

DIRECTOR, BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

NOTICE OF FINAL RULEMAKING

The Board of Ethics and Government Accountability (Board), pursuant to the authority set forth in section 209 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*) (2012 Supp.), hereby gives notice of final rulemaking action to add new Chapters 53, 54, and 55 (Investigations, Hearings and Appeals, Advisory Opinions, and Board of Ethics and Government Accountability: Hearing Procedures) of Title 3 (Elections and Ethics) of the District of Columbia Municipal Regulations (DCMR). The rulemaking establishes, for the Board and the Director of Government Ethics, procedures for investigations, hearings, and appeals as well as for the issuance of advisory opinions.

The emergency and proposed rulemaking was adopted by the Board on September 25, 2012, and became effective immediately, published in the *D.C. Register* on September 28, 2012 at 59 DCR 011203. No written comments were received and no changes have been made to the text of the proposed rules. The Board adopted the rulemaking as final on January 10, 2013. These rules shall become effective on the date of publication of this notice in the *D.C. Register*.

Title 3, ELECTIONS AND ETHICS, of the DCMR is amended by adding new Chapters 53, 54, and 55 to read as follows:

**CHAPTER 53 BOARD OF ETHICS AND GOVERNMENT
ACCOUNTABILITY: INVESTIGATIONS**

5300 GENERAL PROVISIONS

5300.1 The provisions of this chapter shall establish the procedures for the conduct of all investigations by the Director of Government Ethics (Director) and the Board of Ethics and Government Accountability (Board) pursuant to the authority set forth in the Government Ethics Act of 2011 (Act), Title II of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*) (2012 Supp.).

5300.2 Investigations shall be conducted:

- (a) Fairly and professionally;
- (b) So as to protect the rights and reputations of public employees and officials; and
- (c) In accordance with due process.

5300.3 Investigations shall be identified as one (1) of the following:

- (a) Preliminary Investigation; or
- (b) Formal Investigation.

5301 PRELIMINARY INVESTIGATIONS

5301.1 The Director shall conduct a preliminary investigation of a possible violation of the Code of Conduct or of the Act brought to the attention of the Director by any source including but not limited to the following:

- (a) The media;
- (b) A tip received through the hotline; or
- (c) Documents filed with the Ethics Board.

5301.2 If during or after the preliminary investigation, the Director of Government Ethics has reason to believe that a violation of the Code of Conduct or of the Act may have occurred, the Director shall present evidence of the violation to the Board.

5301.3 Upon presentation of evidence, the Ethics Board may authorize a formal investigation and the issuance of subpoenas if it finds reason to believe a violation has occurred.

5301.4 A preliminary investigation may be dismissed at any time by the Director or Board if insufficient evidence exists to support a reasonable belief that a violation has occurred.

5301.5 The identity of an individual who is the subject of the preliminary investigation shall not be disclosed without the individual's consent unless or until the Board finds reason to believe that the individual has committed a violation and that disclosure would not harm the investigation.

5301.6 In conducting a preliminary investigation, the Director shall have the authority to gather evidence using any of the powers and procedures described in § 5303.

5302 FORMAL INVESTIGATIONS

5302.1 A formal investigation shall be initiated upon:

- (a) Receipt of a written complaint transmitted to the Board;

- (b) A finding by the Office of the Inspector General or District of Columbia Auditor that suggests a violation of the Code of Conduct, including but not limited to findings of waste, fraud, or abuse of government resources; or
- (c) A finding by a court of competent jurisdiction of liability in a civil proceeding, indictment, or information in a criminal proceeding with respect to acts or offenses that may constitute violations of the Code of Conduct or of the Act.

5302.2 A written complaint shall include:

- (a) The full name and address of the complainant and the respondent;
- (b) A clear and concise statement of facts that are alleged to constitute a violation of the Code of Conduct or of the Act;
- (c) The complainant's signature;
- (d) A verification of the complaint under oath; and
- (e) Supporting documentation, if any.

5302.3 No complaint may be made later than five (5) years after the discovery of the alleged violation.

5302.4 An individual making a complaint shall be afforded all available protections from adverse employment action or retaliation in accordance with the Comprehensive Merit Personnel Act and Title II of the Whistleblower Reinforcement Act of 1998, effective October 7, 1998 (D.C. Law 12-160; D.C. Official Code § 2-223.01 *et seq.*) (2011 Repl.).

