OFFICE OF EMPLOYEE APPEALS

NOTICE OF FINAL RULEMAKING

The Chairperson of the Office of Employee Appeals in accordance with §602 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 § 1-606.02(a)(5) (2006 Repl.) hereby gives notice of final rulemaking action amending chapter 6 (Rules and Regulations of the Office of the Employee Appeals) of subtitle B (Government Personnel) of title 6 (Personnel) of the District of Columbia Municipal Regulations (DCMR). These rules will amend chapter 6 in its entirety. The central purpose of these rules is to: (1) streamline OEA's litigation procedures in order to facilitate backlog reduction without compromising the due process rights of the parties; and (2) clarify the rules to present an understandable road map for the adjudication process conducted by the Office. A Notice of Proposed Rulemaking was published in the *D.C. Register* on February 10, 2012, at 59 DCR 1095. There were no comments filed in response to the Proposed Rulemaking Notice and no substantive changes have been made since the rules were published as proposed. The Director adopted these rules as final on March 12, 2012.

This rulemaking became effective upon publication in the *D.C. Register* on March 16, 2012.

The new citation for the Office of Employee Appeals Rules of Procedure is as follows: 59 DCR 2129 (March 16, 2012).

Chapter 6, Rules and Regulations of the Office of Employee Appeals, of Subtitle B, Government Personnel, of title 6, Personnel, of the DCMR is repealed and replaced with a new chapter 6 to read as follows:

CHAPTER 6 RULES AND REGULATIONS OF THE OFFICE OF EMPLOYEE APPEALS

600 GENERAL

600.1 The Office of Employee Appeals (Office) is an independent administrative adjudicatory agency created by the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-39; D.C. Official Code §§ 1-606.01, *et seq*. (2006 Repl. & 2011 Supp.))The jurisdiction of the Office is set forth in Rule 604.

601 ORGANIZATIONAL STRUCTURE

601.1 The Board of the Office (Board) is composed of five (5) members appointed by the Mayor and confirmed by the District of Columbia Council. Three (3) members of the Board shall constitute a quorum for the transaction of official business and the issuance of rules and regulations.

601.2 The Mayor designates a Chairperson of the Board.

601.3 The Mayor also designates a Vice Chairperson of the Board. In the absence or disability of the Chairperson, or when the position of Chairperson is vacant, the Vice Chairperson performs the functions vested in the Chairperson.

601.4 The Executive Director is the administrator of the Office and serves as its chief personnel officer.

601.5 The General Counsel, with the assistance of the Deputy General Counsel, provides legal advice to the Board and the Office staff, prepares opinions and orders as directed by the Board, assists in the enforcement of orders pursuant to law, and represents the Office before the Courts.

601.6 Administrative Judges, subject to the provisions of these rules, adjudicate appeals filed before the Office.

602 SCOPE OF RULES

602.1 These rules govern the procedure for deciding cases filed before the Office. These rules shall be applied to promote justice, fairness, and economy.

602.2 These rules shall apply to all appeals filed on or after the effective date of these rules and to all appeals then pending final disposition in the Office.

602.3 The Board may revoke or amend a rule as it applies generally to all cases in accordance with applicable procedures of the District of Columbia Administrative Procedure Act. The Board or an Administrative Judge may waive a rule in an individual case for good cause shown, if application of the rule is not required by statute.

602.4 In the event of a conflict between these rules and a provision of a statute, the statutory provision shall govern. In the event of a conflict between these rules and rules or regulations adopted by another District agency, department, office or board, these rules shall govern.

603 COMPUTATION OF TIME

603.1 In the computation of time periods which involve business days, the first day counted shall be the next business day following the day the event occurs from which the time period begins to run. In the computation of time periods which involve calendar days, the first day counted shall be the next calendar day following the day the event occurs from which the time period begins to run. For calendar days, if the last day of the time period is a Saturday, Sunday, or legal holiday, the period shall be extended to the end of the next business day.

