

TITLE 38
PROCEDURAL RULES
DEPARTMENT OF ENERGY
SERIES 1
PROCEDURES AND PRACTICE BEFORE THE
DEPARTMENT OF ENERGY

§38-1-1. General.

1.1. Scope, Construction, and Applicability.

a. The procedures and rules of practice set forth herein shall govern and apply to proceedings before Presiding Officers, the Commissioner of the Department of Energy or the Department generally including proceedings to assess monetary civil penalties pursuant to Section 19, Article 1A, Chapter 22A of the Code, proceedings to review orders and notices pursuant to Section 16, Article 1A, Chapter 22A of the Code and proceedings initiated upon a petition for declaratory ruling pursuant to Section 1, Article 4, Chapter 29A of the Code.

b. In any proceedings initiated prior to the effective date of these rules, the provisions hereof shall govern and apply to all activities in such proceedings conducted after the effective date of these rules. Except when ordered by the Presiding Officer, no reissuance of any pleading, documents or requests shall be required in such a proceeding.

c. These rules shall be liberally construed to secure the just, prompt and inexpensive conduct and determination of all proceedings before the Department of Energy consistent with adequate consideration of the issues involved.

d. On any procedural question not regulated by the rules, the pertinent provisions of the Administrative Procedure Act shall apply. On any matter not regulated by these rules and for which there is no pertinent provision in the Administrative Procedure Act, the provisions of the West Virginia Rules of Civil Procedure or the rules of evidence and privilege applicable in the courts of general jurisdiction of this State, as appropriate, shall apply.

1.2. Authority. -- W. Va. Code §22A-3-3-1, §29A-1-4, §29A

1.3. Filing Date. -- December 30, 1982

1.4. Effective Date. -- January 30, 1983

1.5. Definitions. As used in these rules:

a. All terms used in these rules, not defined herein, shall have the meanings set forth in Section 1, Article 1A, Chapter 22A of the Code.

b. Assessment officer: The term "Assessment Officer" shall mean any person or persons designated and appointed by the Commissioner to carry out the duties of the Assessment Officer outlined in Part 2 of these rules.

c. Assessment review officer: The term "Assessment Review Officer" shall mean any person or persons designated and appointed by the Commissioner to carry out the duties of the Assessment Review Officer outlined in Part 2 of these rules.

d. Code: The term "Code" when following a reference to a specific section, article, and chapter, shall mean the West Virginia Code of 1931, as amended.

e. Declaratory ruling: The term "Declaratory Ruling" means a decision and order issued by the Commissioner of the Department of Energy as a ruling pursuant to Section 1, Article 4, Chapter 29A of the Code.

f. Mine: The term "Mine" shall mean any mine as defined in Section 1, Article 1A, Chapter 22A of the Code, and any surface mine as that term is defined in Section 3, Article 3, Chapter 22A of the Code.

g. Notice of violation: The term "Notice of Violation" shall mean a notice issued pursuant to the provisions of Section 13, Article 1A, Chapter 22A of the Code.

h. Notice of assessment: The term "Notice of Assessment" shall mean a notice issued for the assessment of a civil penalty pursuant to the provisions of Section 19, Article 1A, Chapter 22A of the Code, and described in Section 2.4, Part 2 of these rules.

i. Presiding officer: The term "Presiding Officer" shall mean the Commissioner or any person authorized by the Commissioner to conduct hearings required or authorized under the coal mine health and safety laws of this State.

j. Representative of miners: The term "Representative of Miners" shall mean a person or organization designated by a group of miners to act as their representative before the Department.

k. Withdrawal order: The term "Withdrawal Order" means an order issued pursuant to Section 13, Article 1A, Chapter 22A of the Code.

1.6. Parties.

a. In proceedings to assess monetary civil penalties against any operator of a coal mine under Section 19(a), Article 1A, Chapter 22A of the Code; and when the amount of the assessment only is in dispute, the parties shall be:

1. the operator against whom a penalty is proposed, and
2. the Department of Energy.

b. In proceedings to assess monetary civil penalties against any miner under Section 19(a), Article 1A, Chapter 22A of the Code, the parties shall be:

1. the miner charged with a violation and against whom a penalty is proposed, and,
2. the Department of Energy.

c. In proceedings to assess monetary civil penalties against any operator of a coal mine under Section 19(b), Article 1A, Chapter 22A of the Code; and where the amount of the assessment only is in dispute, the parties shall be:

1. the operator against whom a penalty is proposed, and
2. the Department of Energy.

d. In proceedings to assess monetary civil penalties under Section 19(c), Article 1A, Chapter 22A of the Code, the parties shall be:

