

OFFICE OF THE ATTORNEY GENERAL

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

Pursuant to the authority set forth in section 861 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139, as added by the Legal Service Establishment Amendment Act of 1998 ("Legal Service Act"), effective April 20, 1999, D.C. Law 12-260, D.C. Official Code § 1-608.61 (2001), the Attorney General hereby gives notice of his adoption, on an emergency basis, of the following amendments to Chapter 36 of the District of Columbia Personnel Regulations, pertaining to the Legal Service.

Emergency action to adopt these rules is necessary to implement section 2 of Article 36 of the Collective Bargaining Agreement ("CBA") between the American Federation of Government Employees, Local 1403, AFL-CIO, and the Office of the Attorney General for the District of Columbia ("OAG"), which the Council of the District of Columbia approved by Resolution No. 15-794 on December 21, 2004. Section 2(A) of Article 36 of the CBA provides that any performance rating by an OAG attorney in the collective bargaining unit may be appealed within thirty (30) days of receipt by the employee to a three-person committee established by the Attorney General. In an accompanying Office Order, the Attorney General has established that committee, which is empowered to review the basis for a direct supervisor's rating, conduct a hearing, receive written briefs, and issue a written decision that may approve, modify, or reject a performance rating. Section 2A of Article 36 also provides that any decision of the committee shall be appealable to the Attorney General within thirty (30) days of the employee's receipt of the decision and that the Attorney General's decision shall be final and not subject to any further appeal. Section 2(B) of Article 36 requires the Attorney General to establish procedures for the appeals under Section 2(A). This rulemaking is designed to establish those procedures. Emergency rulemaking is required because a number of OAG attorneys in the collective bargaining unit have already appealed their performance evaluations for the 2004 rating period, and those appeals cannot be decided until these procedures are in place. It is vital that these procedures be effective immediately so the committee may decide the pending appeals and the Attorney General can consider any appeals from the committee's decisions without delay and can timely and accurately resolve these important matters.

These emergency rules were adopted on February 15, 2005 and will remain effective for 120 days, or until publication of the final rules in the D.C. Register, whichever occurs first. The Attorney General hereby gives notice of his intent to take final rulemaking action to adopt these proposed rules (which are identical to the emergency rules) in not less than 30 days from the date of publication of this notice in the D.C. Register.

Chapter 36 of the D.C. Personnel Regulations is amended as follows:

The table of contents is amended as follows:

By striking the phrase "3605 Evaluation of Performance – Office of the Corporation Counsel Line Attorneys" and substituting the phrase "3605 Evaluation of Performance – Office of the Attorney General for the District of Columbia Line Attorneys".

Section 3605 (Evaluation of Performance – Office of the Corporation Counsel Line Attorneys) is amended to read as follows:

3605 EVALUATION OF PERFORMANCE – OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA LINE ATTORNEYS

- 3605.1 Each supervisor shall prepare a written evaluation for every line attorney under his or her supervision annually, within twenty (20) days after the end of the rating period. Written evaluations shall be prepared using a form that is approved by the Attorney General.
- 3605.2 Each supervisor shall submit evaluations of line attorneys to his or her supervisor for review, comment, or revision. Each supervisor who reviews an evaluation shall complete his or her review within five (5) days of receipt of the evaluation and shall immediately return the draft evaluation to the supervisor who prepared it.
- 3605.3 The supervisor who prepared the evaluation shall complete any revision requested by his or her supervisor within seven (7) days of receipt of the evaluation.
- 3605.4 After completion of any revisions under section 3605.3, the evaluation shall be reviewed by every supervisor in the chain of command from the line attorney up to the Attorney General. Each supervisor within the chain of command shall complete his or her review within five (5) days of receipt of the evaluation and forward the evaluation, along with his or her comments for revision, up the chain of command. The final supervisor in the chain of command below the Attorney General shall, upon completion of his or her review, return the evaluation to the supervisor who prepared it for revision prior to transmittal to the Attorney General.
- 3605.5 The Attorney General shall select at least one, and may select two or more, three (3) member Evaluation Panels of attorneys at the LS-15 grade or above.
- 3605.6 The Evaluation Panel or Panels shall collectively review the evaluations of all line attorneys to assure that the evaluations comply with this Chapter and that performance standards are being applied consistently throughout the Office. When two (2) or more Panels have been appointed, each Panel may review only a proportionate share of all the evaluations submitted. The Evaluation Panel or Panels shall complete their review and make any recommendations for changes to the Attorney General within twenty (20) days of receipt of the evaluations.
- 3605.7 As soon as practicable after the receipt of the recommendations of the Panel or Panels, the Attorney General shall complete his or her review. In reviewing evaluations of line attorneys, the Attorney General may consult with the supervisor

who prepared the evaluation, any person who prepared an advisory evaluation, and the supervisors in the chain of command for the relevant unit.

