

801 CMR 1.00: STANDARD ADJUDICATORY RULES OF PRACTICE AND PROCEDURE

Section

- 1.01: Formal Rules
- 1.02: Informal/Fair Hearing Rules
- 1.03: Miscellaneous Provisions Applicable To All Adjudicatory Proceedings
- 1.04: Conduct of Mediation at the Division of Administrative Law Appeals

801 CMR 1.00 is promulgated pursuant to M.G.L. c. 30A. Issues not addressed in 801 CMR 1.00 or for which any party seeks clarity are to be considered in light of the entire M.G.L. c. 30A. 801 CMR 1.00 is applicable to those state administrative agencies bound by the mandate of M.G.L. c. 30A and shall become effective 90 days after publication by the Secretary of the Commonwealth and will govern only adjudicatory proceedings commenced after the effective date. Existing agency rules will thus remain in effect for an indefinite period in the future, applicable to preexisting matters.

1.01: Formal Rules

(1) Preamble. 801 CMR 1.01 of the Standard Rules of Adjudicatory Practice and Procedure is a self-contained segregable body of regulations of general applicability for proceedings in which formal rules are desired. An Agency must determine for any class of hearing whether to hold hearings under 801 CMR 1.01 or 801 CMR 1.02 Informal/ Fair Hearing Rules. Agencies shall determine based on such factors as: the volume of cases held; whether claimants are represented by counsel; the complexity of the issues; or the applicability of Federal fair hearings procedures. All notices from which an Adjudicatory Proceeding can be claimed shall state which rules apply, whether formal under 801 CMR 1.01, or informal under 801 CMR 1.02. In addition, all notices shall contain a notice printed in English, Spanish, Portuguese, Italian, Greek, French and Chinese that informs the reader that the document is important and should be translated immediately.

(2) Scope, Construction and Definitions.

(a) Scope 801 CMR 1.00 governs the conduct of formal Adjudicatory Proceedings of all Commonwealth agencies governed by M.G.L. c. 30A.

(b) Construction. 801 CMR 1.00 shall be construed to secure a just and speedy determination of every proceeding.

(c) Definitions. Refer to all definitions included in M.G.L. c 30A. In addition, the following words when used in 801 CMR 1.01 shall have the following meanings:

Authorized Representative. An attorney, legal guardian or other person authorized by a Party to represent him in an Adjudicatory Proceeding.

Electronic Medium. Any device used to transmit information electronically, including but not limited to facsimile and e-mail.

Hand Delivery. Delivery by any method other than pre-paid U.S. mail, including but not limited to private mail services.

Petitioner The Party or Agency who initiates an Adjudicatory Proceeding.

Presiding Officer The individual(s) authorized by law or designated by the Agency to conduct an Adjudicatory Proceeding.

Respondent. The Party or Agency who must answer in an Adjudicatory Proceeding.

(3) Representation

(a) Appearance. An individual may appear in his or her own behalf, or may be accompanied, represented and advised by an Authorized Representative. An authorized officer or employee may represent a corporation, an authorized member may represent a partnership or joint venture, and an authorized trustee may represent a trust.

## 1.01: continued

(b) Notice of Appearance. An Authorized Representative shall appear by filing a written notice with the Agency or Presiding Officer. Notice shall contain the name, address and telephone number, as well as facsimile number and email address of the Authorized Representative and of the Party represented, and may limit the purpose of the appearance. The filing by an attorney of any pleading, motion or other paper shall constitute an appearance by the attorney who sent it, unless otherwise stated.

(4) Timely Filing. Parties must file papers required or permitted to be filed with the Agency under 801 CMR 1.00, or any provision of applicable law, within the time provided by statute or Agency rule. Unless otherwise provided by applicable statute or regulation, Parties must file papers at an office of the Agency or with the Presiding Officer.

(a) Manner of Filing. All documents must be filed by email, unless otherwise ordered by the Presiding Officer for good cause or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Agencies must use all reasonable efforts to inform the general public of the appropriate email address where documents will be accepted, such as posting the email address on the Agency website or by other means. Papers filed by Electronic Medium shall be deemed filed at the office of the Agency or with the Presiding Officer on the date received by the Agency or Officer during usual business hours, but not later than 5:00 P.M. Parties are reminded of the prohibition concerning *ex parte* communications contained in 801 CMR 1.03(6). Parties must refrain from contacting the Presiding Officer about a matter, unless permission is granted by the Presiding Officer and a copy of the communication is sent to all other parties. If a party lacks access to sufficient Electronic Medium, Papers filed by U.S. mail shall be deemed filed on the date contained in the U.S. postal cancellation stamp or U.S. postmark, and not the date contained on a postal meter stamp. Papers filed by all other means shall be considered hand-delivered, and shall be deemed filed on the date received by the Agency during usual business hours. Any recipient of papers filed as provided in 801 CMR 1.01 (4)(a) shall stamp papers with the date received. The recipient shall provide on request date receipts to Persons filing papers by hand-delivery during business hours. The Presiding Officer shall make his or her best efforts to process filings delivered by mail and conduct hearings in a reasonable and timely manner.

(b) Papers received after usual business hours shall be deemed filed on the following business day.

(c) Notice of Agency Actions. Notice of actions and other communications from the Presiding Officer or adjudicating Agency, or its designee, shall be delivered by email, unless otherwise agreed upon by the parties, or directed by the Presiding Officer for good cause, or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Notice of actions and other communications by mail shall be presumed to be received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail. The postmark shall be evidence of the date of mailing.

(d) Computation of Time. Unless otherwise specifically provided by 801 CMR 1.00 or by other applicable law, computation of any time period referred to in 801 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included, unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Agency is closed, when the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the Agency is closed shall be excluded.

(e) Extension of Time. The Agency or Presiding Officer may, for good cause shown, extend any time limit contained in 801 CMR 1.00, unless otherwise restricted by law. All requests for extensions of time shall be made by motion before the expiration of the original or next previous extended time period. The filing of such motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion. 801 CMR 1.01(4)(e) shall not apply to any limitation of time prescribed by statute, unless extensions are permitted by the applicable statute

(5) Filing Format.

(a) Title. Papers filed with an Agency shall be titled with the name of the Agency, the docket number of the case if known, the names of the Parties and the nature of the filing.

1.01: continued

(b) Signatures. Documents filed by email will be deemed to be signed by the sender, and must include the sender's email address, street address, and telephone number. Papers filed with an Agency shall be signed and dated by an unrepresented Party, or by a Party's Authorized Representative, and shall state the address and telephone number of the Person signing the document. Such signature constitutes the signer's certification that he has read the document and knows the content thereof, that statements contained therein are believed to be true, that it is not interposed for delay and that if the document has been signed by an Authorized Representative that he has full power and authority to do so.

(c) Designation of Agency. An Agency designated as a Party to Adjudicatory Proceedings shall be designated by its name and not by the individual names of those constituting the Agency. If while the Adjudicatory Proceeding is pending, a change of employees occurs within the Agency, the Adjudicatory Proceeding shall not abate, and no substitution of Parties shall be necessary.

(d) Form.