1. the corporate operator, director, officer, agent or other person or persons charged with a violation and against whom a penalty is proposed, and,
2. the Department of Energy.

e. In proceedings to review an order or notice under Section 15, Article 1A, Chapter 22A of the Code or in a proceeding to assess monetary civil penalties against any operator of a coal mine under Section 19(a), (b), and (c), Article 1A, Chapter 22A of the Code, where the operator is disputing the notice or order alleging a violation, the parties shall be:

1. the representatives of the miners at the mine affected by the notice of order, and
2. the operator of the affected mine, and
3. the Department of Energy.

f. In proceedings initiated by a petition for declaratory ruling pursuant to Section 1, Article 4, Chapter 29A of the Code, the parties shall be:

1. the person requesting a declaratory ruling;
2. the Department of Energy, and
3. any interested person of record allowed to intervene under Section 1.7 of these rules or any other person so allowed to intervene.

1.7. Intervention.

a. Any person claiming a right of participation in a proceeding on the basis that the person has an interest in the outcome of the proceedings or any person otherwise seeking to intervene in a proceeding may become a party to a proceeding upon the Presiding Officer's granting of such person's petition to intervene.

b. A petition seeking intervention must be written, setting forth the interest of the petitioner in the proceedings, containing a showing that petitioner's participation will assist in the determination of the issues in question, and such petition must be served,

contemporaneously with the filing, on the Commissioner who shall serve such petition on all other parties to the proceeding.

c. Any party may file objections to a petition for intervention within fifteen (15) days after service of the petition on the party.

d. A petition for leave to intervene may be filed at any stage of a proceeding before the commencement of a hearing. After the commencement of a hearing, a petition for leave to intervene may be filed only with the waiver by all parties or upon a showing by the petitioner of good cause for the delay in seeking intervention.

e. The Presiding Officer may grant or deny petitions for intervention or may permit intervention limited to a particular stat of the proceeding.

1.8. Form of documents.

a. Caption. The documents filed in any proceeding conducted under these rules shall be captioned in the name of the person or persons charged with a violation or seeking relief from the Department and may contain or include other information appropriate for the identification of the proceeding, including any docket number assigned to the case.

b. Title. After the caption, each such document shall contain a title which shall be descriptive of the document and which shall identify the party by whom the document is submitted.

c. Signature. The original of each document filed shall be signed at the end by the party submitting the document, or, if the party is represented by an attorney, by such attorney. The address and telephone number of the party or the attorney shall appear beneath the signature.

1.9. Filing and service of pleadings and other documents.

a. Where to file. All pleadings or documents in a proceeding described in these rules shall be filed with the Commissioner, Department of Energy, 1615 Washington Street, E., Charleston, West Virginia 25311.

b. Number of copies. Except as otherwise provided in these rules, a party shall furnish an origin

and two (2) copies of all pleadings and other documents required or permitted to be filed.

c. How to file. All filing may be accomplished by personal delivery or first class mail.

d. When filing effective. In the case of mailing by first class mail, filing is effective upon mailing. In the case of personal delivery, filing is effective upon delivery.

e. Copies to be served. Copies of all pleadings and other documents filed in any proceeding described in these rules and copies of all notices pertinent to such proceedings shall be served upon all other parties to the proceeding.

f. Method of service. Documents by which any proceeding is initiated shall be served on each other party personally or by registered or certified mail, return receipt requested. All subsequent documents may be served personally or by first class mail. Service by mail is complete upon mailing.

g. Service of attorney. Whenever a party is represented by an attorney who has signed any document filed on behalf of such party or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney.

h. Proof of service. Any person initiating a proceeding under these rules shall file proof of service in the form of (i) a certificate of service, or (ii) a return receipt where service is by certified mail, or (iii) an acknowledgement by the party served or (iv) a verified return where service is made personally. The certificate of service shall include a statement of how and when service was accomplished.

1.10. Amendments.

a. The strict formal requirements in pleadings are not required to be observed in documents, answers or any other papers filed with the Department and amendments or supplemental statements may be made and filed at any time prior to a scheduled hearing as long as the documents are filed and served as called for under these rules at least ten (10) days prior to the scheduled hearing date. If a party desires to file amended or supplemental statements less than ten (10) days before the scheduled hearing of the matter, the party or his representative shall make a written request to the Presiding Officer to file those amend-

ments along with the amendments. Said request will set forth with particularity the reason for the need to file such documents at the late date. The Presiding Officer will then allow or disallow the filing based solely on his discretion as justice might require.

b. A further and better statement of any cause or ground of complaint or defense, or a further and better statement of particulars of any matter stated, in any document, may in any case be ordered at the discretion of the Presiding Officer.

