

3745-47-01

Adjudication - applicability and construction of rules.

- (A) This chapter ~~shall govern~~governs the procedure for all adjudication proceedings and other procedures relating to adjudications pursuant to Chapter 119. of the Revised Code, or any other statute or rule providing for an adjudication proceeding before the agency.
- (B) This chapter shall be construed liberally to accomplish the purposes of the chapters and sections of the Revised Code governing the functions and duties of the agency, and to afford maximum procedural fairness consistent with just, timely, and efficient resolution of disputes.
- (C) For purposes of this chapter, license, permit, variance, certificate, and registration include at a minimum all provisions, terms, conditions, specifications, requirements, and limitations set forth in the document, appended thereto, or incorporated by reference.

3745-47-02

Adjudication - definitions.

As used in this chapter:

(A)

- (1) "Action" means the issuance, modification, or revocation of an order; the issuance, denial, renewal, modification, suspension, or revocation of a license, permit, lease, variance, certificate, registration, or authorization; or the approval or disapproval of plans and specifications pursuant to law.
- (2) "Adjudication" has the same meaning as in division (D) of section 119.01 of the Revised Code.
- (3) "Adjudication hearing" means an adversarial hearing during which evidence is taken for the purpose of determining issues of fact and law that will be used by the hearing examiner to prepare the report and recommendation and, ultimately, will be used in preparing final findings and orders.
- (4) "Adjudication proceeding" means the entire process through which a person may seek to have a hearing ~~officer~~examiner consider evidence relevant to certain agency actions, beginning with the activities specified in paragraph (A) of rule 3745-47-03 of the Administrative Code and ending with the filing of the ~~report and recommendation in accordance with rule 3745-47-16 of the Administrative Code~~issuance of a final action.
- (5) "Agency" means the Ohio environmental protection agency.

(B) [Reserved.]

(C) [Reserved.]

(D) "Director" means the director of environmental protection or the director's designee.

(E) [Reserved.]

(F) "Final action" means the written decision on any matter that is signed by the director and entered in the director's journal pursuant to rule 3745-49-14 of the Administrative Code.

(G) [Reserved.]

(H) [Reserved.]

(I) "Issue" or "issuance" means either of the following:

(1) In the case of a proposed action, to place the action into the United States mail, addressed to the person who is the subject of the proposed action.

(2) In the case of a final action, to enter the action into the director's journal after the action ~~has been~~is signed by the director.

(J) [Reserved.]

(K) [Reserved.]

(L) [Reserved.]

(M) [Reserved.]

(N) [Reserved.]

(O) [Reserved.]

(P)

(1) "Party" means any one of the following:

(a) The agency.

(b) For purposes of an adjudication proceeding regarding a proposed action, the person to whom the proposed action is issued and any person who objects to the proposed action pursuant to section 3745.07 of the Revised Code.

(c) For purposes of an adjudication proceeding in response to a verified complaint, the alleged violator upon whom a notice of hearing is served pursuant to section 3745.08 of the Revised Code and the person who filed the verified complaint that is the subject of the hearing, if that person filed a written notice of intent to participate as a party with the director before the hearing.

(d) Any person who intervenes in an adjudication proceeding pursuant to rule 3745-47-07 of the Administrative Code.

(e) For purposes of an adjudication proceeding conducted pursuant to section 6109.14 of the Revised Code, the person upon whom notice was served in accordance with that section.

No other person shall be deemed to be a party to an adjudication proceeding.

(2) "Person" means the state of Ohio or any agency thereof, the federal government or any agency thereof, any other state or agency thereof, any interstate agency, any municipal corporation, political subdivision, public or private corporation, individual, partnership, or other legal entity defined as a person under section 1.59 of the Revised Code.

(3) "Proposed action" means a written statement that gives the director's intention with respect to an action and allows persons to do one or more of the following:

(a) File comments or objections to the action.

(b) Request an adjudication hearing in accordance with this chapter.

(c) Request a public meeting regarding the action.

(4) "Public meeting" means a non-adversarial public forum where any person may present written or oral statements for the director's consideration pertaining to the application, draft action, or proposed action that is the subject of the meeting.

(Q) [Reserved.]

(R) [Reserved.]

(S) "Stenographic record" means a record provided by stenographic means or by the use of audio electronic recording devices. The record includes all of the testimony, other evidence, and rulings regarding the admissibility thereof, presented at the hearing.

(T) [Reserved.]

(U) [Reserved.]

(V) "Verified complaint" means a written complaint filed pursuant to and meeting the requirements of section 3745.08 of the Revised Code and rule 3745-49-12 of the Administrative Code.

3745-47-03

Request for an adjudication hearing and objections.

