

RULES OF PRACTICE FOR VARIANCES-EXEMPTIONS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

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Title 29—LABOR

Chapter XVII—Occupational Safety and Health Administration, Depart- ment of Labor

PART 1905—RULES OF PRACTICE FOR VARIANCES, LIMITATIONS, VARI- ATIONS, TOLERANCES, AND EXEMP- TIONS UNDER THE WILLIAMS- STEIGER OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Implementation of Williams-Steiger Occupational Safety and Health Act of 1970

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AUTHORITY: The provisions of this Part 1905 issued under secs. 6, 8, 16, 84 Stat. 1593, 1598, 1606; 29 U.S.C. 655, 657, 665.

Subpart A—General

§ 1905.1 Purpose and scope.

(a) This part contains rules of practice for administrative proceedings (1) to grant variances and other relief under sections 6(b)(6)(A) and 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970, and (2) to provide limitations, variations, tolerances, and exemptions under section 16 of the Act.

(b) These rules shall be construed to secure a prompt and just conclusion of proceedings subject thereto.

(c) The rules of practice in this part do not apply to the granting of variances under section 6(b)(6)(C). Whenever appropriate, the procedure for granting such a variance shall be published in the FEDERAL REGISTER.

§ 1905.2 Definitions.

As used in this part, unless the context clearly requires otherwise—

(a) "Act" means the Williams-Steiger Occupational Safety and Health Act of 1970.

(b) "Secretary" means the Secretary of Labor.

(c) "Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health.

(d) "Person" means an individual, partnership, association, corporation, business trust, legal representative, an organized group of individuals, or an agency, authority, or instrumentality of the United States or of a State.

(e) "Party" means a person admitted to participate in a hearing conducted in accordance with Subpart C of this part. An applicant for relief and any affected employee shall be entitled to be named parties. The Department of Labor, represented by the Office of the Solicitor, shall be deemed to be a party without the necessity of being named.

(f) "Affected employee" means an employee who would be affected by the grant or denial of a variance, limitation, variation, tolerance, or exemption, or any one of his authorized representatives, such as his collective bargaining agent.

§ 1905.3 Petitions for amendments to this part.

Any person may at any time petition

the Assistant Secretary in writing to revise, amend, or revoke any provisions of this part. The petition should set forth either the terms or the substance of the rule desired, with a concise statement of the reasons therefor and the effects thereof.

§ 1905.4 Amendments to this part.

The Assistant Secretary may at any time revise, amend, or revoke any provisions of this part, on his own motion or upon the written petition of any person.

§ 1905.5 Effect of variances.

All variances granted pursuant to this part shall have only future effect. In his discretion, the Assistant Secretary may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employer involved and a proceeding on the citation or a related issue concerning a proposed penalty or period of abatement is pending before the Occupational Safety and Health Review Commission until the completion of such proceeding.

§ 1905.6 Public notice of a granted variance, limitation, variation, tolerance, or exemption.

Every final action granting a variance, limitation, variation, tolerance, or exemption under this part shall be published in the FEDERAL REGISTER. Every such final action shall specify the alternative to the standard involved which the particular variance permits.

§ 1905.7 Form of documents; subscription; copies.

(a) No particular form is prescribed for applications and other papers which may be filed in proceedings under this part. However, any applications and other papers shall be clearly legible. An original and six copies of any application or other papers shall be filed. The original shall be typewritten. Clear carbon copies, or printed or processed copies are acceptable copies.

(b) Each application or other paper which is filed in proceedings under this part shall be subscribed by the person filing the same or by his attorney or other authorized representative.

Subpart B—Applications for Variances, Limitations, Variations, Tolerances, Exemptions and Other Relief

§ 1905.10 Variances and other relief under section 6(b)(6)(A).

(a) *Application for variance.* Any employer, or class of employers, desiring a variance from a standard, or portion thereof, authorized by section 6(b)(6) (A) of the Act may file a written application containing the information specified in paragraph (b) of this section with the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

(1) The name and address of the applicant;

(2) The address of the place or places of employment involved;

(3) A specification of the standard or portion thereof from which the applicant seeks a variance;

(4) A representation by the applicant, supported by representations from qualified persons having first-hand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof by its effective date and a detailed statement of the reasons therefor;

(5) A statement of the steps the applicant has taken and will take, with specific dates where appropriate, to protect employees against the hazard covered by the standard;

(6) A statement of when the applicant expects to be able to comply with the standard and of what steps he has taken and will take, with specific dates where appropriate, to come into compliance with the standard;

(7) A statement of the facts the applicant would show to establish that (i) the applicant is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date; (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard; and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable;

(8) Any request for a hearing, as provided in this part;

(9) A statement that the applicant has informed his affected employees of the application by giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted, and by other appropriate means; and

(10) A description of how affected employees have been informed of the application and of their right to petition the Assistant Secretary for a hearing.