604 JURISDICTION

604.1 Except as otherwise provided in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq*. (2006 Repl. & 2011 Supp.)) or §604.2 below, any District of Columbia government employee may appeal a final agency decision affecting:

(a) A performance rating which results in removal of the employee;

(b) An adverse action for cause which results in removal;

(c) A reduction in grade;

(d) A suspension for ten (10) days or more;

(e) A reduction-in-force; or

(f) A placement on enforced leave for ten (10) days or more.

604.2 An appeal filed pursuant to § 604.1 must be filed within thirty (30) calendar days of the effective date of the appealed agency action.

605 NOTICE OF APPEAL RIGHTS

605.1 When an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with a written copy of all of the following:

(a) The employee's right to appeal to the Office;

(b) The rules of the Office;

(c) The appeal form of the Office;

(d) Notice of applicable rights to appeal under a negotiated review procedure; and

(e) Notice of the right to representation by a lawyer or other representative authorized by the rules.

606 MEDIATION PROGRAM

606.1 All appeals from adverse actions filed on or after October 1, 2011, will be subject to mandatory mediation.

606.2 The Office shall exert every possible effort to resolve matters by mediation, to the extent possible, rather than through litigation.

606.3 The Executive Director shall designate an Administrative Judge to implement the mediation program of the Office.

606.4 The Administrative Judge responsible for mediation shall review the appeals pending in the Office and assign cases to the mediator where there is a reasonable likelihood of settlement to the mediation.

606.5 Any party may file a request for mediation with the Office which, upon the consent of all parties, shall place the matter on the mediation docket.

606.6 The Administrative Judge responsible for mediation shall assign the matter to a mediator who shall promptly convene a conference for the purpose of attempting to reach a voluntary resolution of the appeal. The Administrative Judge assigned to an appeal may not serve as mediator on that appeal. A mediator may not be called as a witness in any proceeding concerning matters raised in a case to which he or she is assigned to attempt mediation.

606.7 The employee and his or her representative shall attend the conference. A representative of the agency with authority to approve a settlement by the agency shall either attend the conference or be available by telephone at the time set for and throughout the conference. The parties shall engage in good-faith efforts to resolve the matter.

606.8 If the mediator finds that a party has failed to engage in settlement discussions in good faith (including a failure to have available a representative with authority to settle), the mediator shall submit such a finding to the Administrative Judge supervising the mediation docket, who may enter such sanctions against the party as may be appropriate to further the objectives of the mediation program.

606.9 The discussions at the conference and the offers of the parties shall be confidential and may not be offered or received into evidence or otherwise disclosed in subsequent adjudication or litigation.

606.10 Upon the failure of the parties to reach a settlement through mediation, the mediator shall refer the matter to the Administrative Judge assigned to said matter for adjudication.

606.11 If the parties reach a settlement, the matter shall be dismissed in accordance with D.C. Official Code § 1-606.06(b) (2006 Repl.).

607 FILING REQUIREMENTS

607.1 An employee shall initiate an appeal by filing a petition for appeal with the Office.

607.2 The Office shall promptly send a copy of the petition for appeal to the agency, and the agency shall file an answer within thirty (30) calendar days of the service of the petition for appeal.

607.3 The date of filing shall be the date the Office time stamps on the document.

607.4 The filing of a petition for appeal and a petition for review must be made by personal delivery at the Office during normal business hours, Monday through Friday, or by mail addressed to the Office.

607.5 The employee must file with the Office one (1) original and two (2) copies of the petition for appeal (including the documents required by § 609).

607.6 Filing of pleadings and documents with the Office, other than a petition for appeal, or a petition for review filed pursuant to § 633, shall be made as prescribed in§607.4 unless the Administrative Judge assigned to the appeal directs otherwise.

607.7 The parties shall serve on each other one (1) copy of each document filed with the Office other than the petition for appeal. A party may affect such service by mailing or by personally delivering to each other party a copy of the document submitted to the Office. Each document must be accompanied by a certificate of service specifying how, when, and on whom service was made.