- (A) An adjudication proceeding shall be initiated if any ~~one or combination~~ of the following occur:
- (1) The person to whom the proposed action was issued timely requests an adjudication hearing pursuant to sections 119.06 and 119.07 of the Revised Code.
 - (2) An officer of an agency of the state or of a political subdivision acting in a representative capacity or any person who would be aggrieved or adversely affected by the issuance or renewal of a permit, license, or variance timely objects to the proposed action pursuant to section 3745.07 of the Revised Code.
 - (3) A person who disputes the agency's determination that the person's activities are subject to permitting or licensing requirements under statutes or rules administered by the agency timely requests an adjudication hearing pursuant to section 119.06 of the Revised Code.
 - (4) A person timely requests an adjudication hearing or objects pursuant to other applicable provisions of the Revised Code.

Paragraphs (A)(1) to (A)(4) of this rule do not authorize the filing of objections to amended proposed actions unless the agency gave public notice of the amended proposed action in accordance with rule 3745-49-08 of the Administrative Code.

- (B) All requests for an adjudication hearing, including requests pursuant to section 119.06 or 119.07 of the Revised Code, and all objections to proposed actions pursuant to section 3745.07 of the Revised Code shall be made in writing. All requests and objections shall ~~state include~~ the ~~matter objected to,~~ following: ~~the~~
- (1) The basis for the request for an adjudication hearing or objection to the proposed action, and the questions to be considered at the requested adjudication hearing, ~~and the basis for the request or objection.~~
 - (2) A copy of the proposed action.
 - (3) The name, address, telephone number, and electronic mail address, if available, of the person who timely requests or objects in accordance with paragraph (A) of this rule.

- ~~(H)~~(C) Not later than sixty days after issuance of the proposed action or such other time as the hearing examiner may order, the person who timely requests or objects in accordance with paragraph (A) of this rule shall file the specific provisions of the

matter objected to that the person believes should be deleted, amended, or added if those specified provisions were not included in the adjudication hearing request or objection as initially filed.

~~(2)~~(D) The requesting or objecting person shall include a clear and concise summary of the factual or legal basis for each request, deletion, amendment, or addition, including a reference setting forth the citation to any statute, regulation, or other legal principle that supports the person's position. Filings required by this paragraph may be included in filings required under rule 3745-47-10 of the Administrative Code, as long as the filing complies with the deadline set forth in paragraph (B)(1) of this rule, and if such is acceptable to the hearing examiner.

~~(G)~~(E) Amendment of adjudication hearing requests and objections may be made in the same manner as the "Ohio Rules of Civil Procedure" ~~(2011)~~ allow amendment of complaints.

~~(D)~~(F) If the agency issues a new proposed action or an amended proposed action after initiation of an adjudication proceeding, the hearing examiner shall grant all parties a reasonable time, which, notwithstanding any other provision of this chapter, may be less than thirty days, to amend their adjudication hearing requests, objections, or petitions to intervene so as to raise issues relating to the amendments.

3745-47-04

Provision, mailing, and publishing of notice of adjudication hearings.

(A) Mailing of notice.

- (1) A notice of an adjudication hearing shall be mailed by certified mail, return receipt requested, or another type of mail accompanied by receipt to the parties to the adjudication proceeding not less than thirty days prior to the adjudication hearing. Service shall be completed in accordance with section 119.07 of the Revised Code and the "Ohio Rules of Civil Procedure" ~~(2011)~~.
- (2) Notices of adjudication hearings shall ~~be mailed by first class mail to all persons on the mailing list of subscribers maintained pursuant to~~ comply with section 3745.07 of the Revised Code ~~not less than fourteen days prior to the adjudication hearing.~~

(B) Public notice. Not later than thirty days prior to an adjudication hearing, a notice of the adjudication hearing shall be published in a newspaper of general circulation in the county in which the source, facility, or subject of the public notice is located. Public notice is complete upon publication.

(C) Public notices of adjudication hearings shall include the following:

- (1) The name of the agency.
- (2) The address and telephone number of the location where agency files and records pertaining to the adjudication are located and may be inspected and copied.
- (3) Instructions for persons desiring to obtain additional information.
- (4) The name of the person requesting the adjudication hearing.
- (5) A brief description of the activities or operations that are the subject of the adjudication.
- (6) The location of the source, facility, or subject of the adjudication, including a street address, if one is known.
- (7) The date of the relevant public notices related to the subject of the adjudication.
- (8) The date, time, and location of the adjudication hearing.

- (9) A concise statement of the issues raised by the party requesting the adjudication hearing.
 - (10) A statement that evidence may be presented by the state and the other parties to the hearing.
- (D) Where duplicate information is required in multiple notices mailed or published together, any information that is required by this rule to be contained in more than one such notice need not be repeated in each notice but may be contained in a separate document mailed or published with and referred to in each notice to which it applies.