1. Size and Printing Requirements. All papers filed for possible inclusion in the record shall be clear and legible and shall be presented in accordance with the standards of the Presiding Officer, if any, or on Agency forms whenever available.

2. Agency Format. An Agency may provide forms to be used for specific purposes by any Person or Party and use of forms provided shall be mandatory.

(e) Maintenance of Files. The papers filed in a given case shall be consolidated and maintained in an individual folder under a unique case or docket number with additional copies as the Agency or applicable statute may require.

(f) Service of Copies. In addition to the filing of any papers with the Agency, the Party filing papers shall serve a copy on all other Parties to the proceedings by email, unless a party lacks access to sufficient Electronic Medium or the Presiding Officer has ordered that papers may be filed by a method other than email, such as either delivery in hand or prepaid U.S. Mail. All papers filed with the Agency shall be accompanied by a statement certifying the date copies have been served, specifying the mode of service, the name of the Party served and the address of service. Papers served by Electronic Medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal. Failure to comply with this rule shall be grounds for the Agency to refuse to accept papers for filing. The means of service of copies should take no longer than the means of filing.

(6) Initiation of Formal Adjudicatory Proceedings.

(a) Agency Notice of Action. When an Agency initiates a proceeding against a Person regarding an Agency action or intended action, the Agency shall provide the Person with notice of the action or an order to show cause why the action should not be taken. The notice or order shall state the reason for the action. It shall specify in numbered paragraphs the specific facts relied upon as the basis for the action, the statute(s) or regulations authorizing the Agency to take action, and, in the case of a notice, any right to request an Adjudicatory Proceeding.

(b) Claim for Adjudicatory Proceeding. Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party.

(c) Form and Content of Claims. The notice of claim for an Adjudicatory Proceeding shall identify the basis for the claim. The notice shall state clearly and concisely the facts upon which the Party is relying as grounds, the relief sought and any additional information required by statute or Agency rule.

(d) Answer.

1. Answer to Claim. Except as statute or Agency rule may otherwise prescribe, within 21 days of receipt of a notice of claim for an Adjudicatory Proceeding, a Respondent shall file an answer to the initiating pleading. The answer shall contain full, direct and specific answers. The answer shall admit, deny, further explain, or state that the Respondent has insufficient knowledge to answer with specificity the initiating Party's allegations or claims. An allegation of inability to admit or deny for lack of information shall be treated as a denial. The answer shall also contain all affirmative defenses which the Respondent claims and may cite any supporting statute or regulation. All allegations contained in an initiating pleading which are neither admitted nor denied in the answer shall be deemed denied.

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2. Answer to Order to Show Cause. Except as statute or Agency rule may otherwise prescribe, within 21 days of receipt of an order to show cause, a Respondent shall file an answer thereto. The answer shall contain full, direct and specific answers. The answer shall admit, deny, further explain, or state that the Respondent has insufficient knowledge to answer with specificity the initiating Party's allegations or claims. An allegation of inability to admit or deny for lack of information shall be treated as a denial. The answer shall also contain all affirmative defenses which the Respondent claims and may cite any supporting statute or regulation. All allegations contained in an initiating pleading which are neither admitted nor denied in the answer shall be deemed denied.
- (e) Agency Answer. An Agency shall not be required to file an answer if, at the time the Agency took the action being appealed, the Agency disclosed to the Petitioner the material facts on which the Agency relied in taking such action and the statutes and/or regulations which authorized or required the Agency to take such action.
- (f) Joinder of Additional Parties and Amendments of Pleadings. If a Person is later joined or allowed to intervene, or allowed as a substitute Party, the Presiding Officer, upon his or her own initiative or upon the motion of any Party, may establish reasonable times for the filing of pleadings or other documents by any additional Party. The Presiding Officer may allow the amendment of any pleading previously filed by a Party upon conditions just to all Parties, and may order any Party to file an Answer or other pleading, or to reply to any pleading.
- (g) Withdrawal. Any Party may, by motion, apply to withdraw a claim, a defense, or a request for action or for review, upon terms established by Agency rule, or which the Presiding Officer may allow in fairness to all Parties.
- (7) Motions.
- (a) General Requirements.
1. Presentations and Responses. An Agency or Party may by motion request the Presiding Officer to issue any order or take any action not inconsistent with law or 801 CMR 1.00. Motions may be made in writing at any time after the commencement of an Adjudicatory Proceeding or orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether a hearing is desired. Within seven days after a written motion is filed with the Presiding Officer, any other Agency or Party may file written responses to the motion and may request a hearing. Responses to oral motions may be made orally at the hearing or in writing filed within seven days according to the discretion of the Presiding Officer.
  2. Action on Motions. The Agency or Presiding Officer shall, unless the Parties otherwise agree, give at least three days' notice of the time and place for the hearing when the Agency or Presiding Officer determines that a hearing on the motion is warranted. The Agency or Presiding Officer may grant requests for continuances for good cause shown or may, in the event of unexcused absence of a Party who received notice, permit the hearing to proceed. The unexcused Party's written motion or objections, if any, are to be regarded as submitted on the written papers. The Agency or Presiding Officer may rule on a motion without holding a hearing if delay would seriously injure a Party, or if presentation of testimony or oral argument would not advance the Agency or Presiding Officer's understanding of the issues involved, or if disposition without a hearing would best serve the public interest. The Agency or Presiding Officer may otherwise act on a motion when all Parties have responded or the deadline for response has expired, whichever occurs first. If the Agency or Presiding Officer acts on the motion before all Parties have responded and the time has not expired, the ruling may be subject to modification or rescission upon the filing of one or more subsequent but timely responses.
  3. Scope of Factual Basis for Hearing on Motions. The Parties may offer at a hearing on a motion evidence relevant to the particular motion. This evidence may consist of statements which are presented orally by sworn testimony, by affidavit, or which appear in admissible records, files, depositions or answers to interrogatories.
- (b) Motion for More Definite Statement. If a pleading to which a responsive pleading is required is so vague or ambiguous that a Party cannot reasonably frame a response, the Party may, within the time permitted for such response, move for a more definite statement before filing its answer. The motion shall set forth the defects complained of and the details desired. If the motion is granted, the more definite statement shall be filed within ten days of the order allowing the motion or within the deadline determined by the Agency or

Presiding Officer.

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(c) Motion to Strike. A Party may move to strike from any pleading, or the Agency or Presiding Officer may on its own motion strike, any insufficient allegation or defense, or any redundant, immaterial, impertinent or scandalous matter.

(d) Motion to Continue. For good cause shown a scheduled hearing may be continued to another date:

1. by agreement of all Parties with the permission of the Presiding Officer, provided the Presiding Officer receives a letter confirming the request and agreement before the hearing date; or
2. by written motion to continue made by a Party at least three days prior to the hearing date; or
3. by the Presiding Officer on his or her own motion or upon a motion to continue made at the scheduled hearing.

(e) Motion to Change Venue. Any Party may move to have a hearing held in a place other than the scheduled location. In deciding such motions the Presiding Officer shall consider the objections of Parties, the transportation expenses of the Presiding Officer, the possibility of conducting the hearing by means of telecommunication facilities, the availability of either stenographic services or a suitable recording system, the availability of a neutral and appropriate hearing site, the availability of witnesses because of their place of residence or state of health, and other appropriate matters.

