

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02), Reorganization Plan No. 4 of 1996, and Mayor's Order 97-42, dated February 18, 1997, hereby gives notice of the adoption, on an emergency basis, of a new section 929 to Chapter 9 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled "Supported Employment Services." These rules establish standards governing reimbursement by the District of Columbia Medicaid Program for supported employment services, a rehabilitative service, provided to participants with mental retardation in the Home and Community-Based Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver). These rules also authorize Medicaid reimbursement rates for supported employment services.

On March 7, 2003, a notice of emergency and proposed rulemaking was published in the *D.C. Register* (50 DCR 2053). These emergency and proposed rules supercede and replace the previously published rules. Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Waiver participants who are in need of supported employment services.

The emergency rulemaking was adopted on December 19, 2003 and became effective on that date. The emergency rules will remain in effect for one hundred and twenty days or until April 17, 2004, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Director also gives notice of the intent to take final rulemaking action to adopt these proposed rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Amend Title 29 DCMR by adding the following new section 929 to read as follows:

SECTION 929 SUPPORTED EMPLOYMENT SERVICES

- 929.1 Supported employment services shall be reimbursed by the Medicaid Program for each participant with mental retardation in the Home and Community-Based Waiver for Persons with Mental Retardation and Developmental Disabilities (Waiver) subject to the requirements set forth in this section.
- 929.2 Supported employment shall consist of paid employment for clients for whom competitive employment at or above the minimum wage is

unlikely, and who, because of their mental retardation, need intensive on-going support to perform in a work setting.

- 929.3 Supported employment may be conducted in a variety of work settings, including work sites where individuals without mental retardation are employed.
- 929.4 Supported employment services shall be delivered under the following three venues:
- (a) Intake and Assessment;
 - (b) Job Development; and
 - (c) Placement and Support.
- 929.5 Immediately following intake each provider shall conduct an assessment, through the use of a vocational profile or situational assessment, of the supportive services needed by each client to succeed in a work environment.
- 929.6 Intake and assessment services shall not be billed in excess of thirty (30) days for each client. If extended services are required for continuation of a situational assessment, the provider shall submit a written justification to the client's case manager. Extended services shall be approved by MRDDA and documented in the client's IHP or ISP.
- 929.7 Job development activities eligible for reimbursement include, but are not limited to the following:
- (a) Conducting workshops designed to assist the client in completing employment applications or preparing for interviews;
 - (b) Conducting workshops to instruct clients on proper work attire;
 - (c) Completing job applications on behalf of the client;
 - (d) Assisting the client with job exploration and placement, including assessing opportunities for advancement;
 - (e) Visiting employment sites;
 - (f) Making telephone calls to prospective employers, utilizing the internet, magazines, newspapers and other publications as leads;
 - (g) Collecting descriptive data regarding various types of employment opportunities, for purposes of preparing a standardized set of requirements for prospective employees; and
 - (h) Negotiating employment terms on behalf of the client.
- 929.8 Job development activities shall not be billed in excess of 90 days for each client, unless previously authorized by the client's case manager and documented in the client's IHP or ISP. The provider shall submit a

written justification in support of the extended services to the client's case manager.

- 929.9 Placement and support activities including follow-along are those activities designed to assist and support the client after employment has been obtained. Activities eligible for reimbursement include but are not limited to the following:
- (a) Assisting the client with learning the tasks and responsibilities of the job through various instructional strategies;
 - (b) Coaching the client on and off the job site;
 - (c) Consulting with other professionals and the client's family, if necessary; and
 - (d) Consulting with the client's employee, co-workers or supervisors, if necessary.
- 929.10 Each provider shall visit the client at the work-site at least twice per month after employment has been obtained. The provider shall maintain written documentation of each client visit.
- 929.11 If supported employment services are provided at a work site where persons without a disability are employed, reimbursement for supported employment services shall only be made for adaptations, supervision and training required by the client who receives Wavier services pursuant to this section. No payment shall be made for supervisory activities, which are rendered as a normal part of the business setting.
- 929.12 Supported employment services are ineligible for reimbursement if the services are available to the client through programs funded under Title I of the Rehabilitation Act of 1973 (Pub.L. 93-112; 29 U.S.C. §720 *et seq.*) or the Individuals with Disabilities Education Act (Pub. L. 91-230; 20 U.S.C. § 1400 *et seq.*) (hereinafter the "Acts"). The case manager shall obtain documentation which demonstrates that supported employment services are not otherwise available pursuant to the Acts in this section for inclusion in the client's record, IHP, or ISP.
- 929.13 When applicable, each provider shall be certified by the U.S. Department of Labor.
- 929.14 Each provider shall provide appropriate services for each client requiring physical assistance to accomplish basic activities of daily living on the job site.
- 929.15 Each provider shall ensure that each client has access to first-aid on the job site.

- 929.16 Supported employment services shall be pre-authorized and provided in accordance with each client's IHP or ISP.
- 929.17 Each provider shall develop a plan which addresses how the provider will meet the needs and communicate with non-English clients.
- 929.18 Each provider of supported employment services shall:
- (a) Be a public or private agency;
 - (b) Have a current District of Columbia Medicaid Provider Agreement that authorizes the provider to bill for supported employment services;
 - (c) Maintain a copy of the most recent IHP or ISP approved by the Department of Human Services, Mental Retardation and Developmental Disabilities Administration (MRDDA);
 - (d) Ensure that all staff providing services are qualified and properly supervised;
 - (e) Offer the Hepatitis B vaccination;
 - (f) Offer training in infection control procedures consistent with the requirements of the Occupational Safety and Health Administration, U.S. Department of Labor regulations at 29 CFR 1910.1030; and
 - (g) Conduct periodic in-person supervisory assessment of the client and supportive employment staff at least twice a year and more frequently if warranted by the client's circumstances and document each assessment in the client's record.
- 929.19 Each person providing supported employment services for a provider under section 929.18 shall meet all of the following requirements:
- (a) Be at least eighteen (18) years of age;
 - (b) Be acceptable to the client;
 - (c) Demonstrate annually that he or she is free from communicable disease as confirmed by an annual PPD Skin Test or documentation from a physician stating that the person is free from communicable disease;
 - (d) Have the ability to communicate with the client;

- (e) Be able to read and write the English language;
 - (f) Have a high school diploma or graduate equivalency development (GED) certificate or have appropriate credentials in the professional field of work;
 - (g) Have (1) year of experience providing supported employment services;
 - (h) Agree to carry out the responsibilities to provide supported employment services consistent with the client's IHP or ISP;
 - (i) Complete pre-service and in-service training approved by MRDDA; and
 - (j) Comply with the requirements of the Health-Care Facility Unlicensed Personnel Criminal Background Check Act of 1998, effective April 20, 1999 (D.C. Law 12-238), as amended by the Health-Care Facility Unlicensed Personnel Criminal Background Check Amendment Act of 2002, effective April 13, 2002, (D.C. Law 14-98; D.C. Official Code § 44-551 *et seq.*).
- 929.20 Supported employment services shall not be provided concurrently with day treatment, prevocational, or day habilitation services.
- 929.21 The reimbursement for supported employment services shall be as follows:
- (a) Intake and Assessment - \$140.00 per day.
 - (b) Job Development- \$140.00 per day.
 - (c) Placement and Support- 1:00-3.99 hrs shall be \$70.00 per day; and 4.00 hrs and over shall be \$140.00 per day.
- 929.22 If supportive employment services are provided in a facility-based setting, the facility must be suitable for the intended use, accessible to persons with mobility limitations and comply with all applicable federal, State and local laws and regulations.
- 929.23 The provider shall not bill for incentive payments, subsidies or unrelated vocational training expenses such as the following:
- (a) Incentive payments made to an employer to encourage or subsidize the client's participation in a supportive employment services program;

- (b) Payments that are passed through to users of supportive employment services programs; or
- (c) Payments for vocational training that is not directly related to the client's supportive employment services program.

929.24 No payment shall be made for routine care and supervision, which is the responsibility of the family, group home provider, or employer.

929.25 Each provider shall maintain a copy of each client's record at least six (6) years after the date of discharge.

929.99 **DEFINITIONS**

When used in this section, the following terms and phrases shall have the meanings ascribed:

Client- An individual with mental retardation who has been determined eligible to receive services under the Home and Community-based Waiver for Persons with Mental Retardation and Developmental Disabilities.

Communicable Disease - Shall have the same meaning as set forth in section 201 of Chapter 2 of Title 22, District of Columbia Municipal Regulations.

Follow-up- Ongoing support services necessary to assure job retention.

Individual Habilitation Plan (IHP) - Shall have the same meaning as set forth in section 403 of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, effective March 3, 1979 (D.C. Law 2-137; D.C. Official Code, 7-1304.03).

Individual Support Plan (ISP) - The successor to the individual habilitation plan (IHP) as defined in the court-approved Joy Evans Exit Plan.

Intake- A process designed to obtain information about the client and their needs as it relates to community integration and employment.

Provider- Any public or private agency that provides services pursuant to this section.

Situational Assessment- A type of assessment that provides the client an opportunity to explore job tasks in real work environments in the community. This assessment is useful in identifying the type of employment that may be beneficial to the client and the support required by each client to succeed in the work environment.

Vocational Profile - An assessment designed to assist clients, their families and service providers with specific employment related data that will generate positive employment outcomes. The assessment outlines the life, relationships, challenges, and perceptions of the client as they relate to potential sources of community support and mentorship.

Comments on the proposed rules should be sent in writing to Robert Maruca, Senior Deputy Director, Medical Assistance Administration, Department of Health, 825 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002, not later than thirty (30) days from the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the same address.

THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Board of Commissioners of the District of Columbia Housing Authority hereby gives notice of the adoption on an emergency basis of amendment to Chapter 93 to Title 14, which amends the Partnership Program for Affordable Housing. The amended sections will: (1) allowing up to 100% of units to be subsidized in properties designated for families, provided that for any subsidy of more than 50% of the units, Board of Commission review is necessary and the subsidy must be reasonable and necessary for the financial viability of the property; (3) awarding, subject to Board of Commission review, a Housing Assistance Payment (HAP) contract on the basis of non-solicited proposals under certain circumstances; (4) awarding a HAP contract to the owner of an eligible property under a revitalization or development plan initiative of DCHA or a DCHA development subsidiary; (5) awarding a HAP to the owner of an existing property that is either losing an operating subsidy or in need of rental subsidy in order to retain occupancy of eligible low income households; and (6) allowing the referral of applicants with special needs to the HCVP waiting list by certain District agencies. The emergency rule was adopted on January 14, 2004, and became effective immediately on that date.

This emergency action is based on the need to address the fading out of the Tenant Assistance Program by the District of Columbia. This amendment will facilitate the housing of Tenant Assistance Program families who would otherwise lose their housing.

The Board of Commissioner also give notice of intent to take final rulemaking action to adopt this amendment not later than thirty (30) days after the date of publication of this notice in the D.C. Register.

The emergency rule will expire on May 13, 2004, or upon publication of the Notice of Final Rulemaking in the Register, whichever occurs first.

“CHAPTER 93 PARTNERSHIP PROGRAM FOR AFFORDABLE HOUSING

Secs.	
9300	Purpose of the Program
9301	Objectives of the Program
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9304	Program Application and Award
9305	Ineligible Properties
9306	Required Application Information
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9309	Commitment and Award of Subsidy
9310	Post Selection Conditions
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9300 PURPOSE OF THE PROGRAM

9300.1 The purpose of the Partnership Program for Affordable Housing is to work, in partnership with private sector for profit and non-profit owners, to protect and increase the supply of affordable housing in the District of Columbia, particularly:

- (a) In properties requiring rehabilitation as a result of significant code violations;
- (b) In neighborhoods where affordable housing is not readily available;
- (c) Where subsidies are needed to reduce displacement as a result of gentrification;
- (d) For low income disabled families requiring accessible or supportive living environments;
- (e) For elderly families requiring accessible or supportive living environments; and
- (f) Of units, located in poverty impacted neighborhoods, undergoing substantial rehabilitation as part of a comprehensive neighborhood revitalization strategy in which subsidies are required to reduce displacement or increase levels of affordability.

