period in response to notice or service, and the notice or service is delivered by United States mail, an additional 3 days is added to the specified period.*

28.02.01.11

.11 Powers and Duties of ALJs.

A. An ALJ shall:

- (1) Conduct a full, fair, and impartial hearing;
- (2) Take action to avoid unnecessary delay in the disposition of the proceedings;
and
- (3) Maintain order.

B. An ALJ has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas for witnesses and the production of evidence;
- (3) Rule upon offers of proof and admit relevant and material evidence;
- (4) Consider and rule upon motions in accordance with this chapter;
- (5) Examine witnesses and call witnesses as necessary to ensure a full and complete record;
- (6) Limit unduly repetitious testimony and reasonably limit the time for presentations;
- (7) Grant a continuance or postponement;
- (8) Modify or waive, reasonably and for good cause, any time periods established by this chapter;
- (9) Request parties to submit *witness and exhibit lists*, legal memoranda, proposed findings of fact, and proposed conclusions of law;
- (10) Make proposed or final decisions and take any other appropriate action authorized by law;
- (11) Require the parties to participate in remote proceedings unless a party establishes good cause for an in-person proceeding as provided by Regulation .20B of this chapter;

(12) Issue such orders as are necessary to procure procedural simplicity and administrative fairness and to eliminate unjustifiable expense and delay;

(13) Conduct the hearing in a manner suited to ascertain the facts and safeguard the rights of the parties to the hearing; and

(14) Impose appropriate sanctions for failure to abide by this chapter or a lawful order of the ALJ.

C. Disqualification; Substitution of ALJs.

(1) Conditions.

(a) An ALJ shall withdraw from participation in an Office proceeding in which personal bias or other reasons render the ALJ unable to remain impartial, or in which an appearance of impropriety may reasonably be inferred from the facts.

(b) For purposes of this section, an ALJ shall presume personal bias under circumstances set forth in the Office's Code of Judicial Conduct.

(2) Motion for Disqualification.

(a) *Upon discovering facts that may establish grounds for disqualification, a [A] party shall move promptly for disqualification of an ALJ by filing a motion with the presiding ALJ [upon discovering facts that establish grounds for disqualification].*

(b) The ALJ shall:

(i) Rule promptly on the motion; and

(ii) If granted, immediately refer the matter for assignment or designation of a substituted ALJ.

(3) Substitution of ALJs.

(a) If an ALJ is unable to continue presiding over a pending Office proceeding, or to issue a proposed or final decision, to the extent that it is allowed by law the Chief ALJ shall assign or designate a substituted ALJ pursuant to State Government Article, §9-1604(a)(4) or 9-1607, Annotated Code of Maryland.

(b) A substituted ALJ may use the existing record and conduct such further proceedings as are necessary and proper.

28.02.01.12

.12 Motions.

A. Unless otherwise provided by this chapter, this regulation pertains to all motions filed with the Office.

B. In General.

(1) [An application] *A request* to the Office for an order shall be by motion that, unless made during a hearing, shall be made in writing, and shall set forth the relief or order sought.

(2) A written motion and response to a motion shall state their respective grounds and a party shall attach any relevant documents as exhibits.

(3) A[n answer] *response* to a written motion shall be filed on the earlier of:

(a) 15 days after the date the motion was filed; or

(b) The date of the hearing.

(4) Absent permission from the presiding ALJ, replies to a response to a motion are not allowed.

[(4)] (5) Upon notice to all parties, the ALJ may schedule a prehearing conference or hearing to consider a written motion.

[(5)] (6) The ALJ may issue a written decision on a motion or state the decision on the record.

[(6)] (7) If a ruling on a motion is not stated on the record, the ruling shall be included in the ALJ's proposed or final decision.

[(7)] (8) The filing or pendency of a motion does not alter or extend any time limit otherwise established by this chapter.

(9) The ALJ shall rule on the motion promptly:

(a) If no motions hearing is held: Unless a statute, regulation, or policy requires otherwise, a ruling on a motion is due 30 days from the filing of the response or the close of the response period, whichever is sooner.

(b) If a motions hearing is held: Unless a statute, regulation, or policy requires otherwise, a ruling on a motion is due 30 days from the date of the motions hearing, or if the motions record is held open, the date the record closes.

(c) If a motion is heard at the time of the merits hearing, a ruling on the motion is due at the same time the decision on the merits is due.