608 CONTENT OF PETITION FOR APPEAL

608.1 A petition for appeal may be filed on the form the Office approved.

608.2 A petition for appeal made without use of the form of the Office shall be in writing and contain the following information:

(a) The name of the employee and the name of the agency which took the action;

(b) The type and the effective date of the action taken by the agency;

(c) The name, address, and telephone number(s) of the employee's representative, if any;

(d) The employee's address and telephone number(s);

(e) A copy of the agency's notice of final decision;

(f) A statement as to whether the employee or anyone acting on his or her behalf has filed an appeal under any negotiated review procedure pursuant to a collective bargaining agreement, or has filed a complaint with any other agency regarding this matter;

(g) The identity of the collective bargaining unit (if any) of which the employee is a member; and

(h) The signature of the employee and his or her representative, if any.

608.3 Along with the petition for appeal, the employee shall also submit the following information:

(a) A statement as to whether the employee requests an evidentiary hearing or oral argument;

(b) A concise statement of the facts giving rise to the appeal;

(c) An explanation as to why the employee believes the agency's action was unwarranted; and

(d) A statement of the specific relief the employee is requesting.

608.4 The Office shall not consider the filing of a petition for appeal complete until the employee provides all of the information required under § 608.2 and 608.3.

608.5 An employee's failure to include a complete address, or to advise the Office of a change in address in writing, shall constitute a waiver of any right to notice and service, and may result in the appeal being dismissed.

608.6 The Administrative Judge may allow an employee to amend the appeal unless the Administrative Judge determines that to do so would prejudice the rights of another party or unduly delay the proceedings.

609 ANSWER

609.1 An agency's answer in which the allegations of a petition are contested shall contain the following:

(a) The name of the employee and the agency which took the action;

(b) The OEA matter number assigned to the appeal;

(c) A statement of the appealed action the agency took against the employee and the reason(s) therefore;

(d) A specific response to each allegation of the petition admitting, denying, or explaining each in whole or in part. The Administrative Judge may assume that the agency concedes as fact an allegation in the employee's petition that the agency does not specifically explain or deny in the answer;

(e) All documents contained in the agency record of the proceeding;

(f) A request for an evidentiary hearing or oral argument, if desired; and

(g) The designation of, and signature by, the authorized agency representative. If the agency fails to designate a representative, the Office shall regard the agency director as the representative.

609.2 If the agency elects not to contest the allegations of fact set forth in the petition, the answer shall consist of a statement that the agency admits all of the material allegations to be true. Such an answer shall constitute a waiver of the right to present evidence or testimony contradicting the admitted facts. However, the right to further participation in the proceedings shall continue and questions of law may be addressed.

609.3 Failure by the agency to file an answer within the time limit set forth in § 607.2 shall constitute a default, and the Administrative Judge may, without further notice, render an appropriate decision.

610 MOTIONS

610.1 Except where the Administrative Judge permits an oral motion hearing, motions shall be in writing, filed with the Office, and served upon the parties in accordance with§607.7.

610.2 Motions shall state the particular order, ruling, or action requested and the grounds and authority therefore.

610.3 No later than ten (10) calendar days after the service of a motion, or within such time as the Administrative Judge may direct for good cause shown, the opposing party may serve and file an answer to the motion. The moving party shall have no right to reply, except as permitted by the Administrative Judge. No oral argument will be heard on motions unless the Administrative Judge directs otherwise. Written briefs may be filed with motions and with answers thereto.

611 CONSOLIDATION AND JOINDER

611.1 If an employee has two (2) or more appeals pending before the Office, the Administrative Judge may consolidate the appeals and adjudicate them as one (1) action.

611.2 If two (2) or more employees have appeals involving similar or identical issues pending before the Office, the Administrative Judge may join the appeals for adjudication as one (1) action.

611.3 The Administrative Judge may consolidate or join appeals on his or her own motion, or on the motion of a party, if to do so would:

(a) Expedite processing of the cases; and

(b) Not adversely affect the interests of the parties.

611.4 At any time and on such terms as are just, the Administrative Judge may sever appeals consolidated or joined under these rules and proceed with each appeal separately.

612 REPRESENTATION

612.1 In any proceeding before the Office, the employee may appear on his or her own behalf, through an attorney, through a union representative, or through any other competent individual.