5302.5 Within fourteen (14) days of the initiation of a formal investigation, the Director shall cause evidence concerning the complaint to be presented to the Board. If the Board decides that there is reasonable belief that a violation has occurred, the Board may authorize the issuance of subpoenas.

5302.6 The Superior Court of the District of Columbia may, upon petition by the Board through the Director, in case of refusal to obey a subpoena or order of the Ethics Board issued under § 5302.5, issue an order requiring compliance; and any failure to obey the order of the court may be treated by the court as contempt.

5302.7 The identity of an individual who is the subject of a written complaint transmitted to the Board, other than pursuant to § 5302.1(b) and (c), shall not be disclosed without the individual's consent unless or until the Board finds reason to believe that the individual has committed a violation and the Board finds that disclosure would not harm the investigation.

5302.8 Notwithstanding § 5302.7, the Board may, in its discretion, publicly disclose the existence of any investigation.

5303 DIRECTOR OF GOVERNMENT ETHICS AUTHORITY TO OBTAIN INFORMATION

5303.1 The Director of Government Ethics (Director) shall have the authority to obtain documents, written reports, and answers relating to the enforcement of the Government Ethics Act of 2011 (Act), Title II of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*) (2012 Supp.).

5303.2 The Director's authority includes the power to:

- (a) Require any person to submit, within a reasonable period and under oath or otherwise as the Director may determine, documents, written reports, and answers to questions that the Director of Government Ethics may propound relating to the administration and enforcement of the Act;
- (b) Administer oaths;
- (c) Require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of the Ethics Board's duties; provided, that a subpoena issued under this paragraph shall be issued by the Director of Government Ethics only upon approval of a majority of the Ethics Board and served either personally or by certified or registered mail on the individual named in the subpoena, or by other means agreed to by the witness named in the subpoena;
- (d) Order testimony to be taken by deposition in a proceeding or investigation before any person who is designated by the Director and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under the Act;
- (e) Pay witnesses the same fees and mileage as are paid in like circumstances in the Superior Court of the District of Columbia; and
- (f) Retain, on a temporary basis, consultants, including attorneys or others, on a paid or pro bono basis.

5303.3 If an employee or official of the District government has been properly served a request for information or documents, or notice of deposition and any applicable witness fee, and that employee or official fails to respond to such a request or appear or participate in a deposition, then the Director or the Board may notify the supervisor or superior of that employee or official and recommend that

appropriate personnel action be commenced for such failure. Nothing in this section shall affect the ability of the Board to seek enforcement of a subpoena before the Superior Court of the District of Columbia.

**CHAPTER 54 BOARD OF ETHICS AND GOVERNMENT
ACCOUNTABILITY: ADVERSARIAL HEARINGS,
APPEALS, AND ADVISORY OPINIONS**

5400 GENERAL PROVISIONS

5400.1 The provisions of this chapter shall establish general procedures for the conduct of all adversarial hearings and appeals, and the issuance of advisory opinions by the Director of Government Ethics (Director) and the Board of Ethics and Government Accountability (Board) pursuant to the authority set forth in the Government Ethics Act of 2011 (Act), Title II of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*) (2012 Supp.).

5401 ADVERSARIAL HEARING

5401.1 After determining that there is reason to believe a violation has occurred based upon the presentation of evidence by the Director pursuant to § 5301.2 or § 5302.5, the Board shall conduct an open and adversarial hearing at which the Director of Government Ethics shall present evidence of the violation. The Director may delegate the presentation of evidence to the General Counsel or other lawyer employed by the Board.

5401.2 A hearing need not be conducted if a matter is dismissed pursuant to § 5403.

5401.3 If the Director fails to present a matter, or advises the Board that insufficient evidence exists to present a matter or that an additional period of time is needed to investigate a matter further, the Board may nonetheless order the Director to present the matter as provided in § 5401.1.

5401.4 Any hearing under this section shall be on the record and shall be held in accordance with the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*) (2011 Repl.).

5401.5 Any witness has a right to refuse to answer a question that might tend to incriminate the witness by claiming his or her Fifth Amendment privilege against self-incrimination.

5401.6 Any person who has been assessed fees pursuant to § 5403.2 may file a request for an adversarial hearing with the Board.

5402 DISPOSITION

5402.1 Following the presentation of evidence to the Board by the Director in an adversary hearing, the Board may:

- (a) Levy a civil penalty in accordance with the Act;
- (b) Refer the matter to the United States Attorney for the District of Columbia for enforcement or prosecution;
- (c) Refer the matter to the Attorney General for the District of Columbia for enforcement or prosecution; or
- (d) Dismiss the action.