C. Motion to Dismiss. Upon motion, the ALJ may issue a proposed or final decision dismissing an initial pleading that fails to state a claim for which relief may be granted.

D. Motion for Summary Decision.

(1) A party may file a motion for summary decision on all or part of an action on the ground that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law.

(2) A motion for summary decision shall be supported by one or more of the following:

(a) An affidavit;

(b) Testimony given under oath;

(c) A self-authenticating document; or

(d) A document authenticated by affidavit.

(3) A response to a motion for summary decision:

(a) Shall identify the material facts that are disputed; and

(b) May be supported by an affidavit.

(4) An affidavit supporting or opposing a motion for summary decision shall:

(a) Conform to Regulation .02 of this chapter;

(b) Set forth facts that would be admissible in evidence; and

(c) Show affirmatively that the affiant is competent to testify to the matters stated.

(5) The ALJ may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to

any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

E. Motion for Judgment.

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the ALJ may:

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so. [and to the same extent as if the motion had not been made].

28.02.01.13

.13 Discovery.

A. By written request [filed] *served on all other parties* not later than 30 days before the scheduled hearing, a party may require any other party to produce within 15 days, for inspection or copying, any file, memorandum, correspondence, document, object, or tangible item, including electronically stored information, that is:

- (1) Relevant to the subject matter of the case; and
- (2) Not privileged.

B. Unless provided by law or by agreement of the parties, no other discovery procedure may be required.

C. Orders Regarding Discovery.

(1) On motion by the parties or on the ALJ's own initiative, an ALJ may enter an order establishing reasonable limits on the scope of discovery, the method of delivery of discovery, and such other orders regarding discovery as the ALJ determines to be just.

(2) Orders regarding discovery may include, but are not limited to, orders regarding expert testimony pursuant to Regulation .21D of this chapter and orders governing the electronic exchange of exhibits.

D. The parties may enter into binding agreements concerning the inadvertent production and handling of privileged materials.

E. [A party that has filed a timely discovery request under this regulation but that has not received a reply may, after providing reasonable notice to the opposing party, file a motion seeking:] *After providing advance notice to the opposing party of the intention to file a motion to compel, a party that has served a timely discovery request under this regulation may file a motion to compel based on the opposing party's failure to fully comply with the request for production. The motion shall include, as an attachment, a copy of the discovery requests at issue and shall set out the method by which the opposing party was notified of the intent to file the motion to compel. The motion to compel may request:*

- (1) An order to compel a *written response or production of documents*;
- (2) An order imposing sanctions, *including, without limitation, precluding a party from introducing specified evidence or limiting the claims or defenses that may be raised by a party*; or
- (3) Both.

F. Copies.

- (1) Copies of requested documents and records shall be made at the expense of the party making the request.
- (2) The charge for copies of requested documents or public records may be waived by the custodian of the documents in accordance with General Provisions Article, §4-206, Annotated Code of Maryland, or other applicable law.

28.02.01.14

.14 Subpoenas.

A. Issuance of Subpoenas. On request of a party, or at the direction of an ALJ, the Office may issue subpoenas requiring the attendance and testimony of witnesses and the production at the hearing of one or more tangible items in the possession or under the control of a witness.

B. Requests.

(1) A request for a subpoena shall be made in writing, filed with the Office, and served on all other parties.

(2) To the extent practicable, subpoena requests shall be filed at least 15 days before the hearing.

(3) A request for a subpoena shall [specify the] *include*:

(a) *The [N]name and full address of the person to be subpoenaed;*

(b) The email address and phone number of the person to be subpoenaed or an affirmative statement that this information is not available; [and]

(c) *The [N] name, full address, and telephone number of the party requesting the subpoena[.]; and*

(d) If a request is for five or more subpoenas, in total, a brief statement of anticipated witness testimony or the basis for the subpoena request for each witness or document sought.

(4) A party requesting a subpoena for the production of tangible items, books, papers, other documents, or electronic files shall describe those items with particularity.

(5) A party requesting a subpoena for the production of medical records shall:

(a) Comply with Health-General Article, §4-306, Annotated Code of Maryland; and

(b) Serve a copy of the subpoena on the person whose medical records are sought.

(6) A party requesting a subpoena for the production of financial records shall:

(a) Comply with Financial Institutions Article, §1-304, Annotated Code of Maryland; and

(b) Serve a copy of the subpoena on the person whose financial records are sought.

