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RULES OF PROCEDURE

FOR THE

ADMINISTRATIVE LAW JUDGE DIVISION

Effective May 1, 2001

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I. GENERAL PROVISIONS

1. Authority and Applicability. The promulgation of these Rules is authorized by S. C. Code Ann. §1-23-650 (1976) (as amended). These Rules shall govern all proceedings before the Administrative Law Judge Division, in which the right to a hearing (a) is provided by the Administrative Procedures Act; (b) is specifically required by other statutes or regulations; or (c) is required by due process under the South Carolina or United States Constitutions.

Note to 1998 Amendments

The purpose of this amendment is to make these Rules applicable to matters within the jurisdiction of the Division that are not contested cases under the Administrative Procedures Act but which are heard pursuant to a constitutional command for a hearing. *Stono River EPA v. S.C. Dep't of Health and Env'tl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991); *League of Women Voters v. Litchfield-by-the-Sea*, 305 S.C. 424, 406 S.E.2d 378 (1991).

2. Definitions.

A. Administrative Law Judge means a judge appointed pursuant to S. C. Code Ann. § 1-23-510 (1976) (as amended) who is assigned a particular matter by the Chief Administrative Law Judge, or if no administrative law judge has been assigned for a particular matter, the Chief Administrative Law Judge.

B. Administrative Law Judge Division means an independent body of administrative law judges who preside over public hearings involving the promulgation of regulations, as authorized in S.C. Code Ann. § 1-23-111 and decide contested cases and appellate cases pursuant to the authority in S.C. Code Ann. § 1-23-310, et seq. and as otherwise provided by law.

C. Agency means a state agency, department, board or commission whose action is the subject of a contested hearing, an appeal heard by an administrative law judge, or a public hearing on a proposed regulation presided over by an administrative law judge.

D. Appeal means the review conducted by an administrative law judge of an agency decision on the record established in the agency and any additional evidence presented to the administrative law judge pursuant to the Administrative Procedures Act.

E. Contested Case is defined in Section 1-23-310. It is a case for which a hearing is conducted pursuant to Article 3, Chapter 23 of Title 1, the South Carolina Administrative Procedures Act, and includes hearings conducted by the Administrative Law Judge Division pursuant to Section 1-23-600(B), hearings required by due process under the South Carolina or United States Constitutions, or as otherwise provided by law.

F. Division means the Administrative Law Judge Division.

G. Docket means the roster of matters pending before the Division, including contested cases, appeals, and hearings on proposed regulations.

H. Party means each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party, including a license or permit applicant. An applicant or licensee whose application or license is the subject of a request for a

contested case hearing shall be deemed a party and shall be served with copies of all papers filed in the case.

I. Transmittal Form means the Division's official form prepared by the affected agency and filed with the Division, notifying the Division of a request by any person for a hearing.

Note to 1996 Amendments

Rule 2(H) [renumbered Rule 2(I) with the 1997 amendments] is amended to delete the reference to "contested case" because the transmittal form may request other procedures including a request for a hearing on proposed regulations.

Note to 1997 Amendments

Rule 2(B) is added to define Administrative Law Judge Division and refers to its statutory authority.

Note to 1998 Amendments

Rule 2(E) is amended to include within the definition of a contested case matters which are heard pursuant to a constitutional command for a hearing and matters, such as county tax cases, which do not come directly from a state agency. Rule 2(H) is amended to make it clear that the licensee or applicant is to be made a party to any matter which involves the license or permit, and that he shall be served with copies of all papers filed in the action. Rule 2(I) is amended to clarify that the transmittal form is an official form of the Division, and to substitute "affected agency" for "agency with subject matter jurisdiction."

3. Time.

A. Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period prescribed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as any other day and not as a holiday.

B. Enlargement. For good cause shown, the administrative law judge may extend or shorten the time to take any action, except as otherwise provided by rule or law.

C. Service By Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period.

Note

The method of calculating time in Rule 6 (a) and 6 (e), SCRCF, is adopted. A simplified procedure for extending time is adopted rather than Rule 6 (b), SCRCF. The 10 day notice requirement for motions in Rule 6 (d) is not adopted. But, the additional five days available if service is made by mail is provided.

Note to 1996 Amendments

The last sentence of Rule 3(A) is amended for clarity and no change in practice is intended.

4. Filing.

A. Filing with Agency. The affected agency shall maintain the complete official file. All original papers shall be filed with that agency and true and complete copies of any paper shall be properly served on all other parties as required by law or regulation until the transmittal form, provided by Rules 2 (I) and 12, is submitted by the agency. All subsequent filings shall be with the clerk of the Division, except that the administrative law judge may permit the papers to be filed with him, in which event he shall note thereon the filing date. The term "papers" includes all public documents filed with the agency regarding the matter and the response of the agency thereto.

B. Filing with Division. After the transmittal form is delivered to the Division, all filings shall be made with the clerk of the Division and shall contain the docket number assigned, except that the administrative law judge may permit the filing to be made with him, in which event he shall note thereon the filing date. Unless otherwise specified in these rules, only the original document should be filed. The agency shall retain the original agency file and shall forward only those materials required to be furnished to the Division by statute, court rule, or order of the Division. The Division shall be responsible for maintaining its official file from the receipt of the transmittal form until a final order is issued by the administrative law judge. The file shall consist of the transmittal form, all documents forwarded from the agency, and all subsequently filed papers, pleadings, documents, exhibits, and orders.

C. Filing Defined. The date of the filing is the date of delivery or the date of mailing. Any document filed with the Division shall be accompanied by proof of service of such document on all parties, and, if filed by mail, shall be accompanied by a certificate of the date of mailing. A document, pleading or motion or other paper is deemed filed with the Division by:

(1) delivering the document to the Division; or

(2) by depositing the document in the U.S. mail, properly addressed to the Division, with sufficient first class postage attached.

D. Paper Size. All papers filed with the Division shall be on letter-size (8½ by 11 inches) paper. Exhibits or copies of exhibits in their original form which exceed that size shall be reduced by photocopying or otherwise to letter-size so long as such documents remain legible after reduction.

Note

The agency maintains the complete file until the transmittal form is issued. After the agency submits the transmittal form, all filings are with the Division which maintains the official file until after the final order is issued. All filed papers are served on all parties as required by law and regulation. The Division

is responsible for the official record from the receipt of the transmittal form until the administrative law judge

issues the final order. Filing with the Division is defined as the date delivered to the Division or the date mailed by first class mail to the Division, along with a certificate of service.

Note to 1996 Amendments

Rule 4 is amended by adding paragraph D requiring that all papers be letter size. Exhibits or other

documents that exceed that size are to be reduced before filing unless the process of reduction would make them illegible.

Note to 1997 Amendments

Rule 4(C) has been amended to require all documents filed with the Division by mail to be accompanied by a certificate of the date of mailing.

Note to 1998 Amendments

Rule 4(A) is amended to be consistent with the amendment to Rule 2(I) and to reflect the renumbering of Rule 2(I).

5. Service. Any document, pleading, motion, brief or memorandum or other paper filed with the Division shall be served upon all parties to the proceeding. Service shall be made upon counsel if the party is represented, or if there is no counsel, upon the party. Service shall be made by delivery, or by mail to the last known address. Service is deemed complete upon mailing. Service that complies with Rule 5 (b)(1), SCRCF, also shall satisfy this Rule.

Note

Service is required of all documents filed. It is complete upon mailing. The method of service is by delivery or mailing, but not fax. Any service that satisfies Rule 5, SCRCF also satisfies this Rule.

6. Docket Number. The clerk of the Division shall assign a docket number to each case. All papers, pleadings, motions and orders thereafter shall be filed with the Division and a copy served on all other

parties of record. All papers shall be signed and contain:

- A. a caption setting forth the title of the case and a brief description of the document;
- B. the case docket number assigned by the Division;
- C. the name, address and telephone number of the person who prepared the document.

7. Forms. The Division shall prescribe the content and format of forms required by these rules. The use of required forms as prescribed is mandatory. The Division may also prescribe the content and format of other forms which would facilitate administrative efficiency and judicial economy.