5402.2 The Board may not refer information concerning an alleged violation of the Code of Conduct or of the Act to the United States Attorney for the District of Columbia or the Attorney General for the District of Columbia without the presentation of evidence by the Director as provided in § 5401.1

5402.3 In addition to an action taken pursuant to § 5402.1, the Board may take any other remedial action pursuant to authority granted it by the Act.

5403 DISMISSAL OF MERITLESS CLAIM, COMPLAINT, OR REQUEST FOR INVESTIGATION

5403.1 The Board may dismiss, at any stage of the proceedings, any claim, complaint, request for investigation, investigation, or portion of an investigation that the Ethics Board finds to be without merit.

5403.2 The Ethics Board may require a person who made or caused to be made a claim, complaint, or request for investigation in bad faith and without merit to pay reasonable fees for time spent reviewing or investigating the claim, complaint, or request for investigation including reasonable attorney's fees for the individual wrongfully named in the claim, complaint, or request for investigation.

5404 APPEALS

5404.1 Appeals of any final order issued or fine levied by the Board in accordance with the Act or regulations promulgated pursuant to the Act shall be made to the Superior Court of the District of Columbia within twenty (20) days of the date the Board or Director's final order or fine is served upon a person subject to the final order or fine.

5405 ADVISORY OPINIONS

- 5405.1 Upon application made by an employee or public official subject to the Code of Conduct, the Board or the Director shall, within a reasonable period of time, provide an advisory opinion as to whether a specific transaction or activity inquired of would constitute a violation of a provision of the Code of Conduct over which the Board has primary jurisdiction.
- 5405.2 An advisory opinion shall be published in the District of Columbia Register within thirty (30) days of its issuance; provided, that the identity of a person requesting an advisory opinion shall not be disclosed in the District of Columbia Register without the person's prior consent in writing. Where consent is not obtained, the name of the requester shall be removed prior to publication.
- 5405.3 If issued by the Director or an individual Board member, an advisory opinion may be appealed for consideration by the full Board. There shall be no enforcement of a violation of the Code of Conduct taken against an employee or public official who relied in good faith upon an advisory opinion requested by that employee or public official and substantially complied with the advice or recommendation given in the advisory opinion; provided, that the employee or public official, in seeking the advisory opinion, made full and accurate disclosure of all relevant circumstances and information.
- 5405.4 A request for an advisory opinion shall be in writing, signed by the requestor, and filed with the Director. The Director may accept email requests for advisory opinions.
- 5405.5 A request for an advisory opinion shall contain the following:
- (a) The full name, residence address, and telephone number of the requestor; and
 - (b) A clear and concise statement of the facts relating to the specific transaction or activity which is the subject of the inquiry.
- 5405.6 Nothing in this Chapter shall prevent the Director from providing informal advice or guidance to an employee or public official by referring that employee or official to a published advisory opinion or established guidance contained in the District's Ethics Manual or other reference source. Such informal advice or guidance need not be published in the District of Columbia Register and does not provide the employee with protections described in § 5405.3.

**CHAPTER 55 BOARD OF ETHICS AND GOVERNMENT
ACCOUNTABILITY: HEARING PROCEDURES**

5500 GENERAL PROVISIONS

- 5500.1 The provisions of this chapter shall govern the procedures of the Board of Ethics and Government Accountability when conducting adversarial hearings and other meetings pursuant to the authority set forth in the Government Ethics Act of 2011 (Act), Title II of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 et seq.) (2012 Supp.).
- 5500.2 In any conflict within this chapter between general and specific provisions, the specific provisions shall govern.
- 5500.3 In any conflict between this chapter and the D.C. Administrative Procedure Act, D.C. Official Code §§ 2-501 *et seq.* (2011 Repl.), the D.C. Administrative Procedure Act shall govern.
- 5500.4 The Director of Government Ethics (Director) shall issue, and from time to time revise, complaint forms and instructions to ensure presentation of adequate information required for the understanding and processing of complaints. All such materials shall be available on the Board's website.
- 5500.5 The Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

5501 COMPUTATION OF TIME

- 5501.1 In computing any period of time prescribed or allowed by these rules or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.
- 5501.2 The last day of the computed period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday.
- 5501.3 When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation unless an applicable statute expressly provides otherwise.
- 5501.4 For the purposes of this chapter, "legal holiday" includes the following:
- (a) New Year's Day;
 - (b) Martin Luther King's Birthday;
 - (c) President's Day;

- (d) District of Columbia Emancipation Day;
- (e) Memorial Day;
- (f) Independence Day (4th of July);
- (g) Labor Day;
- (h) Columbus Day;
- (i) Veterans Day;
- (j) Thanksgiving Day;
- (k) Christmas Day; and
- (l) Any other day designated a legal holiday by the President of the United States or the District of Columbia government.