(7) Failure to comply with the provisions of this regulation may result in the denial of the subpoena request.

C. Delivery of Subpoenas.

(1) Subpoenas may be served:

(a) By personal delivery by an individual 18 years old or older who is not a party to the proceeding;

(b) By certified mail to the person at the address specified in the subpoena request; or

(c) If served by the Office, by United States mail, electronic delivery, personal delivery, or courier delivery.

(2) Unless the subpoena request specifies otherwise, a subpoena served by the Office shall be mailed by First-Class United States mail.

(3) The Office will not seek to enforce a subpoena pursuant to State Government Article, §9-1605(d)(2)(i), Annotated Code of Maryland, and §F of this regulation absent proof of service by certified mail or personal delivery.

(4) Costs of certified mailing or personal delivery of subpoenas are the responsibility of the person requesting service.

(5) Proof of service of subpoenas by certified mail or personal delivery is the responsibility of the person requesting the subpoenas.

(6) The party requesting the subpoena is responsible for notifying the person subpoenaed if the hearing is cancelled or postponed. Subpoenas shall remain in effect until the conclusion of the hearing.

D. Return of service shall be made as follows:

(1) When service is by certified mail, by the filing of the original return receipt; and

(2) When service is by personal delivery, by the filing of an affidavit, signed by the person who made service, containing:

(a) The name of the person served;

(b) The date on which the person was served;

(c) The particular place of service; and

(d) A statement that the affiant is 18 years old or older and not a party to the proceeding.

E. Objections to Subpoenas. A person may object to a subpoena by filing with the Office a motion to quash or for other relief.

F. Enforcement of Subpoenas. If a person fails to comply with a properly served subpoena, at the request of an ALJ the Office may apply to the appropriate circuit court for an order to show cause why the person should not be committed to jail for refusal to comply.

28.02.01.15

.15 Intervention.

A. Upon motion filed not later than 15 days before the earlier of the prehearing conference or the hearing date, a person may be permitted to intervene in an action when the person:

- (1) Has an unconditional right to intervene as a matter of law; or
- (2) Claims an interest relating to the subject matter of the hearing that is:
 - (a) Adversely affected; and
 - (b) Not adequately represented by existing parties.

B. The motion shall state the grounds for the motion, accompanied by a statement setting forth the claim or defense for which intervention is sought.

C. Order of Intervention.

- (1) The ALJ shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
- (2) As soon as practicable, the ALJ shall issue an order denying or allowing intervention.
- (3) In an order allowing intervention, the ALJ may place conditions upon the intervenor's participation in the proceedings.

D. Appeal.

- (1) If the ALJ is not the final decision maker, the denial of a motion to intervene may be appealed to the final decision maker in accordance with the agency's regulations.
- (2) When the ALJ is the final decision maker, a party or other affected person may seek judicial review of the denial of a motion to intervene in accordance with law.
- (3) In the discretion of the ALJ, a request for further review of the denial of a motion to intervene may stay the proceedings.

28.02.01.16

.16 Postponements.

A. Except as provided in §E of this regulation, a request for postponement shall be made in writing not fewer than 5 days before the scheduled hearing.

B. A postponement request shall be served on all parties and may be filed by:

- (1) United States mail;
- (2) Personal or courier delivery;
- (3) Facsimile to *such number as established by the Office; or*
- (4) Email [to oah.postponements@maryland.gov].

C. A request for postponement shall be granted only if the party requesting the postponement establishes good cause for the postponement.

D. Documentation of the reasons for the postponement shall be required from the party making the request.

E. Emergency Request for Postponement.

(1) For purposes of this section, “emergency” means a sudden, unforeseen occurrence requiring immediate attention which arises within 5 days of the hearing.

(2) In an emergency, a request for postponement may be made by telephone to the Office and promptly supported by documentation of the reason for the request.

F. When practicable, all parties to a proceeding shall be contacted before a ruling on a postponement request is made.

28.02.01.17

.17 Prehearing Conferences.

A. When appropriate, the ALJ may hold a prehearing conference to resolve matters preliminary to the hearing.

B. The ALJ may require the parties to submit information before the prehearing conference.

C. A prehearing conference may be convened to address the following matters:

- (1) Issuance of subpoenas;
- (2) Factual and legal issues;
- (3) Stipulations;
- (4) Requests for official notice;
- (5) Identification and exchange of documentary evidence;
- (6) Admissibility of evidence;
- (7) Identification and qualification of witnesses;
- (8) Motions;
- (9) Discovery disputes;
- (10) Order of presentation and burden of proof;
- (11) Scheduling;
- (12) Alternative dispute resolution; and
- (13) Any other matters that will promote the orderly and prompt conduct of the hearing.

