

## § 2638.504

upon notification that such action has been taken.

(3) If the Director determines that the agency has not conducted an adequate investigation, the Director may recommend that the agency undertake further investigative effort.

(4) If the Director determines that the agency has improperly interpreted an ethics provision or improperly applied an ethics provision to the facts of the case, the Director may, in accordance with § 2638.502, provide advice and recommendations necessary to ensure compliance.

(5) If the Director determines that the agency has taken or recommended inappropriate corrective or disciplinary action, the Director may notify the head of the agency of intent to institute proceedings under § 2638.504 or § 2638.505.

(e) *Notice of noncompliance.* If the Director determines that the head of an agency has failed to conduct an adequate investigation within a reasonable period of time, the Director shall notify the President of that determination. A Notice of Noncompliance will not be based upon a determination that the agency has improperly interpreted or applied an ethics provision or that the agency has taken or recommended inappropriate corrective or disciplinary action.

### § 2638.504 Director's finding.

(a) *In general.* If the Director has reason to believe that an employee is violating or has violated an ethics provision, the Director may initiate proceedings under this section for the purpose of making a finding as to whether there is or has been such a violation. In the context of such proceedings, the Office of Government Ethics has the burden of proof to establish that the employee is violating or has violated an ethics provision. The procedures contained in this section do not apply to findings or orders for action made to obtain compliance with the financial disclosure requirements in title II of the Ethics Act. For those findings and orders, the procedures contained in section 206 of the Act shall apply.

(b) *Investigation.* The Director may initiate such investigation as is necessary to determine whether pro-

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ceedings under this section are warranted. Ordinarily, a determination to proceed will be based upon an agency report of investigation filed under § 2638.503(c) and a determination by the Director under § 2638.503(d)(5) that the agency has taken or recommended inappropriate corrective or disciplinary action.

(c) *Notice.* The employee shall be served personally or by United States mail with written notice of commencement of proceedings under this section. A copy of the notice shall be provided to the head of the agency and to the designated agency ethics official. The notice shall be signed by the Director and shall include the following:

- (1) A brief statement setting forth the basis for a possible ethics violation;
- (2) A copy of this section; and
- (3) The date by which the employee's comments must be submitted.

(d) *Employee comments.* The respondent employee has the right to comment on the alleged violation of an ethics provision by submission of evidence or arguments. As determined by the Director, the submission may be made orally or in writing. In the absence of an extension granted by the Director for good cause shown, comments shall be submitted within the time set forth in the notice.

(e) *Finding.* The Director will make a written finding as to whether a violation of any ethics provision has occurred or is occurring. The finding will include a statement of the facts upon which the finding is based and a reference to the specific ethics provision in issue. A copy of the finding will be provided to the respondent employee, the head of the agency and the designated agency ethics official.

### § 2638.505 Director's decision and order.

(a) *In general.* Where the Director has reason to believe that an employee is violating an ethics provision, the Director may, subject to the procedures set forth in this section, issue an order that the employee take specific corrective action to remedy the violation. Ordinarily, a determination to proceed under this paragraph (a) will be based on the Director's finding under § 2638.504(e) that an ethics violation has

occurred or is occurring and reason to believe that the violation is continuing. The procedures contained in this section do not apply to findings or orders for action made to obtain compliance with the financial disclosure requirements in title II of the Ethics Act. For those findings and orders, the procedures contained in section 206 of the Act shall apply.

(b) *Notice.* The employee will be served, personally or by United States mail, with notice of proceedings to determine whether a violation of an ethics provision is occurring and whether corrective action is necessary to end the violation. A copy of the notice shall be provided to the head of the employee's agency and the designated agency ethics official thereof. The notice shall specify the employee's right to present evidence or arguments either in writing or, at the employee's written request, at a hearing conducted on the record. The notice shall be signed by the Director and shall include:

(1) A brief statement setting forth the basis for a possible ethics violation;

(2) Where applicable, a copy of the Director's finding under § 2638.504(e);

(3) A statement of the authority under which proceedings are to be conducted, together with a copy of this section; and

(4) The date by which the employee must, by written notification to the Director, elect to present evidence and arguments either at a hearing or in writing.