II. CONTESTED CASES

GENERAL PROCEDURES

8. Powers and Duties of Administrative Law Judge. Upon assignment of a case, the administrative law judge shall rule on all motions, preside at the contested case hearing, rule on the admissibility of evidence, require the parties to submit briefs when appropriate, issue orders and rulings to insure the orderly conduct of the proceedings and issue the final order.

9. Right of Parties to Participate.

A. Parties and Their Representatives. Parties in a contested case have the right to participate or to be represented in all hearings or pre-hearing conferences related to their case. A partnership, corporation or association may be represented by any member, officer, director or duly authorized employee. An agency may be represented by the director, an official, or duly authorized employee of the agency. Any party may be represented by an attorney admitted to practice, either permanently or pro hac vice, or as otherwise authorized by law. In tax related cases, any party may be represented by a certified public accountant. No one shall be permitted to represent a party where such representation would constitute the unauthorized practice of law. A party proceeding without legal representation shall remain fully responsible for compliance with these Rules and the Administrative Procedures Act. This Rule shall not be construed to permit law student practice except to the extent authorized by Rule 401 of the South Carolina Appellate Court Rules.

B. Notice of Appearance. An attorney or other person authorized to represent a party before the Division pursuant to this rule shall file with the Division a notice of appearance when retained or

authorized to represent a party after commencement of a case.

C. Motion to Withdraw from Representation. An attorney or other person authorized to represent a party before the Division pursuant to these Rules must file a written motion to withdraw from representation of a party or from participation in proceedings.

Note to 1997 Amendments

Rule 9(A) has been amended to clarify who may represent a party before the Division. The amendment incorporates the provisions of the Division's Administrative Order issued November 23, 1994, which allows Certified Public Accountants to represent parties before the Division in tax matters. Rule 9(B) has been added, requiring any authorized representative to file a notice of appearance with the Division if the representative is retained after commencement of the case.

Note to 1998 Amendments

Rule 9(A) has been amended to clarify that representation of a party before the Division is permitted only to the extent that such representation does not conflict with the rules governing the unauthorized practice of law, and to emphasize that parties representing themselves are not relieved of the responsibility to comply with these Rules and the Administrative Procedures Act. Rule 9(C) has been added to require any person representing a party before the Division to file a written motion in order to withdraw from representation of that party.

10. Simplification of Procedures. The administrative law judge, upon being assigned a contested case, shall review the transmittal form and determine the procedure appropriate to the complexity of the issues presented and the types of proof likely to be introduced so that the matter may be fully and fairly presented without unnecessary burden on either the agency or individuals involved in the hearing. The administrative law judge may limit the pre-hearing procedures and simplify the pre-hearing exchange of materials and otherwise take such reasonable measures so that the burdens of procedure do not unfairly prevent the presentation of the facts. In all cases involving *pro se* litigants or those without substantial knowledge and experience in administrative matters the administrative law judge shall make reasonable efforts to assist a party so that the hearing is fair.

Note

The statutory authority of the Division encompasses a wide range of administrative actions from the very simple review of hunting and fishing license revocations to complex environmental cases. This section provides specific direction to the administrative law judge to review the case and limit the pre-hearing procedures if they are unnecessary to a full development of the case. In addition, there is an instruction to the administrative law judge to be aware of the problems of *pro se* litigants. The administrative law judge, through the scheduling conference, which can be held by telephone, can

consider the comments of the parties and then issue an appropriate order defining the pre-hearing procedures.

11. Request for a Contested Case Hearing. In all contested cases except county tax matters, the request for a contested case hearing shall be filed with the affected agency within thirty (30) days after receipt of the agency decision unless otherwise provided by statute. In county tax matters, the request for a contested case hearing shall be filed with the clerk of the Division. The request shall contain the following information:

- A. The name of the party requesting the hearing and the issue(s) for which the hearing is requested;
- B. The caption or other information sufficient to identify the decision, order, action or inaction which is the subject of the hearing;
- C. The relief requested.

Note

This section permits the filing of the request for a contested case hearing with the affected agency, and retains that agency's time limits for filing. The agency will remain responsible for keeping the official records of the matter. The request for a contested case hearing contains basic information so that the matter may be identified.

Note to 1998 Amendments

Rule 11 is amended for consistency with the amendment to Rule 2(I).

Note to 2001 Amendments

Rule 11 is amended to clarify the time frame for filing a request for a contested case hearing and to set forth the procedure for requesting a contested case hearing in county tax matters.

12. Notification of Division by Agency of Contested Case. The agency requesting a contested case hearing or receiving a notice of a contested case from a party shall notify the Division within five (5) working days of the receipt of the request for a contested case hearing by completing and forwarding to the Division a transmittal form, and serving a copy on all parties, containing the following information:

- A. the name of the transmitting agency, along with the name and telephone number of the contact person in the agency responsible for the matter;

B. the name or title of the agency proceeding and the file number or any other identifying information of the agency action or inaction that is the subject of the hearing;

C. the names, addresses and telephone numbers, if known, of all known parties, and their attorneys or other representatives;

D. the names, addresses and telephone numbers, if known, of any persons who have exercised their legal right to object to the issuance of a permit or license.

If the agency fails to file the requested materials with the Division within five working days, the party requesting the hearing may move before the Administrative Law Judge Division for an order directing the agency to respond forthwith.

Note

The agency is responsible for transmitting the request for a contested hearing to the Division. A copy of the transmittal form is served on the other parties.

Note to 1997 Amendments

Rule 12 has been amended to add paragraph D., which requires that the names, addresses, and telephone numbers of any individuals known to the agency who have objected to the issuance of a permit or license be provided in the transmittal form. The rule has been further amended to specify the procedure to be followed if the agency fails to forward the transmittal form to the Division within five working days as required by the first paragraph of Rule 12.

13. Assignment of Case to Administrative Law Judge. Upon receipt of the transmittal form the case shall be assigned to an administrative law judge as provided in S. C. Code Ann. §1-23-570 (1976) (as amended).

Note

There will be individual assignment of cases subject to the six month judicial rotation. Once a case is assigned to a judge that judge will be responsible for all decisions in the case.

14. Notification of Assignment and Request for Information. Upon receipt of the transmittal form,

the Division shall notify all parties of the assignment of an administrative law judge, and the administrative law judge assigned to the case, by pre-hearing order, may request each party to prepare and return a Pre-Hearing Statement describing the contested case.

15. Notice of Contested Case Hearing. The Division shall promptly issue a Notice of Contested Case Hearing at least thirty (30) days before the hearing date that sets forth the date, time, place, and purpose of the hearing, the administrative law judge who will conduct the hearing, and any other matters necessary for the prompt resolution of the matter.

Note

The Division issues the notice of the contested case hearing which includes the information required by the statute.

16. Preliminary Relief. The administrative law judge may issue remedial writs as are necessary to give effect to its jurisdiction and with respect to injunctions shall follow the procedure in Rule 65, SCRCP.

Note

This section provides that the administrative law judge may issue remedial writs as provided in S. C. Code Ann. §1-23-630 (1976) (as amended). The procedure for issuing the injunction is provided by Rule 65, SCRCP.

PRE-HEARING PROCEDURES

17. Scheduling Conferences and Orders.

A. Scheduling Conference. At any time after the case has been assigned, the administrative law judge may hold a scheduling conference with the parties of record, by telephone if convenient, to determine:

- (1) the necessity or desirability of pleadings or amendments;
- (2) the simplification of the issues;

- (3) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;
- (4) the limitation and exchange of expert testimony;
- (5) the scheduling of discovery;
- (6) the possibility of resolving the matter through settlement, reference to mediation or other alternative forms of dispute resolution.

B. Scheduling Order. The administrative law judge, after the conference, may issue an appropriate order containing the action, if any, taken at the scheduling conference.

Note

This rule gives the judge the power to hold a pre-hearing conference in any case, preferably by telephone. The matters discussed are those generally required by Rule 16, SCRCR, including the opportunity for settlement conferences or alternative dispute resolution if appropriate. The administrative law judge issues an appropriate order to guide the pre-hearing proceedings.