5501.5 When an act is required or allowed to be done at or within a specified time, the Board may at any time in its discretion and for cause shown, do either of the following:

- (a) With or without motion or notice, order the period enlarged, if a request for enlargement of time is made before the expiration of the period originally prescribed or as extended by a previous order; or
- (b) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect.

5502 NOTICE OF HEARINGS

5502.1 The parties shall be given sufficient opportunity to prepare for the hearing.

5502.2 The Board shall send a notice of hearing to the party or parties involved which shall:

- (a) Provide the time, date, and location of the hearing;
- (b) Reference applicable statutes, rules, or regulations;
- (c) State the purpose of the hearing;
- (d) Advise the party or parties that they may be represented by counsel or other representative of their choosing; and

- (e) Advise the party or parties that they may bring witnesses.

5503 APPEARANCES AND REPRESENTATION

- 5503.1 In a proceeding before the Board, any person or party may appear on his or her own behalf.
- 5503.2 Any person or party may be represented by any other person duly authorized in writing to do so.
- 5503.3 The authorization shall be on a form prescribed by the Board and shall state either that the individual is an attorney duly licensed to practice law in the District, or if not an attorney, that the authorization includes the power of the agent or representative to bind the person in the matter before the Board.
- 5503.4 If any person or party waives the right to be present at a hearing or fails to appear at a hearing, the Board may proceed ex parte, unless the Board extends the time of the hearing or unless the person's appearance is required by statute.

5504 SERVICE OF PAPERS

- 5504.1 Any paper required to be served upon a party shall be served upon him or her or upon the representative designated by him or her, or on any person otherwise designated by law to receive service of papers.
- 5504.2 When a party has appeared through an attorney or representative, service shall be made upon the attorney or representative of record.
- 5504.3 Service may be made by personal delivery, by mail, by email, or as otherwise authorized by law.
- 5504.4 Service upon a party shall be completed as follows:
 - (a) By personal delivery, on handing the paper to the person to be served, or leaving it at his or her office with his or her administrative assistant or time clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, by leaving it at his or her usual place of residence with some person of suitable age and discretion then residing in that place;
 - (b) By email, by sending the paper electronically to his or her District Government email address or to the email address of his or her attorney or representative as listed on the written appearance submitted pursuant to § 5503.

- (c) By mail, on deposit in the United States mail, properly stamped and addressed; or
- (d) Upon being served in the specific manner prescribed by an order of the Board made in any proceeding.

5504.5 Where there are numerous parties to a proceeding, by written order the Board may make special provisions regarding the service of papers.

5504.6 Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document served.

5504.7 Proof of service may be made by any of the following means:

- (a) Written acknowledgment of the party served or his or her attorney of record;
- (b) The certificate of the attorney of record if he or she has made the service; or
- (c) The certificate of the person making the service.

5504.8 For the purposes of this chapter, the phrase "filing with the Board," means the actual delivery to, and physical receipt by, the Board of pleadings and other papers.

5504.9 All documents filed with the Board relating to a hearing or formal investigation shall bear a caption which identifies the subject of the investigation, the Board's case or reference number, and the title of the pleading or document.

5504.10 All documents filed with the Board shall be printed on letter-sized paper using a font no smaller than 12 point.

5505 RECORD OF MEETINGS AND HEARINGS

5505.1 All meetings whether open or closed shall be recorded by electronic means; provided, that if a recording is not feasible, detailed minutes of the meeting shall be kept.

5505.2 For all open meetings or hearings, copies of records shall be made available for public inspection according to the following schedule;

- (a) For a meeting, a copy of the minutes of a meeting shall be made available for public inspection as soon as practicable, but no later than 3 business days after the meeting.

- (b) For an adversarial hearing, a copy of the full record, including any recording or transcript, shall be made available for public inspection as soon as practicable, but no later than 7 business days after the meeting.
- (c) At the discretion of the Board, electronic recordings of the hearing may be posted on the Board's website.

5505.3 The minutes of Board meetings shall include the vote of each member of any ruling of the Board.

5505.4 Copies of the official transcript shall be available to parties and to the public upon payment to the Board of the charges fixed for the copies.