9301 OBJECTIVES OF THE PROGRAM

9301.1 The objectives of the Partnership Program are to:

- (a) Utilize the expertise of the private sector to protect and increase affordable housing;
- (b) Leverage private funds to develop affordable housing;
- (c) Ensure long term availability of affordable housing;
- (d) Encourage mixed income development and in mixed income communities; and
- (e) Support other District of Columbia housing initiatives.

9302 SCOPE AND SIZE OF THE PROGRAM

- 9302.1 DCHA will provide Partnership Program subsidy to units within privately or public/private partnership owned and developed rental housing properties that help DCHA accomplish the purposes and objectives of the program, as listed in Sections 9300 and 9301 of this Title, respectively, and meet the criteria described in Sections 9306, 9307 and 9308 of this Title.
- 9302.2 The Partnership Program is available to existing units that meet Housing Quality Standards or those that require substantial rehabilitation to do so, and new construction.
- (a) Existing unit is defined as any existing rental housing unit that requires less than \$1,000 in improvements to meet the standards necessary to receive Housing Assistance Payments.
 - (b) Substantial rehabilitation is defined as any rental housing unit that requires more than \$1,000 in improvements to meet the standards necessary to receive Housing Assistance Payments and for which rehabilitation has not yet started before the execution of the Agreement to Enter into a Housing Assistance Payment Contract.
 - (c) New construction is defined as any new rental housing unit not under construction before the award of the Agreement to Enter into a Housing Assistance Payment Contract.
- 9302.3 DCHA, annually, may make up to twenty percent (20%) of its total Housing Choice Voucher Program allocation available for the Partnership Program. The allocation figure may be adjusted from time to time subject to approval by the Board of Commissioners and is available by contacting the DCHA Office of Planning and Development or DCHA's Housing Choice Voucher Program.
- 9303 AVAILABLE SUBSIDY LEVELS**
- 9303.1 Owners of existing units, and units to be substantially rehabilitated or newly constructed, are eligible to apply for Partnership Program subsidy for up to one hundred percent (100%) of the units in each property participating in the Partnership Program, or such lesser percentage as may be set by the DCHA Board of Commissioners for a particular development, housing assistance program or allocation of vouchers under 9302.3 above.
- 9303.2 Partnership Program subsidy may be provided for up to one hundred percent (100%) of the units in a qualified property if the property is a single-family house or units that are specifically for households comprised of elderly families, disabled families, families receiving supportive services, to the extent permitted under federal funding restrictions, or as otherwise permitted by action of the

DCHA Board of Commissioners. The maximum percentage available can be determined by contacting DCHA's Housing Choice Voucher Program.

- 9303.3 The initial and subsequent rents paid under the Housing Assistance Payment Contract (Contract Rents) will be based upon an analysis of the reasonableness of the proposed rent in the neighborhood in which the property is located.
- 9303.4 Contract Rents will not exceed the payment standard for the areas in which the property is located. In some neighborhoods this is as much as 120% of the Fair Market Rents (FMRs) adjusted for bedroom size.
- 9303.5 For Fiscal Year 2002, 2003, and 2004, FMRs will be based on the 50th percentile of rents in the Metropolitan Statistical Area. The current FMRs are available by contacting the Housing Choice Voucher Program.
- 9303.6 DCHA may, after review by the Board of Commissioners, enter into a Housing Assistance Payment contract where the percentage of the total units to be subsidized exceeds 50% of the units, provided that the total operating subsidy is reasonable and necessary and not in excess of the funds necessary for the financial viability and proper operation of the property. Each unit and household occupying a voucher assisted unit is subject to Section 9312.7 as well as all other program requirements.

9304 PROGRAM APPLICATION AND AWARD

- 9304.1 The Partnership Program seeks to be as flexible as possible in order to protect and increase the supply of affordable housing.
- (a) DCHA may award Housing Assistance Payment (HAP) Contracts periodically on a competitive basis under the Partnership Program through published announcements.
- (i) DCHA will advertise for two or more times, at least one week apart, in a newspaper of general circulation for that DCHA will accept applications for assistance.
- (ii) The deadline for applications shall be at least 30 days after the date of the last publication.
- (iii) The advertisement shall identify the estimated number of units that will be assisted.

- (iv) The advertisement will not state that applications will only be considered if submitted in response to the advertisement, as DCHA may also receive and consider from time to time applications for allocations of Partnership Program funding assistance under Sections 9304.2 and 9304.3 hereof on a non-competitive basis.
 - (b) In addition to applications in response to advertisements, DCHA may also request owners with properties in eligible areas of the District of Columbia to respond to the advertised announcement and submit an application for the Partnership Program subsidy for their property.
 - (c) The advertisement shall identify the estimated number of units that will be assisted.
 - (d) The advertisement will not state that applications will only be considered if submitted in response to the advertisement, as DCHA may also receive and consider from time to time applications for allocations of Partnership Program funding assistance under Sections 9304.3 and 9404.4 hereof on a non-competitive basis.
- 9304.2 If no advertised announcement is outstanding, an Owner of an eligible property may submit an application to DCHA. If the application meets the threshold criteria listed in Section 9307 of this Title, it may be eligible for an Agreement to enter into a Housing Assistance Payment (AHAP) contract. Such an application will be reviewed and considered either upon receipt or under Section 9304.3 below or held for competitive consideration along with any applications received in response to an advertised announcement.
- 9304.3 DCHA may proceed, after review by the Board of Commissioners, to award a Housing Assistance Payment (HAP) contract without using a competitive process for an eligible property that is:
- (a) An existing or new property under a revitalization or development plan initiative of DCHA or a DCHA development subsidiary;
 - (b) Losing an operating subsidy formerly provided from another source that is no longer available which would result in displacement of eligible low income households; or
 - (c) In need of a rental subsidy in order to retain the housing as a resource for current and future eligible low income households.
- 9304.4 DCHA may, in its sole discretion award a Housing Assistance Payment (AHAP) contract to the Owner of an eligible property who is developing an existing or new property under a revitalization or development plan initiative of DCHA or

DCHA's development subsidiary, DC Housing Enterprises. Such property must meet the threshold criteria of Section 9307 of this Title.

9305 INELIGIBLE PROPERTIES

9305.1 The following properties or units are not eligible for the Partnership Program.

- (a) Units that are occupied by the Owner of the property. This does not apply to cooperatives, which are deemed rental housing.
- (b) Properties located in a flood zone area unless flood insurance is obtained.
- (c) High-rise elevator properties with children residing therein, unless the HUD determines that there are no practical alternatives. A high-rise elevator building is any building over five (5) stories.
- (d) Shared housing; nursing homes; and facilities providing continual psychiatric, medical nursing services, board and care or intermediate care.
- (e) Units within the grounds of penal, reformatory, medical, mental, and similar public or private institutions.
- (f) College or other school dormitories.
- (g) Manufactured homes. Manufactured homes are defined as structures, which can be transported in one or more sections of eight (8) feet or more in width or forty (40) feet or more in length, or, when erected on site, are three hundred twenty (320) or more square feet, and which are built on a permanent chassis and designed to be used as a dwelling when connected to utilities, and includes plumbing, heating, air-conditioning, and electrical systems.
- (h) Units subsidized with any District of Columbia rent subsidy.
- (i) Units subsidized with tenant-based assistance under the HOME program or any other duplicative Federal or District of Columbia housing subsidy. This does not include the housing component of a welfare payment, a Social Security payment or a rent reduction because of a tax credit.

9306 REQUIRED APPLICATION INFORMATION

9306.1 DCHA may require any or all of the following information to be included in all applications in a format as provided in the announcement.

- (a) A description of the proposed property, including the number of units, the number of bedrooms, the size in square feet of each unit and the types amenities to be provided.
- (b) A description of the location of the property including the address, census tract and name of neighborhood.
- (c) Evidence of site control which may include, deed, agreement of sale or option to purchase contract.
- (d) If the property is new construction or substantial rehabilitation, evidence that the proposed new construction or substantial rehabilitation is permitted by current zoning ordinances.
- (e) The proposed Contract Rent for each unit for which Partnership Program subsidy is requested.
- (f) For substantial rehabilitation projects, a list and description of the number of households to be relocated and a relocation plan and budget.
- (g) The identity of the Owner, the Development Team, if any, and other property principals.
- (h) A list of properties owned and/or managed by the Owner or pertinent Development Team members, including the proposed property. Indicate the number of units in each property that receive housing assistance and identify the type of assistance received. Include any units currently occupied by Housing Choice Voucher Program participants. For each property listed, the proposal must disclose and explain:
 - (1) Current financial default of more than sixty (60) days duration;
 - (2) Mortgage assignment or workout arrangement;
 - (3) Foreclosure and/or bankruptcy;
 - (4) Litigation relating to financing or construction of the property that is pending or which was adjudicated within the past five (5) years with a finding against the Owner or Development Team;
 - (5) Real estate tax delinquencies; and
 - (6) Litigation by tenants, both residential and commercial.

- (i) A description of the experience of the proposed management company over the past five (5) years.
- (j) The Management and Maintenance Plan for the property.
- (k) A financial package including sources and uses and showing evidence of financing commitments or conditional commitments and an operating budget.
- (l) A timeline for property development showing projected date of occupancy.
- (m) Completed certifications regarding commitment to comply with pertinent federal requirements.
- (n) Other information as may be deemed necessary by DCHA.

9307**THRESHOLD CRITERIA**

9307.1 Where DCHA proceeds under any provision of Section 9304 of this Title, each application must meet the criteria of Section 9307 of this Title.

- (a) The property must be eligible under the site and neighborhood standards set forth in Section 6005 of Chapter 60 of these regulations. Information and maps regarding eligible areas may be available from the DCHA Office of Planning and Development or the DCHA Housing Choice Voucher Program.
- (b) For existing units, the property must reasonably be expected to be occupied within six (6) months of the date of award of an AHAP Contract and be in compliance with the Housing Quality Standards. For new construction and substantial rehabilitation, the property must reasonably be expected to be occupied within three (3) years of the date of award of an AHAP Contract and be completed in compliance with the Housing Quality Standards. The Housing Quality Standards are available by contacting the DCHA's Housing Choice Voucher Program.
- (c) A project must be financially feasible. This may be demonstrated by a ten (10) year operating pro-forma or other means, as specified by DCHA in its periodic announcements of Partnership Program subsidy availability.
- (d) Applications requesting Partnership Program subsidy in order to provide supportive living environments for low income disabled families or persons may be awarded HAP Contracts only if the units to be subsidized

were not previously available with supportive services for low income disabled families.

- (e) Evidence of ownership, in a format acceptable to DCHA, must be provided with any application.
- (f) All principals of the ownership and management entities, including the entity itself, must not be on the U.S. General Services Administration List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9308 RATING AND RANKING OF APPLICATIONS

9308.1 If DCHA proceeds under Section 9304.2 of this Title, the following criteria may be used to rate and rank applications:

- (a) The property's ability to meet one or more of the five criteria listed in Section 9300 of this Title;
- (b) In properties with four or more units, a weighted average bedroom size exceeding 1.4;
- (c) Experience of the Owner and Development Team in successful completion of one or more mixed income, HUD subsidized residential development projects;
- (d) Demonstrated market demand for the property if the project will require a lease up from a predominantly vacant condition or will have a rent increase of more than fifteen percent (15%) in the market units;
- (e) The experience and professionalism of the proposed management company in providing high quality management of innovative projects and the quality of the proposed Management and Maintenance Plan;
- (f) The convenience of the facilities and amenities of the neighborhood and, if the property is located in a poverty impacted neighborhood, a comprehensive neighborhood revitalization strategy must be underway or realistically expected to begin implementation in the next three (3) years.
- (g) Such other factors as are published in an announcement.

