

**OFFICE OF ADMINISTRATIVE HEARINGS**

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**NOTICE OF FINAL RULEMAKING**

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The Chief Administrative Law Judge of the Office of Administrative Hearings (OAH), pursuant to the authority set forth in Section 8 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76, D.C. Official Code § 2-1831.05(b)(7)), gives notice of the adoption of the following amendments to Chapter 28 of Title 1 of the District of Columbia Municipal Regulations (DCMR), "Office of Administrative Hearings Rules of Practice and Procedure."

These rules were first published in the *D.C. Register* on June 24, 2005 at 52 DCR 5951. Based upon the comments received, there are no substantive changes to the published rules. These rules will be effective upon the publication of this notice of final rulemaking in the *D.C. Register*.

**Section 2802.2 of 1 DCMR Chapter 28 is amended to read as follows:**

2802.2 Any case commenced before this administrative court that arose exclusively from material facts underlying a contested case pending before an agency or tribunal prior to October 1, 2004, shall be commenced before this administrative court no later than 120 days after this administrative court acquires jurisdiction to hear such case, or by July 15, 2005, whichever is later.

**Section 2810.2 of 1 DCMR Chapter 28 is amended to read as follows:**

2810.2 Unless otherwise provided by statute or these Rules, documents may be faxed to this administrative court in a manner prescribed by the Clerk, and such documents shall be considered filed as of the date the fax is received by the Clerk. Any incomplete or illegible fax will not be considered unless a hard copy of the fax is filed, or a complete and legible fax is received, within three (3) business days of the first transmission. Upon motion, the presiding Administrative Law Judge may extend this time.

**Section 2832.6 of 1 DCMR Chapter 28 is amended to read as follows:**

2832.6 An order granting or denying a motion for reconsideration shall be issued within thirty (30) days of receipt of the motion.

**Section 2843.2 of 1 DCMR Chapter 28 is amended to read as follows:**

2843.2 As required by Federal law, 34 CFR 361.57(e)(1), decisions in cases involving Rehabilitation Services Administration ("RSA") benefits shall be issued and served upon the parties within thirty (30) days from the close of the record.

**Section 2843.3 of 1 DCMR Chapter 28 is amended to read as follows:**

2843.3 As required by the District of Columbia Public Assistance Act, D.C. Official Code § 4-210.12(a), decisions shall be issued and served upon the parties within sixty (60) days of receipt of the hearing request in cases involving the following public benefit programs: Temporary Assistance for Needy Families ("TANF"); Interim Disability Assistance; General Assistance for Children; Program on Work, Employment and Responsibility ("POWER"); Medicaid; and Emergency Family Shelter Services.

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**NOTICE OF FINAL RULEMAKING**

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**ERRATA**

The Chief Administrative Law Judge of the Office of Administrative Hearings (OAH), pursuant to the authority set forth in Section 8 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76, D.C. Official Code § 2-1831.05(b)(7)), adopted Section 2840, Administrative Court and Clerk General Provisions, of Chapter 28 of Title 1 of the District of Columbia Municipal Regulations (DCMR), "Office of Administrative Hearings Rules of Practice and Procedure."

Notice of Final Rulemakings adopting and thereafter amending Section 2840 were published on March 5, 2004, at 51 DCR 2415, September 3, 2004, at 51 DCR 8595, September 3, 2004, at 51 DCR 8606, January 28, 2005, at 52 DCR 720, and June 17, 2005 at 52 DCR 5675. The substance of the rulemaking was adopted by the Chief Administrative Law Judge on June 17, 2005. However, the subsections of Section 2840 were erroneously numbered. The corrected text is set forth below.

**2840 ADMINISTRATIVE COURT AND CLERK GENERAL PROVISIONS**

2840.1 Unless a federal law or regulation or District of Columbia statute requires that a particular federal or District of Columbia procedure be observed, these Rules and any final or interlocutory order of this administrative court shall take precedence and supersede in the event of a conflict with other authority on any issue involving or relating to procedures of this administrative court. All procedural authorities promulgated by any agency relating to adjudicated cases filed with this administrative court pursuant to Section 6 of the Act are hereby superceded. In determining whether an issue involves or relates to procedures of this administrative court, the presiding Administrative Law Judge shall follow the doctrine set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and related case law. These Rules shall be deemed to involve or relate to procedures of this administrative court unless otherwise found in an order issued under the authority of Section 2840.2 or on judicial review of a decision of this administrative court.