5505.5 Changes in the official transcript may be made only when they involve errors affecting substance and upon the filing of a motion by a party to correct a transcript with the Board.

5505.6 Copies of the motion to correct a transcript shall be served simultaneously on all opposing parties or legal representatives.

5505.7 Objections to the motion to correct a transcript shall be filed with the Board within five (5) days and served upon the parties.

5505.8 The transcript may be changed by the Board at a public meeting to reflect any corrections.

5506 MEETINGS AND HEARINGS

5506.1 Hearings shall be scheduled as needed for the purpose of receiving evidence and testimony on specific matters.

5506.2 Meetings and hearings shall be held at the time and place the Board or the Chairperson designates.

5506.3 A member absent at the decision meeting on any matter may cast an absentee vote only if the member attended all other of the meetings or hearings on a matter before Board.

5506.4 A member attending the decision meeting and having read the transcript and reviewed the complete record may vote even though that member may not have attended any or all of the prior meetings or hearings on a matter before the Board.

5507 EVIDENCE

5507.1 Evidence shall be taken in conformity with D.C. Official Code § 2-509(b) (2011 Repl.).

- 5507.2 The Board may permit rebuttal evidence.
- 5507.3 Any party objecting to the admissibility of evidence shall state the grounds of the objection(s) relied upon.
- 5507.4 A party may place on the record a statement summarizing any evidence excluded by the Board.
- 5507.5 If excluded evidence consists of documentary evidence, a copy of the evidence shall be marked for identification and shall constitute the offer of proof.
- 5507.6 The Board, in its discretion, may receive into evidence certified copies of documents in place of the originals.
- 5507.7 If a party is offering materials contained in a book or larger document, that party shall plainly designate the relevant portions. The remaining material contained in that book or document shall be excluded.
- 5507.8 No document or other writing shall be accepted for the record after the close of the hearing, except with the consent of the Board after due notice to the opposing parties and only when the receipt of the document will not unfairly affect the interest of a party.
- 5507.9 During an adversarial hearing under § 5517, witnesses may be examined or cross-examined by the Board, the Director, respondent, or any party so designated by the Board pursuant to this chapter.
- 5507.10 During a meeting to consider a rulemaking conducted under § 5520, witnesses may be examined only by the Board.
- 5507.11 The Board may admit hearsay evidence during an adversarial hearing if it determines it will be relevant and material to the resolution of any factual issue in dispute in the matter before the Board.

5508 COMMENCEMENT OF ADVERSARIAL HEARING

- 5508.1 An adversarial hearing before the Board shall be commenced by the filing of a written notice of violation in the name of the Board, which shall be signed by the Chairperson.
- 5508.2 The employee(s) or official(s) that is (are) the subject of the notice of violation shall be referred to as the Respondent(s) in the notice of violation.
- 5508.3 The Board may consolidate notice of violations if they relate to the same actions or events or raise common questions of law or fact.

5509**GENERAL RULES OF PLEADING**

5509.1

A notice of violation shall contain the following:

- (a) A short and plain statement of the grounds upon which the Board's jurisdiction depends;
- (b) The full names, residence addresses, position, title, agency, and telephone numbers of the respondent;
- (c) A clear and concise statement of facts which are alleged to constitute a violation of the law;
- (d) A description of the respondent's right to a hearing and all procedural rights available to the respondent at the hearing;
- (e) A description of the applicable law and regulations that govern the disposition of the notice of violation should the respondent choose not to file a response or fail to appear at a scheduled hearing; and
- (f) The deadline for filing a response.

5509.2

A respondent shall file with the Board, and serve a copy upon the Director and any other respondents identified in the notice of violation, a response that states in short and plain terms his or her defenses to each violation alleged and shall admit or deny the averments upon which the notice of violation relies. A respondent shall serve his or her response within fifteen (15) days after the service of the notice of violation upon him or her.

5509.3

If a respondent is without knowledge or information sufficient to form a belief as to the truth of an averment, he or she shall so state. This statement shall have the effect of a denial.

5509.4

When a respondent intends in good faith to deny only a part of an allegation, he or she shall specify so much of the allegation as is true and shall deny only the remainder.

5509.5

A respondent may, unless he or she intends in good faith to controvert all the allegations of a pleading, deny as specific denials of designated allegations or paragraphs, or the respondent may generally deny all the allegations except the designated allegations or paragraphs as the respondent expressly admits.

