

RULE PROPOSALS

INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Uniform Administrative Procedure Rules

Proposed Readoption with Amendments: N.J.A.C.

1:1

Proposed New Rule: N.J.A.C. 1:1-18.9

Authorized By: Laura Sanders, Acting Director, Office of Administrative Law.

Authority: N.J.S.A. 52:14F-5(e), (f), and (g).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-212.

Submit comments by January 30, 2015, to:

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The agency proposal follows:

Summary

Pursuant to N.J.S.A. 52:14B-5.1, the Uniform Administrative Procedure Rules of the Office of Administrative Law (OAL) will expire on November 20, 2014. In accordance with N.J.S.A. 52:14B-5.1.c(2), submission of this notice of proposal to the Office of Administrative Law (OAL) prior to November 20, 2014, extends that expiration date by 180 days to May 19, 2015. The Office of Administrative Law has reviewed these rules and has found them to be necessary, reasonable, and proper for the purpose for which they were originally promulgated in 1980. The last amendments to the rules were effective in 2007. The OAL proposes to readopt these rules with amendments and new rule to reflect current practices and to comply with recently enacted legislation. The proposed amendments and new rule are discussed below.

A summary of each subchapter in N.J.A.C. 1:1 follows:

Subchapter 1 provides that the rules shall govern all contested case hearings, that other agencies may no longer propose rules to regulate the conduct of contested cases, and that in the absence of a rule, the judge may proceed in accordance with the New Jersey Court Rules.

Subchapter 2 defines words and terms relating to the chapter.

Subchapter 3 provides that cases shall originate in the agency with the appropriate subject matter jurisdiction, that the Office of Administrative Law acquires jurisdiction only after transmittal by the agency, and that a

case may be returned to the transmitting agency upon written notice from the agency head. This subchapter also provides that the Director of the Office of Administrative Law (Director) is the agency head for purposes of review of issues impacting the administration of the Office of Administrative Law.

Subchapter 4 provides that agencies shall determine whether a matter is a contested case and that the agency may attempt settlement prior to transmitting the matter to the OAL.

Subchapter 5 sets forth standards and procedures for representation by attorneys and authorized non-lawyer representatives and when an agency may proceed on the papers.

Subchapter 6 provides that pleading requirements shall be established by the agency with the subject matter jurisdiction and that pleadings may be freely amended.

Subchapter 7 specifies the method for service and filing of papers.

Subchapter 8 sets forth the method of transmittal of a contested case to the Office of Administrative Law.

Subchapter 9 establishes the method for scheduling proceedings, describes the required notices, and establishes policies for adjournments and the use of the inactive list.

Subchapter 10 describes the types and availability of various discovery mechanisms.

Subchapter 11 describes the process for subpoenaing witnesses or documents.

Subchapter 12 explains the procedure for filing motions, including motions for emergency relief.

Subchapter 13 establishes the procedure for prehearing conferences.

Subchapter 14 establishes the procedures for plenary hearings, in-person hearings, and proceedings on the papers. It also sets forth the policy for use of interpreters, the procedure to be followed when a party fails to appear, the procedure for interlocutory review, for obtaining a transcript, and for disqualifying a judge.

Subchapter 15 sets forth the evidence rules applicable to contested case hearings.

Subchapter 16 sets forth the standards and procedures for intervention and participation in a contested case.

Subchapter 17 explains the mechanism for consolidating two or more cases and for determining predominant interest.

Subchapter 18 describes the required elements of initial decisions, whether written or oral; for exceptions; and for final agency decisions. It also establishes the procedure for requesting an extension of time.

Subchapter 19 describes the settlement and withdrawal processes.

Subchapter 20 describes the mediation process.

Subchapter 21 sets forth the procedures that will be followed when the OAL conducts a hearing in certain uncontested cases.

The chapter Appendix sets forth the Code of Judicial Conduct for Administrative Law Judges.

The proposed amendments to N.J.A.C. 1:1 are as follows: N.J.A.C. 1:1-2.1 is proposed for amendment to add the definition of "Director,"

which is the Director and Chief Administrative Law Judge of the Office of Administrative Law.