2840.2 Where a decision of an Administrative Law Judge is in conflict with a decision of a least one other Administrative Law Judge on the same issue, or where litigants before this administrative court would likely benefit from a clear precedent on a particular legal issue, the Chief Administrative Law Judge may, upon motion by a party in a pending adjudicative case, or upon his or her own motion and in the interest of justice, assign three Administrative Law Judges to sit on a panel and

decide all or part of the pending case. To the extent administratively convenient and operationally practical, the Chief Administrative Law Judge shall seek to appoint Administrative Law Judges who have not participated in prior conflicting decisions, but may elect to appoint the Administrative Law Judge who has presided over the pending adjudicative case. Any order or interlocutory order issued by such a panel shall be treated as a binding precedent of a higher court in all matters subsequently coming before this administrative court, unless later reversed or modified by law, by decision of the District of Columbia Court of Appeals, or by a subsequent order of that panel or another panel acting under this Section. In determining whether to convene a panel under this Section, the Chief Administrative Law Judge may consider, among other things, whether the panel is likely to provide clarity and guidance in an important legal issue before this administrative court.

- (a) Except as otherwise ordered, a motion brought under this Section shall be deemed denied unless granted within ten (10) days of its filing. The denial of a request for a panel under this Section shall be deemed an interlocutory order. A motion under this Section may not be filed within thirty (30) days prior to a trial date, except by leave of the presiding Administrative Law Judge. Unless granted by the Chief Administrative Law Judge, the mere filing of a motion under this Section shall have no effect on a pending case.
- (b) Where a case has been commenced before this administrative court, and upon it appearing to be a non-frivolous question about whether this administrative court possesses legal authority to hear and decide the case, the presiding Administrative Law Judge shall promptly inform the Chief Administrative Law Judge or his or her designee of this, and no final order shall be issued in that case until at least seven (7) calendar days after such notice is provided. Nothing in this Subsection precludes the issuance of an interlocutory order granting interim relief.
- (c) Any order or interlocutory order with the effect of invalidating these Rules or construing them to be otherwise inoperative, whether in whole or in part, may only be issued under the authority of this Section. Any order or interlocutory order issued under this Section shall be entitled "Order Pursuant to Rule 2840" or "Final Order Pursuant to Rule 2840" as appropriate.

2840.3

This administrative court may, on its own motion, obtain information relevant to a pending matter from a disinterested person by inviting and receiving an *amicus curiae* submission. All parties to the matter shall be given a reasonable opportunity to respond to any *amicus* submission. A presiding Administrative Law Judge may also grant a motion to file a submission *amicus curiae*; however, no such submission shall be filed without advance leave of the presiding Administrative Law Judge. A motion for leave to file a submission *amicus curiae*

shall not exceed five pages and shall state which parties to the litigation, if any, consent to its filing. Such a motion shall also state why the filing of the contemplated *amicus curiae* submission is likely to contain relevant matter not already brought to the attention of the administrative court by the parties. Any *amicus curiae* submission filed without advance leave shall be rejected for filing by the Clerk, or be stricken by order of the presiding Administrative Law Judge.

- 2840.4 All papers to be filed in proceedings before this administrative court shall be filed in the Clerk's office. Unless otherwise provided by these Rules or ordered by the Chief Administrative Law Judge, no papers may be filed in the Clerk's office when this administrative court is closed, or before 9:00 AM or after 5:00 P.M. on days when this administrative court is open.
- 2840.5 Papers filed in an appellate proceeding or other proceeding before this administrative court may be subject to a filing fee in accordance with a fee schedule published in the *D.C. Register*.
- 2840.6 This administrative court shall be a weapons and illegal drug free area. Weapons, including, but not limited to, guns, knives, box cutters, chemical spray and pepper spray, are strictly prohibited and subject to confiscation. With regard to authorized service weapons, this Section does not apply to law enforcement officers employed by the District of Columbia or an agency of the United States either in uniform or with a prominently displayed badge and identification.
- 2840.7 No items that are potentially toxic, dangerous or otherwise present a threat to health or safety, such as sharp objects or refuse, shall be brought into the courtrooms of OAH, its common areas or offices, or offered as evidence in any proceeding before this administrative court unless identified to the Clerk's office at least ten (10) or more days prior to the proceeding so that sufficient safeguards may be put in place. A partial list of prohibited items shall be made available in the Clerk's office.
- 2840.8 An Administrative Law Judge, security personnel or administrative court staff may require the temporary removal of any individual who presents a threat to safety or is causing or contributing to a disruption of the administrative court's operations or proceedings.
- 2840.9 A monetary sanction pursuant to Section 12 of the Act or other authority shall not be imposed by an Administrative Law Judge unless it is in writing, is based on the observations of the Administrative Law Judge in a proceeding and is in the record, and the party subject to the sanction has had an opportunity to be heard on the matter. A fine or statutory penalty imposed in an enforcement case, including without limitation a Notice of Infraction or Notice of Violation, shall not be deemed a monetary sanction for purposes of this Section. A non-monetary sanction may only be ordered by an Administrative Law Judge against a party for a default; a violation of these Rules, an order, or interlocutory order; or upon a finding of bad faith conduct within the context of a litigation. Such an order shall