D. Conduct of *Prehearing Conferences*.

[(1) Except as otherwise indicated in this chapter, at the discretion of the ALJ, all or part of a prehearing conference may be recorded.]

[(2)] Prehearing conferences may be conducted *in person*, by telephone, or by videoconference.

E. Prehearing Orders. Unless otherwise provided in this chapter or required by law:

(1) When a prehearing conference has been held, a prehearing order shall be issued by the ALJ.

(2) The prehearing order shall set forth the actions taken or to be taken regarding any matter addressed at the prehearing conference.

(3) If a prehearing conference is not held, the ALJ may issue a prehearing order to regulate the conduct of the proceedings.

(4) The prehearing order shall be a part of the case record.

28.02.01.18

.18 Alternative Dispute Resolution.

A. For purposes of this regulation, “alternative dispute resolution” means the process of resolving issues through a settlement conference, neutral case evaluation, neutral fact finding, mediation, other non-adjudicative method, or combination of those methods.

B. If all parties agree, and unless otherwise prohibited by law, an alternative dispute resolution proceeding may be scheduled by the Office.

C. An individual who presides at an alternative dispute resolution proceeding shall not preside over or take part in the prehearing conference, hearing on the merits, or other stage of the proceedings in that matter or any other matter arising from the same facts.

D. Confidentiality of Alternative Dispute Resolution Proceedings.

(1) Alternative dispute resolution proceedings are confidential and are closed to the public.

(2) Discussions in an alternative dispute resolution proceeding may not be made a part of the case record in any subsequent proceeding.

(3) Alternative dispute resolution proceedings, in whole or in part, may not be recorded electronically, captured through a screen shot, or preserved in any other manner.

(4) Parties participating in a remote alternative dispute resolution proceeding shall consent to an Agreement to Mediate Remotely, allow the mediator to sign the Agreement to Mediate Remotely on their behalf, and agree to participate from a private space that ensures the confidentiality of the alternative dispute resolution proceeding.

(5) An ALJ or other individual who conducts an alternative dispute resolution proceeding may not be called to testify, participate in discovery, or otherwise provide information in a subsequent proceeding related to the alternative dispute resolution proceeding or any other matter arising from the same facts as that proceeding.

28.02.01.19

.19 Proceedings Open to the Public; Recording Devices.

A. Unless prohibited by law, all proceedings before the Office are open to the public.

B. Unless otherwise provided by law, documents, notices, and records in the possession of the Office as a result of a contested case proceeding may be inspected and copied as provided in General Provisions Article, §4-101 et seq., Annotated Code of Maryland, and in COMAR 28.01.04.

C. The ALJ may:

(1) Remove individuals whose conduct impedes the orderly progress of the remote or in-person *proceeding* [hearing]; and

(2) Restrict attendance because of physical or technical limitations of the remote or in-person hearing room.

D. Recording Devices. Unless expressly authorized by the presiding ALJ, the use of audio, video, or photographic recording devices by parties, their representatives, witnesses, or other persons in an Office proceeding is prohibited.

28.02.01.20

.20 Conduct of Hearings; Remote Proceedings, Waivers.

A. In General.

(1) On a genuine issue in a contested case, each party is entitled to call witnesses, offer evidence, cross-examine any witness who testifies, and make opening and closing statements.

(2) A hearing shall be called to order by the ALJ. The ALJ shall explain briefly the purpose of the hearing and state the order of presentation of the evidence. The ALJ may allow the parties to present preliminary matters.

(3) Witnesses shall be sworn or put under affirmation to tell the truth.

(4) A hearing may be conducted in person with the parties present at the Office or another location or by remote proceeding.

B. Remote Proceedings.

(1) Subject to §B(2) of this regulation, and at the request of a party or on the ALJ's initiative, *an ALJ may permit some or all participants in [all or part of] a proceeding to participate by telephone or other audio means, by video or other audio-visual means, or by a combination of in-person, telephone or other audio means, and video or other audio-visual means* [may be conducted by:

(a) Telephone or other audio means, if all parties have an opportunity to participate in the entire proceeding;

(b) Video or other audio-visual means, if all parties have an opportunity to participate in the entire proceeding; or

(c) A combination of in-person, telephone or other audio means, and video or other audio-visual means, if all parties have an opportunity to fully participate in the entire proceeding].