3745-47-05

Filing and service of documents.

- (A) ~~An original and one copy of all~~ All documents shall be ~~filed with~~ delivered to the hearing ~~clerk~~ examiner for each case, even when cases have been consolidated. The hearing ~~clerk~~ examiner shall do the following:
- (1) Immediately upon initiation of an adjudication proceeding, open an adjudication file and assign a docket number to the proceeding.
 - (2) Be the custodian of all adjudication files for the agency.
 - (3) Upon initiation of an adjudication proceeding, include in the adjudication file the request for adjudication, any objection, and ~~copies~~ a copy of ~~any~~ the proposed action.
 - (4) During the pendency of the adjudication proceeding carefully preserve in the adjudication file all documents delivered to the hearing ~~clerk~~ examiner for filing; and all hearing examiner's orders, recording on all such documents the date of receipt thereof in accordance with paragraph (E) of this rule.
- (B) The acceptance of documents for filing shall not be construed as an admission by the agency of the validity or proper filing of such document or of compliance with any procedural requirements imposed by statute or rule.
- (C) All items ~~except copies of documents~~ filed in the proceedings shall be on eight-and-one-half-inch by eleven-inch paper and shall be titled "Before the Ohio Environmental Protection Agency" and shall be styled with the name of the person to whom a final order in the case will be directed, indicating whether such person is an applicant in the case, and, if not, designating such person as respondent (i.e., "In the Matter of _____, Applicant" or "In the Matter of _____, Respondent"), and shall set forth the docket number of the case except where no docket number has been assigned.
- (D) All documents filed ~~shall be printed and~~ shall include the name, address, electronic mail address, and telephone number of the person or, if represented by an attorney, that person's attorney. If a person is represented by a firm of attorneys, a particular attorney with the firm having primary responsibility for the case shall be indicated on such document. All documents filed shall be signed by the person or by the person's attorney.
- (E) All documents shall be deemed filed with the agency upon being date and time-stamped by the Ohio EPA "Legal Records Section."

- (F) In computing any period of time prescribed for filing a document, the day on which the designated period of time begins to run is not included. The last day of the period is included unless it is a day that the agency is not open for business, in which event the period runs until the end of the next day that the agency is open for business. When the time prescribed or allowed is less than seven days, days that the agency is not open for business shall be excluded from the computation.
- (G) Any request for an extension of time to file a document shall be filed within the time allowed for the filing of the document with the agency.
- (H) Documents filed with the hearing ~~clerk~~ examiner shall not be considered ~~by the hearing examiner~~ unless proof of service in accordance with paragraphs (I) and (J) of this rule is endorsed thereon. The proof of service shall state the date and manner of service and shall be signed by the person filing such document or by the person's attorney.
- (I) The hearing examiner and the parties shall send a copy of each document they have filed ~~with the hearing clerk~~ in accordance with this rule to each party or, if a party is represented by an attorney, to the party's attorney. Service by mail is complete upon mailing. Service may also be made by any other means permitted by the "Ohio Rules of Civil Procedure" ~~(2011)~~.
- (J) Copies of all documents filed shall also be sent to any person who has been denied permission to intervene and any party who has been dismissed from a case for any reason, other than that party's voluntary withdrawal, in the same manner as this chapter requires those documents to be sent to the remaining parties. If a person being served is represented by an attorney, service shall be made upon the attorney instead of upon the person.

3745-47-06

Authority and duties of hearing examiners.

- (A) Adjudication hearings shall be conducted before a hearing examiner.
- (B) Upon receiving a request or objection pursuant to rule 3745-47-03 of the Administrative Code, a hearing examiner shall be assigned to the case.
- (C) The hearing examiner shall conduct adjudication hearings in such a manner as to prevent unnecessary delay, maintain order, and ensure the development of a clear and adequate record.
- (D) The authority of the hearing examiner shall include but not be limited to authority to do the following:
 - (1) Schedule adjudication hearings, in which consideration shall be given to the following:
 - (a) Providing adequate time for all parties to prepare for the adjudication hearing.
 - (b) Any request by a party relating to the time and location of the adjudication hearing.
 - (2) Administer oaths and affirmations.
 - (3) Issue subpoenas to require the attendance of witnesses at adjudication hearings and depositions.
 - (4) Issue subpoenas duces tecum to require the production of documents or tangible things.
 - (5) Compel all parties to state their positions in writing with respect to the dispute.
 - (6) Examine witnesses and direct witnesses to testify.
 - (7) Make rulings on the admissibility of evidence.
 - (8) Make rulings on procedural motions, whether such motions are oral or written.
 - (9) Hold conferences pursuant to rule 3745-47-10 of the Administrative Code to discuss settlement or for the simplification of issues.