9308.2 Subsidies will be awarded up to the annual percentage of the total DCHA Housing Choice Voucher Program allocation established pursuant to Section 9302.3 of this Title.

9308.3 In the event that there are more units qualifying for Partnership Program subsidies than are available, Partnership Program subsidies will be reserved for successful applications based on the rating and ranking performed by DCHA.

9309 COMMITMENT AND AWARD OF SUBSIDY

9309.1 Private sector for profit and non-profit owners will be notified within ninety (90) days of receipt of an application of the decision of the DCHA on the qualifications of the application.

9309.2 The notice will indicate whether the application and the property will be:

- (a) accepted for the Partnership Program after having been selected. Upon notifying the Owner that the application has been selected, DCHA will enter into an AHAP Contract;
- (b) deemed incomplete for not supplying the Required Application Information listed in Section 9306 of this Title and returned to the Owner for further information;
- (c) rejected for not having met the Threshold Criteria listed in Section 9307 of this Title;
- (d) determined to have been selected but with no Partnership Program subsidy available for the year requested. In these circumstances the Owner will be given the option of accepting an AHAP Contract beginning in a later year.

9310 POST SELECTION CONDITIONS

9310.1 After the determination has been made to award a HAP Contract for a property, the following conditions must also be met before the HAP Contract can be issued.

- (a) Relocation. Current tenants of units to receive the Partnership Program subsidy must be eligible for a Housing Choice Voucher. In addition, permanent displacement is prohibited.
 - (1) If the units to be assisted are occupied by tenants that are over the allowable income, and the application will require a reduction in the total number of units because there are no other vacant units in the building, or if families to be assisted are living in units that are not suitable to family size, the application will be rejected or partially assisted, at DCHA's discretion.

- (2) Temporary relocation to accommodate rehabilitation or repairs may not exceed twelve (12) months. Tenants will receive reimbursement from the Owner for reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including moving costs to and from the temporary housing and increases in monthly housing costs.
- (b) All properties will undergo a property inspection by DCHA or its contractor. The inspection will identify rehabilitation work that is necessary for the units to meet Housing Quality Standards and identify building systems, in danger of failure, which must be repaired or replaced.
- (c) If the HAP Contract is used as a pledge to secure financing, DCHA must review the commitment documents to ensure that the financing does not modify the AHAP Contract or the HAP Contract and is not inconsistent with those contracts.

9311 HOUSING ASSISTANCE PAYMENT CONTRACT

- 9311.1 For existing units, DCHA will enter into an Agreement to Enter into a Housing Assistance Payment (AHAP) Contract for a term of not more than six (6) months.
- 9311.2 For new construction and substantial rehabilitation, DCHA will enter into an AHAP Contract for a term of not more than three (3) years.
- 9311.3 If the units have not been occupied by the end of the AHAP Contract term, the allocation will be rescinded. If, after rescission, the Owner is still interested in the Partnership Program and additional allocations are available, the Owner will be required to submit a revised application under a new announcement.
- 9311.4 Once the Partnership Program units are occupied, DCHA will enter into a HAP Contract with the Owner based on the FMRs in place at the time the HAP Contract is executed. Upon commencement of the contract term, DCHA will make monthly Housing Assistance Payments in accordance with the HAP Contract for each unit occupied by an eligible family. The initial term of the HAP Contract is up to ten (10) years, subject to future availability of appropriations, and the HAP Contract may be extended for an indefinite period thereafter. To obtain the current FMRs, see Section 9303.5 of this Title.
- 9311.5 Owners agree to accept eligible tenants from DCHA's waiting list in accordance with their own rental screening criteria and to maintain the units at acceptable Housing Quality Standards for the term of the HAP Contract.
- 9311.6 As long as the vacancy is not the fault of the Owner and the Owner is taking every reasonable action to minimize likelihood and extent of any vacancy, DCHA

will make vacancy payments for up to sixty (60) days for vacant units designated for Partnership Program subsidy.

9311.7 If a unit remains vacant for one hundred and twenty (120) days from the first day of the month in which the unit became vacant, DCHA may reduce the HAP Contract with the Owner in an amount equivalent to the remaining months of subsidy attributable to the vacant unit.

9312 ELIGIBLE TENANTS AND TENANT SELECTION

9312.1 Tenants for units subsidized through the Partnership Program will be selected from the Housing Choice Voucher Waiting List maintained by DCHA in accordance with the Administrative Plan as mended and restated from time to time by the Board of Commissioners.

9312.2 For existing occupied properties that are awarded a HAP contract, current occupants at the time of execution of the HAP contract may elect to participate, if determined income eligible as provided in 9312.6 herein. Such occupants/units are eligible for assistance under the Partnership Program without being processed through the Housing Choice Voucher Waiting List.

9312.3 At least seventy five percent (75%) of the families admitted to the Partnership Program must be families whose annual income does not exceed thirty percent (30%) of median income for the area.

(a) When a DCHA subsidized unit becomes vacant at a Partnership Program property, the property manager will notify DCHA, who will refer the next qualified applicant from the HCVP Waiting List to the management office for screening by the property manager.

(b) Any Partnership Program property manager may refer interested applicants to DCHA to apply for the HCVP housing assistance directly from the HCVP Waiting List based on date and time of application, or in the case of special needs housing properties they may refer applicants to the DC Department of Mental Health, DC Office on Aging, or the DC Department of Health for referral to DCHA as a Special Needs Housing applicant for qualification for the Local Preference provided under the HCVP Administrative Plan.

9312.4 Referrals will be placed on the HCVP Waiting List by date and time of application and other preferences established by the DCHA Housing Choice Voucher Program Administrative Plan.

- (a) When a DCHA subsidized unit becomes vacant at a Partnership Program property, the property manager will notify DCHA, who will refer the next qualified applicant from the HCVP Waiting List to the management office for screening by the property manager.
 - (b) Any Partnership Program property manager may refer interested applicants to DCHA to apply for the HCVP housing assistance directly from the HCVP Waiting List based on date and time of application, or in the case of special needs housing properties they may refer applicants to the DC Department of Mental Health, DC Office on Aging, or the DC Department of Health for referral to DCHA as a Special Needs Housing applicant for qualification for the Local Preference provided under the HCVP Administrative Plan.
- 9312.5 Referrals will be placed on the HCVP Waiting List by date and time of application and other preferences established by the DCHA Housing Choice Voucher Program Administrative Plan.
- 9312.6 Any applicant who rejects an offer of a Partnership Program unit or who is rejected for admission to a Partnership Program property by the property manager shall retain his/her place on the DCHA waiting list as if the offer had not been made.
- 9312.7 DCHA retains the responsibility of determining compliance with all Housing Choice Voucher applicable requirements, including:
- (a) Rent reasonableness;
 - (b) Compliance with Housing Quality Standards;
 - (c) Applicant eligibility for all applicants including those referred by other agencies under a preference criteria,
 - (d) Referring eligible applicants from the waiting list in accordance with the Administrative Plan; and
 - (e) Tenant income certification and recertification.

All persons desiring to comment on the subject matter of this emergency and 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 the OGC, DCHA, 1133 North Capitol, N.E., Room 210, Washington, DC 20002-7599. Copies of these rules may be obtained from the DCHA at the same address.

DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE AND SECURITIES REGULATION

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Commissioner of the Department of Insurance and Securities Regulations, pursuant to the authority set forth in §§ 101 (9) and 125 of the Insurance Trade and Economic Development Act of 2000, effective April 3, 2001 (D.C. Law 13-265; D.C. Official Code §§ 31-2231.01 (9) and 31-2231.25), hereby gives notice of the adoption of emergency rules to be included in Title 26, Chapter 50 of the District of Columbia Municipal Regulations ("DCMR"). These rules were adopted on an emergency basis to prevent insurers from using weather related claims from Hurricane Isabel, which occurred on September 17-18, 2003, as grounds to non-renew or deny homeowners' insurance to District of Columbia residents. Because many homeowners' insurance policies are now coming up for renewal following the filing of Hurricane Isabel-related claims, the adoption of these rules is necessary to prevent the nonrenewal of insurance policies for impermissible reasons. Accordingly, the immediate protection of the public welfare justifies emergency action.

The Commissioner also gives notice of his intent to take final rulemaking action to adopt the proposed rules in not less than thirty (30) days from the date of publication of this notice in the D.C. Register. These rules will provide the bases upon which insurers may properly non-renew homeowners' insurance, and use claims information from databases.

These emergency rules were adopted and became effective on December 19, 2003, and will expire 120 days after their effective date, or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever occurs first. If the effective date is declared invalid by a final and unappealable court order, then the emergency regulations shall be effective on the date of publication of this notice.

Emergency rules on this subject were previously adopted on September 17, 2003, and were published as a Notice of Emergency and Proposed Rulemaking in the D.C. Register on October 31, 2003 at 50 DCR 9269. Several comments were received from interested parties and substantives changes were made to the rules based on those comments. This second Notice of Emergency and Proposed Rulemaking supersedes the prior emergency rules published October 31, 2003.

26 DCMR is amended by adding a new Chapter 50, Unfair Trade Practices, to read as follows:

5000 PERMISSIBLE REASONS FOR NON-RENEWAL AND USE OF CLAIMS HISTORY INFORMATION

- 5000.1 An insurer shall not refuse to renew a policy of homeowners insurance solely due to claim or loss frequency unless there have been two or more claims during the most recent three-year experience period.
- (a) For purposes of counting the number of claims under subsection 5000.1, the insurer shall not consider the first claim for a loss caused by weather, unless the insurer can provide evidence that the insured unreasonably failed to maintain the property and such failure to maintain contributed to the loss.
 - (b) For purposes of subsection 5000.1, the insurer shall not consider the first claim that was reported to the agent or insurer for which no payment was made by the insurer.
 - (c) For purposes of subsection 5000.1, the insurer shall not consider a loss where there was no investigation or other claim activity.
 - (d) For purposes of subsection 5000.1, an insurer shall not count any losses caused by a catastrophic event. A catastrophic event shall be a manmade or natural event that causes \$25 million or more in insured property losses, and affects a significant number of property and casualty policyholders and insurers.
- 5000.2 Every insurer shall provide a notice to its homeowners insurance policyholders that the insurer considers claims history in determining whether to renew the policy. Such notice may be on the declarations page or on a separate notice that accompanies the policy so long as the notice is conspicuous and includes language substantially similar to the following statement: "Your insurer may consider your claims and loss history when determining whether to renew your policy."
- 5000.3 An insurer may refuse to renew a policy of homeowner's insurance due to claim or loss frequency based upon standards more restrictive than those set forth in this rule if the insurer has, at the time of policy issuance or renewal, provided the insured with a written copy of the underwriting standards upon which the insurer based its nonrenewal, so long as the standards are conspicuous.
- 5001 USE OF CLAIMS HISTORY—NEW BUSINESS**
- 5001.1 In determining whether to issue a homeowners' insurance policy on a property not previously owned by the applicant, an insurer shall not base an adverse underwriting decision solely on the loss history of a previous owner of the property to be insured.

5002 EFFECTIVE DATE

5002.1 Sections 5000 and 5001 shall take effect on December 19, 2003 for all homeowners' insurance policies issued or reissued on or after that date, except that the notice to homeowners policyholders described in subsection 5000.2 shall take effect for policies issued or reissued on or after March 1, 2004.

5003-5099 RESERVED

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 Leslie Johnson, Hearing Officer, 810 First Street, N.E., Suite 701, Washington, D.C. 20002. Copies of these rules may be obtained at the address stated above.