5509.6

When a respondent intends to controvert all the allegations of the preceding pleading, including allegations of the grounds upon which the Board's jurisdiction depends, the respondent party may do so by general denial. If a respondent

chooses not to file a response, the Board shall treat such action as a general denial.

5509.7 A respondent shall raise any of the following defenses at the time he or she files a response:

- (a) Lack of jurisdiction over the subject matter;
- (b) Lack of jurisdiction over the person;
- (c) Insufficiency of process; or
- (d) Insufficiency of service of process.

5509.8 The Director shall file any opposition to a § 5509.7 defense raised by a respondent within ten (10) days after service of a response on the Board.

5509.9 No technical forms of pleadings or motions shall be required.

5509.10 The Board or respondent may set forth two (2) or more statements of a charge, challenge, or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.

5510 SIGNING OF PLEADINGS

5510.1 Each pleading of a party represented by an attorney shall be signed by at least one (1) attorney of record in his or her individual name, and the attorney's address, email address, and telephone number shall be stated.

5510.2 A party who is not represented by an attorney shall sign each pleading and state his or her address, email address, and telephone number.

5510.3 Except when otherwise specifically provided by law, pleadings need not be verified or accompanied by affidavit.

5510.4 The signature of an attorney shall constitute a certificate by that attorney that he or she has read the pleading; that to the best of his or her knowledge, information, and belief there are grounds to support it; and that it is not interposed for delay.

5511 PRE-HEARING CONFERENCES AND DISCOVERY

5511.1 Prior to any scheduled adversarial hearing, the Board may require that the respondent or his or her attorney or representative appear for a pre-hearing conference with the Director to consider the following:

- (a) Simplification of the issues;

- (b) The necessity or desirability of amendments to the pleadings;
- (c) The possibility of obtaining the admission of facts and documents which will avoid unnecessary proof;
- (d) Limitation of the number of witnesses; and
- (e) Other matters which may aid in the disposition of the notice of violation.

5511.2 The Board may require the Director and the respondent(s) to submit a pre-hearing statement to the Board which recites the action taken at the conference, the amendments allowed to the pleadings by agreement of the parties, and the agreements made by the parties as to any of the matters considered which limit the issues for hearing to those issues not disposed of by admissions or agreements of counsel or parties.

5511.3 Upon the request of the respondent, the Director must disclose to the respondent and make available for inspection, copying, or photographing any relevant written or recorded statements made by the respondent and any books, papers, documents, photographs, tangible objects, or other evidence which is in the possession of the Director and which:

- (a) The Director intends to introduce at the hearing; or
- (b) Are material to the preparation of the respondent's defense.

5511.4 Upon the request of the Director, the respondent must disclose to the Director and make available for inspection, copying or photographing any evidence that the respondent intends to introduce at the hearing.

5511.5 The Director and the respondent shall exchange a list of expected witnesses that may be called at the hearing.

5511.6 The disclosures required by §§ 5511.3, 5511.4, and 5511.5 shall be completed no later than ten (10) days in advance of the adversarial hearing.

5511.7 In its discretion, the Board may exclude the introduction of evidence or the testimony of witnesses that a party failed to disclose as required by §§ 5511.3, 5511.4, and 5511.5.

5511.8 The Board may issue a pre-hearing order concerning the timing and manner of discovery and any pretrial motions or orders.

5512 STIPULATIONS

- 5512.1 Apart from stipulations reached during or as a result of the pre-hearing conference, the parties may stipulate in writing at any stage in the proceeding or orally during the hearing any relevant fact or the contents or authenticity of any document.
- 5512.2 Post-conference stipulations may be received as evidence.
- 5512.3 Parties may also stipulate the procedure to be followed in the proceeding and such stipulation may, on motion of all parties, be approved by the Board and govern the conduct of the proceeding.

5513 CONTINUANCES

- 5513.1 A hearing scheduled to be conducted before the Board shall not be delayed by a continuance unless a motion for the continuance is made not less than five (5) days before the scheduled hearing date.
- 5513.2 A continuance shall not be granted unless the motion for continuance, in the Board's opinion, sets forth good and sufficient cause for the continuance.
- 5513.3 Conflicting engagements of counsel, absence of counsel, or the employment of new counsel shall not be regarded as sufficient cause for continuance unless set forth in a motion filed promptly after notice of the hearing has been given.

