

#### § 4.3

whom is designated as Chief Administrative Judge, the Director as an ex officio member, and alternate members who may serve, when necessary, in place of or in addition to regular members. The Chief Administrative Judge of an Appeals Board may direct that an appeal may be decided by a panel of any two Administrative Judges of the Board, but if they are unable to agree upon a decision, the Chief Administrative Judge may assign one or more additional Administrative Judges of the Board to consider the appeal. The concurrence of a majority of the Board Administrative Judges who consider an appeal shall be sufficient for a decision.

(b) Decisions of the Board must be in writing and signed by not less than a majority of the Administrative Judges who considered the appeal. The Director, being an ex officio member, may participate in the consideration of any appeal and sign the resulting decision.

(c) The Chief Administrative Judge of an Appeals Board shall be responsible for the internal management and administration of the Board, and the Chief Administrative Judge is authorized to act on behalf of the Board in conducting correspondence and in carrying out such other duties as may be necessary in the conduct of routine business of the Board.

[39 FR 7931, Mar. 1, 1974]

#### § 4.3 Representation before appeals boards.

(a) *Appearances generally.* Representation of parties in proceedings before Appeals Boards of the Office of Hearings and Appeals is governed by Part 1 of this subtitle, which regulates practice before the Department of the Interior.

(b) *Representation of the Government.* Department counsel designated by the Solicitor of the Department to represent agencies, bureaus, and offices of the Department of the Interior in proceedings before the Office of Hearings and Appeals, and Government counsel for other agencies, bureaus or offices of the Federal Government involved in any proceeding before the Office of Hearings and Appeals, shall represent the Government agency in the same manner as a private advocate represents a client.

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(c) *Appearances as amicus curiae.* Any person desiring to appear as amicus curiae in any proceeding shall make timely request stating the grounds for such request. Permission to appear, if granted, will be for such purposes as established by the Director or the Appeals Board in the proceeding.

#### § 4.4 Public records; locations of field offices.

Part 2 of this subtitle prescribes the rules governing availability of the public records of the Office of Hearings and Appeals. It includes a list of the field offices of the Office of Hearings and Appeals and their locations.

#### § 4.5 Power of the Secretary and Director.

(a) *Secretary.* Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, except a case before the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978, and render the final decision in the matter after holding such hearing as may be required by law; and

(2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision, except a decision by the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978.

(b) *The Director.* Except for cases or decisions subject to the Contract Disputes Act of 1978, the Director, pursuant to his delegated authority from the Secretary, may assume jurisdiction of any case before any board of the Office or review any decision of any board of the Office or direct reconsideration of any decision by any board of the Office.

(c) *Exercise of reserved power.* If the Secretary or Director assumes jurisdiction of a case or reviews a decision, the

parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is completed, a written decision will be issued.

[50 FR 43705, Oct. 29, 1985, as amended at 52 FR 46355, Dec. 7, 1987; 52 FR 47097, Dec. 11, 1987]

## Subpart B—General Rules Relating to Procedures and Practice

### § 4.20 Purpose.

In the interest of establishing and maintaining uniformity to the extent feasible, this subpart sets forth general rules applicable to all types of proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals.

### § 4.21 General provisions.

(a) *Effect of decision pending appeal.* Except as otherwise provided by law or other pertinent regulation:

(1) A decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effective immediately;

(2) A decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal; a petition for a stay may be filed only by a party who may properly maintain an appeal;

(3) A decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section.

(b) *Standards and procedures for obtaining a stay.* Except as otherwise provided by law or other pertinent regulation:

(1) A petition for a stay of a decision pending appeal shall show sufficient

justification based on the following standards:

(i) The relative harm to the parties if the stay is granted or denied,

(ii) The likelihood of the appellant's success on the merits,

(iii) The likelihood of immediate and irreparable harm if the stay is not granted, and

(iv) Whether the public interest favors granting the stay;

(2) The appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted;

(3) The appellant shall serve a copy of its notice of appeal and petition for a stay on each party named in the decision from which the appeal is taken, and on the Director or the Appeals Board to which the appeal is taken, at the same time such documents are served on the appropriate officer of the Department; any party, including the officer who made the decision being appealed, may file a response to the stay petition within 10 days after service; failure to file a response shall not result in a default on the question of whether a stay should be granted; service shall be made by delivering copies personally or by sending them by registered or certified mail, return receipt requested;

(4) The Director or an Appeals Board shall grant or deny a petition for a stay pending appeal, either in whole or in part, on the basis of the factors listed in paragraph (b)(1) of this section, within 45 calendar days of the expiration of the time for filing a notice of appeal;

(c) *Exhaustion of administrative remedies.* No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

(d) *Finality of decision.* No further appeal will lie in the Department from a decision of the Director or an Appeals