612.2 The agency may appear before the Office only through counsel or an individual acting in a representative capacity. If the agency fails to designate a representative, the Office shall regard the agency director as the representative.

612.3 Except where the agency director is the agency representative, no person may participate in a representative capacity before the Office until:

(a) The party submits a signed written statement authorizing such representation; and

(b) The representative submits a signed written statement which contains his or her name, address and telephone number, and which certifies that he or she is available and willing to represent the party's interest.

613 INTERVENTION

613.1 Any person or District of Columbia government agency may seek to intervene in an appeal by filing a motion. The motion shall state why the person or agency believes intervention is warranted. After allowing the original parties a reasonable

period of time in which to respond, the Administrative Judge may permit the movant to intervene if the movant has an interest that may be affected by the final disposition of the case and the movant's:

(a) Interest will not be represented by the existing parties;

(b) Participation may reasonably be expected to assist in the development of a proper record; and

(c) Participation will not broaden the issues, resulting in prejudicial delay of the proceeding.

613.2 An intervener shall be considered a full party to the proceedings and shall have the same rights and duties as a party, except that the intervener:

(a) Shall not have an independent right to a hearing;

(b) May participate only on the issues affecting them as determined by the Administrative Judge; and

(c) Shall have no right to an award of attorney fees under § 634.

614 SUBSTITUTION

614.1 If an employee dies while the appeal is pending before the Office, and the interest of the deceased employee has not terminated because of the death, the Administrative Judge, upon motion, may order substitution of the proper parties. A motion for substitution may be made within ninety (90) calendar days after the death of the employee.

614.2 If an employee becomes incompetent by reason of mental or physical infirmity, the Administrative Judge, upon motion, may allow the appeal to be continued by the employee's representative.

614.3 When an agency's interest in the appeal is transferred to another District agency, the Administrative Judge may:

(a) Allow the appeal to continue against the original agency;

(b) Order the substitution of the successor agency; or

(c) Join the successor agency with the original agency.

615 SUMMARY DISPOSITION

615.1 If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be granted, the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.

615.2 An Administrative Judge may render a summary disposition either *sua sponte*, after notice under § 615.1, or upon motion of a party.

616 INTERLOCUTORY APPEALS

616.1 An interlocutory appeal is an appeal to the Board of a ruling made by an Administrative Judge during the course of a proceeding. The Administrative Judge may permit this appeal if he or she determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate consideration. The Board shall make a decision on the issue and the Administrative Judge shall proceed in accordance with that decision.

616.2 A party seeking review by interlocutory appeal must file a motion for certification within five (5) business days of service of the Administrative Judge's determination. The motion shall include arguments in support of both the certification and the determination to be made by the Board.

616.3 The Administrative Judge shall grant or deny a motion for certification. If certification is granted, the record shall be referred to the Board.

616.4 At the discretion of the Administrative Judge, the proceeding may be stayed during the time an interlocutory appeal is pending. The Board may stay a proceeding during the time an interlocutory appeal is pending.

617 DISCOVERY

617.1 Parties may obtain discovery by one (1) or more of the following methods:

(a) Depositions upon oral examination or written questions;

(b) Written interrogatories;

(c) Requests for production of documents or things for inspection and other purposes; and

(d) Requests for admission.

617.2 Unless the Administrative Judge orders otherwise, these methods may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

617.3 Unless the Administrative Judge directs otherwise, the parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending appeal. Such information may include the existence, description, nature, custody, condition and location of books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at an evidentiary hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

617.4 The Administrative Judge may limit the frequency or use of discovery if:

(a) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b) The party seeking discovery has had ample opportunity by discovery in the appeal to obtain the information sought; or

(c) The discovery is unduly burdensome or expensive, in light of the nature of the case, the relief sought, the limitations on the parties' resources, and the importance of the issues involved in the case.

617.5 The Administrative Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.

617.6 Discovery may be commenced after the Office notifies the agency that the employee has filed the petition. Unless the Administrative Judge directs otherwise, discovery shall be completed by the date of the prehearing conference.