**COMMISSION ON SELECTION AND TENURE
OF ADMINISTRATIVE LAW JUDGES
OF THE
OFFICE OF ADMINISTRATIVE HEARINGS**

NOTICE OF EMERGENCY RULEMAKING

The Commission on Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings (the "Commission"), pursuant to the authority set forth in section 14(b) of the Office of Administrative Hearings Establishment Act of 2001 (the "Act"), effective March 6, 2002, (D.C. Law 14-76; D.C. Official Code § 2-1831.11 (b) (2002 Supp.)), and § 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2001 ed.)), hereby gives notice of the adoption, on an emergency basis of an amendment to 6 DCMR Chapter 37. That Chapter originally was adopted on an emergency basis on October 2, 2003. See 50 DCR 8619 (October 10, 2003). Initial permanent rules to adopt Chapter 37 of Title 6 were proposed on December 19, 2003 (50 DCR 10,829), and the original emergency rules will expire before completion of the required period of public comment and legislative review pursuant to section 14(a) of the Act, D.C. Official Code § 2-1831.11(a). Adoption of these rules on an emergency basis will ensure that Administrative Law Judges can be recruited and hired for the new Office of Administrative Hearings, which will begin operations on March 22, 2004, during the period of public comment upon, and legislative review of, the initial permanent rules. Therefore, adoption of these rules on an emergency basis is necessary to protect public health, safety and welfare.

These emergency rules were adopted by the Commission on January 12, 2004, and became effective on that date. They will remain in effect for 120 days, or until publication of a notice of final rulemaking in the *D.C. Register*, whichever occurs first.

Chapter 37 of Title 6 DCMR, originally adopted on an emergency basis, is amended to read as follows:

CHAPTER 37

**APPOINTMENT, REAPPOINTMENT, DISCIPLINE AND REMOVAL OF
ADMINISTRATIVE LAW JUDGES BY THE COMMISSION ON SELECTION AND
TENURE OF ADMINISTRATIVE LAW JUDGES**

3700 SCOPE OF THIS CHAPTER

3700.1 This Chapter establishes standards and procedures for the appointment, reappointment, discipline, removal and qualifications of Administrative Law Judges in the Office of Administrative Hearings who hold office pursuant to section 11 of the Act, D.C. Official Code § 2-1831.09.

- 3700.2 This Chapter does not apply to the appointment, reappointment, discipline or removal of a Chief Administrative Law Judge or to a Chief Administrative Law Judge's assumption of a position as a Senior Administrative Law Judge pursuant to sections 7(d) and 7(e) of the Act (D.C. Official Code § 2-1831.05(d) and (e)). In accordance with section 7(e) of the Act, this Chapter does apply to the reappointment of any Senior Administrative Law Judge to any subsequent ten-year term and to the discipline or removal of any Senior Administrative Law Judge at any time.
- 3700.3 This Chapter does not apply to the appointment, reappointment, discipline or removal of any employee of the Office other than those set forth in sections 3700.1 and 3700.2.
- 3701 APPOINTMENT OF PERSONS OTHER THAN HEARING OFFICERS TO AN INITIAL TWO-YEAR TERM AS ADMINISTRATIVE LAW JUDGES**
- 3701.1 Administrative Law Judges, other than hearing officers seeking an appointment authorized by section 11(e) of the Act (D.C. Official Code § 2-1831.08(e)), shall be appointed to an initial two-year term in the manner prescribed in this section.
- 3701.2 The Commission shall have final authority to appoint Administrative Law Judges to an initial two-year term, pursuant to sections 9(b) and 11(c) of the Act (D.C. Official Code §§ 2-1831.06(b) and 2-1831.08 (c)).
- 3701.3 The Commission shall not appoint any person as an Administrative Law Judge who does not satisfy the qualifications prescribed in section 3703 or other applicable law.
- 3701.4 All vacant Administrative Law Judge positions shall be advertised in a portion of a daily or weekly periodical that is likely to be seen by highly qualified public and private sector attorneys in the District of Columbia who are seeking or considering positions as attorneys or Administrative Law Judges in the District of Columbia Government, except for:
- (a) Positions to be filled by persons covered by section 11(e) of the Act, (D.C. Official Code § 2-1831.08(e)); and
 - (b) Positions open only to Administrative Law Judges already appointed pursuant to this Chapter.
- 3701.5 In considering appointments subject to this section, the Commission may be assisted by an initial review panel appointed in conformity with sections 3701.7 to 3701.16. Any initial review panel shall follow the procedures set forth in sections 3701.17 to 3701.24, and, if it uses an initial review panel, the Commission shall follow the procedures set forth in sections 3701.25 to 3701.26. Alternatively, the Commission may proceed in any other manner consistent with the Due Process Clause of the Fifth Amendment to the United States

- Constitution, but all appointments must be approved by a majority of the voting members of the Commission.
- 3701.6 Neither the Commission nor any initial review panel shall discriminate in any manner prohibited by the Constitution or by federal or District of Columbia law.
- 3701.7 An initial review panel shall consist of at least five and no more than seven members.
- 3701.8 The Chief Administrative Law Judge shall be a member of every initial review panel, or may designate a person to act for him or her on any initial review panel.
- 3701.9 Upon request, any member of the Commission may be a member of an initial review panel.
- 3701.10 Other members of an initial review panel may be Administrative Law Judges, members of the District of Columbia Bar who are familiar with trial-level litigation (including members in private practice, in government service or in teaching positions), non-lawyer members of the public experienced in issues likely to come before the Office, and non-lawyer senior management officials of agencies whose cases are adjudicated by the Office.
- 3701.11 No person may serve as a member of an initial review panel if he or she is personally representing a party in any matter pending before the Office. In addition, any person who serves on an initial review panel may not appear as an attorney or otherwise participate in any professional or representative capacity in any matter pending before the Office until one year after the completion of his or her service on the initial review panel. This subsection does not prohibit any Administrative Law Judge or any other employee of the Office from performing his or her assigned duties.
- 3701.12 **[RESERVED]**
- 3701.13 If one or more vacancies exist, and an initial review panel is to be used, the Chief Administrative Law Judge shall file with the Commission a list of proposed members of an initial review panel for a specific vacancy or vacancies. The Chief Administrative Law Judge shall specify the number of vacancies for which each individual review panel is to be formed.
- 3701.14 Each person named in the list submitted by the Chief Administrative Law Judge may become a member of an initial review panel if a majority of the voting members of the Commission approves such person.
- 3701.15 Any voting member of the Commission who disapproves of any proposed member of an initial review panel shall file a written statement to that effect with the Commission within ten days of the filing of the list with the Commission.

- 3701.16 Any person who has not been disapproved by a majority of the voting members of the Commission within ten days of the filing of his or her name with the Commission shall be deemed to be approved by the Commission as a member of an initial review panel.
- 3701.17 An initial review panel shall review the applications of all persons for the vacancy or vacancies for which the panel has been formed.
- 3701.18 Based upon the applicants' written submissions, the initial review panel shall select the most highly qualified applicants from the group for interviews.
- 3701.19 An initial review panel may conduct one or more rounds of interviews. A majority of the members of each initial review panel shall be present for an interview of any applicant. If an initial review panel member is not present for a final round interview of any applicant, he or she may not vote or otherwise participate in the initial review panel's decision to forward applications to the Commission pursuant to sections 3701.20 through 3701.24, but he or she may participate in the deliberations of the individual review panel leading to that decision.
- 3701.20 For each vacancy for which it was formed, an initial review panel may forward to the Commission the applications of one or more applicants whom it determines to be highly qualified to serve as an Administrative Law Judge.
- 3701.21 **[RESERVED]**
- 3701.22 In deciding which applications, if any, should be forwarded to the Commission, an initial review panel shall consider the candidates' legal knowledge, judgment, analytical skills, the amount and the quality of their experience in the practice of law, their judicial temperament and character, their case management skills, and their ability to contribute to the mission of OAH.
- 3701.23 An initial review panel shall not forward to the Commission the application of any candidate who does not satisfy the qualifications prescribed in the Act and in section 3703.
- 3701.24 An initial review panel shall not forward to the Commission the application of any applicant who fails to submit:
- (a) A certificate of good standing, issued no earlier than thirty (30) days before such submission, from the appropriate court of every jurisdiction in the United States to whose Bar the applicant has been admitted, demonstrating that the applicant is a member in good standing of such Bar, except that no such certificate from any federal court is necessary; and
 - (b) A certification, issued no earlier than thirty (30) days before such submission, from the Bar Counsel, Grievance Committee or similar office

in each jurisdiction described in subsection (a) stating whether there are or have been any disciplinary complaints against the applicant and whether any discipline has been imposed upon the applicant.

- 3701.25 The Commission shall consider all applications forwarded to it by an initial review panel. The Commission shall interview all candidates whose names are forwarded by an initial review panel and may interview any other qualified candidate upon the vote of a majority of the voting members. At least two voting members of the Commission shall attend any interview of an applicant.
- 3701.26 For any vacancy, the Commission may appoint a candidate from among the candidates it has interviewed for that vacancy. In making its decision, the Commission shall evaluate the candidates' legal knowledge, judgment, analytical skills, the amount and the quality of their experience in the practice of law, their judicial temperament and character, their case management skills, and their ability to contribute to the mission of OAH. The Commission may decide not to appoint any of the candidates forwarded to it by an initial review panel.
- 3701.27 For a candidate to be appointed, a majority of the voting members of the Commission must vote in favor of the appointment.
- 3701.28 Any person appointed by the Commission to an initial two-year term pursuant to this section shall enter onto duty no later than 60 days after his or her receipt of written notice of the appointment, and his or her term shall commence on the date of his or her entry onto duty.
- 3701.29 For good cause, and upon request of the appointee, the Commission may extend the 60-day deadline established in section 3701.28 for a single period of 30 days.
- 3701.30 If a person appointed by the Commission does not enter onto duty within the deadline provided in sections 3701.28 and 3701.29, the appointment shall expire and the appointee's position shall be deemed to be vacant.
- 3702 APPOINTMENT OF HEARING OFFICERS TO AN INITIAL TWO-YEAR TERM AS ADMINISTRATIVE LAW JUDGES**
- 3702.1 A hearing officer serving in an agency to which the Act becomes applicable and who is eligible for an appointment as an Administrative Law Judge pursuant to section 11(e) of the Act (D.C. Official Code § 2-1831.08(e)) may be appointed by the Commission to an initial two-year term as an Administrative Law Judge only in compliance with this section.
- 3702.2 No person who has been serving as a hearing officer for less than one year before the Act becomes applicable to his or her agency shall be eligible for appointment as an Administrative Law Judge pursuant to section 11(e) of the Act (D.C. Official Code § 2-1831.08(e)) unless his or her employment as a hearing officer has been authorized in writing by the Chief Administrative Law Judge or his or her designee.

- 3702.3 Any hearing officer who does not satisfy the requirements of section 3702.2 is eligible to be considered for appointment as an Administrative Law Judge pursuant to section 11(b) of the Act (D.C. Official Code § 1831.08 (b) and section 3701 of these rules.
- 3702.4 At least sixty days before the Act becomes applicable to his or her agency, a hearing officer who wishes to be appointed to an initial two-year term as an Administrative Law Judge pursuant to section 11(e) of the Act, D.C. Official Code § 2-1831.08(e), shall file with the Chief Administrative Law Judge a request for such appointment.
- 3702.5 The Chief Administrative Law Judge may prescribe a form for the submission of such a request. The form may require information reasonably necessary to show that the hearing officer meets the qualifications set forth in the Act or in this Chapter.
- 3702.6 Each request shall demonstrate that the hearing officer is qualified for appointment as an Administrative Law Judge pursuant to section 11(e) of the Act, D.C. Official Code § 2-1831.08(e). The request shall contain:
- (a) A description of the hearing officer's current position in a covered agency and the amount of time he or she has been so serving;
 - (b) A certificate of good standing, issued no earlier than thirty (30) days before submission of the request, from the appropriate court in every jurisdiction in the United States to whose Bar the hearing officer has been admitted, demonstrating that the hearing officer is a member in good standing of such Bar, except that no such certificate from any federal court is necessary;
 - (c) A certification, issued no earlier than thirty (30) days before submission of the request, from the Bar Counsel, Grievance Committee or similar authority in each jurisdiction described in subsection (b) stating whether there are or have been any disciplinary complaints against the hearing officer and whether any discipline has been imposed upon the hearing officer.
 - (d) A description of the hearing officer's experience in the practice of law, showing that the hearing officer has at least five years experience in the practice of law, including experience with court, administrative or arbitration litigation.
- 3702.7 The Chief Administrative Law Judge shall forward all timely requests for appointment to the Commission.
- 3702.8 The Commission shall examine each hearing officer's request and shall conduct, or direct the Chief Administrative Law Judge or any person designated by the Chief Administrative Law Judge to conduct, inquiries that it deems sufficient to

verify the information submitted by a hearing officer and to verify that the hearing officer satisfies the standards prescribed in section 3703.