- (10) Request any party or any party's attorneys to prepare and file suggested entries, findings, orders, conclusions of law, and briefs before or following the adjudication hearing and within such time limits as the hearing examiner may determine.
 - (11) Dismiss a party for failure to comply with this chapter or with any order that the hearing examiner is authorized to issue, or for failure to appear at an adjudication hearing or conference.
 - (12) Order cases involving common issues of fact and law to be consolidated.
 - (13) Take such other action as may be necessary to accomplish the purposes of paragraph (C) of this rule.
- (E) The hearing examiner shall have such other powers, duties, and authority as are granted by statute or rules.
- (F) All rulings on evidence, motions, and other procedural matters, including dismissal of a party, shall be subject to review by the director upon review of the report and recommendation of the hearing examiner pursuant to rule 3745-47-16 of the Administrative Code.

3745-47-07

Intervention.

- (A) Any person may file a motion to intervene in an adjudication proceeding conducted under this chapter. A motion shall be accompanied by a memorandum setting forth the matter for which intervention is sought, the grounds for proposed intervention, the position and interest of the movant in the adjudication proceeding, and any other matter that the movant deems relevant in light of the factors to be considered by the hearing examiner listed in paragraph (D) of this rule. The movant shall serve a copy of the motion upon each party as provided in rule 3745-47-05 of the Administrative Code.
- (B) Except as provided in paragraph (C) of this rule, a motion to intervene in an adjudication proceeding shall be filed prior to the commencement of the first conference or not later than fifteen days prior to commencement of the adjudication hearing if no conference is held.
- (C) Motions to intervene in an adjudication proceeding filed after the time periods set forth in paragraph (B) of this rule shall contain, in addition to the information required by paragraph (A) of this rule, a statement of good cause for the failure to timely file the motion and shall be granted only upon a finding that extraordinary circumstances justify the granting of the motion.
- (D) Motions to intervene may be granted by the hearing examiner upon consideration of the following factors, where relevant:
- (1) The nature and extent of the movant's interest in the subject matter of the adjudication proceeding and the degree to which the adjudication may impair or impede the movant's ability to protect that interest.
 - (2) The adequacy of the representation of the movant's interest by existing parties.
 - (3) The relationship of the movant's interest to the subject matter of the adjudication hearing.
 - (4) The avoidance of duplicative adjudication proceedings.
 - (5) Whether the intervention would unduly delay or prejudice the adjudication of the rights of the parties.
 - (6) The contribution the movant may make to the just determination of the issues.
- (E) In any adjudication proceeding in which intervention is granted under this rule, the intervener shall be bound by previous rulings. The hearing examiner may impose

reasonable conditions or restrictions on the extent of the intervener's participation in the adjudication proceeding.

3745-47-08

Motions.

- (A) All motions, unless made before the hearing examiner upon the record, shall be made in writing. A written motion shall state with particularity the relief or order sought and shall be accompanied by a memorandum setting forth the grounds therefor.
- (B) Not later than ten days after service of a written motion, or such other time as fixed by the hearing examiner, any party may file a response to a motion. A movant may reply to the response only with the permission of the hearing examiner. Procedural motions shall not cause delay of an adjudication hearing without a finding by the hearing examiner that good cause for such delay exists.
- (C) Before deciding a written motion, the hearing examiner shall consider all applicable memoranda filed. The hearing examiner shall file a written decision, including any order issued, and shall serve copies on all parties. The hearing examiner's ruling on all oral motions shall be included in the stenographic record but the hearing examiner may elect to take the motion under advisement and issue a written ruling later. The hearing examiner shall include in each written decision on a motion a short statement of the reasons for each ruling.
- (D) Motion for summary disposition.
 - (1) Any party may file a motion for summary disposition. A motion for summary disposition shall be filed not later than fifteen days before the date set for commencement of an adjudication hearing, unless leave for filing thereafter is obtained from the hearing examiner.
 - (2) When considering such a motion, the hearing examiner shall consider the proposed action; requests for adjudication hearing; objections; depositions; answers to interrogatories; stipulations of fact; admissions; the response to the motion and any replies to the response; affidavits accompanying the motion, response, or reply; and any argument presented at an adjudication hearing on the motion. If, after consideration of the foregoing, the hearing examiner determines that there is no genuine issue as to any material fact and that the moving party is entitled to the outcome requested as a matter of law, the hearing examiner shall submit to the director a report and recommendation pursuant to rule 3745-47-16 of the Administrative Code without holding an adjudication hearing.

3745-47-09

Continuances.