617.7 Discovery matters before the Office are intended to be of a simplified nature. Discovery procedures shall be established by the Administrative Judge as appropriate under the circumstances. Further guidance, however, may be obtained by referring to the District of Columbia Superior Court Rules of Civil Procedure. Such rules should be interpreted as instructive rather than controlling.

618 SUBPOENAS

618.1 Application for issuance of a subpoena requiring a person to appear and testify at a specific place and time shall be made in writing to the Administrative Judge. All requests for subpoenas *ad testificandum* shall clearly identify the person subpoenaed and his or her address and shall be supported by a showing of the relevance and materiality of the testimony sought.

618.2 Application for issuance of a subpoena requiring a person to produce documents (including writings, drawings, graphs, charts, photographs, phone records and other recordings, and other data compilations from which information can be obtained) at a specific time and place shall be made in writing to the Administrative Judge. All requests for subpoenas *duces tecum* shall specify with reasonable particularity the information sought, the facts expected to be established thereby, and how these facts are relevant and material.

618.3 An applicant for a subpoena shall arrange for service; except for good cause shown, service shall be completed no later than ten (10) calendar days before the date of the requested testimony or production.

618.4 Personal service of a subpoena may be made by any person, not a party, who is at least eighteen (18) years of age. Service of the subpoena shall be attested to in an affidavit by the person making such service. The attesting affidavit shall state the date, time, and method of service.

618.5 Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within three (3) calendar days of the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits, and other supporting documentation.

618.6 In the case of contumacy or failure to obey an issued subpoena, the Office, pursuant to D.C. Official Code § 1-606.02(a)(4) (2006 Repl.), may request enforcement of the subpoena in the Superior Court of the District of Columbia.

619 ADMINISTRATIVE JUDGES

619.1 Proceedings shall be presided over by an Administrative Judge.

619.2 Administrative Judges shall conduct the hearings fairly and impartially, take all necessary action to avoid delay in the disposition of proceedings, and maintain order. They shall have all powers necessary to that end including, but not limited to, the power to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas and protective orders;

(c) Rule upon motions;

(d) Compel discovery;

(e) Regulate the course of the proceeding, require an evidentiary hearing, if appropriate, fix the time and place of such evidentiary hearing, and exclude persons from such evidentiary hearings for contumacious conduct;

(f) Call and examine witnesses and admit to the record documentary or other evidence;

(g) Dismiss cases based on a settlement agreement reached by the parties; and

(h) Take other appropriate action authorized by statute, mandatory case law, these rules, or the Board.

619.3 If a new Administrative Judge is substituted for the one originally assigned, a party wishing to object to the substitution shall file a motion no later than seven (7) calendar days after the Office notifies the parties of the reassignment. Failure to make such motion within this time period shall constitute a waiver of the right to object to the substitution.

620 DISQUALIFICATION OF ADMINISTRATIVE JUDGE

620.1 If an Administrative Judge deems himself or herself disqualified to preside in a particular case, he or she shall withdraw by notice, on the record, and shall notify the Executive Director of such withdrawal.

620.2 At any time following the assignment of the appeal to an Administrative Judge, and before issuance of an initial decision in the matter under § 631, a party may request the Administrative Judge to disqualify himself or herself on the grounds of personal bias or other disqualification, by serving and filing a motion promptly upon the discovery of the alleged facts, with an affidavit setting forth, in detail, the matters alleged to constitute grounds for disqualification.

620.3 If, in the opinion of the Administrative Judge, the affidavit is sufficient on its face, the Administrative Judge shall disqualify and remove himself or herself from the case. If the Administrative Judge does not disqualify himself or herself, the Administrative Judge shall issue a written order to that effect stating the grounds for the ruling.

621 SANCTIONS

621.1 The Administrative Judge may impose sanctions upon the parties as necessary to serve the ends of justice, including, but not limited to, the instances set forth in this section.

621.2 If a party fails to comply with an order or ruling, the Administrative Judge may, for example:

(a) Draw an inference adverse to the party who failed to comply;

(b) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon evidence relating to, the information sought;

(c) Permit any party who has been prejudiced by the non-compliance to introduce secondary evidence concerning the information sought; and

(d) Strike any part of the pleadings or other submissions of the party failing to comply with such order.