- 3702.9 If the Commission finds that the hearing officer satisfies the qualifications set forth in this section 3702 and in section 3703, it shall appoint the hearing officer to an initial two-year term as an Administrative Law Judge. A majority of the voting members of the Commission must approve all such appointments.
- 3702.10 The term of a hearing officer appointed as an Administrative Law Judge pursuant to this section shall commence on the day that the Act becomes applicable to cases heard by the agency by which he or she is employed when the request is submitted to the Chief Administrative Law Judge.
- 3702.11 For a former hearing officer to remain qualified for his or her appointment as an Administrative Law Judge, he or she must pass a qualifying examination approved by the Commission pursuant to section 3704 of this Chapter, either before the appointment takes effect, or within 18 months of the appointment's effective date.
- 3702.12 If a qualifying examination approved by the Commission has not been offered and graded at least three times between the date of submission of a hearing officer's request for appointment and 18 months after the effective date of his or her appointment, the deadline for a hearing officer to remain qualified by passing the qualifying examination shall be extended until such an examination has been offered and graded three times after the date of submission of the hearing officer's request for appointment.

3703 QUALIFICATIONS OF ADMINISTRATIVE LAW JUDGES

- 3703.1 An Administrative Law Judge must be a member of the District of Columbia Bar at the time of his or her appointment, and must remain a member of the District of Columbia Bar throughout his or her tenure as an Administrative Law Judge.
- 3703.2 At the time of appointment, an Administrative Law Judge must have at least five years' experience as a member of the bar engaged in the full time practice of law, including substantial litigation experience in court, in an administrative agency, or in arbitration. Such an attorney may count his or her experience as a hearing officer, judge, administrative law judge, or hearing examiner toward meeting this requirement.
- 3703.3 An Administrative Law Judge appointed to a position at Grade 15 or below is subject to the residency requirements applicable to attorneys pursuant to section 906(c) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139, as amended (D.C. Official Code § 1-609.06(c)).
- 3703.4 An Administrative Law Judge appointed to a position at a level higher than Grade 15 shall be subject to the residency requirements placed on members of the Senior

Executive Attorney Service pursuant to section 859 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-608.59).

- 3703.5 An Administrative Law Judge shall possess judicial temperament, judgment, expertise, experience and analytical and other skills necessary and desirable for an Administrative Law Judge.
- 3703.6 An Administrative Law Judge shall be a person of good moral character. Without limiting the foregoing, no person may be appointed or serve as an Administrative Law Judge who:
- (a) Has been convicted (on any plea) of a felony at any time;
 - (b) Has been convicted (on any plea) of a misdemeanor involving moral turpitude within the ten (10) years preceding the date of his or her appointment; or
 - (c) Has been convicted (on any plea) of a misdemeanor involving moral turpitude while serving as a hearing officer, without regard to the date of conviction.
- This section shall not preclude the appointment or service as an Administrative Law Judge of any person who has been pardoned for any offense described in subsections (a) through (c). For purposes of subsections (b) and (c), a misdemeanor is one involving moral turpitude if it would be considered an offense involving moral turpitude within the meaning of D.C. Official Code § 11-2503(a).
- 3703.7 The Commission may seek any information concerning an applicant that will assist it in determining whether the applicant satisfies any of the standards of this Chapter.
- 3703.8 No person may be appointed or re-appointed to any term as an Administrative Law Judge who fails to provide any necessary release or fails to cooperate in any other way with the efforts of the Commission or any of its designees to obtain any of the information described in section 3703.7.
- 3703.9 Except as provided in sections 3702.11 and 3702.12, no person may be appointed as an Administrative Law Judge unless that person has obtained a passing grade on a qualifying examination devised and administered in accordance with section 3704.

3704 QUALIFYING EXAMINATION

- 3704.1 No qualifying examination may be administered unless it has been approved by the Commission as provided in this section.
- 3704.2 Except as provided in section 3702.11, only applicants whom an initial review panel decides to interview in a final round interview may take the qualifying examination. If the Commission decides, pursuant to section 3701.5 of this Chapter, not to use an initial review panel, it shall decide, in its sole discretion, which applicants for a particular position shall be permitted to take the qualifying examination.
- 3704.3 The Chief Administrative Law Judge shall propose questions, model answers and grading standards for each qualifying examination.
- 3704.4 The Chief Administrative Law Judge shall submit each proposed version of the qualifying examination, including the questions, the model answers and the grading standards to the Commission for its approval. No examination may be used unless a majority of the voting members approves the questions, the model answers and the grading standards.
- 3704.5 In preparing any version of a qualifying examination, the Chief Administrative Law Judge may seek assistance from law school faculty members, Administrative Law Judges or others with suitable knowledge and experience who will not be taking that version of the examination.
- 3704.6 No version of the qualifying examination may be administered more than once.
- 3704.7 No person who has assisted the Chief Administrative Law Judge in preparing a specific qualifying examination may sit for the examination for which he or she has provided such assistance.
- 3704.8 Except as authorized by this Section 3704, no person shall reveal the contents of an examination to any other person before administration of that examination is completed.
- 3704.9 The examination shall test analytical writing skills, case management skills, and legal reasoning skills.
- 3704.10 The examination shall be graded on a pass/fail basis by members of an initial review panel appointed pursuant to sections 3701.7 - 3701.16 or by attorney graders approved by the Commission in the manner described in sections 3701.7 - 3701.16.
- 3704.11 The examination shall be graded anonymously, and graders shall not seek or receive any information about the identity of a person who submits a particular examination before the grading process is complete. If any person provides or attempts to provide such information to a grader, the grader shall report it in

writing to the Chairperson of the Commission and the Chief Administrative Law Judge.

- 3704.12 Each grader shall grade each examination independently. For an examination to receive a passing grade, at least fifty percent (50%) of the assigned graders must award it a passing grade.
- 3704.13 The examination shall be graded non-competitively, and neither the initial review panel nor the Commission shall use the examination to rank applicants in any way, other than to distinguish those who pass from those who fail.
- 3704.14 The decision of the graders shall be final, and neither the Commission nor an initial review panel may review the graders' decision.
- 3704.15 In forwarding applications to the Commission, the initial review panel shall inform the Commission only that an applicant has passed the examination, and shall give no other information about the applicant's performance on the examination.
- 3704.16 Applicants will be informed whether or not they passed the examination, but neither the initial review panel nor the Commission shall disclose any other information about an applicant's performance on an examination.
- 3704.17 All examination papers shall be destroyed one year after they are graded.
- 3704.18 If an applicant receives a passing grade on any qualifying examination but is not appointed as an Administrative Law Judge, such applicant shall be deemed to have satisfied the requirement of section 3703.9 for any vacancy arising within three years of the date that he or she sat for the examination.
- 3704.19 Whenever hearing officers will be eligible to be appointed as Administrative Law Judges pursuant to section 11(e) of the Act (D.C. Official Code § 2-1831.08(e)), the Chief Administrative Law Judge shall use his or her best efforts to arrange for the administration of at least three qualifying examinations during the period between four (4) months before and eighteen (18) months after the date when the Office begins hearing cases from such officers' agency.

3705 REAPPOINTMENT OF ADMINISTRATIVE LAW JUDGES

- 3705.1 No earlier than nine (9) months before the expiration of an Administrative Law Judge's term of office, any Administrative Law Judge seeking reappointment to a new term (including a Senior Administrative Law Judge) shall file a statement with the Commission and with the Chief Administrative Law Judge requesting reappointment.
- 3705.2 If such a statement is not filed by any Administrative Law Judge at least six (6) months before the expiration of his or her term, a vacancy shall result from the

expiration of the term of office and shall be filled by appointment as provided in section 3702.

- 3705.3 The statement may review significant aspects of the Administrative Law Judge's activities that the Administrative Law Judge believes will be helpful to the Commission in the evaluation of his or her candidacy for reappointment.
- 3705.4 For every Administrative Law Judge who files a statement in accordance with section 3705.1, the Chief Administrative Law Judge shall prepare a record for the Commission's review. That record shall contain:
- (a) Copies of performance evaluations of the Administrative Law Judge, as set forth below:
 - (1) For Administrative Law Judges completing a ten-year term, the record shall contain performance evaluations for at least the previous five years;
 - (2) For Administrative Law Judges completing a two-year term, the record shall contain all performance evaluations during his or her term;
 - (b) At least one year of decisions authored by the Administrative Law Judge;
 - (c) Copies of any other decisions that the Chief Administrative Law Judge deems relevant to the determination of the Administrative Law Judge's fitness for reappointment;
 - (d) Data on how the Administrative Law Judge has met applicable objective performance standards during his or her term;
 - (e) The Chief Administrative Law Judge's recommendation, with a statement of reasons, as to whether the Administrative Law Judge should be reappointed; and
 - (f) Any other information requested by one or more members of the Commission.
- 3705.5 The Chief Administrative Law Judge shall file the record required by section 3705.4 with the Clerk within 120 days of the filing of a statement by the Administrative Law Judge in accordance with section 3705.1.
- 3705.6 The Chief Administrative Law Judge shall serve a copy of the record upon the Administrative Law Judge no later than the same day that the record is filed with the Commission.
- 3705.7 As soon as practicable after receiving a statement of intent to seek reappointment from an Administrative Law Judge, the Commission shall publish a notice in the

District of Columbia Register that the Administrative Law Judge is seeking reappointment and that the Commission is soliciting the views of litigants, attorneys and members of the public on whether the Administrative Law Judge should be reappointed.

- 3705.8 The notice required by section 3705.7 shall call for comments to be submitted to the Commission within thirty (30) calendar days of its publication.
- 3705.9 The Commission shall provide copies of any comments it receives to the Administrative Law Judge, and shall redact the names and other information that identifies the person submitting the comments.
- 3705.10 Within ten (10) calendar days of service of the record or of the Commission's sending of public comments to the Administrative Law Judge, whichever is later, an Administrative Law Judge who wishes to respond to the Chief Administrative Law Judge's recommendation or to any public comments or to add information to the record that he or she believes should be considered with respect to his or her reappointment shall file with the Clerk a notice of intent to supplement the record. The Administrative Law Judge may file such a notice regardless of whether he or she files a request to appear before the Commission. The notice shall describe generally the additional information that the Administrative Law Judge intends to add to the record and shall be promptly transmitted to the members of the Commission by the Clerk.
- 3705.11 Within ten (10) calendar days of service of the record, or of the Commission's sending of public comments to the Administrative Law Judge, whichever is later, an Administrative Law Judge who wishes to appear before the Commission to be heard in person concerning his or her reappointment shall file with the Clerk a request to appear. The Administrative Law Judge may file such a request regardless of whether he or she has filed a notice of intent to supplement the record. The request shall be promptly transmitted to the members of the Commission by the Clerk.
- 3705.12 If the Administrative Law Judge does not timely file a notice of intent to supplement the record or a request to appear, the Commission may proceed to consider the application for reappointment based solely on the Administrative Law Judge's written statement, the record filed by the Chief Administrative Law Judge and any public comments.
- 3705.13 If an Administrative Law Judge files a notice of intent to supplement the record, he or she must file with the Commission and the Chief Administrative Law Judge any response to the Chief Administrative Law Judge's recommendation and any additional information that he or she wishes the Commission to consider within twenty (20) calendar days of filing the notice of intent to supplement.
- 3705.14 If an Administrative Law Judge fails to supplement the record within the deadline established in section 3705.13, the Commission may proceed to consider the

reappointment without waiting for the filing of any supplement to the record by the Administrative Law Judge.