- 3605.8 If the Attorney General decides that an evaluation should be changed, the supervisor who prepared the evaluation shall make all changes that are directed by the Attorney General within five (5) days of receipt of the Attorney General's directive.
- 3605.9 Each supervisor shall review the evaluation with the line attorney evaluated within twenty (20) days of receipt of the approved evaluation from the Attorney General or within twenty (20) days after completion of any revisions directed by the Attorney General. Both the line attorney evaluated and his or her supervisor shall sign the written evaluation to confirm that it has been reviewed.
- 3605.10 If a line attorney disagrees with the written evaluation, he or she may appeal it within thirty (30) days of receipt to a committee established by the Attorney General, the Performance Evaluation Review Committee ("Committee"). The Attorney General shall appoint nine managing attorneys to the Committee, which shall sit in three-member panels as designated by the Attorney General. The Committee shall be empowered to review the basis for the direct supervisor's rating, conduct a hearing, receive written briefs, and issue a written decision which may approve, modify, or reject the performance rating. The line attorney shall initially provide the Attorney General (or his or her designee) with a notice of appeal, including any request for a hearing, within thirty (30) days of receipt of the evaluation. The Committee shall circulate the notice to the line attorney's direct supervisor and to every supervisor in the chain of command between the line attorney and the Attorney General.
- 3605.11 The Committee has the discretion to decide whether to grant any request for a hearing. If a request for a hearing is granted, the committee shall circulate a hearing notice to the line attorney and to every supervisor in the chain of command between the line attorney and the Attorney General, which provides:
- (a) The place of the hearing and a hearing date and time no more than fifteen (15) days from the date of the hearing notice;
 - (b) That the line attorney may review, upon request to his or her direct supervisor, all materials upon which the evaluation is based;
 - (c) That the line attorney may be represented by an approved attorney, or other representative at the hearing; and
 - (d) That the line attorney has the right to testify and present evidence at the hearing.
- 3605.12 The hearing shall be closed except for the line attorney, his or her representative, the line attorney's direct supervisor, and every supervisor in the chain of command between the direct supervisor and the Attorney General. There shall be no discovery

procedures except as provided in this section. An official record shall be kept of the hearing. The Committee may hold a pre-hearing conference in order to:

- (a) Formulate and simplify the issues, including the elimination of frivolous claims or defenses;
- (b) Obtain admissions of fact and of documents that will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings on the admissibility of evidence;
- (c) Obtain identification of all witnesses and documents, which identification shall be binding at the hearing, except as, in the discretion of the committee, the interests of justice warrant the addition of witnesses and documents at the hearing;
- (d) Achieve settlement of the dispute;
- (e) Dispose of any pending motions;
- (f) Set reasonable limits on the time allowed for presenting evidence;
- (g) Establish a post-hearing briefing schedule, which may permit written briefs or other documents to be filed by the line attorney, the line attorney's direct supervisor, and each supervisor in the chain of command between the line attorney and the Attorney General; and
- (h) Address such other matters as may facilitate the just and efficient disposition of the matter.

3605.13 If the Committee decides, in its discretion, to reject any request for a hearing, in whole or in part, it shall so advise the line attorney, the attorney's direct supervisor, and each supervisor in the chain of command between the line attorney and the Attorney General. The Committee shall circulate a notice that schedules the filing of written briefs or other documents to the line attorney, the line attorney's direct supervisor, and each supervisor in the chain of command between the line attorney and the Attorney General. The Committee may schedule a meeting with the line attorney, the line attorney's direct supervisor, and each supervisor in the chain of command between the line attorney and the Attorney General in order to address the matters raised in the appeal.

3605.14 The Committee shall provide the line attorney, the line attorney's direct supervisor, and every supervisor in the chain of command between the line attorney and the Attorney General with a final written administrative decision within thirty (30) days of the conclusion of the appeal proceeding. The final written administrative decision shall be accompanied by notice of the right to appeal the decision to the Attorney General within thirty (30) days of receipt of the decision by the line attorney.

- 3605.15 The Attorney General shall circulate the line attorney's notice of appeal to the line attorney's direct supervisor and to every supervisor in the chain of command between the direct supervisor and the Attorney General.
- 3605.16 The Attorney General shall review the basis for the three-person committee's decision de novo, without taking any additional evidence. As part of this review, the Attorney General may permit written appellate briefs to be filed in accordance with a schedule established by the Attorney General. No oral arguments shall be permitted. The Attorney General may, in the exercise of his or her discretion, hold a pre-briefing conference for the purposes, among others, of formulating and simplifying the issues, disposing of any pending motions, attempting to settle the dispute, establishing a schedule for the filing of written briefs or other documents, and addressing such other matters as may facilitate the just and efficient disposition of the appeal.
- 3605.17 The Attorney General shall provide the line attorney, the line attorney's direct supervisor, and every supervisor in the chain of command between the direct supervisor and the Attorney General with a final written administrative decision within a reasonable time after the final brief is filed. The Attorney General's decision shall be final and no further appeal shall be allowed.
- 3605.18 Each supervisor shall perform at least one interim evaluation of every attorney under his or her supervision annually, in the ninth month of the rating period. An interim evaluation shall consist of an informal meeting to discuss the line attorney's performance under his or her Individual Accountability Plan. At his or her discretion, a supervisor may provide a written interim evaluation. Any written interim evaluation shall be provided to the attorney evaluated, but shall not be included in the attorney's official personnel file unless the supervisor rates the attorney as "needs improvement" or lower. At his or her discretion, or at the request of the Attorney General, a supervisor may perform interim evaluations no more frequently than once every three (3) months during the rating period. Interim evaluations rating a line attorney as "needs improvement" or lower may be changed by mutual agreement or by the filing of an appeal as provided in this section.

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments in writing not later than thirty (30) days after the date of publication of this notice in the D.C. Register. Comments should be filed with Wayne C. Witkowski, Esq., 1350 Pennsylvania Avenue, N.W., Room 409, Washington, D.C. 20004. Copies of these rules may be obtained at the address stated above.