(f) Motion for Speedy Hearing. Upon motion of any Party and upon good cause shown, the Presiding Officer may advance a case for hearing.

(g) Motion to Dismiss.

1. Grounds. Upon completion by the Petitioner of the presentation of his or her evidence, the Respondent may move to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his or her case. The Presiding Officer may act upon the dismissal motion when presented, or during a stay or continuance of proceedings, or may wait until the close of all the evidence.
2. Failure to Prosecute or Defend. When the record discloses the failure of a Party to file documents required by statute or by 801 CMR 1.00, to respond to notices or correspondence, to comply with orders of the Presiding Officer, or otherwise indicates an intention not to continue with the prosecution of a claim, the Presiding Officer may initiate or a Party may move for an order requiring the Party to show cause why the claim shall not be dismissed for lack of prosecution. If a Party fails to respond to such order within ten days, or a Party's response fails to establish such cause, the Presiding Officer may dismiss the claim with or without prejudice.
3. Dismissal for Other Good Cause. The Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided.

(h) Motion for Summary Decision. When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues.

(i) Substitution of Parties. The Agency or Presiding Officer may, on motion, at any time in the course of a proceeding, permit substitution of Parties as justice or convenience may require.

(j) Consolidation of Proceedings. If there are multiple proceedings which involve common issues, a Party shall notify the Agency or Presiding Officer of this fact, stating with particularity the common issues. The Agency or Presiding Officer may with the concurrence of all parties and any other tribunal that may be involved, consolidate the proceedings.

(k) Motion to Reopen. At any time after the close of a hearing and prior to a decision being rendered, a Party may move to reopen the record if there is new evidence to be introduced. New evidence consists of newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it. A motion to reopen shall describe the new evidence which the Party wishes to introduce.

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- (l) Motion for Reconsideration. After a decision has been rendered and before the expiration of the time for filing a request for review or appeal, a Party may move for reconsideration. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A, § 14(1) for the purposes of tolling the time for appeal.
- (8) Discovery.
- (a) General Policy and Protective Orders. The Parties are encouraged to engage in voluntary discovery procedures. In connection with document requests, interrogatories, depositions or other means of discovery, the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense. Orders may include limitations on the method, time, place and scope of discovery and provisions for protecting the secrecy of confidential information or documents.
- (b) Document Request Procedure and Costs. After a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve another Party or Agency with a document request which lists with reasonable specificity items requested for inspection which are in the possession, custody or control of the Party or Agency requested to provide them. A Party or Agency served with a document request shall respond within 30 days or as otherwise determined by the Presiding Officer. The Presiding Officer may require a Party requesting documents to pay the Party or Agency responding to a document request the fee per page determined by the Executive Office for Administration and Finance.
- (c) Depositions: When Permitted. After a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, the Presiding Officer may, upon motion by a Party, order the taking of the testimony of any Person by deposition before any officer authorized to administer oaths. The motion shall specify the name and address of each deponent and the reasons for the deposition. The Presiding Officer shall allow the motion only upon showing that the parties have agreed to submit the deposition in lieu of testimony by the witness, or the witness cannot appear before the Presiding Officer without substantial hardship. The motion shall only be allowed upon a showing by the moving Party that the testimony sought is significant, relevant, and not discoverable by alternative means. Motions for depositions shall be considered and acted upon in accordance with 801 CMR 1.01(7)(a).
- (d) Depositions: How Taken, Signing. Depositions shall be taken orally before an officer having power to administer oaths. Each deponent shall be duly sworn. In instances where sincere scruple forbids the taking of an oath, a person may affirm with the same legal effect as having been sworn. Any Party shall have the right to cross-examine. The questions asked, the answers given, and any objections shall be recorded. The Presiding Officer shall rule only on objections accompanied by a reason and only in regard to the stated reason. Each deponent shall have the option of reviewing and affirming the deposition transcript and of indicating an affirmance in whole or in part by signing a statement to that effect on the title page of the transcript. The deponent may waive the reviewing and signing, in which case the officer shall state the fact of the waiver in the officer's certification, and the transcript shall then have the same status as if signed by the deponent. Subject to appropriate rulings on objections, the Presiding Officer may receive the deposition in evidence, as if the testimony contained therein had been given by a witness in the proceeding.
- (e) Recording by Other than Stenographic Means. The Presiding Officer may on motion permit the testimony at a deposition to be recorded by other than stenographic means, in which event the Presiding Officer's authorization shall designate the manner of recording, preserving, and filing of the record of the deposition and may include other provisions to assure that the recorded testimony will be accurately preserved.
- (f) Certification of Transcript. A duplicate transcript of the deposition shall be certified by the officer before whom the deposition was taken. When the deposition is introduced into evidence, the Party requesting the deposition shall order a duplicate copy of the transcript and forward a copy to the Presiding Officer.

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(g) Interrogatories. With the approval of the Agency or Presiding Officer, after a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve written interrogatories upon any other Party for the purpose of discovering relevant information not privileged and not previously supplied through voluntary discovery. Interrogatories may be served by Hand-delivery, pre-paid U.S. mail or Electronic Medium. A duplicate of all interrogatories shall be simultaneously filed with the Presiding Officer. No Party, without the approval of the Presiding Officer, shall serve more than a total of 30 interrogatories either concurrently or serially including subsidiary or incidental questions. A Party may not serve any interrogatories less than 45 days before the scheduled hearing, without the approval of the Agency or Presiding Officer.

(h) Answers to Interrogatories. Each interrogatory shall be separately and fully answered under the penalties of perjury, unless an objection to the interrogatory with supporting reasons are stated in *lieu* of an answer. An answer shall be served within 30 days of receipt of an interrogatory, or within such other time as the Presiding Officer may specify. A duplicate of all answers to interrogatories shall be simultaneously filed with the Presiding Officer.

(i) Motion for Order Compelling Discovery. A Party may file with the Presiding Officer, subject to 801 CMR 1.01(7)(a), a motion to compel discovery if a discovery request is not honored, or only partially honored, or interrogatories or questions at deposition are not fully answered. If the motion is granted and the other Party fails without good cause to obey an order to provide or permit discovery, the Presiding Officer, before whom the action is pending, may make orders in regard to the failure as are just, including one or more of the following:

1. An order that designated facts shall be established adversely to the Party failing to comply with the order; or
2. An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.

(9) Intervention and Participation.

(a) Intervention. Any Person not initially a Party, who may be substantially and specifically affected thereby and wishes to intervene or participate in an Adjudicatory Proceeding shall file a written petition for leave to be allowed to do so. Except as otherwise provided in 801 CMR 1.01(9), the petition shall be subject to 801CMR 1.01(7)(a).

(b) Form and Content. The petition shall state the name and address of the Person filing the petition. It shall describe the manner in which the Person making the petition may be affected by the proceeding. It shall state why the Agency or Presiding Officer should allow intervention or participation, any relief sought, and any supporting law.