(c) *Separation of functions.* Once the Director has issued a notice of proceedings and if the respondent employee has elected to have a hearing conducted on the record, the General Counsel of the Office of Government Ethics shall designate attorneys of the Office of Government Ethics to participate on behalf of the Office in the proceedings, including the investigation and presentation of the evidence at the hearing. During this time period, the General Counsel of the Office of Government Ethics shall serve as Advisor to the Director and will not supervise Office of Government Ethics attorneys who are charged with the investigation and presentation of the evidence in the pending matter. A Deputy General

Counsel shall supervise the Office attorneys responsible for the investigation and presentation of the evidence during this time period. No officer, employee, or agent engaged in the performance of investigative or advocacy functions for the Office of Government Ethics shall, in that or a factually related case, participate or advise in the decision, recommended decision or Office review except as witness or counsel in the proceedings. The Deputy General Counsel may request the views or report of the designated agency ethics official of the employee's agency when necessary to develop the record.

(d) *Written submissions.* Where the respondent employee elects to submit evidence and arguments in writing, he will be given a period of 30 calendar days from the date of the notice within which to make a submission.

(e) *Hearings.* If the respondent employee demands a hearing conducted on the record, he will be given written notice of the time and place of the hearing. The hearing will be convened within a reasonable period of time and will be conducted on the record. An administrative law judge who has been appointed under 5 U.S.C. 3105 shall act as the presiding official at the hearing. Hearings will be as informal as may be reasonably appropriate under all the circumstances. Evidence and testimony, although not ordinarily admissible under rules of evidence, may be received subject to the discretion of the administrative law judge. Immaterial, irrelevant or unduly repetitious evidence may be excluded. The parties may stipulate as to any facts or testimony. The testimony of witnesses shall be under oath and witnesses shall be subject to cross-examination. The administrative law judge shall make such rulings with respect to the conduct of the hearings as circumstances may require to ensure the orderly and expeditious presentation of evidence in a manner fair to the parties and consistent with these regulations and requirements of due process of law. The following procedures will apply to the hearing:

(1) *Conference.* The respondent employee or the designated attorney for the Office of Government Ethics may request, and the administrative law

judge, on his own initiative or in response to a request, may set a pre-hearing conference for such purposes as the administrative law judge deems necessary.

(2) *Public hearings.* Hearings shall generally be open to the public. However, the administrative law judge may order a hearing or any part thereof closed, on his own initiative or upon motion of a party or other affected person, where to do so would be in the best interests of national security, the respondent employee, a witness, the public or other affected persons. Unless specifically excluded by the administrative law judge, the designated agency ethics official of the employee's agency shall be permitted to attend a closed hearing. Any order closing the hearing or any part thereof shall set forth the reasons for the administrative law judge's decision. Any objections thereto shall be made a part of the record. If a party or affected person's request to close the hearing or any part thereof is denied by the administrative law judge, that request shall be immediately appealable to the Director and the hearing shall be held in abeyance pending resolution of the appeal. The notice of appeal shall be filed in writing, not to exceed 10 pages exclusive of attachments, with the Director within 3 working days of the administrative law judge's denial of the request. The Director shall provide an opportunity for an oral hearing on the appeal conducted on the record and shall decide the appeal within 3 working days following receipt of the notice of appeal.

(3) *Continuances and delays.* The authority to adjourn the hearing shall rest with the administrative law judge. Continuances will be allowed only for the most compelling reasons.

(4) *Hearing record.* Testimony and arguments shall be recorded verbatim and preserved for a reasonable period of time. When requested, transcripts of the testimony and arguments and copies of all documentary exhibits will be made available to the respondent employee upon the payment of the reasonable costs thereof.

(5) *Representation.* A party is entitled to appear in person or by or with counsel.

(6) *Witnesses.* The administrative law judge does not have the authority to subpoena witnesses. However, the respondent employee and the Office of Government Ethics may call witnesses whose testimony is relevant and necessary to the proceedings. Witnesses who are to testify or to produce documents in their official capacities will be assigned to do so by their agencies pursuant to 5 U.S.C. 6322 and will be paid travel expenses under 5 U.S.C. 5702. Witnesses who are not Federal employees may be issued invitational travel orders under 5 U.S.C. 5703 based on a determination by the administrative law judge that their testimony is essential to the proceedings.