- 3705.15 If an Administrative Law Judge has filed a request to appear before the Commission, the Commission may not vote on his or her reappointment or issue a notice of grounds for possible denial of reappointment unless it affords the Administrative Law Judge an opportunity to appear before it.
- 3705.16 The Commission may request that an Administrative Law Judge appear personally or respond in writing to any questions or concerns it may have.
- 3705.17 No Administrative Law Judge may be denied reappointment unless the Commission first serves upon him or her a notice of grounds for possible denial of reappointment. Any such notice shall specify the reasons why the Commission is considering the possible denial of his or her application for reappointment and shall set a date, at least twenty (20) days after service of the notice, on which the Commission will meet to consider final action on the request for reappointment. The Commission may not take final action on the request for reappointment before such meeting.
- 3705.18 Within fifteen (15) days of service of a notice of grounds for possible denial of reappointment, an Administrative Law Judge may file a written response to the notice, and may request an opportunity to appear at the Commission's meeting.
- 3705.19 An Administrative Law Judge who timely files a request to appear at the Commission's meeting shall have the right to appear and be heard at the meeting. In its discretion, the Commission may permit other persons to testify at the meeting, either in support of, or in opposition to, the request for reappointment.
- 3705.20 The voting members of the Commission shall vote on the request for reappointment prior to the expiration of the Administrative Law Judge's term, but no earlier than 60 days prior to such expiration. In case of conflict between this section and section 3705.17, section 3705.17 shall control.
- 3705.21 In deciding whether to reappoint an Administrative Law Judge, the Commission shall consider all information it has received concerning the reappointment, and the voting members shall give significant weight to the recommendation of the Chief Administrative Law Judge, unless they determine that the recommendation is not founded on substantial evidence. The Commission shall reappoint the Administrative Law Judge if it finds that the Administrative Law Judge has satisfactorily performed the responsibilities of his or her office and is likely to continue to do so.
- 3705.22 The Commission shall issue a written statement of reasons for every decision to reappoint or not to reappoint an Administrative Law Judge.

- 3705.23 The Commission's decision on whether to reappoint the Administrative Law Judge shall be final, and a decision not to reappoint an Administrative Law Judge shall not be deemed to be disciplinary action.
- 3705.24 Any decision by the Commission not to reappoint an Administrative Law Judge shall be reviewable only to the same extent as a decision of the District of Columbia Commission on Judicial Disabilities and Tenure giving an evaluation of "Unqualified."
- 3705.25 An Administrative Law Judge who is reappointed pursuant to this section shall serve a term of ten years, beginning on the expiration date of his or her current term, or on the date he or she is notified in writing of the Commission's vote, whichever is later.
- 3705.26 If the Commission does not vote on the reappointment of an Administrative Law Judge before the expiration of his or her current term, the Administrative Law Judge may, in the discretion of the Chief Administrative Law Judge, be retained as a non-judicial employee of the Office, without reduction in grade or step, until the Commission votes on his or her reappointment.
- 3706 MISCELLANEOUS PROVISIONS**
- 3706.1 To file any document with the Commission pursuant to this Chapter, a person must deliver six copies of that document to the Clerk. The Clerk shall note the date of receipt on each filed document and shall arrange for prompt delivery of one of the copies to each member of the Commission. The Clerk shall retain the sixth copy in a suitably indexed file.
- 3706.2 Any document may be served upon an Administrative Law Judge by personal delivery to the Administrative Law Judge or by mail addressed to his or her home address. When service is by mail, three days shall be added to any period in this Chapter that is measured from the date of service.
- 3706.3 If the deadline for filing or serving any document falls on a Saturday, Sunday or legal holiday, that deadline is extended to the next day that is not a Saturday, Sunday or legal holiday.
- 3706.4 The Chief Administrative Law Judge shall take all necessary actions, including signing any required personnel forms, to effectuate the appointment or reappointment of any Administrative Law Judge appointed or reappointed by the Commission, but shall not violate the Act or the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, in doing so.
- 3707-3720 [RESERVED]**

3721 TRANSACTION OF COMMISSION BUSINESS

- 3721.1 The Commission shall operate in accordance with the provisions of the Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76 (D.C. Official Code, §§ 2-1831.01, *et seq.*).
- 3721.2 The Chairperson, or his or her designee, shall preside at each meeting of the Commission.
- 3721.3 The Commission, in consultation with the Chief Administrative Law Judge, may make reasonable part-time use of the Clerk and other non-judicial employees of the Office of Administrative Hearings in connection with the Commission's official duties.
- 3721.4 The General Counsel of the Office may serve as the General Counsel of the Commission.
- 3721.5 Meetings of the Commission shall be held at times agreed upon by the members of the Commission, or upon call by the Chairperson, or by two or more members of the Commission. Any meeting called shall be scheduled upon reasonable written notice to all members of the Commission, unless the requirement of written notice is waived by unanimous consent of all members of the Commission.
- 3721.6 The Chairperson, or his or her designee, may carry out routine Commission business (such as the granting of postponements pursuant to this chapter, authorization of preliminary inquiry into complaints regarding an Administrative Law Judge, and authorization of informal and non-determinative communications with an Administrative Law Judge or the Administrative Law Judge's counsel). Any of the foregoing shall be disclosed and reported to the Commission at its next meeting. Any act carried out by one of the above members may be reconsidered at the next meeting of the Commission upon motion.
- 3721.7 All records pertaining to the potential appointment, re-appointment, discipline, or removal of an Administrative Law Judge shall, without limitation as to other applicable privileges and protections, be deemed to be personnel records subject to D.C. Official Code § 1-631.01 and to rules issued thereunder.
- 3721.8 Nothing in this chapter limits the authority of the Commission to issue a protective order as otherwise permitted by law.

3722 PHYSICAL EXAMINATIONS AND MEDICAL INFORMATION

- 3722.1 At the Commission's written request for the purpose of evaluating an issue relating to the appointment, reappointment, discipline, or removal of an Administrative Law Judge, the Administrative Law Judge shall submit to one or more physical or mental examinations by a licensed physician, licensed

psychologist, or other licensed health professional designated by the Commission after consultation with the Administrative Law Judge. The examination and report shall be made at the expense of the District of Columbia.

3722.2 The health professional shall report his or her findings in writing to the Commission.

3722.3 At the Commission's request and for the purposes stated in section 3722.1, an Administrative Law Judge shall provide the Commission with all waivers and releases necessary to authorize the Commission to receive all medical records, reports, and information from any health professional, health care facility, or other facility regarding the Administrative Law Judge's physical or mental condition.

3722.4 The failure of an Administrative Law Judge to submit to a physical or mental examination or to provide waivers and releases required under this section by the Commission may be used as the basis for drawing an adverse inference against the Administrative Law Judge.

3722.5 Copies of all medical records, reports, and information received by the Commission shall be provided to the Administrative Law Judge at his or her request, and shall be maintained as confidential, personal and private by the Commission.

3723 FINANCIAL REPORTS

3723.1 To the extent required under any code of professional responsibility for Administrative Law Judges adopted pursuant to section 8(a)(9) of the Act, D.C. Official Code § 2-1831.05(a)(9), each Administrative Law Judge shall file a copy of the disclosure form required by D.C. Official Code § 1-1106.02 with the Commission within five (5) days of filing it with the Board of Elections and Ethics.

3723.2 The intentional failure by an Administrative Law Judge to file a report required by this section, or the intentional or reckless filing of a materially inaccurate report, shall constitute willful misconduct in office and shall be grounds for removal from office, or other disciplinary action, by the Commission.

3724 [RESERVED]

3725 PRECEDENTS

3725.1 Provided that copies have been filed by the Commission with the Chief Administrative Law Judge in the Office of Administrative Hearings and maintained and made reasonably available for review, each Administrative Law Judge shall be deemed to be on notice of the following:

- (a) The Commission's decisions in proceedings;

- (b) The Commission's evaluations of Administrative Law Judges who have been candidates for reappointment; and
 - (c) Any written communication by the Commission to the Chief Administrative Law Judge specifying that Administrative Law Judges are to take notice of the communication.
- 3725.2 Each Administrative Law Judge shall be deemed to be on notice of any code of professional responsibility for Administrative Law Judges promulgated by the Chief Administrative Law Judge under section 8(a)(9) of the Act, D.C. Official Code § 2-1831.05(a)(9), and any interpretative authorities cited therein as persuasive or authoritative.
- 3725.3 Each Administrative Law Judge shall be deemed to be on notice of Administrative Orders and other issuances of the Chief Administrative Law Judge so long as such documents are maintained by the Office of Administrative Hearings and made reasonably available for review.
- 3725.4 To the extent a document covered by this section has been redacted, an Administrative Law Judge shall not be deemed to be on notice of the redacted material unless he or she has received it separately.
- 3726-3728 [RESERVED]**
- 3729 CAUSE FOR DISCIPLINE OR REMOVAL**
- 3729.1 Cause to discipline or remove an Administrative Law Judge under the Act includes any of the following:
- (a) Willful misconduct in office, violation of applicable law or rules, including without limitation, any violation of a code of professional responsibility applicable to the Administrative Law Judge pursuant to section 8(a)(9) of the Act, D.C. Official Code § 2-1831.05(a)(9), or an Administrative Law Judge's willful and persistent failure to perform his or her judicial and other duties, including without limitation, the unexcused failure to meet annual performance standards in any two (2) years within a three (3) year period; or
 - (b) Other conduct prejudicial to the administration of justice or which brings the judicial office into disrepute; or
 - (c) Reckless or intentional material misrepresentation in securing or retaining his or her appointment or reappointment or intentional or reckless falsification of official records.
- 3729.2 Cause to remove an Administrative Law Judge includes:

- (a) Inability to discharge the duties of his or her office by reason of mental or physical condition or disability (including habitual intemperance) that has persisted for a period of at least one (1) year; or
- (b) Inability to discharge the duties of his or her office by reason of mental or physical condition or disability (including habitual intemperance) that is reasonably expected to persist for a period of at least one (1) year; or
- (c) An Administrative Law Judge's failure to satisfy all qualifications required by the Act or this Chapter at anytime during his or her term;

3729.3 A removal under section 3729.2 shall be designated as an involuntary retirement.

3730 INVESTIGATIONS

3730.1 The Commission may investigate and deliberate to determine whether a formal proceeding to discipline or remove an Administrative Law Judge should be instituted. It may do so upon proposal of the Chief Administrative Law Judge, or upon receiving information giving it reason to believe that there may be cause to discipline or remove an Administrative Law Judge.

3730.2 The investigation may be carried out in any lawful manner that the Commission deems appropriate, including without limitation, interviews, document reviews, the taking of evidence at Commission meetings or by deposition, and the issuance of subpoenas when authorized by law.

3730.3 The Commission may elect to notify the Administrative Law Judge in writing of the pendency of the investigation if it would not be prejudicial to the interests of justice.

3730.4 If, after investigation, the Commission has reason to believe that there is cause to discipline or remove an Administrative Law Judge, it may commence a formal proceeding against the Administrative Law Judge.

3730.5 If the Commission determines not to institute a formal proceeding, it shall so inform the Administrative Law Judge upon his or her inquiry, or if the Commission or its designee previously informed the Administrative Law Judge of the investigation. The Commission also shall give written notice to any complainant either that there is insufficient cause to proceed, or that the complaint poses a legal issue over which the Commission has no jurisdiction, as appropriate.

3730.6 Before instituting a formal proceeding against an Administrative Law Judge, the Commission shall serve the Administrative Law Judge with notice of the investigation and offer the Administrative Law Judge an opportunity to meet with the Commission.

3730.7 If the Administrative Law Judge files a request to meet with the Commission within seven (7) days of service of notice of the investigation, the Commission

shall meet with the Administrative Law Judge and his or her counsel, if any, for the purpose of considering whether the matter should be disposed of without a proceeding.