(c) Filing the Petition. The petition may be filed at any time following a request for an Adjudicatory Proceeding or an order to show cause, but in no event later than the date of hearing. Petitions may be allowed at the discretion of the Presiding Officer, for any Person who is likely to be substantially and specifically affected by the proceeding, provided all existing Parties are given notice and an opportunity to respond pursuant to 801 CMR 1.01(7)(a).

(d) Rights of Intervenors. The Presiding Officer may permit any Person who is likely to be substantially and specifically affected by the proceeding. Any Person permitted to intervene shall have all the rights of a Party, subject to the discretion of the Presiding Officer to avoid undue delay or unnecessary duplication of evidence, and shall be subject to all limitations imposed upon a Party.

(e) Rights of Participants. The Presiding Officer may permit any Person who may be affected by a proceeding may be permitted to participate. Permission to participate shall be limited to the right to argue orally at the close of a hearing and to file an amicus brief, but shall not necessarily make the Person allowed to participate a Party in interest who may be aggrieved by any result of the proceeding. A Person who petitioned to intervene and who was allowed only to participate may participate without waiving his or her rights to administrative or judicial review of the denial of his or her motion to intervene.

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(f) Intervention to Protect the Environment. Any group of ten or more Persons may intervene collectively as a Party in any Adjudicatory Proceeding according to M.G.L. c. 30A, § 10A, provided that intervention is limited to the issue of actual or probable damage to the environment as defined in M.G.L. c. 214 § 7A, and the elimination or reduction thereof. The petition to intervene pursuant to M.G.L. c. 30A, § 10A shall also state the names and addresses of the members of the group and identify the member of the group, or the group's attorney, or the group's agent, who will be the group's representative before the Presiding Officer. The representative shall have the sole authority to sign papers for the group and to accept service for the group. Any Paper served on the representative of the group shall be deemed served on the entire group. If no representative is specifically stated in the petition, the first Person mentioned in the motion to intervene as a member of the group shall be deemed the representative of the group. A group that is permitted to intervene as a Party shall be collectively deemed a single Party as defined in 801 CMR 1.00.

(g) Permissive Reference. When a Party to an action relies upon any rule or regulation issued by an Agency, other than the one conducting the proceeding as grounds for a claim or defense, the Agency having promulgated the rule or regulation on timely application by a Party and in the discretion of the Presiding Officer, or at the initiative of the Presiding Officer, may offer a relevant construction, interpretation or application of the rule or regulation in aid of the resolution of one or more of the issues involved in the Adjudicatory Proceeding. Any request to the promulgating Agency shall be in writing and present a neutral statement of the issue or issues possibly affected by the rule or regulation. The promulgating Agency may respond in writing as promptly as its resources allow, but in no event later than 30 days from its receipt of the request. The promulgating Agency may expressly decline to respond and need not justify its position, and its failure to respond within the time limited shall be deemed a declination to do so.

(10) Hearings and Conferences.

(a) Pre-hearing Conference. The Presiding Officer may initiate or upon the application of any Party, may call upon the Parties to appear for a conference to consider;

1. the simplification or clarification of the issues;
2. the possibility of obtaining stipulations, admissions, agreements on matters already of record, or similar agreements which will reduce or eliminate the need of proof;
3. the limitation of the number of expert witnesses, or avoidance of cumulative evidence, if the case is to be heard;
4. the possibility of an agreement disposing of any or all issues in dispute; and
5. such other matters as may aid in the disposition of the Adjudicatory Proceeding.

Those matters agreed upon by the Parties shall be reduced to writing and signed by them, and the signed writing shall constitute a part of the record. The scheduling of a pre-hearing conference shall be according to Agency rule or, in the absence of rules, solely within the discretion of the Presiding Officer.

(b) Stipulations. In the discretion of the Presiding Officer, the Parties may, by written stipulation filed with the Presiding Officer at any stage of the proceeding, or by oral stipulation made at a hearing, agree as to the truth of any fact pertinent to the proceeding. The Presiding Officer may require parties to propose stipulations. In making findings, the Presiding Officer need not be bound by a stipulation which is in contravention of law or erroneous on its face.

(c) Submission without a Hearing. Any Party may elect to waive a hearing and submit his or her case upon written submissions. Submission of a case without a hearing does not relieve the Parties from the necessity of proving the facts supporting their allegations or defenses on which a Party has the burden of proof.

(d) Conduct of Hearing.

1. Decorum. All Parties, their Authorized Representatives, witnesses and other Persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Presiding Officer may take appropriate action. Appropriate action may include refusal to allow a disruptive Person to remain in the hearing room and, if such Person is a Party, to allow participation by representative only.



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2. Duties of Presiding Officer. The Presiding Officer shall conduct the hearing, administering an oath or affirmation to all witnesses, making all decisions on the admission or exclusion of evidence and resolving questions of procedure. The Presiding Officer shall file a decision or recommended decision with the Agency within a reasonable time after the close of the hearing.
- (e) Order of Proceedings.
1. Opening. In the usual case, except as otherwise required by law, in hearings resulting from a notice of claim of an adjudicatory proceeding, the Party filing the claim shall open and first present evidence; in hearings resulting from orders to show cause, the Agency issuing the order shall open and first present evidence.
  2. Order of Presentation. The Party taking the position contrary to that of the Party opening shall have the right to present his or her position upon completion of the opening Party's case.
  3. Closing. The Party opening shall argue last in summation.
  4. Discretion of the Presiding Officer. The Presiding Officer may, when the evidence is peculiarly within the knowledge of one Party, or when there are multiple Petitioners, or when he or she otherwise determines appropriate, direct who shall open and may otherwise determine the order of presentation.
- (f) Presentation of Evidence. All Parties shall have the right to present documentary and oral evidence, to cross-examine adverse or hostile witnesses, to interpose objections, to make motions and oral arguments. Cross-examination is to follow the direct testimony of a witness. Whenever appropriate, the Presiding Officer shall permit reasonable redirect and recross-examination and allow a Party an adequate opportunity to submit rebuttal evidence. Except as otherwise provided, evidence of the Respondent shall be presented after the presentation of the Petitioner's case in chief. The Respondent shall first argue in summation.
1. Oath. A witness's testimony shall be under oath or affirmation.
  2. Offer of Proof. An offer of proof made in connection with a ruling of the Presiding Officer rejecting or excluding proffered testimony shall consist of a statement of the substance of the evidence which the Party contends would be adduced by the testimony. If the excluded evidence consists of evidence in documentary or written form, it shall be filed and marked for identification and shall constitute the offer of proof.
- (g) Subpoenas. The Agency or Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12.
- (h) Administrative Notice. The Presiding Officer may take notice of fact(s), pursuant to the requirements of M.G.L. c. 30A, § 11(5).
- (i) Transcript of Proceedings.
1. Stenographic or Recorded Records and Transcripts. Except where a Party elects to provide a public stenographer as provided herein, the testimony and argument at the hearing shall be recorded either stenographically or by Electronic Medium. The Presiding Officer shall arrange for verbatim transcripts of the proceedings to be supplied at cost to any Party upon request, at the Party's own expense. The Agency may elect to supply a copy of the tape, disc or other audio-visual preserving medium employed at the proceeding to record its events in *lieu* of a verbatim transcript. Any Party, upon motion, may be allowed to provide a public stenographer to transcribe the proceedings at the Party's own expense upon terms ordered by the Presiding Officer. In this event, a verbatim transcript shall be supplied to the Presiding Officer at no expense to the Agency.
  2. Correction of Transcript. Corrections of the official hearing transcript may be made only to make it conform to the evidence presented at the hearing. Transcript corrections, agreed to by opposing Parties, may be incorporated into the record, if and when approved by the Presiding Officer. If opposing Parties cannot agree on transcript corrections, any Party may report the fact to the Presiding Officer, who may call for the submission of proposed corrections and shall determine what corrections, if any, are to be made with reliance on his or her own notes.
- (j) Hearing Briefs. At the close of the taking of testimony and prior to his or her rendering a decision, the Presiding Officer may in his or her discretion call for and fix the terms of the filing of written summaries and arguments on the evidence and/or proposed findings of fact and conclusions of law.