(c) *Interim order.*—(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and

arguments as to why the order should be granted. The Assistant Secretary may rule ex parte upon the application.

(2) *Notice of denial of application.* If an application filed pursuant to subparagraph (1) of this paragraph is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties and the terms of the order shall be published in the FEDERAL REGISTER. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

§ 1905.11 Variances and other relief under section 6(d).

(a) *Application for variance.* Any employer, or class of employers, desiring a variance authorized by section 6(d) of the Act may file a written application containing the information specified in paragraph (b) of this section, with the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

(1) The name and address of the applicant;

(2) The address of the place or places of employment involved;

(3) A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the applicant;

(4) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought;

(5) A certification that the applicant has informed his employees of the application by (i) giving a copy thereof to their authorized representative; (ii) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and (iii) by other appropriate means;

(6) Any request for a hearing, as provided in this part; and

(7) A description of how employees have been informed of the application and of their right to petition the Assistant Secretary for a hearing.

(c) *Interim order.*—(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The Assistant Secretary may rule ex parte upon the application.

(2) *Notice of denial of application.* If an application filed pursuant to subparagraph (1) of this paragraph is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be published in the FEDERAL REGISTER. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

§ 1905.12 Limitations, variations, tolerances, or exemptions.

(a) *Application.* Any person, or class of persons, desiring a limitation, variation, tolerance, or exemption authorized by section 16 of the Act may file an application containing the information specified in paragraph (b) of this section, with the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

(1) The name and address of the applicant;

(2) The address of the place or places of employment involved;

(3) A specification of the provision of the Act to or from which the applicant seeks a limitation, variation, tolerance, or exemption.

(4) A representation showing that the limitation, variation, tolerance, or exemption sought is necessary and proper to avoid serious impairment of the national defense;

(5) Any request for a hearing, as provided in this part; and

(6) A description of how employees have been informed of the application and of their right to petition the Assistant Secretary for a hearing.

(c) *Interim order.*—(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the limitation, variation, tolerance, or exemption filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The Assistant Secretary may rule ex parte upon the application.

(2) *Notice of denial of application.* If an application filed pursuant to subparagraph (1) of this paragraph is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be published in the FEDERAL REGISTER. It shall be a condition of the order that

the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

§ 1905.13 Modification, revocation, and renewal of rules or orders.

(a) *Modification or revocation.* (1) An affected employer or an affected employee may apply in writing to the Assistant Secretary of Labor for Occupational Safety and Health for a modification or revocation of a rule or order issued under section 6(b) (6) (A), 6(d), or 16 of the Act. The application shall contain:

- (i) The name and address of the applicant;
- (ii) A description of the relief which is sought;
- (iii) A statement setting forth with particularity the grounds for relief;
- (iv) If the applicant is an employer, a certification that the applicant has informed his affected employees of the application by:

(a) Giving a copy thereof to their authorized representative;

(b) Posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and

(c) Other appropriate means.

(v) If the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer; and

(vi) Any request for a hearing, as provided in this part.

(2) The Assistant Secretary may on his own motion proceed to modify or revoke a rule or order issued under section 6(b) (6) (A), 6(d), or 16 of the Act. In such event, the Assistant Secretary shall cause to be published in the FEDERAL REGISTER a notice of his intention, affording interested persons an opportunity to submit written data, views, or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and shall take such other action as may be appropriate to give actual notice to affected employees. Any request for a hearing shall include a short and plain statement of:

(i) How the proposed modification or revocation would affect the requesting party; and

(ii) What the requesting party would seek to show on the subjects or issues involved.

(b) *Renewal.* Any final rule or order issued under section 6(b) (6) (A) or 16 of the Act may be renewed or extended as permitted by the applicable section and in the manner prescribed for its issuance.

§ 1905.14 Action on applications.

(a) *Defective applications.* (1) If an application, filed pursuant to § 1905.10(a), § 1905.11(a), § 1905.12(a), or § 1905.13 does not conform to the applicable section, the Assistant Secretary may deny the application.

(2) Prompt notice of the denial of an

application shall be given to the applicant.

(3) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.

(4) A denial of an application pursuant to this paragraph shall be without prejudice to the filing of another application.