be consistent with the Due Process Clause, these Rules, and all other applicable law. Every order or interlocutory order issued by a presiding Administrative Law Judge shall be deemed to have incorporated this Section by reference.

- 2840.10 The use of cellular phones, pagers or other devices that emit noise and/or are capable of wireless transmission or reception shall not be permitted in courtrooms during a proceeding, except that such devices are permitted if they are set in a non-audible mode and are not used for transmission during a proceeding.
- 2840.11 Any organization, group, or individual may possess or use drawing or sketching equipment in a hearing room so long as the possession or use of such equipment does not interfere with the rights of the parties to a fair hearing, does not interfere with the fairness or conduct of a proceeding, and where such use is not precluded by statute, regulation, or order.
- 2840.12 Broadcasting, videotaping, photographing, or audio recording by any organization, group, or individual is not permitted in hearing rooms, witness rooms, waiting rooms, reception areas, or any other rooms or areas regularly utilized by OAH for administrative court operations.
- 2840.13 For purposes of this Rule, a hearing or proceeding is any matter in which an Administrative Law Judge or the Chief Administrative Law Judge presides.
- 2840.14 Nothing in this Rule shall be construed to limit the authority of the Chief Administrative Law Judge to authorize the recordation of a proceeding for training or evaluative purposes, to the extent that the Chief Administrative Law Judge has determined that the use of such equipment does not interfere with the fairness or conduct of a proceeding, and where such use is not precluded by statute, regulation, or order.
- 2840.15 Except as otherwise required by the Chief Administrative Law Judge, any Administrative Law Judge may attend and observe any proceeding before the OAH to facilitate training, and for any other purposes consistent with the Act. Any Administrative Law Judge attending any proceeding pursuant to this Section shall manage any privileged or otherwise legally confidential information as required by applicable law and in the same manner that would be required if he or she was presiding at that proceeding.
- 2840.16 Non-judicial staff of the OAH may attend and observe any proceeding before the OAH for training, and for any other purposes consistent with the Act, except as otherwise ordered by the presiding Administrative Law Judge. Any non-judicial staff member attending any proceeding pursuant to this Section shall manage any privileged or otherwise legally confidential information as required by applicable law and in the same manner required if he or she was serving as a member of the Clerk's office at that proceeding.

- 2840.17 Unless otherwise prohibited by applicable law or by order of this administrative court, proceedings before this administrative court shall be open to the public.
- 2840.18 Unless otherwise provided in these Rules or prohibited by applicable law, the Chief Administrative Law Judge may, in his or her discretion, delegate the authority of his or her office to an Administrative Law Judge, and an Administrative Law Judge may delegate any ministerial or administrative authority of his or her office to the Clerk or his or her designees.
- 2840.19 If no applicable District of Columbia law or agency rule, other than these Rules, provides a time period within which to appeal an agency action or decision consistent with Rule 2805, such appeal must be filed within thirty (30) days of the agency's transmitting its decision to the party filing a request for a hearing under Rule 2805.
- 2840.20 The term "Caseload" for purposes of Section 16(e) of the Act shall be measured and reported based on any projected increases or decreases in the number of individual cases commenced by a government agency under 1 DCMR §§ 2803, 2804 or 2805. A government agency commencing cases under 1 DCMR 2803 may, in the alternative, elect to report projected increases or decreases in the number of individual infractions charged. This Section codifies existing practice and shall be effective October 1, 2004, *nunc pro tunc*.
- 2840.21 The Chief Administrative Law Judge or his or her designee may administer oaths of office to an Administrative Law Judge or other employee of this administrative court.