1.01: continued

(k) Settling the Record.

1. Contents of Record. The record of the proceeding shall consist of the following items: notices of all proceedings; all motions, pleadings, briefs, memoranda, petitions, objections, requests and rulings; evidence received, including deposition transcripts, and offers of proof with the arguments; statements of matters officially noticed if not otherwise documented; interrogatories and the answers; all findings, decisions and orders presented whether recommended or final; transcripts of the hearing testimony, argument, comments or discussions of record or the tape, disc or preserving medium; and any other item the Presiding Officer has specifically designated be made a part of the record. The record shall at all reasonable times be available at the offices of the Agency or other designated location for inspection by the Parties.

2. Evidence after Record Closed. No evidence shall be admitted after the close of the record, unless the Presiding Officer reopens the record.

3. Exceptions. Formal exceptions to rulings on evidence and procedure are unnecessary. It is sufficient that a Party, at the time that a ruling is made or sought, makes known his or her objection to and grounds for any action taken. If a Party does not have an opportunity to object to a ruling at the time it is made, or to request a particular ruling at an appropriate time, the Party may submit a written statement of his or her specific objections and grounds within three days of notification of action taken or refused. Oral or written objections to evidentiary rulings shall be part of the record.

(11) Decisions. Unless otherwise provided by statute, decisions shall be made as follows:

(a) Direct Agency Decisions. The Agency may by regulation elect to preside at the reception of evidence in all cases. In the absence of such regulation, the Agency may elect to preside at the reception of evidence in particular cases and shall exercise this election by so stating in the notice scheduling the time and place for the Adjudicatory Proceeding in the particular case. The decision of the Agency as Presiding Officer shall be the final Agency decision.

(b) Initial Decisions. A Presiding Officer other than the Agency who presided at the reception of evidence shall render a decision as provided in M.G.L. c. 30A § 11(8). The decision of the Presiding Officer shall be called an initial decision. The Presiding Officer shall promptly provide the parties with a copy of his or her decision when filed with the Agency.

(c) Tentative Decisions. If the Agency elects to render a decision on the record without having presided at the reception of evidence, either by regulation or by statement in the notice scheduling the hearing, the initial decision shall also become a tentative decision.

1. Objections and Response. The Parties shall have the opportunity to file written objections to the tentative decision with the Agency, which may be accompanied by supporting briefs. The Parties shall have 30 days from the filing of the tentative decision or the transcript corrections under 801 CMR 1.01(10)(i)2., whichever occurs last, to file written objections. Parties may file responses to objections within 20 days of receipt of a copy of the objections. The Agency may order or allow the Parties to argue orally. A Party requesting oral argument shall file the request with the Party's written objections or response.

2. Agency Action on the Tentative Decision. The Agency may affirm and adopt the tentative decision in whole or in part, and it may recommit the tentative decision to the Presiding Officer for further findings as it may direct. The same procedural provisions applicable to the initial filing of the tentative decision shall apply to any refiled tentative decision after recommitment. If the Agency does not accept the whole of the tentative decision, it shall provide an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt. However, the Agency may not reject a Presiding Officer's tentative determinations of credibility of witnesses personally appearing. The Agency's decision shall be on the record, including the Presiding Officer's tentative decision, and shall be the final decision of the Agency not subject to further Agency review.

3. Failure to Issue Final Decision. If the Agency fails to issue a final decision within 180 days of the filing or refiled of the tentative decision, the initial decision shall become the final decision of the Agency, not subject to further Agency review.

1.01: continued

(d) Final Decisions. Every decision shall be made as required in M.G.L. c. 30A § 11(8), and shall be mechanically or electronically printed, and signed by the Presiding Officer or by those members of the Agency making the decision. A majority of the members constituting the Agency or the Agency panel authorized by the Agency to decide the case shall make direct Agency decisions. A final decision shall incorporate by reference those portions of an initial or tentative decision that are affirmed and adopted, and may expressly incorporate other portions it modifies or rejects with its reasons therefor. A final decision by an Agency under 801 CMR 1.01(11)(c) shall make appropriate response to any objections filed in regard to an initial or tentative decision.

(e) Decision Maker Unavailable. When a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence again from the beginning. The Agency shall provide without cost to all Parties and the successor a copy of the official verbatim transcript, or completed portions thereof, if not previously provided.

(f) Notice of Decision. The Agency or Presiding Officer shall promptly provide all Parties with a copy of every Agency decision or order when filed and otherwise give prompt notice of all Agency actions from which any time limitation commences.

(12) Telecommunications. The Presiding Officer may designate that all or a portion of a hearing be conducted with one or more participants situated in different locations and communicating through the medium of one or more telecommunication devices, including telephone and video conferencing, unless the Respondent or Petitioner lacks access to sufficient Electronic Medium.

(13) Further Appeal. After the issuance of a final decision, except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any Agency in an Adjudicatory Proceeding shall be entitled to a judicial review thereof in accordance with M.G.L. c. 30A, § 14.

(14) Withdrawal of Exhibits and Recording Media. Three years after a decision in a given case has become final and all periods for requesting further review, whether administrative or judicial, which may require reference to original exhibits or the reproduction or transcription of events recorded stenographically or by Electronic Medium, have lapsed, an Agency or Presiding Officer may in its discretion:

- (a) permit the withdrawal of original exhibits or any part thereof by the Party or Person entitled thereto; and
- (b) withdraw from its file stenographic or electronic media employed to record the events of the Adjudicatory Proceedings before it and dispose of them as it sees fit.

1.02: Informal/Fair Hearing Rules

(1) Preamble. 801 CMR 1.02 of the Standard Adjudicatory Rules of Practice and Procedure is a self-contained segregable body of regulations of general applicability for proceedings in which formal rules cannot be utilized or federal fair hearing procedures are applicable. An Agency must determine for any class of hearings whether to hold hearings under 801 CMR 1.01, Formal Hearings, or 801 CMR 1.02. Agencies shall determine based on such factors as: the volume of cases held; whether claimants are represented by counsel; the complexity of the issues; or the applicability of Federal fair hearing procedures. All notices from which an Adjudicatory Proceeding can be claimed shall state which rules apply, whether formal under 801 CMR 1.01, or informal under 801 CMR 1.02. In addition, all notices shall contain a notice printed in English, Spanish, Portuguese, Italian, Greek, French and Chinese that informs the reader that the document is important and should be translated immediately.