18. Pleading. The administrative law judge by order may require pleadings from the parties. If pleadings are required they shall be as follows:

A. A Petition shall be filed within 30 days after the order requiring pleadings, unless a different time is set by the judge. The petition shall state in separately numbered paragraphs the facts and the particular statutes and rules relied upon, and the relief requested. If the contested case arises out of an order or similar document containing specific findings of fact or conclusions of law, the petition shall admit or deny each specific finding. A party shall deny only that part of an averment that may be denied in good faith.

B. An Answer shall be filed within 30 days of service of the petition, unless otherwise ordered, and shall admit or deny or otherwise answer each allegation of the petition. Any allegation not denied shall be deemed admitted. The Answer shall assert any facts deemed to show an affirmative defense. Any defense not raised on the facts known to the parties may be deemed waived.

C. Any pleading, paper or document can be amended at any time upon motion and for good cause shown, unless the amendment would substantially prejudice any other party in the presentation of its case.

D. All pleadings shall contain the names, addresses, and telephone numbers of the parties or their attorneys or authorized representatives.

Note

The pleadings are optional with the administrative law judge. If ordered, they shall be in the form specified.

An additional requirement is added that if the case arises from an order, the petition is to admit and deny the averments of the order.

Note to 1996 Amendments

The first sentence of the Rule is amended to provide that the administrative law judge may require pleadings by order rather than in the Notice of Hearing. The second sentence of 18(A) is amended to require that the petition contain a statement of the relief requested.

Note to 1998 Amendments

Rule 18(A) is amended to provide for cases, such as enforcement actions, in which the agency has the burden of proof. Rule 18(D) is added to require that all pleadings contain the name, address, and telephone number of the party or his representative.

19. Motions.

A. Content and Filing. All pre-hearing motions shall be written, contain the caption of the case and the title of the motion, the contested case docket number assigned by the Division and the name and address of the person preparing it. The motion shall also state the grounds for relief and the relief sought. All motions pertaining to the hearing shall be filed not later than ten (10) days before the hearing date, unless otherwise ordered by the administrative law judge. Any party may file a written response to the motion within ten (10) days unless the time is extended or shortened by the administrative law judge.

B. Motions for Continuance. A motion for continuance shall be in writing, state the reasons therefor, and be signed by the requesting party or representative. No application for a continuance may be made or granted ex parte without notice except in an emergency where notice is not feasible. An agency may waive notice of requests for continuances in a class of cases.

C. Motions Regarding Discovery. Any motion relating to discovery shall state that the moving party has made a good faith attempt to resolve all the issues raised by the motion with the opposing party. Opposing parties may respond within ten (10) days of the filing of the motion unless the time is otherwise altered by the administrative

law judge, who may rule on the basis of the written motion and any response thereto, or may order argument on the motion.

D. Motions for Consolidation. When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the administrative law judge may upon motion by any party or on his own motion order that a consolidated hearing be

conducted. Where consolidated hearings are held, a single record of the proceedings may be made and evidence introduced in one matter may be considered as introduced in others, and a separate or joint decision shall be made, at the discretion of the administrative law judge as appropriate.

Note

Section A. contains the requirement that motions be made at least ten days before the contested case hearing. A special rule for continuances was added because of their common usage. Notice to all parties is required. The last sentence in Section B. permits an agency to waive receipt of the notice of a motion for continuance in a class of cases where the issues do not require extensive preparation. Section C. contains a standard provision that the parties must consult with opposing counsel before filing of a discovery motion to discourage frivolous motions.

Note to 1997 Amendments

Rule 19 has been amended to add subsection D., which provides for consolidation of two or more cases in the event that the same or substantially similar evidence is relevant and material in the cases to be consolidated. The language of the subsection is adapted from 29 C.F.R., Part 18, Subpart A §18.11, which is applicable to proceedings before Federal administrative law judges.

20. Intervention.

A. Motions for Intervention. A motion for leave to intervene shall be served on all parties and shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of the intervention on the proceedings. A proposed answer or position in intervention shall be attached to the motion.

B. Grounds for Intervention. Any person may intervene in any pending contested case hearing upon a showing that:

- (1) the movant will be aggrieved or adversely affected by the final order;
- (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene;
- (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

C. Time for Motion for Intervention. The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings. Unless otherwise ordered by the administrative law judge, the motion to intervene shall be filed at least twenty (20) days before the hearing. Any later motion shall contain a statement of good cause for the failure to intervene earlier.

D. Conditions of Intervention. A person granted leave to intervene is a party to the proceeding. The intervenor shall be bound by any agreement, arrangement or other matter previously determined in the case. The order granting intervention may restrict the issues to be raised or otherwise condition the intervenor's participation in the proceeding. If appropriate, the administrative law judge may order consolidation of petitions and briefs and limit the number of representatives allowed to participate in the proceedings.

Note

This rule contains the standard for intervention based upon the civil rules and specifically provides that the intervenor's participation can be limited. The rule encourages early joinder, and requires a good cause explanation if intervention is sought immediately before the hearing.

21. Discovery. Discovery shall be available as provided in S. C. Code Ann. §1-23-320 (1976) (as amended), and as provided under these rules. Discovery shall be conducted according to the procedures in Rules 26-37, SCRPC, except that only the standard interrogatories provided by SCRPC 33(b), as applicable to the pending contested case, are permitted; there shall be no more than three (3) depositions per party under Rule 30, SCRPC; and no more than ten (10) requests to admit per party, including subparts under Rule 36, SCRPC. All discovery shall be completed within 90 days of the receipt of the Notice of Assignment and Request for Information. Upon motion for good cause shown or upon his own motion, discovery may be expanded or curtailed by the administrative law judge.

Note

The Administrative Procedures Act permits discovery by depositions, and this rule authorizes discovery by interrogatories, document production or requests to admit. The mechanism, timing and procedure of discovery is governed by the Rules of Civil Procedure, with specific limitations on the interrogatories, depositions and requests to admit.

22. Subpoenas.

A. Issuance and Service. Subpoenas by or on behalf of any party shall be issued in blank by the clerk of the Division. The party requesting the subpoena shall complete the form and return the completed form to the clerk of the Division for signature before service, and shall file a copy of the subpoena and the return of service with the clerk of the Division upon service. An attorney authorized to practice before the courts of the State of South Carolina, as an officer of the court, may also issue and sign a subpoena on behalf of the Division. The attorney shall complete the form before service and file a copy of the subpoena and the return of service with the clerk of the Division upon service. The party requesting the subpoena shall be responsible for service of the subpoena and the payment of fees and mileage in accordance with Rule 45, SCRPC.

B. Enforcement. The administrative law judge shall enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of records, books, and papers, and have the power to punish as for contempt of court, by fine or imprisonment or both, the unexcused failure or refusal to attend and give testimony or produce books, papers, and records that have been required by subpoena to be produced.

C. Motions to Quash or Modify Subpoenas. A person to whom a subpoena has been issued may move before the administrative law judge for an order quashing or modifying the subpoena.

Note

S. C. Code Ann. §1-23-320(d) (1976) (as amended) authorizes issuance of subpoenas; however, new Rule 45, SCRPC provides that attorneys, or in the case of pro se litigants, the clerk of court, issue the subpoena. This rule adopts some of the procedure in Rule 45, SCRPC for subpoenas. The administrative law judge has the power to enforce the subpoena as for contempt.

Note to 1996 Amendments

Rule 22(A) is amended to require a person requesting a subpoena to file a copy of the subpoena and of the return of service with the clerk of the Division after the subpoena has been served. Compliance with these requirements will make the enforcement of subpoenas more efficient.

Note to 1998 Amendments

Rule 22(A) is amended to adopt the procedure in Rule 45, SCRPC, whereby an attorney may issue and sign a subpoena. Rule 22(C) is added to clarify the procedure for motions to quash or modify subpoenas.