- (A) An adjudication hearing may be continued or postponed by the hearing examiner upon the hearing examiner's own motion, or upon the hearing examiner's determination that the written motion of any party shows good cause.

- (B) Before granting any continuance, the hearing examiner shall consider any harm to public welfare or the environment which may result from delay in the adjudication proceeding.

3745-47-10

Conferences.

(A) Upon written notice by the hearing examiner to all parties, the parties or the parties' attorneys may be ordered to appear at a specified time and place for a conference, presided over by the hearing examiner, before or during the course of the adjudication hearing, to consider such matters as the hearing examiner shall direct including but not limited to the following:

- (1) The settlement of the adjudication proceeding.
- (2) The specification and simplification of the questions presented.
- (3) The disclosure of names, identities, and location of witnesses together with a brief statement of what is proposed to be established by the testimony of each.
- (4) The limitation of the number of and the exchange of reports of expert witnesses expected to be called by any party.
- (5) The submission of admissions of fact.
- (6) The submission of stipulations as to the admissibility into evidence of documents and other exhibits to avoid unnecessary proof.
- (7) The exchange of documentary evidence to be submitted at the adjudication hearing.

(B) Each party shall attend the initial conference fully prepared to discuss in detail the following:

- (1) The party's own positions with respect to all issues of fact and law raised in the party's requests for adjudication hearing.
- (2) All issues of fact and law raised by other parties on which the party wishes to take a position.
- (3) All respects in which the party desires the proposed action to be altered, and the reasons therefor.

~~(C) The proceedings at the initial conference shall be off the record.~~

~~(D)~~(C) Prior to or subsequent to any conference, the hearing examiner may require a

party to prepare briefs covering such matters as the hearing examiner may specify. For any conference, the hearing examiner may prepare, or order prepared, a conference report encompassing the agreements reached and decisions made at the conference, including any agreed upon admissions, stipulations, or proposals. All offers of settlement, proposals of adjustment, and proposed stipulations not agreed upon shall not constitute admissions, and shall not be admissible in evidence against the person making the offer or proposal.

3745-47-11

Discovery; availability of agency files.

- (A) Any party may obtain public records of the agency, pursuant to section 149.43 of the Revised Code and rule 3745-49-03 of the Administrative Code, and obtain discovery or protection from discovery in the same manner and to the same extent as is prescribed in the "Ohio Rules of Civil Procedure" (~~2011~~) and section 119.09 of the Revised Code.
- (B) No adjudication hearing shall be continued to a date more than sixty days after initiation of the adjudication proceeding for the purpose of discovery unless the hearing examiner finds in writing that the party requesting the continuance diligently pursued discovery but was unable to complete discovery.
- (C) Parties shall cooperate in conducting discovery procedures with the objective being full and complete disclosure of all relevant facts. Informal consultation among parties concerning discovery shall be attempted before filing of formal motions to compel discovery.
- (D) All costs of service, mileage, witness fees, and other costs of discovery shall be borne by the party requesting such discovery. Witness and mileage fees shall be the same as paid in the common pleas courts of Ohio in criminal cases.

3745-47-12

Adjudication hearing procedures.

(A) During an adjudication hearing the following procedures shall occur:

- (1) A record of the testimony and other evidence submitted shall be memorialized by stenographic record.
- (2) The hearing examiner shall provide the parties the opportunity to make an opening statement.
- (3) A witness at the hearing shall testify under oath or affirmation which will be administered by the hearing examiner.

(B) During an adjudication hearing the following procedures may occur:

- (1) The hearing examiner on his own motion or on the motion of any party, provide for the separation of witnesses during the hearing.
- (2) In accordance with rule 3745-47-15 of the Administrative Code, the parties may present their cases-in-chief and submit evidence into the record.
- (3) The hearing examiner may permit rebuttal evidence to be submitted.
- (4) The parties may submit oral or written closing arguments.
- (5) The hearing examiner may use the "Ohio Rules of Evidence" as guidance in making evidentiary rulings.

~~(A)~~(C) The hearing examiner shall admit all relevant and material evidence, except evidence that is unduly repetitious, even though inadmissible under the "Ohio Rules of Evidence" ~~(2011)~~ applicable to judicial proceedings. All records maintained by the agency or the agency's duly authorized representative shall not be inadmissible for lack of authentication if the custodian of such records certifies the identity of the records in writing. The weight to be given evidence shall be determined by the evidence's reliability and probative value. In all adjudication hearings the testimony of witnesses shall be taken orally, except as provided by this chapter or by the hearing examiner. Parties shall have the right to cross-examine witnesses.