1.02: continued

(2) Scope, Construction and Definitions.

(a) Scope and Construction. 801 CMR 1.02 shall apply to Adjudicatory Proceedings involving review of action or inaction of an Agency or of a Veterans' agent with respect to a claim for benefits or services. Without intending to limit its applicability, 801 CMR 1.02 shall apply to all hearings held pursuant to the fair hearing requirements of 7 CFR 273; 42 USC 503 (a)(3) and M.G.L. c. 151A, §§ 39 and 41. 801 CMR 1.02 shall also apply to the hearing procedures of any other Agency which is, in whole or in part, governed by the requirements of similar law, and to classes of hearings of any Agency for which 801 CMR 1.02 establishes minimum procedural protections for applicants or recipients in such proceedings, and shall in no way be construed to limit the protections afforded by state or federal law.

(b) Definitions. Refer to all definitions included in M.G.L. c. 30A and in 801 CMR 1.01. In addition, the following words when used in 801 CMR 1.02 shall have the following meanings:

Applicant. An individual who has applied or been denied the opportunity to apply for benefits available under any program administered by an Agency, H.C.C. or veterans' agent appointed pursuant to M.G.L. c. 115, § 3.

ASAP. An Aging Services Access Point organized to provide services pursuant to a contract with The Executive Office of Elder Affairs.

Benefits. Any benefit to an individual or service administered or rendered by an Agency.

Case Manager. The Person who performs case management services.

DALA. The Division of Administrative Law Appeals.

Division of Hearings (DTA). The Division of Hearings for the Department of Transitional Assistance.

Electronic Medium. Any device used to preserve or transmit information electronically, including but not limited to telephone, e-mail and facsimile.

Hearing. An Adjudicatory Proceeding held under these informal rules at 801 CMR 1.02.

Institution. Any licensed hospital, nursing home or public medical institution.

Presiding Officer. The individual(s) authorized by law or designated by the Agency or DALA to conduct an Adjudicatory Proceeding.

Recipient. A Person or family receiving benefits under a program administered by an Agency, ASAP, or Veterans' Agent pursuant to M.G.L. c. 115, § 3.

(3) Representation.

(a) Appearance. An individual may appear in his or her own behalf, or may be accompanied, represented and advised by an Authorized Representative.

(b) Notice. An Authorized Representative shall appear by filing a written notice with the Agency or Presiding Officer. Notice shall contain the name, address and telephone number, as well as facsimile number and e-mail address if available, of the Authorized Representative and of the Party represented, and may limit the purpose of the appearance. The filing by an attorney of any pleading, motion or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise.

(c) Powers. An Authorized Representative may exercise on a Party's behalf any rights and powers vested in that Party by 801 CMR 1.00.

(4) Time. Papers shall be filed according to the procedures set forth in 801 CMR 1.01(4)(a) through (e).

1.02: continued

(5) Filing. All papers filed with the Agency, its designee, or DALA should contain the name, address, telephone number and signature of the sender or Authorized Representative. Papers which do not contain all of this information shall be accepted for filing if they contain sufficient identifying information so they can be placed in the appropriate file.

(6) Initiation of Adjudicatory Proceedings.

(a) Notice of Agency, ASAP, or Veterans' Agent Action.

1. Requirements. Notice of action by an Agency, ASAP or Veterans' agent to deny, terminate, reduce, or suspend services or Benefits to a Recipient or to deny Benefits or services to an applicant shall include but not be limited to:

- a. clear and plain statement of the action to be taken;
- b. the date on which the action shall become effective;
- c. an explanation of reasons for the action;
- d. the regulation or other legal authority on which such action is based;
- e. the telephone number and address where further information may be obtained;
- f. an explanation of the applicant's or recipient's right to request a hearing (including the time limits and manner for request);
- g. a copy of the form used to request a hearing;
- h. an explanation of the circumstances, if any, under which Benefits or services will continue pending an Adjudicatory Proceeding;
- i. an explanation of the right to be represented, including if applicable, the availability of assistance; and
- j. the mailing address, telephone number and office hours of the office responsible for receiving and/or hearing appeals from the Agency action.

2. Exceptions for ASAP.

- a. If a Recipient voluntarily assents in writing to a termination, reduction or suspension of services, the ASAP shall implement the change in service in accordance with the terms of that assent, without sending notice of action. ASAP shall use a written assent format provided by Elder Affairs.
- b. If a recipient is hospitalized or otherwise institutionalized, ASAP shall suspend the Recipient's services as soon as feasible, without sending notice of action. Upon discharge, the ASAP shall reassess the Recipient's service needs.
- c. If an ASAP has actual knowledge that a Recipient is temporarily absent from the ASAP service area and is therefore unavailable to receive services, the ASAP may suspend services for the period of the Recipient's absence without sending notice of action.

(b) Grounds for Appeal. A right to request an Adjudicatory Proceeding shall arise when controversy exists which by law or Agency regulation requires an Adjudicatory Proceeding, or when a Person is aggrieved by an Agency, ASAP, or veterans' agent action or failure to act.

(c) Adjudicatory Proceedings - How Taken. A Person entitled to an Adjudicatory Proceeding or his or her Authorized Representative must request a hearing in writing in the form prescribed, or on the form provided by the Agency or the Presiding Officer, and must sign and date the request. At the discretion of the Agency, the request for hearing may be filed by Electronic Medium. The requesting Party must file with the Agency or the Presiding Officer within the time limit prescribed by law. In the absence of any time limit, the requesting Party must file within 60 days after receipt of the notice of action or, for failure to act, within 120 days from application, unless the Agency has established a longer period.

(d) Continuation of Benefits Pending Appeal. Benefits shall continue when required by applicable statute or regulation, if the Recipient or Institution has met the standard set forth by applicable statute or regulation.

(e) Termination of Continued Benefits. Benefits continued in accordance with 801 CMR 1.02(6)(d) shall be terminated if:

1. a determination is made at the hearing that the sole issue is a challenge to the validity of a particular law or regulation; or
2. a change affecting the Recipient's Benefits occurs subsequent to the Adjudicatory Proceeding request which makes the previously filed Adjudicatory proceeding request moot, and the Recipient fails to request a hearing on the subsequent matter within the applicable time period; or