N.J.A.C. 1:1-3.1(b), is proposed for amendment to add a cross-reference to N.J.A.C. 1:4B-3.1, which requires parties in certain civil service matters to file simultaneously with the Civil Service Commission and the OAL.

N.J.A.C. 1:1-4.2 is proposed for amendment, to add a sentence requiring a copy of each agency's settlement process and procedures be filed with the Director, as prescribed in recent amendments to N.J.S.A. 52:14B-9.1.

An amendment to N.J.A.C. 1:1-8.2(f) is proposed, to comply with current practices, to require only one copy, instead of two copies, of attachments to be filed with the OAL in transmitted cases. Additionally, the OAL proposes to add new N.J.A.C. 1:1-8.2(g), to address an amendment to N.J.S.A. 52:14B-10(a)(2), which prescribes new deadline requirements for certification of a permitting record in Department of Environmental Protection (DEP) permitting or licensing matters.

N.J.A.C. 1:1-9.1(c) is proposed for amendment, to delete that the Clerk may schedule mediation whenever all parties concur, as this is not a current practice at OAL. The OAL Clerk only schedules some settlement conferences as stated in the first sentence of the subsection. A proposed amendment to N.J.A.C. 1:1-9.1(e) deletes reference to a proceeding on the papers for Division of Motor Vehicles cases dealing with excessive points and surcharges and Department of Environmental Protection cases involving emergency water supply allocation plan exemptions, which are no longer heard at the OAL. N.J.A.C. 1:1-9.1(g) is proposed to be added, to correspond with a recent amendment at N.J.S.A. 52:14F-5, to state that the OAL Director may, on a temporary basis, schedule hearings outside of specified timelines, when required in exigent circumstances.

N.J.A.C. 1:1-15.8(e) is proposed for amendment to reflect recent amendments to N.J.S.A. 52:14B-9 that allow witnesses to testify by video conference call.

N.J.A.C. 1:1-18.1(a) is proposed for amendment to add a reference to proposed new N.J.A.C. 1:1-18.9, regarding agency orders, which would allow initial decisions to be deemed final decisions. New N.J.A.C. 1:1-18.1(c) is proposed to comply with recent amendments to N.J.S.A. 52:14B-10(c), to permit an administrative law judge to file a recommended report or decision in the form of a checklist, in appropriate cases as prescribed by the Director, after consultation with the applicable State agency.

N.J.A.C. 1:1-18.8(e) and (f) are proposed for amendment to comply with recent legislative changes at N.J.S.A. 52:14B-10(c). Amendments to N.J.A.C. 1:1-18.8(e) reiterate that requests for extensions must set forth good cause as originally stated in N.J.A.C. 1:1-18.8(a). Additionally, amendments to N.J.A.C. 1:1-18.8(e) add that any additional requests for extensions are contingent upon consent of the parties and that first extension requests and those made pursuant to N.J.A.C. 1:1-17.8(c), that permits a non-predominant agency to issue a final decision, are exempt from the consent requirement. Proposed amendments to N.J.A.C. 1:1-18.8(f) would add that the extension order must state that consent from the parties was obtained.

New N.J.A.C. 1:1-18.9 is proposed to address newly-enacted N.J.S.A. 52:14B-10(f), and would permit agencies to file an order with the OAL Director describing a case, or a class of cases, where the OAL initial decision will serve as the final agency decision as of the date the decision is filed with the agency. The agency shall not have the opportunity to reject or modify the recommended report or decision. The proposed new section also sets forth that these orders may be rescinded or modified effective as of the date filed with the Director.

New N.J.A.C. 1:1-20.1(a) is proposed, to reflect changes to N.J.S.A. 52:14F-5w, to permit the Director to assign an administrative law judge or other personnel to conduct dispute resolution. In addition, the heading for the subchapter and for N.J.A.C. 1:1-20.1 are proposed for amendment to replace "mediation" with "alternative dispute resolution."