Note to 2001 Amendments

Rule 22(A) is amended to clarify the procedure for issuance and service of subpoenas. Signed blank subpoena forms will no longer be issued by the clerk of the Division. Instead, an unrepresented party requesting a subpoena must complete the blank form and return the completed form to the clerk for signature before service. However, the existing procedure by which attorneys may issue and sign subpoenas on behalf of the Division remains unchanged.

23. Default. The administrative law judge may dismiss a contested case or dispose of a contested case adverse to the defaulting party. A default occurs when a party fails to plead or otherwise prosecute or defend, fails to appear at a hearing without the proper consent of the judge or fails to comply with any interlocutory order of the administrative law judge. Any non-defaulting party may move for an order

dismissing the case or terminating it adversely to the defaulting party.

24. Confidentiality. When, by statute or rule, a matter subject to the jurisdiction of the Division is required to be kept confidential, all pleadings, motions or other papers filed with the Division, and served on all parties, shall bear the designation "CONFIDENTIAL" and such documents shall be maintained so that only authorized individuals shall have access to those documents or pleadings.

HEARING PROCEDURES

25. Evidence.

A. Governing Statute. S. C. Code Ann. §1-23-330 (1976) (as amended) shall govern questions of evidence.

B. Objections. Objections to evidence shall be timely made and noted in the record. Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony. If the evidence excluded consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

C. Preference for Stipulations, Documentary Evidence. Stipulations of law, fact and testimony are encouraged. Subject to these rules and when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in documentary form.

Note

This subsection establishes that the rules of evidence apply to administrative hearings as required by the Administrative Procedures Act. As much as possible the evidence should be written. Rule 26 A. provides a mechanism for avoiding delay in establishing the foundation for documents that are deemed reliable in ordinary business and personal affairs.

D. Prepared Statements and Exhibits. A witness, who is present and subject to cross-examination, may submit as direct testimony of that witness, written statements of fact or expressions of opinion prepared by the witness. Any or all of the written statements of fact or expressions of opinion are subject to objection. A party shall prefile with the Division and all other parties of record copies of prepared testimony and exhibits which that party proposes to use during a hearing. Prefiled statements and exhibits shall be filed and served at least two days before the hearing. Two copies of such testimony and

exhibits shall be filed with the Division.

Note

This language is adapted from PSC Reg. 103-869(C) (Supp. 1993). The rule permits a witness to read prepared statements or submit them as exhibits, subject to objection by opposing parties. The witness whose testimony is prefiled must be present and subject to cross-examination at the hearing.

26. Presumptive Admissibility of Documents.

A. Documents Admissible Without Foundation. If at least twenty (20) days' written notice of the intention to offer the following documents is given to every party, accompanied by a copy of the document, the name of the author or maker of the document or other person who can establish its admissibility in evidence, a party may offer in evidence, without foundation or other proof:

- (1) photographs, maps, drawings, blue prints, weather reports, business records and communications and the like;
- (2) documents prepared by hospitals, doctors, dentists, registered nurses and other health care providers; bills for drugs and medical appliances; property damages bills or estimates when itemized setting forth the charges for labor and materials; and reports of earnings and lost time prepared by an employer;
- (3) the deposition of a witness or the statement of a witness which the witness would be allowed to express if testifying in person, if the statement is made by affidavit;
- (4) the written opinion of an expert, or the deposition of the expert provided that the expert's qualifications, the subject of the expert testimony, and the basis of the expert's opinions and conclusions and the expert's opinions are also submitted at least twenty (20) days prior to the hearing;
- (5) any other document not specifically covered by any of the foregoing provisions which is otherwise admissible under the rules of evidence.

B. Right to Subpoena Maker of Document. Upon ten (10) days notice to the proponent of the document and all other parties, any other party may subpoena the author, maker, or other person identified by the proponent who can establish the admissibility in evidence of a document admissible under this rule at that party's expense and examine the author or maker as if under cross-examination. If the properly subpoenaed author, maker, or other person identified by the proponent who can establish the admissibility of the document in evidence fails to appear at the hearing, or is beyond the jurisdiction of the subpoena and fails to appear at the hearing, the document shall not be admissible unless otherwise provided by the rules of evidence.

C. Admissibility. Except as provided in this rule, the established rules of evidence as provided in S. C. Code Ann. §1-23-330 (1976) shall be followed. The administrative law judge shall apply the tests under established rules of evidence otherwise relating to admissibility and credibility and determine the weight to be given such evidence. The administrative law judge may require the submitting party to identify the

portions of voluminous records, or depositions that are relevant and material.

Note

The purpose of this rule is to avoid delay involved in establishing the foundation for documents normally considered reliable and trustworthy in every day affairs. Upon 20 days notice of the intent to introduce the document, identification of the author or maker of the document or other person who can establish its admissibility, and submission of a copy of each to all parties, the documents are presumed admissible. Any other party may obtain information about the documents either through discovery or requiring the testimony of the maker, author, or other person identified by the proponent who can establish the admissibility of the document in evidence at the hearing. If the maker, author, or other person identified by the proponent is not subject to the subpoena power, and fails to appear at the hearing, the document is not admissible under this provision, but may be admitted if it is otherwise admissible under other rules of evidence. The administrative law judge must still apply the normal rules of admissibility regarding the documents and may require the submitting party to identify the specific portions of the document that are relevant and material to the issues in the case. This is to prevent blanket submission of voluminous documents. The rule is based upon similar rules found in arbitration proceedings.

27. Pre-Hearing Exchange of Evidence. Upon notice, the administrative law judge may, in appropriate cases, require the parties to exchange prior to the hearing:

- A. a final list of witnesses the party reasonably expects to testify at the hearing;
- B. a final list of all exhibits expected to be offered at the hearing;
- C. a final list of all facts which the party intends to request be judicially noticed by the administrative law judge and the information supporting the judicial notice of the facts requested.

Any witness list or exhibit not exchanged prior to the hearing may be excluded from admission into evidence. The pre-hearing exchange may be amended upon motion and for good cause shown, unless the amendment would substantially prejudice any other party in the presentation of its case.

Note

This rule provides the administrative law judge another technique for limited pre-hearing exchange of information. It might be appropriate with other pre-hearing procedures in complex cases, or be the only disclosure in simple hearings.

Note to 1998 Amendments

This rule is amended to provide a procedure for the amendment of the pre-hearing exchange.

28. Pre-Hearing Conference. The administrative law judge may hold a pre-hearing conference prior to the hearing. The purpose is to obtain stipulations of law and fact, rule on the admissibility of evidence and to identify matters which any party intends to have judicially noticed. The administrative law judge may consider pending motions, and any other matter that will expedite the hearing.

Note

This rule provides another tool to help the administrative law judge manage the case. This conference is discretionary and may be held shortly before the hearing to permit the pre-hearing resolution of any matter that would expedite the hearing itself.

29. Contested Case Hearings.

A. Order of Proceedings. The administrative law judge shall conduct the hearing in the following manner:

- (1) The administrative law judge shall give an opening statement briefly describing the nature of the proceeding.
- (2) The parties shall be given an opportunity to briefly present opening statements.
- (3) Parties shall present their evidence in the order determined by the administrative law judge. The party with the burden of proof will be the first to present evidence, all other parties being allowed to cross-examine in an orderly fashion. When that party rests, other parties will then be allowed to present their evidence, again allowing for orderly cross-examination. Rebuttal and surrebuttal evidence are allowed only in the discretion of the administrative law judge.
- (4) Each witness shall be sworn or affirmed by the administrative law judge or the court reporter, and be subject to examination. In the discretion of the administrative law judge, witnesses may be sequestered during the hearing.
- (5) Parties have the right to introduce evidence on the points at issue, to cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, to present evidence in rebuttal and to submit briefs.
- (6) All objections to procedure, admission of evidence or any other matter shall be timely made and stated on the record.

(7) When all of the parties and witnesses have been heard, the parties shall be given the opportunity to present final arguments.

(8) Briefs and proposed findings of fact and conclusions of law may be requested by the administrative law judge, and if served upon the administrative law judge shall be served at the same time and by the same method on all parties. Briefs shall set forth the factual and legal position of the party and be served on the Division and on all parties of record.