1.02: continued

3. a determination is made at the hearing that the Agency action to terminate Benefits was correct.
- (7) Special Requests.
    - (a) Withdrawals. With the approval of the Agency or the Presiding Officer, a Petitioner may withdraw his or her request for an Adjudicatory Proceeding in a writing signed by the Petitioner or his or her Authorized Representative.
    - (b) Emergency Scheduling. The Agency or the Presiding Officer, on its own or by request of a Party, may for good cause order an accelerated hearing.
    - (c) Other Requests. A Party may request rulings or relief in writing at any time or orally during a hearing. After providing notice to the other Parties, the Agency or Presiding Officer shall rule on the request with or without a hearing.
  - (8) Discovery.
    - (a) Generally. Parties to an Adjudicatory Proceeding are encouraged to engage in voluntary discovery.
    - (b) Examination of File. At any time after an Adjudicatory Proceeding has been requested, a Party and its Authorized Representative shall have adequate access to and an opportunity to examine and copy or photocopy the entire content of his or her case file and all other documents to be used by the Agency, ASAP, or Veterans' Agent at the hearing. The cost of photocopying shall be determined from time to time by the Executive Office for Administration and Finance.
  - (9) Group Hearings.
    - (a) Purpose. A group hearing may be held if it appears from the request for a hearing or other written information submitted by the Parties that the matters involve questions of fact which are identical, or the sole issue involves federal or state law or policy, or changes in federal or state law. For these purposes, a change in federal or state law shall mean any change in standards governing eligibility or limitation in the amount of time for which Benefits or services are provided, affecting a class of Recipients or Applicants and promulgated by state or federal law or regulation.
    - (b) Severance of Individual Hearing. If, at any stage of such group hearing, the Presiding Officer finds that any individual appeal involves questions of fact unique to the individual Petitioner, such as the applicability of the law change to such Petitioner, the Presiding Officer shall sever the appeal and hear it individually.
  - (10) Hearings.
    - (a) Adjustment of Matters Related to Hearing. A filed request for hearing does not prohibit an adjustment in the matters at issue prior to the hearing. If as a result of an adjustment, the Petitioner is satisfied and wishes to withdraw all or part of his or her appeal, he or she shall file a signed withdrawal in writing with the Agency or the Presiding Officer in accordance with 801 CMR 1.02(7)(a). A hearing shall not be delayed or canceled because of a proposed adjustment under consideration, unless the Petitioner requests a delay or cancellation.
    - (b) Submission without a Hearing. The Petitioner may elect to waive a hearing and to submit any documents without appearing at the time and place designated for the hearing. Submission of a case without a hearing does not relieve the Parties from supplying all documents supporting their allegations or defenses. Affidavits and stipulations may be employed to supplement other documentary evidence in the record.
    - (c) Notice of Hearing. The notice of the hearing must include the date, time, and place of the hearing, an explanation of the hearing procedure and an explanation of the Party's right to have an Authorized Representative present. Unless already provided in the notice of action under 801 CMR 1.02(6)(a)(1), the notice shall provide sufficient notice of the issues involved so that the Parties may have a reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all Parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

1.02: continued

(d) Dismissals for Failure to Appear. If the Petitioner fails to appear at the hearing, the Presiding Officer shall notify the Petitioner in writing that a default will be entered against him, unless within ten days from the date of said notice he or she files a motion for a rescheduled hearing, and the motion is granted. In the event a Petitioner fails to appear at the time and place of a granted rescheduled hearing, the appeal shall be dismissed and shall include an explanation of the manner in which dismissals may be vacated. Any motions to vacate a dismissal must be in writing, signed by the Petitioner or his or her Authorized Representative, and directed to the Presiding Officer. Dismissals shall be vacated only for good cause shown.

(e) Dismissal for Failure to Prosecute. The Agency or the Presiding Officer may order dismissal for failure to prosecute in accordance with the provisions of 801 CMR 1.01(7)(g)2.

(f) Presiding Officer's Duties and Powers at Hearings. The Presiding Officer shall have the duty to conduct a fair hearing to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence, including examining witnesses and authorizing the Agency to pay for an independent medical examination; to exclude irrelevant or unduly repetitious evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; to reach a fair, independent and impartial decision based upon the issues and evidence presented at the hearing and in accordance with the law; and to reconvene the hearing with notice to the parties at any time prior to the decision being issued.

(g) Rights and Duties of Parties.

1. Each Party may present his or her own case, or may be assisted by an Authorized Representative at his or her expense. The Party, or Authorized Representative, shall have a right to:

- a. present witnesses;
- b. present and establish all relevant facts and circumstances by oral testimony and documentary evidence;
- c. advance any pertinent arguments without undue interference;
- d. question or refute any testimony, including an opportunity to cross-examine adverse witnesses; and
- e. examine and introduce evidence from his or her case record, and examine and introduce any other pertinent documents.

2. The Agency, in addition to the rights and duties above, at 801 CMR 1.02(10)(g)1.:  
 a. is responsible for submitting at the hearing all documented information on which its action or motions are based;  
 b. shall introduce into the hearing only material which pertains to the issues; and  
 c. may designate and may send a staff person to the hearing to testify as to its action or inaction. In cases involving the judgment of the Case Manager relative to reduction, suspension, or termination of services, the Case Manager, or a person authorized to represent the Case Manager, shall be present at the hearing.

(h) Evidence.

1. General. The Agency or Presiding Officer shall admit and consider evidence in accordance with M.G.L. c. 30A, § 11(2).

2. Presented at Hearing. Except as the Agency, its designee, or Presiding Officer may otherwise order, any documentary evidence on which a decision is based must be presented either at the hearing or, in cases submitted without a hearing pursuant to 801 CMR 1.02(10)(b), before notification that the case is ready for decision. Copies of any evidence shall be provided to all other Parties.

3. Oral Testimony. Oral testimony shall be given under oath or affirmation. Witnesses shall be available for examination and cross-examination.

4. Stipulations. Stipulations may be used as evidence in accordance with the provisions of 801 CMR 1.01(10)(b).

5. Additional Evidence. The Agency or the Presiding Officer may in any case require any Party or the Agency, with appropriate notice to all other Parties, to submit additional evidence on any relevant matter.

(i) Subpoenas. The Agency or the Presiding Officer may issue, vacate or modify subpoenas in accordance with M.G.L. c. 30A, § 12. Parties may issue subpoenas in accordance with M.G.L. c. 30A, § 12(3). Witnesses may petition the Agency to vacate or modify subpoenas in accordance with M.G.L. c. 30A, § 12(4).

1.02: continued

(j) Scheduling. Upon receipt of a request for a hearing, the Agency or Presiding Officer shall within a reasonable time register the appeal, set a date and designate a site for a hearing, and notify all Parties. If the Petitioner has a disability or is otherwise unable to appear at the designated site, the Petitioner may request that the hearing be held at another convenient location. The Agency or Presiding Officer may grant such request.

(k) The Hearing Record.

1. Contents of the Record All documents and other evidence offered or taken shall become part of the record, which shall be the exclusive basis of the decision. The record shall at reasonable business hours be available at the offices of the Agency or other designated location for inspection by the parties.

2. Stenographic or Taped Record. All evidence and testimony at the hearing shall be recorded either stenographically or by Electronic Medium. The Presiding Officer shall arrange for verbatim transcripts of the proceedings to be supplied at cost to any Party upon request, at the Party's own expense. The Agency by rule may elect to supply a copy of the tape, disc or other audio-visual preserving medium employed at the proceeding to record its events in lieu of a verbatim transcript at the Party's own expense. The Agency or the Presiding Officer may permit any Party to maintain his or her own stenographic or electronic record.

(l) Continuances. The Agency or the Presiding Officer may continue a hearing by notifying all parties and authorized representatives of the date, time and place of the continued hearing.

(11) Decisions. Upon completion of the hearing, the Agency or Presiding Officer shall render a written decision as promptly as administratively feasible, in accordance with M.G.L. c. 30A, § 11(8).

(12) Appeals.

