

### Subpart C—Commissioner and Presiding Officer

#### § 16.40 Commissioner.

Whenever the Commissioner has delegated authority under part 5 on a matter for which a regulatory hearing is available under this part, the functions of the Commissioner under this part may be performed by any of the officials to whom the authority has been delegated, e.g., a center director.

[44 FR 22367, Apr. 13, 1979, as amended at 54 FR 9037, Mar. 3, 1989]

#### § 16.42 Presiding officer.

(a) An FDA employee to whom the Commissioner delegates such authority, or any other agency employee designated by an employee to whom such authority is delegated, or, consistent with 5 CFR 930.209(b) or (c), an administrative law judge to whom such authority is delegated, may serve as the presiding officer and conduct a regulatory hearing under this part.

(b) In a regulatory hearing required by the act or a regulation, the presiding officer is to be free from bias or prejudice and may not have participated in the investigation or action that is the subject of the hearing or be subordinate to a person, other than the Commissioner, who has participated in such investigation or action.

(c)(1) The Commissioner or the delegate under § 16.40 is not precluded by this section from prior participation in the investigation or action that is the subject of the hearing. If there has been prior participation, the Commissioner or the delegate should, if feasible, designate a presiding officer for the hearing who is not a subordinate. Thus, if the Commissioner's authority to make a final decision has been delegated to a center director, the presiding officer may be an official in another center or the office of the Commissioner. The exercise of general supervisory responsibility, or the designation of the presiding officer, does not constitute prior participation in the investigation or action that is the subject of the hearing so as to preclude the Commissioner or delegate from designating a subordinate as the presiding officer.

(2) The party requesting a hearing may make a written request to have the Commissioner or the delegate under § 16.40 be the presiding officer, notwithstanding paragraph (c)(1) of this section. If accepted, as a matter of discretion, by the Commissioner or the delegate, the request is binding upon the party making the request.

(3) A different presiding officer may be substituted for the one originally designated under § 16.22 without notice to the parties.

[44 FR 22367, Apr. 13, 1979, as amended at 54 FR 9037, Mar. 3, 1989; 67 FR 53306, Aug. 15, 2002]

#### § 16.44 Communication to presiding officer and Commissioner.

(a) Regulatory hearings are not subject to the separation of functions rules in § 10.55.

(b) Those persons who are directly involved in the investigation or presentation of the position of FDA or any party at a regulatory hearing that is required by the act or a regulation should avoid any off-the-record communication on the matter to the presiding officer or the Commissioner or their advisors if the communication is inconsistent with the requirement of § 16.95(b)(1) that the administrative record be the exclusive record for decision. If any communication of this type occurs, it is to be reduced to writing and made part of the record, and the other party provided an opportunity to respond.

(c) A copy of any letter or memorandum of meeting between a participant in the hearing and the presiding officer or the Commissioner, e.g., a response by the presiding officer to a request for a change in the time of the hearing, is to be sent to all participants by the person writing the letter or the memorandum.

### Subpart D—Procedures for Regulatory Hearing

#### § 16.60 Hearing procedure.

(a) A regulatory hearing is public, except when the Commissioner determines that all or part of a hearing should be closed to prevent a clearly unwarranted invasion of personal privacy; to prevent the disclosure of a

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trade secret or confidential commercial or financial information that is not available for public disclosure under § 20.61; or to protect investigatory records compiled for law enforcement purposes that are not available for public disclosure under § 20.64.

(1) The Commissioner may determine that a regulatory hearing is closed either on the Commissioner's initiative or on a request by the party asking for a regulatory hearing, in the request for the hearing.

(2) If the hearing is a private hearing, no persons other than the party requesting the hearing, counsel and witnesses, and an employee or consultant or other person subject to a commercial arrangement as defined in § 20.81(a) and FDA representatives with a direct professional interest in the subject matter of the proceeding are entitled to attend.

(b) A regulatory hearing will be conducted by a presiding officer. Employees of FDA will first give a full and complete statement of the action which is the subject of the hearing, together with the information and reasons supporting it, and may present any oral or written information relevant to the hearing. The party requesting the hearing may then present any oral or written information relevant to the hearing. All parties may confront and conduct reasonable cross-examination of any person (except for the presiding officer and counsel for the parties) who makes any statement on the matter at the hearing.

(c) The hearing is informal in nature, and the rules of evidence do not apply. No motions or objections relating to the admissibility of information and views will be made or considered, but any other party may comment upon or rebut all such data, information, and views.

(d) The presiding officer may order the hearing to be transcribed. The party requesting the hearing may have the hearing transcribed, at the party's expense, in which case a copy of the transcript is to be furnished to FDA. Any transcript of the hearing will be included with the presiding officer's report of the hearing.

(e) The presiding officer shall prepare a written report of the hearing. All

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written material presented at the hearing will be attached to the report. Whenever time permits, the parties to the hearing will be given the opportunity to review and comment on the presiding officer's report of the hearing.

(f) The presiding officer shall include as part of the report of the hearing a finding on the credibility of witnesses (other than expert witnesses) whenever credibility is a material issue, and shall include a recommended decision, with a statement of reasons, unless the Commissioner directs otherwise.

(g) The presiding officer has the power to take such actions and make such rulings as are necessary or appropriate to maintain order and to conduct a fair, expeditious, and impartial hearing, and to enforce the requirements of this part concerning the conduct of hearings. The presiding officer may direct that the hearing be conducted in any suitable manner permitted by law and these regulations.

(h) The Commissioner or the presiding officer has the power under § 10.19 to suspend, modify, or waive any provision of this part.

[44 FR 22367, Apr. 13, 1979, as amended at 66 FR 6469, Jan. 22, 2001; 66 FR 12850, Mar. 1, 2001]

### § 16.62 Right to counsel.

Any party to a hearing under this part has the right at all times to be advised and accompanied by counsel.

## Subpart E—Administrative Record and Decision

### § 16.80 Administrative record of a regulatory hearing.

(a) The administrative record of the regulatory hearing consists of the following:

(1) The notice of opportunity for hearing and the response.

(2) All written information and views submitted to the presiding officer at the hearing or after if specifically permitted by the presiding officer.

(3) Any transcript of the hearing.

(4) The presiding officer's report of the hearing and comments on the report under § 16.60(e).

(5) All letters and memoranda of meetings or communications between