B. Burden of Proof. In matters involving the assessment of civil penalties, the imposition or sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.

C. Decision. The administrative law judge shall issue the decision in a written order which shall include separate findings of fact and conclusions of law. Issues raised in the proceedings but not addressed in the order are deemed denied.

Note

Subsections A. and B. describe the procedure at the hearing which follows the standard civil trial format. The decision is to be written with separate statements of fact and law. Issues raised in the proceedings but not addressed in the final decision are deemed denied.

Note to 1998 Amendments

Rule 29(B) is added to clarify that in certain matters, such as enforcement actions, the agency has the burden of proof. Former Rule 29(B), 29(C), and 29(D) are renumbered as Rule 29(C), 29(D), and 29(E) respectively.

D. Motion for Reconsideration. Any party may move for reconsideration of a final decision of an administrative law judge in a contested case, subject to the grounds for relief set forth in Rule 60(B) (1 through 5), SCRCF, as follows:

(1) Within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a petition for judicial review has not been filed.

(2) The administrative law judge shall act on the motion for rehearing within thirty (30) days after it is filed, and if no action is taken by the administrative law judge within that period, the inaction shall be deemed a denial of the relief sought in the motion.

(3) The filing of a motion for reconsideration shall not, of itself, stay the order of the administrative law judge or excuse or delay compliance with the order of the administrative law judge.

(4) The time for appeal for all parties shall be stayed by a timely motion for reconsideration, and shall

run from receipt of an order granting or denying such motion, or if no order is filed regarding the motion, thirty (30) days after notice that the motion was filed.

The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge.

Note

This subsection provides for a motion for reconsideration of the decision of an administrative law judge in a contested case. The administrative law judge must decide it within 30 days or it is deemed denied. The filing of a motion for reconsideration does not stay the effectiveness of the administrative law judge's order, but does toll the time for appeal until the motion is resolved. A motion for reconsideration made after a petition for judicial review has been filed is untimely because jurisdiction then resides in the circuit court. The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from the final decision of an administrative law judge.

Note to 1997 Amendments

Rule 29(C) [now 29(D)] has been amended to incorporate SCRCR Rule 60, which sets forth the following grounds for relief from a final judgment:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

E. Stay of Final Order. An administrative law judge who issues a final order subject to judicial review may in the order stay its effect. At any time prior to the filing of a petition for judicial review, and upon the motion of any party, with notice to all parties, the administrative law judge may stay the final order upon appropriate terms. The filing of a motion for a stay does not alter the time for filing a petition for judicial review.

Note

This subsection permits the administrative law judge to stay the effect of any final order that is subject only to judicial review. The authority to stay the order is derived from S. C. Code Ann. §1-23-380(A)(2) (1976) (as amended) which gives the agency or the reviewing court the power to stay an order. When the administrative law judge issues a final order subject only to judicial review, agency action is completed and the administrative law judge is the appropriate authority to consider the issue of a stay. Motions for stays

do not alter the time for filing a petition for judicial review which is jurisdictional.

Note to 1996 Amendments

The Note to Rule 29(D) [now 29(E)] is amended to change the reference to S.C. Code Ann. § 1-23-380 (A)(3) to S.C. Code Ann. § 1-23-380(A)(2). This change reflects the correct statutory section which gives an agency or a reviewing court the power to stay an order.

30. Record After Final Decision. The record of the contested case shall consist of:

- A. All pleadings, motions, intermediate rulings and depositions filed with the Division;
- B. All evidence received or considered;
- C. A statement of matters judicially noticed;
- D. All proffers of proof of excluded evidence;
- E. The final order or decision which is subject to administrative or judicial review;
- F. The transcript of the testimony taken during the proceeding, if prepared.

Note to 1997 Amendments

Rule 30(E) has been amended to define the decision or order which is to be included in the record of the contested case.

31. Appeal of Final Order.

A. Notice of Appeal and Request for Transcript. The decision of the administrative law judge may be appealed as provided by law. An appellant shall request the preparation of the transcript of the proceedings and file a copy of the notice of appeal with the clerk of the Division at the same time the notice of appeal is filed with the reviewing authority. The transcript shall be ordered within ten days after the date of the service of the notice of appeal, and, unless otherwise agreed by all parties in writing, the appellant must order the entire transcript.

B. Transmission of Record. The clerk of the Division shall prepare a Statement of the Contents of the Record listing each document contained in the record and transmit the Statement of Contents of the Record and the record of the contested case to the reviewing authority upon receipt of a notice of appeal. The agency or court receiving the record shall acknowledge receipt of the record by signing and returning the Statement of the Contents of the Record to the Division. A certified copy of the record may be substituted for the original.

Note to 1996 Amendments

Rule 31 is amended by adding paragraph (A) which requires the appellant to file a copy of the notice of appeal with the clerk of the Division and also to request a copy of the transcript at that time. Rule 74, SCRCP imposes a similar requirement. The amendment insures the prompt preparation of the record and the transcript. Former Rule 31 concerning the transmission of the record is renumbered as Rule 31(B).

Note to 1997 Amendments

Rule 31(A) has been amended to require that the transcript be ordered within ten days of service of the notice of appeal, and to permit the ordering of a partial transcript if all the parties agree. A similar requirement has been incorporated into Rule 35 for appeals cases. Unlike SCACR 206(A), there is no provision for sanctions if a party, without justification, refuses to order a partial transcript.

32. Transcript. The hearings concerning a contested case shall be available for transcription as required by S.C. Code Ann. §1-23-600 (a) (1976) (as amended). The cost of preparing a copy of a transcript shall be borne by the party requesting the transcript.

III. MATTERS HEARD ON APPEAL FROM FINAL DECISIONS OF CERTAIN AGENCIES

33. Notice of Appeal. The notice of appeal from the final decision of an agency to be heard by the

Administrative Law Judge Division shall be filed with the Division and a copy served on each party and the agency whose final decision is the subject of the appeal within thirty (30) days of receipt of the decision from which the appeal is taken. The notice shall contain the following information:

- A. the name, address and telephone number of the party requesting the appeal, and the name, address and telephone number of the attorney or other authorized representative, if any, representing that party;
- B. a general statement of the grounds for appeal as provided in S.C. Code Ann. §1-23-380(A)(6). The grounds for appeal may be amended, supplemented or modified in the statement of issues in the brief required by Rule 37(B)(1);
- C. a copy of the final decision which is the subject of the appeal and the date received;
- D. a copy of the request for a transcript.

Note

The notice of appeal is filed with the Division as the entity hearing the appeal. The time is set at 30 days because it is the same time for civil appeals. The notice of appeal should include a general statement of the issues on appeal, but the statement of issues in the brief shall be considered the final statement of the issues on appeal.

Note to 1997 Amendments

Rule 33(A) has been amended to require that the telephone number of the party requesting the appeal and the address and telephone number of the appellant's counsel be added to the notice of appeal.

Note to 1998 Amendments

Rule 33(A) has been amended to substitute "attorney or other authorized representative" for "counsel" since parties may be represented by non-attorneys in certain situations.

Note to 2001 Amendments

Rule 33 has been amended to require that a copy of the request for a transcript be included with the notice of appeal, and to delete the reference to filing the record with the Division, since procedures for filing the record with the Division are now included in Rule 36.

34. Automatic Stay of Proceedings Upon Appeal. The filing of an appeal from the final decision of an agency shall stay the final decision of that agency unless the effect of filing an appeal is otherwise established by statute, the Administrative Procedures Act notwithstanding; or the administrative law judge has entered an order regarding the effect of the proceedings in the agency. Notwithstanding the foregoing, upon the filing of an appeal from the final decision of an agency, any party may apply to the administrative law judge for an order regarding the effect of the appeal on the agency decision.

35. Ordering and Filing of Transcript. The party filing the notice of appeal shall be responsible for ordering a transcript and shall file a copy of the request for a transcript with the notice of appeal. Unless otherwise agreed by all parties in writing, the appellant must order the entire transcript. The administrative law judge may also order the agency to prepare a transcript. The transcript of the proceedings shall be filed with the clerk of the Division by the agency pursuant to Rule 36.