As the Office of Administrative Law has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption have proven effective in creating a fair, efficient, and effective contested case hearing process. The amendments and new rule are proposed to clarify several provisions, to comply with current practices, and/or to reflect recent changes in the OAL's implementing statute.

Economic Impact

The rules proposed for readoption with amendments and new rule are not anticipated to have any substantial economic impact. The rules are administrative and govern contested case matters before the OAL and, therefore, do not have a significant economic impact. The economic effects of the amendments may actually reduce costs in that there may be fewer requests for extensions of time to file final decisions and reduce agency time spent on issuing final decisions where OAL initial decisions may be deemed final.

Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption with amendments and new rule are promulgated in implementation of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 and 52:14F-1 et seq., and are not subject to any Federal standards or requirements.

Jobs Impact

The rules proposed for readoption with amendments and new rule will not generate or cause the loss of any jobs.

Agriculture Industry Impact

The rule proposed for readoption and the proposed amendments and new rule will not impact the agriculture industry.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments and new rule impose no reporting or recordkeeping requirements. Compliance requirements are imposed on small businesses, as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., who may be parties in a contested case proceeding or attorneys and others who represent the parties. These requirements are procedural in nature and apply to all who are involved in litigation before the OAL. Attendant costs may include those which are administrative (preparation of documents, etc.) and/or related to possible employment of legal counsel. The uniform application of these requirements is necessary to ensure fairness and efficiency in contested case matters; therefore, lesser requirements or exemptions for small businesses are not provided.

Housing Affordability Impact Analysis

The rules proposed for readoption with amendments and new rule will have no impact on housing affordability or average costs associated with housing as they govern the conduct of cases before the OAL.

Smart Growth Development Impact Analysis

The rules proposed for readoption with amendments and new rule will have no impact on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan as they only govern the conduct of cases before the OAL.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 1:1.

Full text of the proposed amendments and new rule follows (additions indicated in boldface **thus**; deletion indicated in brackets [thus]):

1:1-2.1 Definitions

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

...

"Director" means the Director and Chief Administrative Law Judge of the Office of Administrative Law.

...

1:1-3.1 Commencement of contested cases in the State agencies
(a) (No change.)

(b) A request for a contested case hearing may not be filed with the Office of Administrative Law by the individual or entity requesting the hearing, **except as set forth in N.J.A.C. 1:4B-3.1.**

1:1-4.2 Settlement by agencies prior to transmittal to the Office of Administrative Law

If an agency attempts settlement prior to transmitting the matter to the Office of Administrative Law, settlement efforts may be conducted in any manner the agency believes may be appropriate and productive. **A copy of the agency's settlement process and procedures shall be filed with the Director.** The agency may utilize its own personnel or may request in writing to the Director of the Office of Administrative Law the services of an administrative law judge. An administrative law judge who conducts pre-transmission settlement efforts at the request of an agency will not thereafter be assigned to hear the case if settlement efforts are unsuccessful and the case is transmitted.

1:1-8.2 Transmission of contested cases to the Office of Administrative Law

(a)-(e) (No change.)

(f) The completed transmittal form and [two copies] **one copy** of any attachments shall be filed with the Clerk of the Office of Administrative Law.

(g) **Where the case involves a permitting or licensing decision of the Department of Environmental Protection, the Department shall be required to produce and certify a permitting record within 30 days after the filing of the contested case. This deadline may be extended by an administrative law judge upon the unanimous agreement of the parties. The production and certification of the Department's permitting record, in accordance with this subsection, shall not limit the ability of the parties to further supplement the record. The Department shall file the certified record with the administrative law judge. If a case has not yet been assigned, the certified record shall be filed with the Clerk.**

1:1-9.1 Scheduling of proceedings

(a)-(b) (No change.)

(c) The Clerk may schedule a settlement conference whenever such a proceeding may be appropriate and productive. [The Clerk may schedule mediation whenever all parties concur.]

(d) (No change.)