621.3 If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

(a) Appear at a scheduled proceeding after receiving notice;

(b) Submit required documents after being provided with a deadline for such submission; or

(c) Inform this Office of a change of address which results in correspondence being returned.

621.4 The Administrative Judge may refuse to consider any motion or other action which is not filed in a timely fashion.

622 *EX PARTE* COMMUNICATIONS

622.1 *Ex parte* communication is oral or written communication to decision-making personnel of the Office from a party to a proceeding who does not provide the other party or parties an opportunity to participate.

622.2 An *ex parte* communication which involves the merits of the case is prohibited.

622.3 In the event of a prohibited communication, the Administrative Judge shall describe that occurrence on the record with notice to the parties either by filing therein a memorandum, if the transaction was oral, or by filing any writing delivered to him or her.

622.4 When an Administrative Judge determines that a party has initiated a prohibited *ex parte* communication, the Administrative Judge may impose such sanctions or remedial relief as may be appropriate under the circumstances.

623 PREHEARING CONFERENCES

623.1 The Administrative Judge may convene a prehearing conference to consider:

(a) Simplification, clarification, compromise, or settlement of the issues;

(b) Necessity and desirability of amendments to the pleadings;

(c) Stipulations, admissions of fact, and the contents, admissibility, and authenticity of documents;

(d) Whether the Administrative Judge will order an evidentiary hearing to expedite the presentation of evidence, including, but not limited to, restricting the number of witnesses;

(e) A statement of the issues; and

(f) Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses and furnishing, for inspection or copying, non-privileged documents, papers, books, or other physical exhibits, which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of any party to the proceeding.

623.2 A prehearing conference, in the discretion of the Administrative Judge, may be recorded verbatim.

623.3 After such prehearing conference, the Administrative Judge shall issue an order that identifies the legal and factual issues in the appeal. Unless modified, such order shall control the subsequent course of the proceeding.

623.4 Failure of a party to appear for a prehearing conference, unless the Administrative Judge excuses him or her for good cause shown, before or after the fact, may be deemed to be a waiver by that party of all rights to participate further in the proceeding, and may be grounds for dismissal of the case or the imposition of other sanctions.

624 EVIDENTIARY HEARINGS

624.1 A party may request the opportunity for an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading.

624.2 If the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary, the Administrative Judge will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed. The Administrative Judge shall give due regard to the availability of the parties or their authorized representative(s) in designating the time and place of the evidentiary hearing.

624.3 Postponement of an evidentiary hearing will be allowed only upon good cause shown or upon agreement of the parties, with the concurrence of the Administrative Judge. Except in extraordinary circumstances, a motion for a postponement shall not be considered unless it is served and filed at least seven (7) calendar days in advance of the date designated for the evidentiary hearing.

624.4 Failure of a party to appear for an evidentiary hearing, unless excused by the Administrative Judge for good cause shown, before or after the fact, may be deemed to be a waiver by that party of all rights to participate further in the proceeding, and may be grounds for dismissal of the case or the imposition of other sanctions.

624.5 Hearings shall be open to the public, except that the Administrative Judge may order a hearing or any part thereof closed, where a closed hearing would be in the best interest of the employee, a witness, the public, or other affected persons.

625 RECORDING AND TRANSCRIPTS

625.1 Evidentiary hearings shall be recorded verbatim under the supervision of the Administrative Judge and shall be the sole official record of the proceeding.

625.2 A transcript or, if the record was not transcribed, a copy of the recording may be obtained by the parties upon request.

625.3 The Office will provide one (1) copy of the transcript or recording to each party or, if the party is represented, to the representative at no cost. Any additional copies of the record shall be at the expense of the requesting party.

625.4 A party may request correction to the official transcript by written motion. A motion for correction shall be submitted within ten (10) calendar days of receipt of the transcript.

626 PRESENTATION OF EVIDENCE OR WITNESSES

626.1 All material and relevant evidence or testimony shall be admissible, but may be excluded if it is unduly repetitious.

