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28 CFR Ch. I (7-1-03 Edition)

(3) Protect witnesses from harassment or undue embarrassment.

(d) The Judge shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the Judge, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

(f) Upon motion of any party, the Judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This part does not authorize exclusion of the following:

(1) The respondent;

(2) An individual whose presence is shown by a party to be essential to the presentation of its case.

§ 76.30 Evidence.

(a) The Judge shall determine the admissibility of evidence.

(b) Except as provided in this part, the Judge shall not be bound by the Federal Rules of Evidence. However, the Judge may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The Judge shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Relevant evidence may be excluded if it is privileged under federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The Judge shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the Judge pursuant to 28 CFR 76.27.

§ 76.31 Standards of conduct.

(a) All persons appearing in proceedings before a Judge are expected to

act with integrity and in an ethical manner.

(b) The Judge may exclude parties, witnesses, and their attorneys for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against *ex parte* communications. The Judge shall state in the record the cause for suspending or barring an attorney from participation in a proceeding. Any attorney so suspended or barred may appeal to the Chief Administrative Hearing Officer for the District, or if there is no Chief Administrative Hearing Officer, to the Attorney General but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

§ 76.32 Hearing room conduct.

Proceedings shall be conducted in an orderly manner. The consumption of food or beverage, smoking, or rearranging of courtroom furniture, unless specifically authorized by the Judge, is prohibited.

§ 76.33 Legal assistance.

The Judge does not have authority to appoint counsel, nor can it refer a party to an attorney.

§ 76.34 Record of hearings.

(a) *General.* Unless otherwise agreed by the parties, a verbatim written record of all hearings shall be kept. All evidence upon which the Judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits introduced as evidence shall be marked for identification and incorporated into the record. Upon completion of the transcript, the transcript shall be filed by the official court reporter with the Judge, who will notify the parties. Transcripts may be obtained by the parties and the public from the official court reporter of record. Unless otherwise ordered by the

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Judge, any fees in connection therewith shall be the responsibility of the parties.

(b) *Corrections.* Corrections to the official transcript will be permitted upon motion. Motions for corrections must be submitted within ten (10) days of the service by the Judge of the notice of the filing of the transcript, or such other time as may be permitted by the Judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the Judge.

(c) The record of the proceedings shall consist of the notices, pleadings, motions, rulings, exhibits, orders, the findings, decisions or opinions of the Judge, the stipulations and briefs, and the transcript(s) of the hearing(s).

§ 76.35 Decision and Order of the Judge.

(a) *Proposed decision and order.* Within twenty (20) days of the filing of the transcript of the testimony, or such additional time as the Judge may allow, a party, if authorized by the Judge, may file proposed Findings of Fact, Conclusions of Law, and Order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision.* Within a reasonable time, but not later than forty-five (45) days after the filing of the hearing transcript, and the time allowed for the filing of the post-hearing briefs, proposed Findings of Fact, Conclusions of Law, and Order, if any, or within thirty (30) days after receipt of an agreement containing Consent Findings and Order disposing of the disputed matter in whole, the Judge shall make a decision. The decision of the Judge shall include Findings of Fact and Conclusions of Law upon each material issue of fact or law presented on the record. The decision of the Judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. The standard of proof shall be a preponderance of the evidence. Such decision shall be in accordance with the regulations and the statutes conferring jurisdiction. If the

Judge fails to meet the deadline contained in this paragraph, he or she shall notify the parties and the Attorney General of the reason for the delay and shall set a new deadline.

(c) *Order.* If the Judge determines, by a preponderance of the evidence, that the respondent knowingly possessed a controlled substance that is listed in section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)) in violation of 21 U.S.C. 844, in an amount that, as specified by this part, is a personal use amount, the order shall require the respondent to pay a civil penalty of not more than \$10,000 for each violation. If the Judge determines that a preponderance of the evidence does not establish that the respondent knowingly possessed a controlled substance as described above, for his or her personal use, then the order shall dismiss the complaint. A copy of the decision and order together with a record of the proceedings will be forwarded to the Attorney General.

§ 76.36 Administrative and judicial review.

(a) Upon entry of an order by a Judge, any party may file with the Attorney General, within ten (10) days of the date of the Judge's decision and order, a written request for review of the decision and order together with supporting arguments. Within thirty (30) days from the date of the filing of the request for review, the Attorney General may enter an order which adopts, affirms, modifies or vacates the Judge's order.

(b) If a party does not seek review of the Judge's decision, or if the Attorney General enters no order within thirty (30) days from the date of the filing of the request for review, the order of the Judge becomes the final order of the Attorney General. If the Attorney General modifies or vacates the order, the order of the Attorney General becomes the final order.

(c) An individual subject to an order assessing a penalty after a hearing may, before the expiration of the thirty (30) day period beginning on the date the final order is entered, either by the Judge or the Attorney General, whichever is applicable, bring a civil action in the appropriate District Court of the