5514 NONAPPEARANCE OF PARTIES AND DEFAULTS

- 5514.1 The Board may wait a reasonable length of time for a party to appear before beginning a proceeding. After a reasonable time, however, if a party who has received notice has not appeared, the Chairperson may proceed as follows:
- (a) The Chairperson may proceed with the hearing, obtain the testimony of those persons present, and, on the basis of the testimony and the record, the Board may issue a decision in the case; or
 - (b) The Chairman, for good and sufficient cause, may postpone the hearing without taking testimony.

5515 RESERVED

5516 INTERPRETERS

- 5516.1 The Board shall ascertain before the hearing whether an interpreter will be required and make appropriate arrangements.
- 5516.2 An oath or affirmation shall be administered to the interpreter orally or in writing.

5517 SPECIFIC RULES OF HEARING PROCEDURE

- 5517.1 All parties shall have the right to produce evidence and witnesses on their behalf and to rebut or explain testimony or evidence against them.
- 5517.2 All parties have the right to cross-examine other parties and witnesses and to offer argument or explanation in support of their positions or contentions.
- 5517.3 A party may cross-examine any other party or person, except that the Board, through the Chairman, may rule a question out of order when it is irrelevant, immaterial, or unduly repetitious.
- 5517.4 Witnesses shall be examined and cross-examined orally under oath or affirmation.
- 5517.5 The order of procedure for presenting evidence at the hearing shall be as follows:
- (a) Call to order and opening statements by the Chairperson and members of the Board;
 - (b) Introductory statement by Director or staff;
 - (c) Consideration of pending motions and procedural matters;
 - (d) The Director's case;
 - (e) The respondent's case; and
 - (g) Any rebuttal offered by the Director.
- 5517.6 If there is more than one respondent, the respondents shall stipulate their order of presentation. If the respondents are unable to agree, the Chairperson shall set the order.
- 5517.7 In an adversarial hearing no decision or order of the Board shall be made except upon the exclusive record of the proceedings before the Board.

5518 BURDEN OF PROOF

- 5518.1 In all cases involving a notice of violation, the Director has the burden of persuading the Board that a violation has occurred by substantial evidence.
- 5518.2 The Director has the burden of producing evidence of a prima facie case that a respondent has committed a violation. Whenever a respondent asserts an affirmative defense to a notice of violation, the respondent will bear the burden of producing sufficient evidence to establish the affirmative defense.

5519 POST-HEARING PROCEDURES: GENERAL

- 5519.1 The record shall be closed at the end of the public hearing, except that the record may be kept open for a stated period for the receipt of specific exhibits, information, or legal briefs, as directed by the Board.
- 5519.2 Prior to filing the final decision, the Board may, on its own motion, reopen the record and require further hearing or briefing on designated issues before the Board.
- 5519.3 Notice of a further hearing along with a designation of issues shall be forwarded to any party who participated in the earlier proceedings, or his or her legal representative. Notice shall be given at least fourteen (14) days prior to the date set for further hearing.

5520 PROPOSED FINDINGS

- 5520.1 The Board may request parties to submit proposed findings of fact and conclusions of law for the consideration of the Board within the time as the Chairperson may direct.
- 5520.2 Copies of proposed findings and conclusions shall be served by each party upon all other parties.

5521 FINAL DECISION

- 5521.1 Within a reasonable time after the conclusion of the hearing, the Board shall render its decision setting forth findings of fact and conclusions of law and giving the reasons for the decision.
- 5521.2 There shall be a written decision setting forth findings of fact and conclusions of law and giving the reasons for the decision.
- 5521.3 The conclusions or opinion in the decision shall be governed by and based upon all the evidence adduced at the hearing.
- 5521.4 A decision shall be supported by substantial evidence on the record. Pursuant to the substantial evidence rule, courts shall uphold an administrative determination of fact if on the entire record the determination is rationally supportable and could have been arrived at reasonably.
- 5521.5 The decision shall include a description of any action(s) the Board takes pursuant to § 5402 (Disposition).
- 5521.6 The decision shall include an instruction that the respondent shall refer to § 5404 to determine the respondent's right to appeal.

5521.7 The decision shall be served promptly on all parties or their attorneys or representatives. In its discretion, the Board may announce its decision at a public hearing.

5522 RECONSIDERATION

5522.1 A motion for reconsideration, rehearing, or re-argument of a final decision in a contested case proceeding pursuant to § 5517 shall be filed by a party within ten (10) days of the order having become final. The motion shall be served upon all other parties. The Board shall not receive or consider any motion for reconsideration, rehearing, or re-argument of a final decision in a contested case proceeding that is filed prior to the order having become final.