626.2 During an evidentiary hearing, a party shall be entitled to present his or her case or defense by oral, documentary or physical evidence, and to conduct reasonable cross examination.

626.3 Objections to the admission of evidence, or to the conduct of the proceeding, may be made orally on the record where an evidentiary hearing has been provided, or by written motion. Argument thereon, or briefs or legal memoranda, if requested by the Administrative Judge, shall be included in the record. Rulings on objections shall be made at the time of the objection or prior to the receipt of further evidence, unless the Administrative Judge orders otherwise, and shall be a part of the record.

626.4 The parties may agree upon any facts or procedures relevant to the proceeding. Such stipulations shall be binding on the parties.

626.5 The Administrative Judge on his or her own motion or on motion of a party, may take official notice of matters of common knowledge or matters that can be verified. Official notice taken of any fact shall satisfy a party's burden of proving the fact noticed.

626.6 All exhibits offered into evidence shall be numbered and marked so as to identify the party offering the exhibit.

626.7 Whenever the Administrative Judge excludes evidence, the offering party may make an offer of proof of what the party expects the evidence to establish. In the case of an evidentiary hearing, if the offer of proof consists of an oral statement, it shall be included in the record. If the offer of proof consists of an exhibit or other documentary evidence, it shall be marked for identification and retained in the record so as to be available for consideration by any reviewing authority.

627 WITNESSES

627.1 Every person shall be competent to be a witness as to any material matter unless the Administrative Judge finds that the proposed witness is incapable of:

(a) Expressing himself or herself concerning the matter so as to be understood by the Administrative Judge either directly or through interpretation by one who can understand the witness; or

(b) Understanding the duty of a witness to tell the truth.

627.2 Each District of Columbia government agency shall make its employees available to furnish sworn statements or affirmation or to appear as witnesses at depositions and hearings when the Administrative Judge requests. When providing such statements or testimony, witnesses shall be on official duty status.

627.3 Witnesses not employed by the District of Columbia government may be required to appear by subpoena at the cost of the moving party.

627.4 Witnesses shall have the right to representation when testifying.

628 BURDEN OF PROOF

628.1 The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

628.2 The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

629 CLOSING THE RECORD

629.1 When an evidentiary hearing has been provided, the record shall be closed at the conclusion of the hearing, unless the Administrative Judge directs otherwise. When no evidentiary hearing has been provided, the record shall be closed on the date that the Administrative Judge sets as the final date for the receipt of submissions from the parties.

629.2 Once the record is closed, no additional evidence or argument shall be accepted into the record unless the Administrative Judge reopens the record pursuant to § 630.1.

630 REOPENING THE RECORD; TERMINATION OF JURISDICTION

630.1 The Administrative Judge may reopen the record to receive further evidence or argument at any time prior to the issuance of the initial decision.

630.2 The jurisdiction of an Administrative Judge terminates upon issuance of the initial decision. However, the Administrative Judge shall retain jurisdiction over the appeal to the limited extent necessary to correct the record or transcript, rule on a request by the employee for attorney fees, and process any petition for enforcement.

631 INITIAL DECISION

631.1 The Administrative Judge shall issue an initial decision. Such decision shall be issued no later than one hundred twenty (120) business days after the employee files a complete petition for appeal. However, the Administrative Judge may extend this period for a reasonable time under extraordinary circumstances.

631.2 Each initial decision shall contain:

(a) Findings of fact and conclusions of law, as well as the reasons or bases therefore, upon all the material issues of fact and law presented on the record;

(b) An order as to the final disposition of the case, including appropriate relief if granted; and

(c) A statement of the right to seek further administrative remedy, including the right to petition for review.

631.3 Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

631.4 The Office shall serve a copy of the initial decision on each party to the proceeding.

632 FINALITY OF DECISION

632.1 The initial decision shall become final thirty-five (35) calendar days after issuance.

632.2 The initial decision shall not become final if any party files a petition for review or if the Board reopens the case on its own motion within thirty-five (35) calendar days after issuance of the initial decision.

632.3 If the Board denies all petitions for review, the initial decision shall become final upon issuance of the last denial.