(2) Exceptions.

(a) If a party establishes good cause not to conduct *a [an audio] proceeding by video or other audio-visual means*, the proceeding shall be held by *telephone [audio-visual means]* or in person.

(b) Except for proceedings involving the *Incarcerated Individual* [Inmate] Grievance Office, if a party establishes good cause not to conduct [an audio-visual] a proceeding *by video, telephone, or other audio-visual means*, the proceeding shall be held in person.

(c) Good cause for an in-person proceeding may include, but is not limited to, a party needing an interpreter or other accommodation that cannot be provided remotely, or a party being unable to access the internet or a device suitable for remote conferencing.

(d) A remote proceeding may not be permitted unless all parties have an opportunity to participate in the entire proceeding.

(3) Rights. All substantive and procedural rights apply to remote proceedings, subject only to the limitations of the physical and technological arrangements.

(4) Evidence. Except for proceedings involving the *Incarcerated Individual* [Inmate] Grievance Office, if the Office grants a request or issues a notice for a remote proceeding, at least 10 days before the proceeding, or as ordered by the ALJ, a party shall disclose all documentary, photographic, and other evidence the party plans to offer at the proceeding by:

(a) Delivering one set of copies to the Office;

(b) Serving one set of copies on the other party or parties; and

(c) Complying with an ALJ's order requiring documentary evidence to be filed electronically.

(5) When a party electronically files a video or audio file, the party shall also submit the file to the Office on electronic storage media.

C. Waivers.

(1) Waiver of Right to Appear.

(a) Unless otherwise precluded by law, a party or a party's representative may waive the party's right to appear at an Office proceeding by:

(i) Entering an oral waiver into the record; or

(ii) Filing a written waiver with the Office and serving a copy on all other parties.

(b) When a party has properly waived the right to appear, the failure of a party to appear personally or by representative shall not result in a finding of default. The proceeding shall be held and the matter decided in the party's absence.

(c) A waiver of the right to appear may be withdrawn by filing a withdrawal with the Office and serving a copy on all other parties not later than 5 days before the scheduled proceeding.

(2) Waiver of Right to a Hearing.

(a) Unless otherwise precluded by law, a hearing before an ALJ is not necessary if all parties:

(i) Agree to the admission of the evidence; and

(ii) Waive their rights to a hearing.

(b) A waiver of the right to a hearing shall be in writing and filed with the Office.

(c) When a hearing is properly waived, the ALJ shall decide the matter based on the pleadings and evidence in the file.

28.02.01.21

.21 Evidence; Burden of Proof.

A. Evidence shall be admitted in accordance with State Government Article, §10-213, Annotated Code of Maryland, and other pertinent law.

B. The ALJ may admit evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs, and give [probative effect to] that evidence *the weight the ALJ considers to be appropriate*.

C. Evidence may not be excluded solely on the basis that it is hearsay.

D. Expert Testimony. Expert testimony may be admitted, in the form of an opinion or otherwise, if the ALJ determines that the testimony will assist the ALJ to understand the evidence or to [determine] *decide* a fact in issue.

(1) In making that determination, the ALJ shall *consider* [determine] whether:

(a) The individual's knowledge, skill, experience, training, or education is sufficient to qualify them as an expert;

(b) Expert testimony on the particular subject is appropriate; and

(c) There is a sufficient factual basis to support the testimony.

(2) In the discretion of the ALJ:

(a) Expert testimony may be offered through the video deposition of an expert witness taken with the consent of all parties; and

(b) The deposition may be used for any purpose even though the witness is available to testify.

E. Exclusion of Witnesses.

(1) On request by a party, or on an ALJ's own initiative, an ALJ may exclude witnesses other than parties from the hearing room, except when testifying.

(2) A party, representative, witness, or spectator may not disclose to a witness excluded under this section the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during that witness's absence.

(3) A party that is *an agency or other legal entity* [not an individual] may designate an employee or officer as its representative to remain in the hearing room, even *if* [though] *that* [the] employee or officer *is* [may be] a witness *in the proceeding*.

(4) An expert witness who is to render an opinion based on testimony given at the hearing may remain during *all* [the] testimony.