Note to 1997 Amendments

Rule 35 has been amended to require that the transcript be ordered within ten days of service of the notice of appeal, and to permit the ordering of a partial transcript if all the parties agree. A similar requirement has been incorporated into Rule 31 for contested cases. Unlike SCACR 206 (A), there is no provision for sanctions if a party, without justification, refuses to order a partial transcript.

Note to 2001 Amendments

Rule 35 has been amended to require that the transcript be ordered at the same time as the service of the notice of appeal, and to require that a copy of the request for a transcript be filed with the notice of appeal.

36. Record on Appeal.

A. Time for Service and Filing. Within thirty (30) days of receipt of the Notice of Appeal, the agency with possession of the Record shall file the Record with the Division and serve one (1) copy on each party to the appeal, unless the time for filing the Record is extended by the Administrative Law Judge assigned to the appeal.

B. Content. The Record shall consist of the following:

- (1) All pleadings, motions, and intermediate rulings;
- (2) All evidence received or considered;
- (3) A statement of matters judicially noticed;

- (4) All proffers of proof of excluded evidence;
- (5) The final order or decision which is subject to review;
- (6) The transcript of the testimony taken during the proceeding.

C. Order of Record. The Record shall be arranged in the following order: the title page, index, orders, judgments, decrees, pleadings, transcript, exhibits, other materials or documents, and a certificate of service. Each page of the Record shall be numbered consecutively beginning with the index.

D. Title Page. The title page shall contain only the caption.

E. Index. Every Record shall contain an index to the principal matters therein, to include orders, judgments, pleadings, prehearing matters, opening statements, testimony, motions, closing arguments, post-hearing motions, and exhibits. For witness testimony, the index shall show the pages on which direct, cross, redirect, and recross examination begins.

F. Exhibits. Photographs, plats and diagrams, and other paper exhibits shall be inserted in the Record where they can be reduced or drawn to a size which permits them to be printed and inserted in the Record, without folding more than one time. Where exhibits are larger, or do not reasonably lend themselves to accurate reproduction, they need not be included in the Record, but shall be filed separately. All exhibits other than paper exhibits must be delivered to the clerk of the Division.

G. Review Limited to Record. The Administrative Law Judge will not consider any fact which does not appear in the Record.

Note to 2001 Amendments

Rule 36 (formerly Rule 37) has been amended to specify the procedure by which the agency in possession of the record on appeal shall file the Record with the Division (formerly set forth in Rule 33), to add provisions standardizing the content and format of the Record on Appeal, and to add a provision limiting the administrative law judge's review to those facts appearing in the Record.

37. Briefs.

A. Time for Filing. The party first noticing the appeal shall file an original and two copies of its brief within fifteen (15) days after receipt of the Record on Appeal. Within fifteen (15) days thereafter, the respondent and other parties shall file an original and two copies of their briefs in response. A reply brief and two copies may be filed ten (10) days thereafter. The principal briefs shall not exceed thirty (30) pages and the reply brief shall not exceed ten (10) pages.

B. Content of Brief. Each brief shall contain:

- (1) Statements of the Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue and may be stated in question form. Broad general

statements may be disregarded by the Division. Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal.

(2) **Statement of the Case.** The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain as a minimum, the following information: the date of the commencement of the action; the nature of the action; the nature of the defense or response; the date and nature of the agency action appealed from; the date of the service of the notice of appeal; the date of and description of any orders or proceedings in the agency as may have affected the appeal, or may throw light upon the questions involved in the appeal. Any matters stated or alleged in appellant's statement shall be binding on the appellant.

(3) **Argument.** The brief shall be divided into as many parts as there are issues to be argued, and each such part shall bear an appropriate caption, followed by a discussion and citation of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize that party's contentions.

(4) **Conclusion.** A short conclusion stating the precise relief requested.

(5) **Certificate of Service.** A certificate showing the service of the brief on all parties of record.

C. Service of Brief. At the time of filing the brief with the Division, one copy of the brief and any appendix shall be served on each party to the appeal.

Note to 2001 Amendments

Former Rule 36 has been renumbered as Rule 37. Rule 37(A) [formerly Rule 36(A)] has been amended to specify that the appellant's brief is to be filed within fifteen days after receipt of the Record on Appeal.

38. Dismissal of Appeal for Failure to Comply with the Rules. Upon motion of any party, or on its own motion, an administrative law judge may dismiss an appeal for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section.

Note

In all cases involving pro se litigants or those without substantial knowledge and experience in administrative matters, the administrative law judge shall make reasonable efforts to assist a party to assure fairness.

39. Oral Argument. The clerk of the Division shall provide at least twenty (20) days notice of oral argument. The oral argument shall follow the procedure in Rule 218, SCACR. In the discretion of the

administrative law judge, oral argument may not be required.

40. Opinion. The administrative law judge shall render a decision in a written order which shall be served on all parties and filed with the clerk of the Division. Judicial review of any decision of the Division shall be as provided in S. C. Code Ann. §1-23-610 (1976) (as amended).

Note

The rules for hearing matters on appeal from the final decision of an agency are based on the South Carolina Appellate Court Rules as modified for the less complex matters heard by the Division. The South Carolina Appellate Court Rules should be examined to resolve novel issues of appellate procedure in the Division.

41. Transmission of Record. The appellant shall file a copy of the notice of appeal from the decision of the administrative law judge with the clerk of the Division. Upon receipt of the notice of appeal, the clerk of the Division shall transmit the record of the agency proceedings which were the subject of the appeal to the reviewing authority. A certified copy of the record may be substituted for the original. The agency or court receiving the record shall acknowledge transmission of the record by signing and returning the Statement of Contents of the Record to the Division.

Note to 1996 Amendments

Rule 41 is amended to add the first sentence requiring the appellant to file a copy of the notice of appeal with the clerk of the Division who, upon receipt, prepares and transmits the record to the appropriate authority. A similar amendment was made to Rule 31.

IV. REGULATION HEARING PROCEDURES

42. Request for Hearing on Proposed Regulation. An agency desiring a hearing on a proposed regulation pursuant to S. C. Code Ann. §1-23-111 (1976) (as amended) shall file with the clerk of the Division a transmittal form including a description of the subject matter of the regulation and a request that a hearing be scheduled. Within five (5) days the chief administrative law judge shall assign an administrative law judge to preside over the proceedings.

43. Documents Filed with Request for Hearing. At the time the request for a hearing is made, the agency shall file with the clerk of the Division the following:

- (a) a copy of the drafting notice for the proposed regulation as published in the State Register;
- (b) the State Register Document Number of the proposed regulation;
- (c) the proposed date of submission of the proposed regulation to the State Register for publication;
- (d) the proposed date of publication in the State Register of the text or synopsis of the proposed regulation;
- (e) a suggested date for the hearing.

Note to 1996 Amendments

Rule 43 is amended to clarify that the Request for a Hearing on Proposed Regulations should include documentation showing that the requirements for publication in the State Register have been met, and to delete the requirement that the agency suggest a time and location for the hearing.

44. Scheduling of Hearing on Proposed Regulation. Within ten (10) days of receipt of the request for a hearing and the required documents, the administrative law judge to whom the matter is assigned shall notify the agency of the location, date, and time of the hearing to allow participation by all affected interests and shall advise the agency to issue the proposed Notice of Hearing for the Proposed Regulation for publication in the State Register.

Note to 1996 Amendments

Rule 44 is amended to specify that the Notice of Hearing for the Proposed Regulation should be published in the State Register.

45. Documents to be Pre-Filed with Division. At least ten (10) days before the date scheduled for the hearing, the agency shall provide a statement confirming the need for a hearing as required by S. C. Code Ann. §1-23-110 (1976) (as amended) on the basis that a request for a hearing was made by twenty-five (25) persons, a governmental subdivision or agency, or an association having not less than twenty-five (25) members.