(7) *Proof.* The Office of Government Ethics has the burden of proof to establish that the respondent employee is committing a violation of an ethics provision and that corrective action is necessary to end the violation.

(8) *Evidence.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination. The respondent employee and the designated attorney for the Office of Government Ethics may offer evidence, arguments, testimony of witnesses, affidavits or sworn statements.

(f) *Recommended decision.* At the conclusion of the hearing, the administrative law judge may request that the parties submit proposed findings and conclusions within a reasonable period of time. After receipt of the proposed findings and conclusions, if any, the administrative law judge shall certify the entire record to the Director for decision. When so certifying the record, the administrative law judge shall make a recommended decision that includes his written findings of fact and conclusions of law with respect to material issues.

(g) *Decision and order.* The Director's decision shall include written findings and conclusions with respect to all material issues and shall be supported by substantial evidence of record. The order shall state the corrective action, if any, to be taken by the respondent employee in order to remedy a violation of an ethics provision and shall establish a reasonable period of time within which the respondent employee

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must commence and complete the corrective action. A copy of the decision and order shall be furnished to the respondent employee and to the head of the agency and the designated agency ethics official, or where the respondent employee is the head of an agency, to the President.

(1) Preliminary to issuing a decision and order, the Director may request that comments on the recommended decision be provided by the designated agency ethics official of the employee's agency.

(2) Where the respondent employee has elected to have a hearing conducted on the record, the Director shall issue a decision and order as soon as practicable following receipt of the certified record and the administrative law judge's recommended decision.

(3) Where the respondent employee has elected to make a written submission under paragraph (d) of this section or has chosen to make no submission and has not requested a hearing, the Director will issue a decision and order as soon as practicable following receipt of all materials of record.

(4) In addition to the decision and order and any finding issued under § 2638.504(e), the record will include, where applicable, all written submission under § 2638.504(d) and § 2638.505(d), a record of the hearing, all documentary evidence introduced at the hearing, any proposed findings and conclusions submitted by the parties and the administrative law judge's recommended decision.

(h) *Compliance with the order.* The respondent employee shall comply with the Director's order by commencing and completing the corrective action within the time specified in the order and by furnishing the Director with satisfactory evidence of compliance.

(i) *Notice of noncompliance.* Where the respondent employee fails to comply with the Director's order within the time specified in the order, the Director will provide the head of the respondent employee's agency with written notice of the respondent employee's failure to comply. Where the respondent employee is the head of the

agency, the Director shall submit such notification to the President.

[55 FR 1667, Jan. 18, 1990, as amended at 55 FR 21846, May 30, 1990]

### § 2638.506 Director's recommendation.

(a) Where the Director has made a finding under § 2638.504(e) or has issued a decision and order under § 2638.505(g) that an ethics provision is being or has been violated, the Director may recommend to the head of the respondent employee's agency that appropriate disciplinary action be taken. If the respondent employee is the head of an agency, the Director shall make any such recommendation to the President and the procedures contained in this section will serve as guidance only.

(b) *Agency response.* Within the time specified by the Director in his recommendation, the head of the agency shall notify the Director in writing of the action taken. If the action cannot be accomplished within the time specified, the head of the agency shall notify the Director in writing of the time needed for the action to be taken, and, thereafter, will provide appropriate notice of the disciplinary action taken.

(c) *Notice of noncompliance.* If the Director determines that the head of an agency has not taken appropriate disciplinary action within a reasonable period of time after the Director has recommended such action, the Director may notify the President of that determination in writing.

## Subpart F—Executive Branch Agency Reports

SOURCE: 55 FR 1670, Jan. 18, 1990, unless otherwise noted.

### § 2638.601 In general.

Agencies are required by section 402(b)(10) of the Act to file such reports as the Director of the Office of Government Ethics deems necessary. Section 402(e) contains specific requirements for annual reports and for reporting cases referred for possible prosecution under 28 U.S.C. 535. Reporting requirements imposed under this subpart are in addition to any requirements for reports or opinions contained in part 735 of this title, parts 2633 through 2637 of