632.4 If the Board grants a petition for review or reopens a case, the subsequent decision of the Board shall be the final decision.

632.5 Administrative remedies shall be considered exhausted when a decision becomes final in accordance with this section.

633 PETITIONS FOR REVIEW

633.1 Any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision.

633.2 Within thirty-five (35) calendar days after the filing of the petition for review, any party may file an answer.

633.3 The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a petition for review when the petition establishes that:

(a) New and material evidence is available that, despite due diligence, was not available when the record closed;

(b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

633.4 Any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board.

633.5 The Board may review an initial decision on its own motion within thirty-five (35) calendar days of issuance of the initial decision.

633.6 The Board may order oral argument on its own motion or on motion filed by any party.

633.7 In its discretion, the Board may grant a motion to expedite a petition for review. The motion must be approved by at least three (3) members of the Board.

633.8 A Board member shall recuse himself or herself from participating in any proceeding in which their impartiality may reasonably be questioned. Reasons for recusal include, but are not limited to:

(a) A personal bias or prejudice concerning a party;

(b) Personal knowledge of disputed facts concerning the petition for review;

(c) The Board member has previously served as a lawyer or witness concerning the same appeal; or

(d) A personal financial interest in the outcome of the proceeding.

633.9 The Board member shall notify the Chairperson of the recusal prior to discussion of the petition for review. The Board member will not be permitted to discuss the merits of the case and may not participate in the vote to grant, deny, or remand the petition for review.

633.10 The Board may affirm, reverse, remand, modify, or vacate the initial decision, in whole or in part.

633.11 The Board's decision on whether to grant or deny a petition for review shall be by public vote. However, the Board's final decision shall be the written opinion and order.

633.12 An employee or agency may appeal a final decision to the District of Columbia Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-601.01, *et seq*. (2006 Repl. & 2011 Supp.))

634 ATTORNEY FEES

634.1 An employee shall be entitled to an award of reasonable attorney fees if:

(a) He or she is a prevailing party; and

(b) The award is warranted in the interest of justice.

634.2 Unless the Administrative Judge directs otherwise, a request for attorney fees shall be made by written motion within thirty (30) calendar days of the date that the initial decision becomes final.

634.3 An employee shall submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal.

634.4 An agency may file a written opposition to the employee's motion for attorney fees within fifteen (15) business days of service of the motion or within such time as the Administrative Judge may direct. In its written opposition the agency must state its objection to the employee's request for attorney fees with particularity and clarity.

634.5 A decision by an Administrative Judge on a request for attorney fees shall be considered an addendum to the initial decision.

635 COMPLIANCE AND ENFORCEMENT

635.1 Unless the Office's final decision is appealed to the Superior Court of the District of Columbia, the District agency shall comply with the Office's final decision within thirty (30) calendar days from the date the decision becomes final.

635.2 If any agency fails to comply with the final decision of the Office within the time period specified in § 635.3, the employee may file a motion to enforce the final decision. The motion shall be directed to the Administrative Judge who decided the appeal.

635.3 An agency must file an answer within twenty (20) calendar days of receipt of the employee's motion.

635.4 The employee, with specificity, shall explain in the motion how the agency has failed to comply with the Office's decision. The agency shall include in its answer a statement which admits or denies each allegation in the employee's motion.

635.5 The parties shall serve the motion and answer on each other.

635.6 Failure by the agency to file an answer to the motion for enforcement shall be construed as an admission of the employee's allegations.

635.7 The Administrative Judge shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter.

635.8 The Administrative Judge may, for good cause shown, allow the agency additional time to submit proof of compliance with the initial decision.

635.9 If the Administrative Judge determines that the agency has not complied with the final decision, the Administrative Judge shall certify the matter to the General Counsel. The General Counsel shall order the agency to comply with the Office's final decision in accordance with D.C. Official Code § 1-606.02 (2006 Repl.).

635.10 No additional filings are permitted once the General Counsel certifies the final decision.

635.11 If the agency fails to comply with the order, the General Counsel may take such actions as are necessary to secure compliance with the order.