(5) An ALJ may exclude the testimony of a witness who receives information in violation of §E of this regulation, or take other appropriate action.

F. Prefiled Direct Testimony

(1) At the request of a party or on the ALJ's initiative, direct testimony may be received in writing in either question and answer or narrative format.

(2) The testimony shall be under oath or affirmation and be filed and served on all other parties as ordered by the ALJ or, in the absence of an order, not later than 10 days before the hearing[s].

(3) Any party who submits prefiled testimony shall ensure that the witness is available, either remotely or in-person, for cross-examination at the hearing.

(4) The filing of prefiled direct testimony does not preclude any party from presenting rebuttal testimony.

G. Official Notice.

(1) At the request of a party or on the ALJ's own motion, an ALJ may take official notice of a fact that is:

(a) [Judicially noticeable] *So well known or generally understood that it cannot be reasonably disputed*; or

(b) General, technical, or scientific and within the specialized knowledge of the agency.

(2) Before taking official notice of a fact, the ALJ shall:

(a) Notify each party before or during the hearing; and

(b) Give each party an opportunity to contest the fact.

H. Stipulations.

(1) The parties may, in accordance with law, agree to any substantive or procedural matter.

(2) A stipulation may be filed in writing or entered on the record at the hearing.

(3) The ALJ may require additional development of stipulated matters.

I. Affidavits. An ALJ may admit an affidavit as evidence.

J. Dangerous or Toxic Evidence. No dangerous or toxic item, as defined in COMAR 28.01.02.01, may be offered into evidence at a hearing unless:

(1) At least 10 days prior to the hearing, the party seeking to offer it files a motion for leave to offer the evidence; and

(2) The motion is granted in advance of the hearing.

K. Proof. Unless otherwise provided by law:

(1) The standard of proof is by a preponderance of the evidence;

(2) A party asserting:

(a) A claim, right, or entitlement bears the burden of proof regarding the claim, right, or entitlement; and

(b) An affirmative defense bears the burden of proof regarding the defense; and

(3) The proponent of a motion bears the burden of proof regarding the motion.

28.02.01.22

.22 The Record.

A. The Office shall prepare an official case record of each hearing.

B. The record shall include:

(1) All pleadings, motions, responses, correspondence, memoranda, [including proposed findings of fact and conclusions of law, and] requests *and other papers* filed by the parties;

(2) All hearing notices;

(3) All documentary and other tangible evidence received or considered;

[(4)] A statement of each fact officially noticed;

(5) All stipulations;

(6) All offers of proof and objections;]

[(7)] (4) All rulings, orders, and decisions, proposed or final;

[(8)] (5) Matters placed on the record in connection with ex parte communication;

[(9)] (6) The recording of the hearing, and any prehearing proceeding, and any transcript of the recording prepared by a court reporting service; and

[(10)] (7) Any other item required by law.

C. All exhibits *filed with the Office or presented to the ALJ* [marked for identification, whether or not offered in evidence and, if offered, whether or not admitted,] shall be retained for purposes of judicial review.

28.02.01.23

.23 Failure to Attend or Participate in a Hearing, Conference, or Other Proceeding; Default.

A. If, after receiving proper notice as provided in Regulation .05C of this chapter, a party fails to attend or participate, either personally or through a representative, in a prehearing conference, hearing, or other stage of a proceeding, the ALJ may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party, *including a defaulting party that bears the burden of proof.*

[B. If after receiving proper notice as provided in Regulation .05C of this chapter, a party fails to attend or participate, either personally or through a representative, in a prehearing conference hearing, or other stage of proceeding, the ALJ may issue a default order against the party that bears the burden of proof.]

B.[C.] Final Default Orders.

(1) Unless otherwise provided by law, a party may move to vacate a final order of default within 30 days after the date of the order. The motion shall state the reasons for the failure to attend or participate in the proceeding.

(2) If an ALJ finds that there is good cause for a party's failure to attend or participate in the proceeding, the ALJ shall vacate the order and set the case in for further proceedings as appropriate.

(3) If a motion is not filed under §C(1) of this regulation, or is filed and denied, the final default order is effective.

C. [D.] Proposed Default Orders. A proposed default order is reviewable in accordance with the delegating agency's regulations governing review of proposed decisions, *or, where applicable, proposed default orders.*

28.02.01.24

.24 Dismissal for Lack of Prosecution.