(b) *Adequate applications.* (1) If an application has not been denied pursuant to paragraph (a) of this section, the Assistant Secretary shall cause to be published in the FEDERAL REGISTER a notice of the filing of the application.

(2) A notice of the filing of an application shall include: (i) the terms, or an accurate summary, of the application; (ii) a reference to the section of the Act under which the application has been filed; (iii) an invitation to interested persons to submit within a stated period of time written data, views, or arguments regarding the application; and (iv) information to affected employers and employees of any right to request a hearing on the application.

§ 1905.15 Requests for hearings on applications.

(a) *Request for hearing.* Within the time allowed by a notice of the filing of an application, any affected employer or employee may file with the Assistant Secretary, in quadruplicate, a request for a hearing on the application.

(b) *Contents of a request for a hearing.* A request for a hearing filed pursuant to paragraph (a) of this section shall include:

(1) A concise statement of facts showing how the employer or employee would be affected by the relief applied for;

(2) A specification of any statement or representation in the application which is denied, and a concise summary of the evidence that would be adduced in support of each denial; and

(3) Any views or arguments on any issue of fact or law presented.

§ 1905.16 Consolidation of proceedings.

The Assistant Secretary on his own motion or that of any party may consolidate or contemporaneously consider two or more proceedings which involve the same or closely related issues.

Subpart C—Hearings

§ 1905.20 Notice of hearing.

(a) *Service.* Upon request for a hearing as provided in this part, or upon his own initiative, the Assistant Secretary shall serve, or cause to be served, a reasonable notice of hearing.

(b) *Contents.* A notice of hearing served under paragraph (a) of this section shall include:

(1) The time, place, and nature of the hearing;

(2) The legal authority under which the hearing is to be held;

(3) A specification of issues of fact and law; and

(4) A designation of a hearing examiner appointed under 5 U.S.C. 3105 to preside over the hearing.

(c) *Referral to hearing examiner.* A

copy of a notice of hearing served pursuant to paragraph (a) of this section shall be referred to the hearing examiner designated therein, together with the original application and any written request for a hearing thereon filed pursuant to this part.

§ 1905.21 Manner of service.

Service of any document upon any party may be made by personal delivery of, or by mailing, a copy of the document to the last known address of the party. The person serving the document shall certify to the manner and the date of the service.

§ 1905.22 Hearing examiners; powers and duties.

(a) *Powers.* A hearing examiner designated to preside over a hearing shall have all powers necessary or appropriate to conduct a fair, full, and impartial hearing, including the following:

(1) To administer oaths and affirmations;

(2) To rule upon offers of proof and receive relevant evidence;

(3) To provide for discovery and to determine its scope;

(4) To regulate the course of the hearing and the conduct of the parties and their counsel therein;

(5) To consider and rule upon procedural requests;

(6) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) To make, or to cause to be made, an inspection of the employment or place of employment involved;

(8) To make decisions in accordance with the Act, this part, and the Administrative Procedure Act (5 U.S.C. Ch. 5); and

(9) To take any other appropriate action authorized by the Act, this part, or the Administrative Procedure Act.

(b) *Private consultation.* Except to the extent required for the disposition of ex parte matters, a hearing examiner may not consult a person or a party on any fact at issue, unless upon notice and opportunity for all parties to participate.

(c) *Disqualification.* (1) When a hearing examiner deems himself disqualified to preside over a particular hearing, he shall withdraw therefrom by notice on the record directed to the Chief Hearing Examiner.

(2) Any party who deems a hearing examiner for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file with the Chief Hearing Examiner of the Department of Labor a motion to disqualify and remove the hearing examiner, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. The Chief Hearing Examiner shall rule upon the motion.

(d) *Contumacious conduct; failure or refusal to appear or obey the rulings of a presiding hearing examiner.* (1) Contumacious conduct at any hearing before the hearing examiner shall be ground for exclusion from the hearing.

(2) If a witness or a party refuses to answer a question after being directed to do so, or refuses to obey an order to

provide or permit discovery, the hearing examiner may make such orders with regard to the refusal as are just and appropriate, including an order denying the application of an applicant or regulating the contents of the record of the hearing.

(e) *Referral to Federal Rules of Civil Procedure.* On any procedural question not regulated by this part, the Act, or the Administrative Procedure Act, a hearing examiner shall be guided to the extent practicable by any pertinent provisions of the Federal Rules of Civil Procedure.

§ 1905.23 Prehearing conferences.