(e) A proceeding on the papers may be scheduled in accordance with N.J.A.C. 1:1-14.8 [for:

1. Division of Motor Vehicles cases dealing with excessive points and surcharges, pursuant to N.J.A.C. 1:13;

2. Department of Environmental Protection cases involving emergency water supply allocation plan exemptions, pursuant to N.J.A.C. 1:7; and

3. Any other] **in any class of suitable cases which the Director of the Office of Administrative Law and the transmitting agency agree could be lawfully decided on the papers.**

(f) (No change.)

(g) **The Director may, on a temporary basis and when required by exigent circumstances, schedule hearings notwithstanding deadlines otherwise set forth in statute.**

SUBCHAPTER 15. EVIDENCE RULES

1:1-15.8 Witnesses; requirements for testifying; testifying by telephone

(a)-(d) (No change.)

(e) Testimony of a witness may be presented by telephone **or by video conference call, as prescribed by the Director,** if, before the hearing begins, the judge finds there is good cause for permitting the witness to testify by telephone **or video conference.** In determining whether good cause exists, the judge shall consider:

1.-5. (No change.)

(f) (No change.)

1:1-18.1 Initial decision in contested cases

(a) [When] **Except as provided in N.J.A.C. 1:1-18.9, when** a case is not heard directly by an agency head, the judge shall issue an initial decision which shall be based exclusively on:

1. The testimony, documents, and arguments accepted by the judge for consideration in rendering a decision;

2. Stipulations; and

3. Matters officially noticed.

(b) (No change.)

(c) At the judge's discretion, an initial decision or recommended report may be filed in the form of a checklist in appropriate cases as prescribed by the Director after consultation with the applicable State agency.

Recodify existing (c)-(g) as **(d)-(h)** (No change in text.)

1:1-18.8 Extensions of time limits

(a)-(d) (No change.)

(e) [If the] **An agency head may request[s] [an] a single extension of the time limit for filing a final decision[,] for good cause. [he] He** or she shall sign and forward a proposed order to the Director of the Office of Administrative Law. If the Director approves the request, he or she shall within 10 days of receipt of the proposed order sign the proposed order and return it to the transmitting agency head, who shall issue the order and cause it to be served on all parties. **Any additional request for an extension is contingent upon the unanimous consent of the parties. To be considered for approval, proposed orders for extensions must state the names of the consenting parties. First requests for extensions and second requests where the agency is only requesting the extension pursuant to N.J.A.C. 1:1-17.8(c) are exempt from the requirement to obtain unanimous consent.**

(f) Any order granting an extension must set forth the factual basis constituting good cause for the extension, and establish a new time for filing the decision or exceptions and replies. Extensions for filing initial or final decisions may not exceed 45 days from the original decision due date. Additional extensions of not more than 45 days each may be granted only for good cause shown. **For final decisions, the order must additionally state that unanimous consent to extend the due date was obtained from the parties.**

1:1-18.9 Final decisions by administrative law judges

(a) **Where the head of an agency determines that the decision or recommended report of the administrative law judge, in a case or in a class of cases, will serve as the final agency decision, the head of agency shall file with the Director a written order describing the case or class of cases. The order shall apply to all cases described therein commenced with the agency after the order's issuance.**

(b) **For all cases in (a) above, the decision of the administrative law judge shall be the final agency decision on the matter and it will be deemed adopted by the head of agency on the date the decision is filed with the agency. The head of agency shall not have the opportunity to reject or modify the administrative law judge's recommended report or decision.**

(c) **The order delegating final decisions may be rescinded or modified by order filed by the head of agency with the Director. The rescission or modification shall be effective for all cases filed with the agency after the rescission or modification order is filed with the Director.**

SUBCHAPTER 20. [MEDIATION] ALTERNATIVE DISPUTE RESOLUTION BY THE OFFICE OF ADMINISTRATIVE LAW

1:1-20.1 Scheduling of [mediation] **alternative dispute resolution**

(a) **The Director may assign an administrative law judge or other personnel to conduct mediation or other forms of alternative dispute resolution with regard to any matter filed with the Office of Administrative Law.**

Recodify existing (a)-(b) as **(b)-(c)** (No change in text.)