~~(B)~~(D) If a party objects to the admission or exclusion of any evidence, that party shall ~~state~~ briefly state the grounds for such objection. The stenographic record shall include any argument or debate thereon, unless the hearing examiner, with the consent of all parties, orders that such argument not be recorded. The ruling of the hearing examiner on any objection shall be part of the stenographic record.

~~(C)~~(E) A copy of each documentary exhibit filed with the hearing examiner shall be furnished to each ~~other~~ party. A true copy of an exhibit may, in the discretion of the hearing examiner, be substituted for the original.

~~(D)~~(F) Whenever evidence is ruled inadmissible, the party offering such evidence may make an offer of proof, which shall be included in the stenographic record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature and substance of the evidence excluded. If the evidence consists of a document or exhibit, the evidence shall be inserted in the record in total. If the director decides that the hearing examiner's ruling in excluding the evidence was erroneous, the adjudication hearing may be reopened to permit the taking of such evidence, or, where appropriate, the director may evaluate the evidence and proceed to a final decision.

~~(E)~~(G) Official notice may be taken of such matters as are within the expertise of the hearing examiner. The parties shall be given adequate opportunity to show that such facts are erroneously noticed.

~~(F)~~(H) Parties may file proposed findings, orders, conclusions of law, or briefs for consideration by the hearing examiner not later than fourteen days after receipt of the stenographic record of the adjudication hearing or such other period of time as the hearing examiner may set.

~~(G)~~(I) After the conclusion of an adjudication hearing and prior to the submission of a report and recommendation, the hearing examiner, upon motion of a party, may permit the parties to file newly discovered documentary evidence that by due diligence could not have been discovered prior to the adjudication hearing.

~~(H)~~(J) No interlocutory appeal of any ruling or order of the hearing examiner may be made to the director.

(K) Due to the duties in deciding adjudicatory matters, the director, assistant director, and deputy directors shall not be competent witnesses or deponents in any adjudication proceeding before the agency.

(L) Evidence from other persons relating to the mental processes of the director, assistant director, and deputy directors shall not be admissible.

Conclusion of adjudication proceedings.

- (A) Withdrawal of request for adjudication. A party may file a withdrawal of its objection or request for an adjudication hearing at any stage of the adjudication proceeding. Provided there is not another party to the adjudication proceeding who wishes the adjudication proceeding to continue, not later than forty-five days after the filing of a withdrawal of the objection or request for an adjudication hearing, the hearing examiner shall submit to the director a written report and recommendation of the action to be taken by the director. This paragraph does not apply to withdrawals made as a result of settlement agreement by all parties pursuant to paragraph (C) of this rule.

- (B) Failure to prosecute. Where a party fails to comply with these rules or with orders of the hearing examiner, the hearing examiner may, upon motion of any party or upon the hearing examiner's motion and after notice to the parties, submit to the director a written report and recommendation that recommends that the director dismiss the adjudication proceeding.

- (C) Settlement agreements. If all parties agree, a settlement agreement may be entered into at any stage of the adjudication proceeding prior to the issuance of a final order by the director. Not later than forty-five days after the filing of a settlement agreement entered into by all parties, the hearing examiner shall submit to the director a written report setting forth findings of fact and conclusions of law, and a recommendation of the action to be taken by the director. The hearing examiner may recommend that the settlement agreement be adopted as a final order.

*** DRAFT - NOT YET FILED ***

****TO BE RESCINDED****

3745-47-14

Witnesses and evidence.

- (A) Due to the duties in deciding adjudicatory matters, the director, assistant director, and deputy directors shall not be competent witnesses or deponents in any adjudication proceeding before the agency.

- (B) Evidence from other persons relating to the mental processes of the director, assistant director, and deputy directors shall not be admissible.

3745-47-15

Burden of proof - evidence.

- (A) The burden at all adjudication hearings with respect to applications for permits, licenses, variances, certificates, or other authorizing actions shall be upon the applicant to prove entitlement to the permit, license, variance, certificate, or authorizing action.
- (B) Except as provided in paragraph (A) of this rule, the agency ~~shall bear~~bears the burden of proof at all adjudication hearings relating to the following:
- (1) Proposed modifications initiated by the agency.
 - (2) Proposed revocations.
 - (3) Proposed orders.
 - (4) Findings under division (B) of section 3714.12, division (B) of section 3734.13, division (C) of section 3745.08, division (B) of section 6109.05, section 6109.14, or division (C) of section 6111.06 of the Revised Code.
 - (5) Notice of the hearing under division (B) of section 3714.12, division (B) of section 3734.13, division (C) of section 3745.08, division (B) of section 6109.05, section 6109.14, or division (C) of section 6111.06 of the Revised Code.
- (C) A party raising an issue of fact shall have the burden of presenting a prima facie case establishing that fact; thereafter, the burden of proof on such issue is allocated according to paragraphs (A) and (B) of this rule.
- (D) Notwithstanding paragraph (A) of this rule, there shall be a legal presumption in favor of facts asserted by a party that can be disproved by evidence available to and under the control of an opposing party. In order to rebut this presumption, the party having control of such evidence shall show that the nonexistence of the presumed fact is more likely than the existence of such fact.