(a) *Convening a conference.* Upon his own motion or the motion of a party, the hearing examiner may direct the parties or their counsel to meet with him for a conference to consider:

- (1) Simplification of the issues;
- (2) Necessity or desirability of amendments to documents for purposes of clarification, simplification, or limitation;
- (3) Stipulations, admissions of fact, and of contents and authenticity of documents;
- (4) Limitation of the number of parties and of expert witnesses; and
- (5) Such other matters as may tend to expedite the disposition of the proceeding, and to assure a just conclusion thereof.

(b) *Record of conference.* The hearing examiner shall make an order which recites the action taken at the conference, the amendments allowed to any documents which have been filed, and the agreements made between the parties as to any of the matters considered and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order when entered controls the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

§ 1905.24 Consent findings and rules or orders.

(a) *General.* At any time before the reception of evidence in any hearing, or during any hearing a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be in the discretion of the presiding hearing examiner, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement which will result in a just disposition of the issues involved.

(b) *Contents.* Any agreement containing consent findings and rule or order disposing of a proceeding shall also provide:

- (1) That the rule or order shall have the same force and effect as if made after a full hearing;
- (2) That the entire record on which any rule or order may be based shall consist solely of the application and the agreement;

(3) A waiver of any further procedural steps before the hearing examiner and the Assistant Secretary; and

(4) A waiver of any right to challenge or contest the validity of the findings and of the rule or order made in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the presiding hearing examiner for his consideration; or

(2) Inform the presiding hearing examiner that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and rule or order is submitted within the time allowed therefor, the presiding hearing examiner may accept such agreement by issuing his decision based upon the agreed findings.

§ 1905.25 Discovery.

(a) *Depositions.* (1) For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition. Depositions may be taken orally or upon written interrogatories before any person designated by the presiding hearing examiner and having power to administer oaths.

(2) *Application.* Any party desiring to take the deposition of a witness may make application in writing to the presiding hearing examiner, setting forth: (i) the reasons why such deposition should be taken, (ii) the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; (iii) the name and address of each witness; and (iv) the subject matter concerning which each witness is expected to testify.

(3) *Notice.* Such notice as the presiding hearing examiner may order shall be given by the party taking the deposition to every other party.

(4) *Taking and receiving in evidence.* Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to the witness, subscribed by him, and certified by the officer before whom the deposition is taken. Thereafter, the officer shall seal the deposition, with two copies thereof, in an envelope and mail the same by registered mail to the presiding hearing examiner. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present, represented at the taking of the deposition, or who had due notice thereof. No part of a deposition shall be admitted in evidence unless there is a showing that the reasons for the taking of the deposition in the first instance exist at the time of hearing.

(b) *Other discovery.* Whenever appropriate to a just disposition of any issue in

a hearing, the presiding hearing examiner may allow discovery by any other appropriate procedure, such as by written interrogatories upon a party, production of documents by a party, or by entry for inspection of the employment or place of employment involved.

§ 1905.26 Hearings.

(a) *Order of proceeding.* Except as may be ordered otherwise by the presiding hearing examiner, the party applicant for relief shall proceed first at a hearing.

(b) *Burden of proof.* The party applicant shall have the burden of proof.

(c) *Evidence.*—(1) *Admissibility.* A party shall be entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any oral or documentary evidence may be received, but a presiding hearing examiner shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(2) *Testimony of witnesses.* The testimony of a witness shall be upon oath or affirmation administered by the presiding hearing examiner.

(3) *Objections.* If a party objects to the admission or rejection of any evidence, or to the limitation of the scope of any examination or cross-examination, or to the failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the presiding hearing examiner may be relied upon subsequently in a proceeding.

(4) *Exceptions.* Formal exception to an adverse ruling is not required.

(d) *Official notice.* Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the Department of Labor by reason of its functions is presumed to be expert: *Provided*, That the parties shall be given adequate notice, at the hearing or by reference in the presiding hearing examiner's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

(e) *Transcript.* Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

§ 1905.27 Decisions of hearing examiners.

(a) *Proposed findings of fact, conclusions, and rules or orders.* Within 10 days after receipt of notice that the transcript of the testimony has been filed or such additional time as the presiding hearing examiner may allow, each party may file with the hearing examiner proposed findings of fact, conclusions of law, and rule or order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all other parties, and shall refer to all portions of the record

and to all authorities relied upon in support of each proposal.