(a) General. Within the time prescribed by law or regulation, or within ten days where no other time limit is prescribed, any Party entitled to further administrative review of the decision at an Agency which has a review process, may file a request for review with the appropriate reviewing Agency. Upon receipt of motion for administrative review, the reviewing Agency shall notify all other parties of any hearing scheduled.

(b) DALA Appeals. For any decision adverse to a Petitioner, DALA shall send the Petitioner a copy of the decision with a notice informing the Petitioner of his or her right to appeal. The notice should specify:

1. that the Petitioner must make a written request for appeal within 15 days of the date DALA mailed the notice;
2. that the Petitioner must send the written request for hearing to DALA;
3. that the Petitioner must ask for a new hearing in order to have a new hearing; and
4. that unless the Petitioner requests a new hearing, the appeal shall be limited to a review of the record to determine if the decision was supported by substantial evidence.

1.03: Miscellaneous Provisions Applicable to All Adjudicatory Proceedings

(1) Preamble. 801 CMR 1.03 is applicable to all proceedings held under 801 CMR 1.01 and 1.02.

(2) Amendments. The Secretary of Administration and Finance may adopt any appropriate amendments and additions to 801 CMR 1.00 in accordance with M.G.L c. 30A, § 9. Any Agency may make application to the Secretary of Administration and Finance for amendments to 801 CMR 1.00.

(3) Severability. If any rule contained herein is found to be unconstitutional or invalid by a Court of competent jurisdiction, the validity of the remaining rules will not be so affected.

(4) Exemptions. Any agency wishing to be exempted from 801 CMR 1.00 shall apply for exemption to the Secretary of Administration and Finance.

(5) Conflicts. No Presiding Officer who has a direct or indirect interest, personal involvement or bias in an Adjudicatory Proceeding shall conduct a hearing or participate in decision-making for the relevant Adjudicatory Proceeding.



## 1.03: continued

(6) Ex Parte Communications.(a) General Provisions. In any Adjudicatory Proceeding:

1. Any member of the body comprising the Agency, Presiding Officer, or other Agency employee who is or may reasonably be expected to be involved in the decisional process of the Adjudicatory Proceeding:
  - a. shall not make or receive an *ex parte* communication to or from any interested person outside the Agency relevant to the merits of the Adjudicatory Proceeding; and
  - b. shall place on the public record of the Adjudicatory Proceeding:
    - i. all prohibited written communications made or received;
    - ii. memoranda stating the substance of all prohibited oral communications made or received;
    - iii. all written responses, and memoranda stating the substance of all oral responses, to the materials described in 801 CMR 1.03(6)(a)1.b.i. and .ii.; and
    - iv. a statement whether, in his or her opinion, the receipt of the *ex parte* communication disqualifies him or her from further participation in the Adjudicatory Proceeding, pursuant to 801 CMR 1.04(5).
2. The Presiding Officer may, upon the motion of any Party or on his or her own motion, accept or require the submission of additional evidence of the substance of a communication prohibited by 801 CMR 1.03(6).
3. Upon receipt of a communication knowingly made or knowingly caused to be made by a Party in violation of 801 CMR 1.03(6), the Presiding Officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the Party to show cause why his or her claim or interest in the Adjudicatory Proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.
4. The prohibitions of 801 CMR 1.03(6) shall apply beginning at the time at which an Adjudicatory Proceeding is initiated under 801 CMR 1.01(6) or 1.02(6), unless the person responsible for the communication knows or reasonably should know that the Adjudicatory Proceeding will be initiated, in which case the prohibitions shall apply beginning at the time of such person's acquisition of such actual or constructive knowledge.

(b) Exception. 801 CMR 1.03(6)(b) does not apply to consultation among Agency members concerning the Agency's internal administrative functions or procedures.

1.04: Conduct of Mediation at the Division of Administrative Law Appeals

(1) Preamble. On cases appealed to the Division of Administrative Law Appeals, or assigned to the Division of Administrative Law Appeals for hearing, the case may be assigned to mediation at the request of any Party. Any Party may decline assignment to mediation.

(2) Definitions. Refer to all definitions included in M.G.L. c. 30A and in 801 CMR 1.01 and 1.02. In addition, MODR shall mean the Massachusetts Office of Dispute Resolution.

(3) Mediation Referral.

(a) Internal Mediation. DALA shall supply the Parties with a list containing not less than three DALA administrative magistrates as suggested mediators. Each Party may strike one administrative magistrate from the list, and DALA will not assign any administrative magistrate who has been stricken from the list to conduct the mediation. DALA shall notify the parties of the assigned mediator. The mediator shall, within ten days of assignment, schedule a mediation at a convenient time and location.

(b) External Mediation. By decision of DALA or by agreement between the parties in *lieu* of or following an internal mediation, a case can be referred to the Massachusetts Office of Dispute Resolution (MODR) for mediation or other dispute resolution service. MODR will supply the parties with a list of three suggested mediators. Each Party shall indicate to MODR their order of preference and MODR will coordinate the selection of the mediator and the mediation process. The Massachusetts Office of Dispute Resolution will work with the Department of Administrative Law Appeals to develop criteria for referrals, screening and fee policy.

1.04: continued

(4) Mediation. Mediation, either with a DALA administrative magistrate or a mediator from the Massachusetts Office of Dispute Resolution, shall be conducted in accordance with the following procedures.

(a) All Parties shall make available to the mediation a Person who has authority to bind the Party to a mediated settlement.

(b) All Parties must agree in writing to the following:

1. Not to use any information gained solely from the mediation in any subsequent proceeding;
2. Not to disclose any information gained solely from the mediation to persons not involved in the mediation;
3. Not to subpoena the mediator for any subsequent proceeding;
4. Not to disclose to any subsequently assigned administrative magistrate the content of the prior mediation discussion;
5. To mediate in good faith;
6. That any agreement of the parties derived from the mediation shall be binding on the parties and, once reduced to writing and signed by all parties, will have the effect of a contract in subsequent proceedings; and
7. That this confidentiality provision set forth in this agreement shall also apply to the person serving as mediator.
8. If any Party fails to appear at the mediation without explanation, the mediator shall return the matter to DALA.
9. The mediator may at any time return the matter to DALA. If the mediator was a DALA administrative magistrate, the hearing shall be scheduled before another DALA magistrate.
10. No particular form of mediation is required. The structure of the mediation shall be tailored to the needs of the particular dispute. Where helpful, Parties may be permitted to present any documents, exhibits, testimony or other evidence which would aid in the attainment of a mediated settlement.

(c) Time Limit. In no event shall mediation efforts continue beyond 30 days from the date of the first scheduled mediation, unless this time limit is extended by agreement of all the parties.

(d) Conclusion of Mediation.

1. If mediation results in agreement, mediation shall be concluded by a settlement agreement.
2. If mediation does not result in agreement resolving the entire matter, the matter shall be returned to DALA for scheduling appropriate subsequent proceedings at the earliest possible time.

#### REGULATORY AUTHORITY

801 CMR 1.00: M.G.L. c. 30A, §§ 9 and 10.

(PAGES 23 THROUGH 26 ARE RESERVED FOR FUTURE USE.)