3745-47-16

Report and recommendation of hearing examiner.

- (A) Except as otherwise provided in this paragraph, not later than forty-five days after receipt of the stenographic record of an adjudication hearing, and upon due consideration of the record, the hearing examiner shall file a report and recommendation and shall submit a copy of that report and recommendation to the director. In cases where the hearing examiner has established a post-hearing briefing schedule, the report and recommendation shall be filed and submitted not later than forty-five days after the completion of briefing. The report shall include findings of fact and conclusions of law, and the recommendation shall include the recommendations regarding the action to be taken by the director.
- (B) A copy of the report and recommendation shall be mailed to all parties or their attorneys, and to the persons entitled to receive documents pursuant to rule 3745-47-05 of the Administrative Code. Copies shall be mailed by certified mail or another type of mail accompanied by receipt not later than five days after the submission of the report and recommendation to the director.
- (C) Any person to whom a copy of the report and recommendation shall be provided pursuant to paragraph (B) of this rule may file a written statement of objections to the report and recommendation not later than ten days after receipt of the copy. The written statement of objections should be filed with the hearing examiner in accordance with rule 3745-47-05 of the Administrative Code. All written statements of objections filed pursuant to this paragraph shall be considered by the director before issuance of a final action. Upon the director's own motion, or upon motion of any person entitled to file an objection, the director may grant extensions of the ten-day period. A request for an extension of time to file a written statement of objection should be filed with the hearing examiner in accordance with rule 3745-47-05 of the Administrative Code. All objections shall state each legal and each factual basis for the objection. Where matters of fact form a basis for the objection, a citation to the record shall be included. Persons filing objections shall serve their objections upon all other persons entitled to file objections. Answers to objections may not be filed.
- (D) After the hearing examiner's report and recommendation has been filed, the director, upon the director's own motion or upon motion of a party, may permit the parties to file further documentary evidence, ~~and after granting the opposing party the opportunity to prepare, may take additional testimony or~~ in accordance with the rule 3745-47-05 of the Administrative Code. The director may remand the matter to the hearing examiner for the taking of additional testimony. In deciding whether to permit the taking of additional testimony, the director shall give consideration to harm to the public welfare or the environment that may result from delay in the adjudication proceeding.
- (E) Not earlier than expiration of the time for submission of objections under paragraph

(C) of this rule, the director shall approve, modify, or disapprove the hearing examiner's report and recommendation as a final action.

(F) When the final action modifies or disapproves the hearing examiner's report and recommendation, the final action shall include findings of fact and conclusions of law with the reasons for such modification or disapproval.

(G) The decision of the director shall be entered in the director's journal and in the record of the adjudication proceeding.

3745-47-17

Record.

(A) After the initiation of an adjudication proceeding, a record of the adjudication proceeding shall be maintained at the expense of the agency. Such record shall include the following pertaining to the adjudication proceeding:

(1) The adjudication file [maintained pursuant to rule 3745-47-05 of the Administrative Code.](#)

(2) Any stenographic record [as defined in paragraph \(S\) of rule 3745-47-02 of the Administrative Code.](#)

~~(3) Offers of proof.~~

~~(4) Stipulations.~~

~~(5) Written motions.~~

~~(6) Exhibits.~~

~~(7) Requests.~~

~~(8) Objections.~~

~~(9) Answers.~~

~~(10) Comments submitted on the proposed action.~~

~~(11) Written statements.~~

~~(12) Correspondence.~~

~~(13) Briefs.~~

~~(14) A copy of the proposed action.~~

~~(15)~~(3) Copies of public notices.

~~(16)~~(4) The fact sheet, where the agency is required to prepare one.

~~(17) The report and recommendation of the hearing examiner.~~

~~(18)~~(5) The record of a public meeting.

~~(19)~~(6) Any comments submitted pursuant to paragraph (D) of rule 3745-49-05 of

the Administrative Code.

~~(20)~~(7) The report of the presiding officer if a public meeting was held, and written orders or rulings of the hearing examiner.

(8) Any written statement of objection to the report and recommendation of the hearing examiner pursuant to paragraph (C) of rule 3745-47-16 of the Administrative Code.

(9) Any request for an extension of time to submit written statements of objection to the report and recommendation of the hearing examiner pursuant to paragraph (C) of rule 3745-47-16 of the Administrative Code.