A. Agency Statement of Need and Reasonableness. An agency desiring to adopt a regulation shall

prepare and pre-file not later than ten (10) days before the date scheduled for the hearing, the full text of the proposed regulation, and a statement of need and reasonableness that contains a summary of anticipated evidence and argument to be presented by the agency at the hearing. The statement shall include citations to any statutes or case law, citations to any economic, scientific, or other manuals or treatises, and a list of any witnesses to be called by the agency to testify on its behalf with a summary of their anticipated testimony. The statement may contain evidence and argument in rebuttal of evidence and argument presented by the public.

B. Other Pre-Filed Documents. At the time the agency confirms the hearing, it also shall file a copy of the State Register containing the Notice; all materials received by the agency during the initial drafting period; a list of the agency personnel who will represent the agency at the hearing; a list of all persons who contacted the agency orally or in writing regarding the proposed regulation; and, a list of all persons expected to testify or present evidence at the hearing.

46. Powers of Administrative Law Judge. Consistent with law, the administrative law judge is authorized to do all things necessary and proper to the performance of the foregoing and to promote justice, fairness, and economy, including, but not limited to the power to preside at the hearing; administer oaths or affirmations; hear and rule on objections and motions; question witnesses when appropriate to make a complete record; rule on the admissibility of evidence; and strike from the record objectionable evidence, limit repetitive or immaterial oral statements and questions, and determine the order of making statements and questions.

47. Order of Proceedings. All hearings held pursuant to S. C. Code Ann. §1-23-111 (1976) (as amended) shall proceed substantially in the following manner:

A. Registration of Participants. All persons intending to present evidence or ask questions shall register with the administrative law judge before the hearing begins by legibly printing their names, addresses, telephone numbers, and names of any individuals or associations that the person represents on a register provided by the administrative law judge.

B. Notice of Procedure. The administrative law judge shall convene the hearing at the proper time, and shall explain to all persons present the purpose of the hearing and the procedure to be followed at the hearing so that all persons are treated fairly and impartially. The administrative law judge may impose time limitations on testimony by the agency or interested persons. The administrative law judge also shall announce when the record of the hearing is to be closed, and in its discretion may permit the filing of additional written statements and materials within five (5) days after the hearing. The time period may be extended in the discretion of the administrative law judge, but not later than twenty (20) days after the hearing ends.

C. Agency Presentation. The agency representatives will identify themselves and the witnesses expected to testify on the agency's behalf for the record, and make available copies of the proposed regulation at the hearing. The agency shall make its showing of the need for and the reasonableness of the regulation, and shall present any other evidence it considers necessary to fulfill all statutory or regulatory requirements. The agency may rely on its pre-filed Statement of Need and Reasonableness to satisfy its burden, and it may also present oral evidence.

D. Opportunity for Questions. Interested persons shall be given an opportunity to address questions to the agency representatives or witnesses or to interested persons making oral statements. Agency representatives may question interested persons making oral statements. Questioning may extend to the proposed regulations or a suggested modification, or may be conducted for other purposes, if material to the evaluation or formulation of the proposed regulations.

E. Opportunity for Presenting Statements and Evidence. Interested persons shall be given an opportunity to present oral and written statements and evidence regarding the proposed regulations.

F. Questioning by Administrative Law Judge. The administrative law judge may question all persons, including the agency representatives.

G. Further Agency Evidence. The agency may present any further evidence that it considers appropriate in response to statements made by interested persons. Upon presentation by the agency, interested persons may respond thereto.

H. Receipt of Written Materials. The administrative law judge may permit any interested person to submit written materials after the close of oral testimony on such terms and conditions as permit all parties an opportunity to comment on subsequent submissions.

48. Report of Administrative Law Judge. After the time for the submission of all written materials, the administrative law judge shall issue a written report with findings as to the need and reasonableness of the proposed regulation, and if there is a finding of a lack of need or of reasonableness, may include suggested modifications to the proposed regulation.

49. Record of Proceeding. The hearing record for the proposed regulations shall be closed on the date established by the administrative law judge, but not later than twenty (20) days after the hearing ends. The full record shall include:

- A. all pre-filed documents submitted to the Division;
- B. copies of all publications in the State Register pertaining to these rules;
- C. all written petitions, requests, submissions or comments received by the agency or the administrative law judge pertaining to the substance and jurisdiction of the proceeding on the proposed regulation;
- D. the proposed regulation as submitted to the administrative law judge;
- E. the transcript of the proceedings, if one has been prepared; and
- F. the report of the administrative law judge.

50. Transcript. A transcript of the proceedings shall be prepared upon the order of the administrative law judge or the request of an agency or interested person. The party or person requesting the transcript shall pay for its production.

V. SPECIAL APPEALS

51. Applicability. The Rules in this section shall apply exclusively in matters heard on appeal from final decisions of the South Carolina Department of Corrections (DOC) pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

Note to 2001 Amendments

The Special Appeals Rules have been added to the Division's Rules of Procedure to be the exclusive rules of procedure used in appeals from final decisions of the Department of Corrections. The Division's jurisdiction to hear such matters is derived entirely from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These Rules are based upon the Division's existing general procedural and appellate rules, with adaptations for this specific type of appeal.

52. Computation of Time. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period prescribed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as any other day and not as a holiday.

53. Filing.

A. Filing Defined. The date of the filing is the date of delivery or the date of mailing as shown by the postmark or by the date stamp affixed by the mail room at the appellant's correctional institution. Any document filed with the Division shall be accompanied by proof of service of such document on all parties. A document, pleading or motion or other paper is deemed filed with the Division by:

(1) delivering the document to the Division; or

(2) depositing the document in the U.S. mail or in the mail room at the appellant's correctional institution, properly addressed to the Division, with sufficient first class postage attached.

B. Paper Size. All papers filed with the Division shall be on letter-size (8 ½ by 11 inches) paper. Exhibits or copies of exhibits in their original form which exceed that size shall be reduced by photocopying or otherwise to letter-size so long as such documents remain legible after reduction.

54. Service. Any document, pleading, motion, brief or memorandum or other paper filed with the Division shall be served upon all parties to the proceeding. Service shall be made upon counsel if the party is represented, or if there is no counsel, upon the party. Service shall be made by delivery, or by mail to the last known address. Service is deemed complete upon mailing. Service that complies with Rule 5(b)(1), SCRCF, also shall satisfy this Rule.

55. Docket Number. The clerk of the Division shall assign a docket number to each case. All papers, pleadings, motions and orders thereafter shall be filed with the Division and a copy served on all other parties of record. All papers shall be signed and contain:

- A. a caption setting forth the title of the case and a brief description of the document;
- B. the case docket number assigned by the Division;
- C. the name, address and telephone number of the person who prepared the document.

56. Legibility of Documents. Any document, pleading, motion, brief or memorandum or other paper filed with the Division may be typewritten or handwritten, but in either event must be legible. In the discretion of the clerk of the Division, any illegible document may be returned unfiled to the party who submitted it.

57. Forms. The Division shall prescribe the content and format of forms required by these rules. The use of required forms as prescribed is mandatory. The Division may also prescribe the content and format of other forms which would facilitate administrative efficiency and judicial economy.

58. Record After Final Decision. The record of the contested case shall consist of:

- A. All pleadings, motions, intermediate rulings and depositions filed with DOC;
- B. All evidence received or considered;

- C. A statement of matters judicially noticed;
- D. All proffers of proof of excluded evidence;
- E. The final order or decision of DOC which is subject to administrative review;
- F. Any transcript taken of the testimony during the proceeding.

59. Notice of Appeal. The notice of appeal from the final decision of DOC to be heard by the Administrative Law Judge Division shall be filed with the Division and a copy served on each party and DOC within thirty (30) days of receipt of the decision from which the appeal is taken. The notice shall be on the form prescribed by the Division pursuant to Rule 57 and shall contain the following information:

- A. the name, address, SCDC number, and telephone number of the party requesting the appeal, and the name, address, and telephone number of the attorney or other authorized representative, if any, representing that party;
- B. a brief factual basis for each expressly and specifically asserted constitutional violation;
- C. a copy of the final decision which is the subject of the appeal and the date received.