- 3730.8 An Administrative Law Judge may voluntarily terminate any investigation or formal proceeding before the Commission by filing with the Clerk a binding notarized statement that the Administrative Law Judge voluntarily resigns or retires from his or her position as an Administrative Law Judge; that he or she wishes to terminate the investigation or formal proceeding without a decision on the merits; and that he or she agrees never again to seek or accept an appointment as an Administrative Law Judge.
- 3730.9 Any person submitting a statement to the Commission pursuant to section 3730.8 shall not be qualified to be appointed as an Administrative Law Judge at any time thereafter.
- 3730.10 If an investigation is concluded without commencement of a formal proceeding, the Commission shall give written notice to the complainant explaining that the matter has been resolved and the nature of that resolution.
- 3730.11 Individuals interviewed by any member of the Commission or persons acting on its behalf during an investigation shall be asked to keep the matter confidential.
- 3730.12 All records and meetings relating to an investigation that does not result in a formal proceeding shall be non-public records of the Commission. All records and meetings relating to an inquiry that results in a formal proceeding, unless otherwise privileged or confidential under law, shall be public records of the Commission.
- 3730.13 If an Administrative Law Judge requests that a record documenting a non-public decision disposing of an inquiry involving that Administrative Law Judge be made public, the Commission shall make that record public within ten (10) days of the request. If an Administrative Law Judge requests that a document other than one documenting the decision from an investigation or complaint be made public, the Commission shall do so if it would serve the interests of justice.

3731 OATHS OR AFFIRMATIONS

- 3731.1 Each witness who appears before the Commission in an investigation or proceeding shall swear or affirm to tell the truth and not to disclose the nature of the investigation or of the proceeding or the identity of the Administrative Law Judge involved unless or until the matter is no longer confidential under the provisions of this chapter or other provisions of law.
- 3731.2 Each member of the Commission shall be authorized to administer oaths or affirmations to all witnesses appearing before the Commission.

3731.3 Each person appointed by the Commission to assist it shall be required to sign a confidentiality agreement as a condition of that person's participation in any non-public meeting, proceeding, investigation, or other activity.

3732-3733 [RESERVED]

3734 FORMAL PROCEEDINGS

3734.1 If the Commission institutes a formal proceeding against an Administrative Law Judge, it shall issue a written notice to the Administrative Law Judge advising him or her that the investigation has led to the institution of a formal proceeding against him or her.

3734.2 Unless otherwise ordered by the Commission, each formal proceeding shall be titled as follows:

BEFORE THE
DISTRICT OF COLUMBIA COMMISSION ON SELECTION AND TENURE
OF ADMINISTRATIVE LAW JUDGES

In re [name of Administrative Law Judge], Formal Proceeding Against an
Administrative Law Judge No. ____

3734.3 The notice shall be served by personal service upon the Administrative Law Judge.

3734.4 If it appears to the Chairperson of the Commission upon affidavit that, after reasonable effort for a period of ten (10) days, personal service could not be made, service may be made upon the Administrative Law Judge by mailing the notice by registered, certified, or express mail, addressed to the Administrative Law Judge at his or her Office of Administrative Hearings address and at his or her last known home address.

3734.5 The notice of formal proceeding shall specify concisely the charges and the alleged basis for the charges, and shall advise the Administrative Law Judge of the following:

- (a) The right to counsel;
- (b) The most severe action that the Commission proposes to take against the Administrative Law Judge if it concludes that there is cause for discipline or removal;
- (c) The obligation to file a written answer within twenty (20) days of service of the notice;

- (d) The person with whom the answer must be filed;
- (e) The right to an evidentiary hearing; and
- (f) The right to review any material that will be presented to the Commission during the formal proceeding.

- 3734.6 Pursuant to section 8 of the Act, D.C. Official Code § 2-1831.05, an Administrative Law Judge against whom a formal proceeding has been instituted may be placed on administrative leave at the discretion of the Chief Administrative Law Judge pending the outcome of the formal proceeding.
- 3734.7 An Administrative Law Judge shall file a written answer to a notice of formal proceeding within twenty (20) days of service of the notice.
- 3734.8 In his or her answer, an Administrative Law Judge shall raise every procedural and substantive defense or challenge and every fact or matter in extenuation, exculpation, or mitigation of which the Administrative Law Judge has knowledge or reasonably should have knowledge. Failure to include any such matter in the answer shall preclude the Administrative Law Judge from relying upon it at any point in the formal proceeding or subsequent judicial review.
- 3734.9 The Chairperson or the Commission may extend the time for filing an answer.
- 3734.10 In the interests of justice, the Commission at any time prior to its final decision in a proceeding may amend the notice of formal proceeding or may permit the answer to be amended to conform to proof or otherwise.
- 3734.11 The Administrative Law Judge shall be given a reasonable time to answer an amendment and to present his or her defense against any matter charged in an amendment.
- 3734.12 The notice of proceeding and the answer shall constitute the pleadings. No further pleadings or motions shall be filed, unless expressly authorized by the Commission.

3735 HEARINGS IN FORMAL PROCEEDINGS

- 3735.1 Upon the timely filing of an answer, unless good cause to the contrary appears in the answer, or if no timely answer is filed, the Commission shall order an evidentiary hearing to be held before it concerning the matters specified in the notice of formal proceeding.
- 3735.2 The Commission shall set a time and place for the hearing and, at least thirty (30) days prior to the date set, shall mail a notice of the hearing time and place by registered, certified, or express mail to the Administrative Law Judge addressed to the Administrative Law Judge at his or her Office of Administrative Hearings

- address and his or her last known home address and to the Administrative Law Judge's counsel, if any.
- 3735.3 The Chairperson or the Commission may extend the time for the commencement of a hearing.
- 3735.4 The Commission may rule on the defenses and challenges asserted in the answer at the outset of the hearing or may take them under advisement and rule on them during, at the close of, or after the hearing.
- 3735.5 At least fifteen (15) days before the hearing, the Administrative Law Judge and the Commission shall disclose to each other a list of witnesses that each may call (except rebuttal witnesses) and the documents that each may offer at the hearing (except documents that will be used solely for impeachment). Such documents may be redacted to protect privacy and confidential information, and to remove irrelevant and privileged information, but only to the extent consistent with due process.
- 3735.6 At the time and place set for hearing, the Commission shall proceed with the hearing whether or not the Administrative Law Judge has filed an answer or appears at the hearing.
- 3735.7 The hearing shall be held before the Commission, and evidence shall be received only when a quorum of the Commission is present.
- 3735.8 The Chairperson, or his or her designee, shall control the conduct of the proceeding, which shall be conducted in accordance with the procedures for contested hearings under D.C. Official Code § 2-509 and any other applicable law. In evaluating the weight of any evidence, the Commission shall use the codified rules of evidence applicable in the Superior Court of the District of Columbia once a comprehensive codification occurs, or if no such code exists, the Federal Rules of Evidence.
- 3735.9 The failure of the Administrative Law Judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of facts alleged to constitute cause for discipline or removal, but it may be a basis for an adverse inference.
- 3735.10 Special counsel designated by the Commission may present evidence against the Administrative Law Judge at the hearing.
- 3735.11 The Commission shall keep a complete record of each formal proceeding, including a verbatim record of each hearing. Upon request, a copy of the record of a formal proceeding shall be provided to the Administrative Law Judge at the expense of the District of Columbia.
- 3735.12 The Administrative Law Judge has the right to be represented by counsel in an investigation or formal proceeding. Any such counsel must be an active member

of the District of Columbia Bar, or may be admitted to represent the Administrative Law Judge *pro hac vice* by the Commission to the extent such admission would serve the interests of justice.

3735.13 The Administrative Law Judge shall be admitted to the hearing unless he or she is incompetent or so disruptive as to make it unduly burdensome for the Commission to conduct the hearing. If the Administrative Law Judge is not admitted, he or she shall be offered audio and visual access to the hearing.

3735.14 An Administrative Law Judge shall be given every reasonable opportunity to defend himself or herself against the charges at the hearing, including the introduction of evidence and examination and cross-examination of witnesses.

3735.15 **[RESERVED]**

3735.16 If it appears to the Commission at any time during a proceeding that the Administrative Law Judge is not competent to act for himself or herself, the Commission shall seek the appointment of a guardian *ad litem* unless the Administrative Law Judge has a legal representative who will act for him or her.

3735.17 The guardian *ad litem* or legal representative may exercise any right and privilege and make any defense for the Administrative Law Judge with the same force and effect as if exercised or made by the Administrative Law Judge if he or she were competent. Whenever the provisions of this chapter provide for notice to the Administrative Law Judge, that notice shall be given to the guardian *ad litem* or legal representative.

3735.18 Hearings in formal proceedings shall be open to the public, unless otherwise ordered by the Commission in order to avoid unfair prejudice to the persons other than the Administrative Law Judge who is the subject of the formal proceeding.

3736 FINDINGS OF FACT AND CONCLUSIONS OF LAW

3736.1 Within ninety (90) days after the close of the record in any formal proceeding, the Commission shall issue written findings of fact and conclusions of law.

3736.2 A copy of the findings and conclusions shall be served on the Administrative Law Judge and his or her counsel, if any.

3736.3 A copy of the findings and conclusions also shall be filed with the Clerk, together with the entire record.

3737 SANCTIONS

3737.1 If the Commission determines that there is cause for discipline or removal of an Administrative Law Judge, it may sanction the Administrative Law Judge by oral

reprimand, written reprimand, suspension without pay, reduction in grade, or removal.

3737.2 The Commission may require that the Administrative Law Judge undergo counseling, training, or rehabilitation as a condition for terminating a suspension or avoiding any disciplinary sanction.

3737.3 Any decision by the Commission imposing any sanction upon a Administrative Law Judge pursuant to this section, suspending an Administrative Law Judge pursuant to sections 3738 and 3739, affirming the imposition of disciplinary action upon an Administrative Law Judge pursuant to section 3740.17, or affirming the summary suspension of an Administrative Law Judge pursuant to section 3741, shall be reviewable only to the same extent as a decision of the District of Columbia Commission on Judicial Disabilities and Tenure giving an evaluation of "Unqualified."

3737.4 During any period of suspension pursuant to this Chapter, an Administrative Law Judge shall remain absent from the Office, unless authorized in writing to enter the premises by the Chief Administrative Law Judge.

3738 SUMMARY SUSPENSION UPON COMMENCEMENT OF CRIMINAL PROCEEDINGS

3738.1 Notwithstanding any other provision of this chapter, the Commission shall suspend an Administrative Law Judge with pay if it has probable cause to believe any of the following:

- (a) The Administrative Law Judge has been indicted for any crime that is or would be a felony under federal or District of Columbia law;
- (b) A criminal proceeding has been commenced in any court alleging that the Administrative Law Judge has committed any crime that bears a relationship to his or her position as an Administrative Law Judge; or
- (c) A criminal proceeding has been commenced in any court alleging that the Administrative Law Judge has committed any crime of dishonesty within the meaning of D.C. Official Code § 14-305.

3738.2 To suspend an Administrative Law Judge with pay pursuant to section 3738.1, the Commission shall serve a written notice of suspension upon the Administrative Law Judge. The notice shall inform the Administrative Law Judge of the following:

- (a) The reason for the suspension;
- (b) The beginning date of the suspension;

- (c) The Administrative Law Judge's right to file a written response within ten (10) days of service; and
- (d) The right to counsel.

3738.3 Within ten (10) days of service of the notice of summary suspension, the Administrative Law Judge may file a written response. The response shall address only whether the Administrative Law Judge has been indicted for a felony, or whether a criminal proceeding described in section 3738.1 (b) or (c) has been commenced against him or her. The response shall not address the merits of the underlying charges.

3738.4 The Commission promptly shall review any response filed by the Administrative Law Judge. After such review, if the Commission finds that the preponderance of the evidence does not establish that the Administrative Law Judge has been indicted for a felony or that a criminal proceeding described in section 3738.1(b) or (c) has been commenced against him or her, it shall vacate the summary suspension forthwith. Otherwise, the summary suspension shall remain in effect pending the final outcome of the criminal proceedings. The Commission shall not address the merits of the underlying charge.