~~(21)~~(10) Any further documentary evidence and additional testimony, if any, permitted by the director, pursuant to paragraph (D) of rule 3745-47-16 of the Administrative Code, after the filing of the hearing examiner's report and recommendation.

(B) The record shall be the exclusive basis for the decision by the director in an adjudication proceeding.

(C) The director's decision pertaining to the adjudication proceeding shall be added to the ~~record~~adjudication file.

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** TO BE RESCINDED **

3745-47-18

Final action.

- (A) Not earlier than expiration of the time for submission of objections under paragraph (C) of rule 3745-47-16 of the Administrative Code, nor later than sixty days thereafter, the director shall approve, modify, or disapprove the hearing examiner's report and recommendation as a final action.
- (B) When the final action modifies or disapproves the hearing examiner's report and recommendation, the final action shall include findings of fact and conclusions of law with the reasons for such modification or disapproval.
- (C) The decision of the director shall be entered in the director's journal and in the record of the adjudication proceeding.

3745-47-19

Emergency orders.

- (A) When the director has determined that an emergency exists and has ordered that such action be taken as is necessary to meet the emergency pursuant to division (B) of section 3714.12, division (B) of section 3734.13, division (B) of section 6109.05, or division (C) of section 6111.06 of the Revised Code, any person to whom such order is directed may request an adjudication hearing. Notwithstanding a request for an adjudication hearing, emergency orders shall be effective immediately. Immediately upon receipt of such request, the ~~director shall appoint a~~ hearing examiner ~~who~~ shall convene an adjudication hearing within ~~forty-eight hours~~ the applicable time period specified in division (B) of section 3714.12, division (B) of section 3734.13, division (B) of section 6109.05, or division (C) of section 6111.06 of the Revised Code to consider the issues raised by the adjudication hearing request. ~~To obtain necessary evidence, the hearing examiner may continue the adjudication hearing, but shall reconvene the adjudication hearing as soon as possible and not later than twenty days after the adjudication hearing request unless the subject of the adjudication hearing becomes moot.~~ The director shall give priority to consideration of the hearing examiner's report and recommendation and shall not await written objections of the parties before issuing a decision. To the extent that other rules of this chapter conflict with this rule or would cause delay in an emergency adjudication hearing, the other rules shall not be applicable to adjudication proceedings under this rule.
- (B) Proceedings pursuant to the declaration of an air pollution emergency under section 3704.032 of the Revised Code shall not be subject to this chapter.

3745-47-20

Rules of ethics.

(A) Ex parte communications.

- (1) No party to an adjudication proceeding shall engage in or encourage other persons to engage in ex parte communications with the hearing examiner about any matter that is the subject of the adjudication proceeding. The hearing examiner shall not entertain such communications.
- (2) No persons identified in paragraphs (P)(1)(b) to (P)(1)(e) of rule 3745-47-02 of the Administrative Code shall engage in or encourage other persons to engage in ex parte communications with the director, the assistant director, or the deputy directors about any matter that is the subject of the adjudication proceeding. The director, the assistant director, and the deputy directors shall not entertain such communications [during the pendency of the adjudication process](#).
- (3) The director, the assistant director, the deputy directors, and the hearing examiner may participate in conferences or any other discussions in which all the parties have a right to participate.

(B) All communications prohibited by paragraph (A) of this rule shall be reported immediately to the hearing examiner, who shall place the communication or a memorandum describing the communication in public files associated with the case, but separate from the record material upon which the agency will rely in reaching a decision. The hearing examiner shall take such additional action as the hearing examiner deems advisable.

(C) A hearing examiner shall be disqualified upon the hearing examiner filing an affidavit stating the reason for disqualification. A hearing examiner shall file a disqualification affidavit for either of the following reasons:

- (1) If for any reason the hearing examiner may not be able to preside in a fair and impartial manner and render an impartial report and recommendation to the director.
- (2) If the hearing examiner receives, or has during the previous two years received, ten per cent or more of the hearing examiner's gross personal income for a calendar year from a party or any subsidiary or owner thereof. For purposes of this paragraph, "party or any subsidiary or owner thereof" does not include the state. The hearing examiner's gross personal income includes retirement benefits, consultant fees, and stock dividends, but does not include income from diversified investments where the hearing examiner does not know the identity of the primary sources of income.

- (D) Hearing examiners shall behave in the manner prescribed for judges generally in the "Ohio Code of Judicial Conduct" ~~(2010)~~.

- (E) It shall not be deemed a violation of this rule if the director, in the performance of duties and functions other than decision-making in an adjudication proceeding, gathers information or expresses opinions on matters of fact or law that are the subject of any adjudication proceeding.