Within forty-five (45) days of the date the case is assigned to an Administrative Law Judge (date of assignment), DOC shall file the record with the Division, including a statement of the contents of the record, unless the time for filing the record is extended by the Administrative Law Judge assigned to the appeal.

60. Briefs.

A. Time for Filing Briefs. Unless otherwise ordered, the party first noticing the appeal shall file an original brief within sixty-five (65) days after the date of assignment. Within eighty-five (85) days after the date of assignment, the respondent shall file an original brief in response. A reply brief may be filed within ninety-five (95) days after the date of assignment. The principal briefs shall not exceed ten (10) pages and the reply brief shall not exceed five (5) pages.

B. Content of Brief. Each brief shall contain:

- (1) **Statements of the Issues on Appeal.** A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue and may be stated in question form. Broad general statements may be disregarded by the Division. Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal.
- (2) **Statement of the Case.** The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain as a minimum, the following information: the date of commencement of the action; the nature of

the action; the nature of the defense or response; the date and nature of the agency action appealed from; the date of service of the notice of appeal; the date of and description of any orders or proceedings in the agency as may have affected the appeal, or may throw light upon the questions involved in the appeal. Any matters stated or alleged in appellant's statement shall be binding on the appellant.

(3) **Argument.** The brief shall be divided into as many parts as there are issues to be argued, and each such part shall bear an appropriate caption, followed by a discussion and citation of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize that party's contentions.

(4) **Conclusion.** A short conclusion stating the precise relief requested.

(5) **Certificate of Service.** A certificate showing the service of the brief on all parties of record.

C. Service of Brief. At the time of filing the brief with the Division, one copy of the brief and any appendix shall be served on each party to the appeal.

61. Record on Appeal. The record on appeal shall consist of the transcript of the proceedings before the DOC, if any, and the record of the contested case as described by Rule 58.

62. Dismissal of Appeal. Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section (V), or for the failure to provide a factual basis for each expressly and specifically asserted constitutional violation as prescribed by Rule 59(B). Notwithstanding the time frames established herein, the Administrative Law Judge has the discretion to determine that a document is timely filed upon a finding that the party who filed the document made a good faith effort to file the document within the applicable time limits.

63. Motions. Any motions filed shall be in written form and shall state the grounds for relief and the relief sought. Any response to the motion must be filed within ten (10) days after receipt of the motion, unless the time is extended or shortened by the Administrative Law Judge. The filing of a motion does not toll any time limits imposed by these Rules.

64. Oral Argument. In the discretion of the Administrative Law Judge, oral argument may not be required. Oral argument will ordinarily not be ordered by the Administrative Law Judge unless the proceeding involves a novel issue or a question of exceptional importance. If so ordered, at least twenty (20) days notice of oral argument shall be provided. The oral argument shall follow the procedure in Rule 218, SCACR.

65. Opinion. The Administrative Law Judge shall render a decision in a written order which shall be served on all parties and filed with the clerk of the Division. The decision of the Administrative Law Judge is a final decision and motions for reconsideration will not be considered. Judicial review of any decision of the Division shall be as provided in S.C. Code Ann. § 1-23-610 (1976) (as amended).

66. Transmission of Record. The appellant shall file a copy of the notice of appeal from the decision of the Administrative Law Judge with the clerk of the Division. Upon receipt of the notice of appeal, the clerk of the Division shall transmit the record of the proceedings which were the subject of the appeal to the reviewing authority. A certified copy of the record may be substituted for the original. The court receiving the record shall acknowledge transmission of the record by signing and returning the Statement of Contents of the Record to the Division.

VI. MISCELLANEOUS PROVISIONS

67. Clerical Mistakes. Clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the administrative law judge at any time of his own initiative or on the motion of any party and after such notice, if any, as the administrative law judge orders. During the pendency of an appeal from the decision of an administrative law judge, leave to correct the mistake must be obtained from the appellate court.

68. Applicability of South Carolina Rules of Civil Procedure. The South Carolina Rules of Civil Procedure may, where practicable, be applied in proceedings before the Division to resolve questions not addressed by these rules.

69. Applicability of Rules of the Division. Once the Division acquires jurisdiction of a matter from an agency, the ALJD Rules shall govern all procedural aspects of the matter, notwithstanding any other agency regulation or procedural rule.

Note to 1996 Amendments

Rule 53 (now Rule 69 with the 2001 amendments) is added to provide for situations in which the procedural rules of the agency in which the case arose differ from the ALJD Rules. Rule 53 makes clear that the ALJD Rules, rather than the rules of the agency, govern the proceedings once the Division acquires jurisdiction. Thus, questions of preliminary relief, content and form of pleadings, discovery and other procedural matters are resolved by the ALJD Rules.

Note to 2001 Amendments

Former Rules 51, 52 and 53 have been renumbered as Rules 67, 68 and 69 respectively.

70. Judges Sitting En Banc.

A. Grounds for Consideration En Banc. A majority of the administrative law judges may order that a matter of law be considered by all the judges sitting en banc where (1) consideration by all the judges is necessary to serve or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance and public concern.

B. Quorum and Presiding Judge. When the administrative law judges sit en banc, a majority of the judges constitutes a quorum. A concurrence of a majority of the judges sitting is necessary for a decision. The Chief Administrative Law Judge shall preside at all en banc proceedings and in his absence, the administrative law judge next senior in service and who is present shall preside.

C. Petition for Consideration En Banc. No later than forty-five (45) days after the assignment of a case by the Chief Administrative Law Judge to an administrative law judge, a party may suggest the appropriateness of consideration of a matter en banc by filing a petition with the clerk of the Division. No response to the petition shall be required unless ordered by the assigned judge or by a majority of the judges. The presiding administrative law judge in a case may also request en banc consideration at any time during the proceedings. After receipt of the petition or request, the clerk will immediately circulate to the administrative law judges a vote sheet with the petition seeking an en banc hearing attached. No vote of the judges need be taken to determine whether the cause should be heard en banc unless a judge, within ten (10) days of receipt of the vote sheet, notifies the clerk in writing of his request for a vote of the judges on the suggestion. If no poll is requested, the Chief Administrative Law Judge will issue an order which bears the notation that no judge requested a poll. If a poll is requested and the hearing en banc is granted or denied, the Chief Administrative Law Judge will issue an order reflecting the decision.

D. Procedure. En banc consideration in an individual case is limited to only the particular issue(s) of law which meet the criteria set forth in paragraph A of this Rule 70. Upon a majority of the administrative law judges ordering a matter to be considered by the judges sitting en banc, notice will be given to the parties of the issue(s) under consideration. The parties may be required to file briefs and may be allowed to present oral argument on the issue(s). After the hearing, the Chief Administrative Law Judge will assign the authorship responsibility for the opinion.

E. En Banc Consideration Interlocutory. En banc consideration of a matter of law in a contested case or appellate case is an interlocutory measure. It is dispositive of the limited issue(s) addressed, but the decision is not final and conclusive until all factual issues and remaining legal issues in the contested case, or all issues in the appellate case, are resolved by the final order of the administrative law judge assigned to preside over the hearing in the case. Parties have no direct right of appeal from an en banc decision. Any appeal must follow the issuance of the final order on the merits of the case.

F. Effect of an En Banc Order. The issue(s) addressed in en banc decisions by the administrative law judges are binding upon all individual administrative law judges in all subsequent cases, unless a majority of the judges determine otherwise.

Note to 2001 Amendments Rule 70 is added to provide a procedure for en banc consideration of a matter of law in specified circumstances. If an issue in a case before the Division is considered en banc, that consideration must occur prior to the contested case or appeal hearing on the merits by the assigned administrative law judge. En banc consideration does not replace the contested case or appeals hearing before the administrative law judge provided for by S.C. Code Ann. Sections 1-23-320, 1-23-600, or 1-23-610. An en banc proceeding is not an evidentiary hearing and the administrative law judges sitting en banc can not make findings of fact. After the judges sitting en banc render their decision, the assigned administrative law judge assigned to the case must conduct all further proceedings and render all further orders necessary in the matter.