3739 SUMMARY SUSPENSION UPON CONVICTION

3739.1 Notwithstanding any other provision of this Chapter, the Commission shall suspend an Administrative Law Judge without pay if it has probable cause to believe any of the following:

- (a) The Administrative Law Judge has been convicted (on any plea) of any crime that is or would be a felony under federal or District of Columbia law;
- (b) The Administrative Law Judge has been convicted (on any plea) of any crime that bears a relationship to his or her position as an Administrative Law Judge; and
- (c) The Administrative Law Judge has been convicted (on any plea) of any crime of dishonesty within the meaning of D.C. Official Code § 14-305.

3739.2 To suspend an Administrative Law Judge without pay pursuant to section 3739.1, the Commission shall serve a written notice of suspension upon the Administrative Law Judge. The notice shall inform the Administrative Law Judge of the following:

- (a) The reason for the suspension;
- (b) The beginning date of the suspension;

- (c) The Administrative Law Judge's right to file a written response within ten (10) days of service; and
 - (d) The right to counsel.
- 3739.3 Within ten (10) days of service of the notice of summary suspension pursuant to section 3739.2, the Administrative Law Judge may file a written response. The response shall address only whether the Administrative Law Judge has been convicted of a crime specified in section 3739.1, and shall not address the merits of the underlying charges.
- 3739.4 The Commission promptly shall review any response filed by the Administrative Law Judge. After such review, if the Commission finds that the preponderance of the evidence does not establish that the Administrative Law Judge has been convicted of a crime specified in section 3739.1, it shall vacate the summary suspension forthwith. Otherwise, the summary suspension shall remain in effect pending the outcome of any appeal or any proceeding to remove the Administrative Law Judge. The Commission shall not address the merits of the underlying charge.
- 3739.5 Upon issuance of a final order affirming the conviction, or the running of the time for filing an appeal without any appeal being filed, the Commission shall issue an order summarily removing the Administrative Law Judge from office.
- 3739.6 If criminal proceedings against an Administrative Law Judge who has been suspended pursuant to section 3738.1 or section 3739.1 are terminated in the Administrative Law Judge's favor, the Commission shall vacate the summary suspension, effective on the date of termination.
- 3739.7 If an appellate court vacates or reverses a criminal conviction, and remands the case for further proceedings, the Administrative Law Judge shall be suspended with pay pending the judgment in the remanded proceedings. If the remanded proceedings result in a conviction specified in section 3739.1, the Administrative Law Judge shall be suspended without pay in accordance with this section.
- 3740 CORRECTIVE DISCIPLINE BY THE CHIEF ADMINISTRATIVE LAW JUDGE**
- 3740.1 Pursuant to sections 8 and 13(e) of the Act, D.C. Official Code §§ 2-1831.05 and 2-1831.10(e), the Chief Administrative Law Judge may discipline an Administrative Law Judge by issuing an official reprimand to the Administrative Law Judge or by suspending the Administrative Law Judge without pay for a period of nine (9) days or less.
- 3740.2 The Chief Administrative Law Judge may take corrective disciplinary action against an Administrative Law Judge pursuant to section 3740.1 only for cause, as described in section 3729.1.

- 3740.3 The Chief Administrative Law Judge may take corrective disciplinary action against an Administrative Law Judge pursuant to section 3740.1 only in accordance with the procedures set forth in this section 3740.
- 3740.4 Except as provided in section 3741, before taking corrective disciplinary action against an Administrative Law Judge, the Chief Administrative Law Judge must serve a notice of proposed corrective disciplinary action upon the Administrative Law Judge and must provide the Administrative Law Judge an opportunity to respond.
- 3740.5 A notice of proposed corrective disciplinary action issued pursuant to section 3740.4 must contain at least the following information:
- (a) A statement of the factual basis for the proposed corrective disciplinary action;
 - (b) A statement describing the proposed corrective disciplinary action;
 - (c) A statement that the Administrative Law Judge has the right to review any material upon which the proposed corrective disciplinary action is based;
 - (d) A statement of the Administrative Law Judge's right to file a written response; and
 - (e) Any other information required by the Due Process Clause of the Fifth Amendment to the United States Constitution.
- 3740.6 Within five (5) days of service of a notice of proposed corrective disciplinary action, the Administrative Law Judge may file a written response with the Chief Administrative Law Judge.
- 3740.7 For good cause shown, the Chief Administrative Law Judge may extend the five (5) day deadline prescribed in section 3740.6 for one additional period of up to five (5) days.
- 3740.8 After reviewing any response filed under section 3740.6, or after expiration of the time for filing a response (if no response is filed), the Chief Administrative Law Judge shall serve the Administrative Law Judge with a decision on the proposed corrective disciplinary action.
- 3740.9 A decision issued pursuant to section 3740.8 shall state that corrective disciplinary action either shall be taken or shall not be taken and shall contain a statement of the reasons for the Chief Administrative Law Judge's decision. If corrective disciplinary action will be taken, the decision shall state the nature and applicable dates, if any, of the corrective disciplinary action and shall state with specificity the cause upon which the corrective disciplinary action is based.

- 3740.10 If the Chief Administrative Law Judge decides, in the exercise of his or her discretion, to take corrective disciplinary action, he or she may impose the corrective disciplinary action proposed in the notice issued pursuant to section 3740.5, or any less severe corrective disciplinary action, but may not impose a corrective disciplinary action more severe than proposed in the notice.
- 3740.11 Any decision of the Chief Administrative Law Judge imposing corrective disciplinary action shall contain a statement of the Administrative Law Judge's right to appeal to the Commission.
- 3740.12 An Administrative Law Judge may appeal any decision of the Chief Administrative Law Judge to take corrective disciplinary action by filing a notice of appeal with the Commission within fifteen (15) days of service of the decision and serving a copy upon the Chief Administrative Law Judge. The notice of appeal shall state fully every argument of the Administrative Law Judge in support of his or her appeal.
- 3740.13 The corrective disciplinary action imposed by the Chief Administrative Law Judge shall not be stayed pending appeal.
- 3740.14 Within ten (10) days of service of the notice of appeal, the Chief Administrative Law Judge, or his or her designee, may file a response to the notice of appeal with the Commission.
- 3740.15 After receipt of the Chief Administrative Law Judge's response, or the expiration of the deadline for filing a response (if no response is filed), the Commission shall decide the appeal.
- 3740.16. The Commission shall affirm the decision of the Chief Administrative Law Judge unless it finds that there is not substantial evidence in the record to support the Chief Administrative Law Judge's finding of cause. The Commission may not overturn the Chief Administrative Law Judge's exercise of discretion to choose a sanction unless it concludes that the sanction was unlawful.
- 3740.17 If the Commission reverses a suspension without pay imposed by the Chief Administrative Law Judge, the Administrative Law Judge shall receive any pay and other benefits that were lost as the result of the suspension.
- 3740.18 A corrective disciplinary action taken against an Administrative Law Judge pursuant to this section shall not preclude the Commission from taking any action authorized by sections 3730 to 3739, including the imposition of any additional sanction upon the Administrative Law Judge.
- 3741 SUMMARY SUSPENSION OF AN ADMINISTRATIVE LAW JUDGE**
- 3741.1 Pursuant to sections 8 and 13(e) of the Act, D.C. Official Code §§ 2-1831.05 and 2-1831.10(e), the Chief Administrative Law Judge may summarily suspend an

Administrative Law Judge without pay if there is cause for discipline or removal pursuant to section 3729 and the Administrative Law Judge's conduct:

- (a) Threatens the integrity of the Office's operations; or
- (b) Constitutes an immediate hazard to the Office or its employees, to the Administrative Law Judge, or to the public.

3741.2 Any summary suspension imposed by the Chief Administrative Law Judge may last no longer than nine (9) days.

3741.3 An Administrative Law Judge who is notified by a written or oral directive of a summary suspension shall immediately leave his or her duty station and the premises of the Office.

3741.4 With a reasonable time after the summary suspension, but no later than 48 hours thereafter, the Chief Administrative Law Judge shall serve upon the Administrative Law Judge a written notice that includes all of the following information:

- (a) A statement of the reasons for the summary suspension;
- (b) The effective date of the summary suspension and its duration;
- (c) A statement that the Administrative Law Judge has the right to review any material upon which the summary suspension was based;
- (d) A statement of the Administrative Law Judge's right to present a written response for review by the Commission; and
- (e) Any other information required by the Due Process Clause of the Fifth Amendment.

3741.5 Within forty-eight (48) hours after receipt of the notice required by section 3741.4, the Administrative Law Judge may file with the Commission a written response to the notice. That response shall raise every defense, fact, or matter in extenuation, exculpation, or mitigation of which the Administrative Law Judge has knowledge or reasonably should have knowledge that is relevant to the determination of cause or the legality of the summary suspension. An Administrative Law Judge's failure to file a response within the deadline established by this subsection shall constitute a waiver of all rights to challenge the summary suspension.

3741.6 Upon review of the notice of summary suspension and the Administrative Law Judge's response, the Commission shall determine whether the summary suspension complies with the requirements of this section. In its discretion, the Commission may require the Administrative Law and the Chief Administrative

Law Judge, or his or her designee, to appear before it, and it may receive relevant testimonial and documentary evidence.

3741.7 The summary suspension shall not be stayed during the pendency of the matter before the Commission. If the Commission determines that the summary suspension did not comply with the requirements of this section, it shall issue an order vacating the summary suspension and restoring any pay and benefits lost by the Administrative Law Judge during the suspension.

3741.8 Summary suspension of an Administrative Law Judge pursuant to this section shall not preclude the Commission from taking any action authorized by sections 3730 to 3739, including the imposition of an additional sanction upon the Administrative Law Judge.

3742-3798 **[RESERVED]**

3799 **DEFINITIONS**

When used in this chapter, the following words shall have the following meanings:

Act – The Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1831.01 *et seq.*)

Administrative Law Judge – An Administrative Law Judge of the Office of Administrative Hearings.

Applicant – Any person seeking to be appointed or reappointed as an Administrative Law Judge.

Chief Administrative Law Judge – The Chief Administrative Law Judge of the Office or any person serving as Acting Chief Administrative Law Judge or interim Chief Administrative Law Judge of the Office.

Clerk – The Clerk of the Office.

Commission – The Commission on Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings.

Hearing officer – An individual, other than an agency director or member of the governing board or body of an agency, whose permanent duties as an employee of the District of Columbia on the day prior to the Act's becoming applicable to his or her agency, consisted in whole or substantial part of regularly adjudicating administrative matters as required by law. "Hearing officer" includes, without limitation, any person with a position bearing the title "Hearing Officer," "Hearing Examiner," "Attorney Examiner," "Administrative Law Judge," "Administrative Judge," or "Adjudication Specialist." The term "hearing officer" does not include any employee holding an intermittent service appointment, a

temporary appointment of less than one year, or a term appointment of less than one year.

Investigation – An inquiry to determine whether a proceeding should be instituted.

Legal holiday – Includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the District of Columbia, or any day on which the Office is closed.

Member of the District of Columbia Bar – 1) An active member in good standing of the District of Columbia Bar; 2) a judicial member in good standing of the District of Columbia Bar; or 3) any person eligible to practice law in the District of Columbia pursuant to Rule 49 (c)(4) of the Rules of the District of Columbia Court of Appeals while employed by the Government of the District of Columbia.

Misrepresentation – An untrue statement, orally or in writing, or an omission that is materially misleading.

Office – The Office of Administrative Hearings.

Proceeding – A formal proceeding, initiated by a Notice of Proceeding, to hear and determine charges as to an Administrative Law Judge's conduct or health.

Special Counsel – Any member of the District of Columbia Bar retained by the Commission to assist it, including without limitation, by investigating, prosecuting, or advising on any matter.

Vacancy -- An unfilled available position as an Administrative Law Judge.

Voting member – One of the three voting members of the Commission appointed pursuant to section 10(a) of the Act, D.C. Official Code § 2-1831.07(a).