5522.2 A motion for reconsideration, rehearing, or re-argument shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought.

5522.3 Within seven (7) days after a motion has been filed and served, any other party may file a response in opposition to or in support of the motion.

5522.4 Neither the filing nor the granting of the motion shall stay a decision unless the Board orders otherwise.

5522.5 A motion for reconsideration, rehearing, or re-argument shall not be a prerequisite to judicial review.

5523 SUBPOENAS AND DEPOSITIONS

5523.1 The Board may require by subpoena the attendance and testimony of witnesses and the production of documentary evidence.

5523.2 Each subpoena issued by the Board shall include the following:

- (a) The name of the respondent;
- (b) The title of the action;
- (c) A specification of the time allowed for compliance with the subpoena;
- (d) A command to the person to whom it is directed to attend and give testimony at a time and place specified in the subpoena; or
- (e) A command to the person to whom it is directed to produce and permit inspection and copying of the books, papers, documents, or tangible things designated in the subpoena.

- 5523.3 Any party may, by a written motion, request the Board to subpoena particular persons or evidence.
- 5523.4 A request for subpoena shall state the relevancy, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, the identification of all documents desired and the facts to be proven by them in sufficient detail to indicate materiality and relevancy.
- 5523.5 Any person to whom a subpoena is directed may, prior to the time specified in the subpoena for compliance, request the Board to quash or modify the subpoena.
- 5523.6 Any application to quash a subpoena shall be accompanied by a brief statement of the reasons supporting the motion to quash.
- 5523.7 The Board may quash or modify the subpoena upon a showing of good cause.
- 5523.8 Upon written notice the Board may order testimony to be taken by deposition, before any person who is designated by the Board to administer oaths.

5524 SERVICE OF SUBPOENA OR NOTICE OF DEPOSITION

- 5524.1 A subpoena or notice of deposition may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena or notice upon a person named therein shall be made by delivering a copy of the subpoena to the person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or the District of Columbia or an officer or agency thereof, fees and mileage need not be tendered.
- 5524.2 Witnesses are entitled to a witness fee of forty dollars (\$40) per day and the cost of public transportation to the proceeding or a mileage fee calculated at seventeen cents (17¢) per mile.
- 5524.3 Service of a subpoena or notice and fees to an individual may be made by any of the following means:
- (a) Handing the subpoena or notice to the person;
 - (b) Leaving the subpoena or notice at the person's District Government office with the person in charge of the office;
 - (c) Leaving the subpoena or notice at the person's dwelling place or usual place of abode with some person of suitable age and discretion then residing in that dwelling place or abode; or

- (d) Mailing the subpoena or notice by registered or certified mail to the person at the person's last known address.

5524.4 When the person to be served is not an individual, a copy of the subpoena or notice of the deposition and fees shall be delivered by one (1) of the following ways:

- (a) Handing the subpoena or notice to a registered agent for service;
- (b) Handing the subpoena or notice to any officer, director, or agent in charge of any office of that person; or
- (c) Mailing the subpoena or notice by registered or certified mail to the representative at his or her last known address.

5524.5 The individual serving a subpoena shall file with the Board a return of service setting forth the facts establishing proper service.

5524.6 The Board may, upon the failure by any person to obey a subpoena served upon that person, apply to the D.C. Superior Court for an order requiring the person to appear before the Board to give testimony, produce evidence, or both. If a person fails to obey the order without an adequate excuse, the Board may apply for an order that the person be held by the court for contempt.

5525 RULEMAKING HEARINGS

5525.1 At its discretion, the Board may from time to time schedule public hearings to obtain comment on a proposed rulemaking. The rules of procedure set forth in this section shall apply to rulemaking hearings.

5525.2 Any person may appear at a rulemaking hearing and may present, within the time limits determined by the Board, evidence, testimony, or argument that is relevant and not unduly repetitious.

5525.3 No person shall have the standing of a party in a rulemaking hearing.

5525.4 In those instances in which a petition for rulemaking has been filed with the Board by a member of the public pursuant to the District of Columbia Administrative Procedure Act, and where the Board in its discretion schedules a public hearing, the order of procedure at the hearing shall be as follows:

- (a) Call to order and opening statement by the Chairperson and Board members;

- (b) Introductory statement by the Director, General Counsel, or other staff designated by the Board;
- (c) Consideration of pending motions and procedural matters;
- (d) Petitioner's case;
- (e) Persons in support of the petition; and
- (f) Persons in opposition to the petition.