(b) *Decision of the hearing examiner.* Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and rule or order, the presiding hearing examiner shall make and serve upon each party his decision, which shall become final upon the 20th day after service thereof, unless exceptions are filed thereto, as provided in § 1905.28. The decision of the hearing examiner shall include (1) a statement of findings and conclusions, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, relief, or denial thereof. The decision of the hearing examiner shall be based upon a consideration of the whole record and shall state all facts officially noticed and relied upon. It shall be made on the basis of a preponderance of reliable and probative evidence.

§ 1905.28 Exceptions.

Within 20 days after service of a decision of a presiding hearing examiner, any party may file with the hearing examiner written exceptions thereto with supporting reasons. Such exceptions shall refer to the specific findings of fact, conclusions of law, or terms of the rule or order excepted to, the specific pages of transcript relevant to the suggestions, and shall suggest corrected findings of fact, conclusions of law, or terms of the rule or order. Upon receipt of any exceptions, the hearing examiner shall fix a time for filing any objections to the exceptions and any supporting reasons.

§ 1905.29 Transmission of record.

If exceptions are filed, the hearing examiner shall transmit the record of the proceeding to the Assistant Secretary for review. The record shall include: the application, any request for hearing thereon, motions and requests filed in written form, rulings thereon, the transcript of the testimony taken at the hearing, together with the exhibits admitted in evidence, any documents or papers filed in connection with prehearing conferences, such proposed findings of fact, conclusions of law, rules or orders, and supporting reasons, as may have been filed, the hearing examiner's decision, and such exceptions, statements of objections, and briefs in support thereof, as may have been filed in the proceeding.

§ 1905.30 Decision of the Assistant Secretary.

If exceptions to a decision of a hearing examiner are taken pursuant to § 1905.28, the Assistant Secretary shall upon consideration thereof, together with the record references and authorities cited in support thereof, and any objections to exceptions and supporting reasons, make his decision. The decision

may affirm, modify, or set aside, in whole or part, the findings, conclusions, and the rule or order contained in the decision of the presiding hearing examiner, and shall include a statement of reasons or bases for the actions taken on each exception presented.

Subpart D—Summary Decisions

§ 1905.40 Motion for summary decision.

(a) Any party may, at least 20 days before the date fixed for any hearing under Subpart C of this part, move with or without supporting affidavits for a summary decision in his favor on all or any part of the proceeding. Any other party may, within 10 days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding hearing examiner may, in his discretion, set the matter for argument and call for the submission of briefs.

(b) The filing of any documents under paragraph (a) of this section shall be with the hearing examiner, and copies of any such documents shall be served in accordance with § 1905.21.

(c) The hearing examiner may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise obtained, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The hearing examiner may deny such motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

(d) Affidavits shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(e) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(f) The denial of all or any part of a motion for summary decision by the hearing examiner shall not be subject to interlocutory appeal to the Assistant Secretary unless the hearing examiner certifies in writing (1) that the ruling involves an important question of law or

policy as to which there is substantial ground for difference of opinion, and (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the proceeding. The allowance of such an interlocutory appeal shall not stay the proceeding before the hearing examiner unless the Assistant Secretary shall so order.

§ 1905.41 Summary decision.

(a) *No genuine issue of material fact.*

(1) Where no genuine issue of a material fact is found to have been raised, the hearing examiner may issue an initial decision to become final 20 days after service thereof, unless, within such period of time any party has filed written exceptions to the decision. If any timely exception is filed, the hearing examiner shall fix a time for filing any objections to the exception and any supporting reasons. Thereafter, the Assistant Secretary, after consideration of the exceptions and any supporting briefs filed therewith and of any objections to the exceptions and any supporting reasons, may issue a final decision.

(2) An initial decision and a final decision made under this paragraph shall include a statement of—

(i) findings and conclusions, and the reasons or bases therefor, on all issues presented; and

(ii) the terms and conditions of the rule or order made.

(3) A copy of an initial decision and a final decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine material question of fact is raised, the hearing examiner shall, and in any other case he may, set the case for an evidentiary hearing in accordance with Subpart C of this part.

Subpart E—Effect of Initial Decisions

§ 1905.50 Effect of appeal of a hearing examiner's decision.

A hearing examiner's decision under this part shall not be operative pending a decision on appeal by the Assistant Secretary.

§ 1905.51 Finality for purposes of judicial review.

Only a decision by the Assistant Secretary shall be deemed final agency action for purposes of judicial review. A decision by a hearing examiner which becomes final for lack of appeal is not deemed final agency action for purposes of 5 U.S.C. 704.

Signed at Washington, D.C., this 22d day of June 1971.

J. D. HODGSON,
Secretary of Labor.

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