A. Unless otherwise required by law, a case pending before the Office may not be placed on inactive status.

B. At the expiration of 6 months from the last docket entry, and on the request of a party or on an ALJ's own initiative, a case is subject to dismissal for lack of prosecution.

C. If dismissal is initiated, the Office shall send notice to all parties that a final or proposed dismissal for lack of prosecution will be entered after the expiration of 30 days from the date of the notice unless a motion is filed under §D of this regulation.

D. On motion filed within 30 days after the date of the notice under §C of this regulation, and for good cause shown, an ALJ may defer issuance of a final or proposed order of dismissal for the period and on the terms the ALJ considers proper.

E. Issuance of Order.

(1) If a timely motion is not filed under §D of this regulation, or if a motion is filed and denied, the ALJ shall issue an order or proposed order of dismissal within 30 days after the time for filing the motion has expired.

(2) If a motion is filed and good cause is shown for deferral of the dismissal, the ALJ shall issue an order deferring dismissal and specifying the period and the terms of the deferral.

28.02.01.25

.25 Final or Proposed Decisions; Other Dispositions.

A. An ALJ shall issue a final decision or proposed decision in accordance with the pertinent law and any relevant delegation.

B. Unless otherwise provided by law, an ALJ may dispose of a contested case by:

- (1) Decision on the merits;
- (2) Stipulation;
- (3) Settlement;
- (4) Consent order;
- (5) Default;
- (6) Withdrawal;
- (7) Summary disposition; or
- (8) Dismissal.

C. Proposed Decisions. [Except as otherwise provided by law or agency delegation, if an ALJ is not the final decision maker:]

(1) The ALJ shall submit a proposed decision to the final decision maker *and, if provided for by law or agency delegation, distribute* [with] a copy to each party.[; and]

(2) An adversely affected party may file exceptions to the proposed decision with the final decision maker in accordance with State Government Article, §§10-216 and 10-220, Annotated Code of Maryland, and the final decision maker's regulations.

D. Final Decisions. Except as otherwise provided by law, when an ALJ is the final decision maker, the ALJ's decision is the final agency decision for purposes of judicial review.

28.02.01.26**.26 Cases Remanded to the Office.**

A. A case remanded to the Office by a court or agency for further proceedings is considered filed with the Office when both the court's or agency's order and the record are received by the Office.

B. Unless the remand order specifies otherwise, the Office shall promptly schedule further proceedings as necessary and issue a decision in accordance with State Government Article, §10-205(e), Annotated Code of Maryland.

28.02.01.27

.27 Revision.

A. Final Decisions.

(1) A final decision may be revised only by the ALJ who rendered the decision.

(2) Except as set forth in §A(3) of this regulation:

(a) On a motion filed by a party, the ALJ may exercise revisory power and control over a final decision in the event of fraud, mistake, or irregularity; and

(b) Clerical mistakes in final decisions, orders, or other parts of the record may be corrected by the ALJ on the ALJ's own initiative, or on a motion filed by a party.

(3) Judicial Review.

(a) The ALJ may revise a final decision under §A(2) of this regulation:

(i) At any time before the decision is docketed for judicial review; or

(ii) After a decision is docketed for judicial review, only with leave of the circuit or appellate court before which the action is pending.

(b) A request for revision does not automatically stay the action or toll the time for filing a request for judicial review.

B. Proposed Decisions. [Proposed decisions may not be revised.] *Clerical mistakes in proposed decisions or proposed orders may be corrected by the ALJ on the ALJ's own initiative, or on a motion filed by a party. Proposed decisions may not otherwise be revised.*

28.02.01.9999

Administrative History

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Regulation .01A amended effective March 14, 1994 (21:5 Md. R. 405); May 6, 1996 (23:9 Md. R. 672); June 16, 1997 (24:12 Md. R. 866)

Regulation .02B amended effective March 14, 1994 (21:5 Md. R. 405)

Regulation .04 amended effective March 14, 1994 (21:5 Md. R. 405)

Regulation .05B amended effective March 14, 1994 (21:5 Md. R. 405)

Regulation .08B amended effective March 14, 1994 (21:5 Md. R. 405)

Regulation .09 amended effective March 14, 1994 (21:5 Md. R. 405)

Regulation .11B, C, D amended effective March 14, 1994 (21:5 Md. R. 405)

Regulation .13 amended effective March 14, 1994 (21:5 Md. R. 405)

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Regulation .18A, F amended effective March 14, 1994 (21:5 Md. R. 405)

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