1.11. Motions.

a. Unless made during a hearing, all motions shall be in writing, contain a short and plain statement of the grounds on which it is based, and set forth the relief sought. Motions may be accompanied by appropriate supporting material or discussion of the reasons for granting the motion.

b. A statement in opposition to a motion may be filed by any party within ten (10) days after the date of service.

c. Any motion, including motions made during the hearing and except for motions relating to jurisdiction or directed verdict or for a motion for reconsideration of the final decision of the Commissioner, made less than ten (10) days before the commencement of an evidentiary hearing shall contain a showing of good cause for the motion not having been filed prior to the ten (10) day period.

d. Unless ordered by the Presiding Officer, oral argument on motions will not be heard.

1.12. Consolidation of proceedings. The Presiding Officer may at any time order a proceeding described in these rules consolidated with any other such proceeding then pending before the Department, if such a consolidation is, in the opinion of the Presiding Officer, a more efficient and expeditious manner of taking evidence, as long as all parties to the proceeding are afforded due process of law and fair opportunity to present and make a record of evidence.

1.13. Hearings. All hearings shall be conducted by a Presiding Officer in accordance with the provisions

of the provisions of these rules. All hearings shall be conducted by a Presiding Officer in accordance with the provisions of Section 3 of these rules, and all such hearings shall be open to the public.

c. Whenever any party has the right or is required to do some act or undertake some proceedings

a. Subject to reasonable regulation by the Commissioner, all departmental records relating to the assessment of monetary civil penalties or review proceedings under the coal mine health and safety laws of this State shall be open for public inspection.

b. The Commissioner shall, from time to time, publish a list of final orders entered by the Department. Such list shall include the person against whom a violation was charged and the amount of the penalty paid or assessed or the relief sought and granted, as appropriate.

c. The Commissioner shall make available to public inspection, all final orders, decisions and opinions in the adjudication of cases under the provisions of these rules.

d. Notwithstanding the above provisions, upon the motion of any party to a proceeding, the Commissioner may take appropriate action to protect as confidential, trade secrets or sensitive information about individuals. However, under no circumstances shall this section be deemed to protect as confidential, proposed orders of assessments, final orders and decisions, or the dates on which meetings and conferences were held and the procedures by which cases were disposed of.

1.15. Time.

a. In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday when the offices of the government of this State are closed, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday when the offices of the government of this State are closed.

b. When by these rules or by a notice given thereunder, an act is required or allowed to be done at or within a specified time, the Presiding Officer may extend such time for good cause at the expiration of the prescribed time or at the expiration of any earlier granted extension, upon the showing that the failure

a Presiding Officer in accordance with the provisions of Section 3 of these rules, and all such hearings shall be open to the public.

1.14. Public access to departmental

within a prescribed period after service of a notice or other document upon him and the notice or document is served upon the party by mail, three (3) days shall be added to the prescribed period.

1.16. Discovery.

a. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a pending proceeding. The party requesting discovery shall have the burden of showing the necessity and relevancy of any materials, answers or testimony desired. All requests for public records directed to the Department of Energy shall be in accordance with the provisions of Chapter 29B, Article 1, Section 1 et seq. of the Code of West Virginia, 1931, as amended.

b. Discovery shall be completed within sixty (60) days after commencement of a proceeding. For good cause shown, the Presiding Officer may permit the time for discovery to be extended.

c. Parties may obtain discovery of any relevant matter, not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

d. Upon application by a party or by the person from whom discovery is sought or upon its own motion, the Presiding Officer may, for good cause shown, make any order limiting discovery to prevent undue delay or to protect a party or person from annoyance, oppression, or undue burden or expense.

e. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories. If the parties are unable to agree thereto, the time, place, and manner of taking depositions shall be governed by the order of the Presiding Officer.

f. Any party may serve written interrogatories or requests for admission upon another party. A party served with written interrogatories or a request for admission shall answer such interrogatories or request within fifteen (15) days of service unless the proponent of the interrogatories or request agrees to a longer time, or unless the Presiding Officer by order specifies a different time or excuses the party from answering in good cause shown. Interrogatories shall be answered under oath. For good cause shown, the Presiding Officer may order a party to produce

and permit inspection, copying, or photographing of designated documents or objects.

1.17. Ex parte communications.

a. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Presiding Officer and any of the parties or intervenors, representatives, or other interested persons.

b. In the event an ex parte communication in violation of this section occurs, the Commissioner or the Presiding Officer may make such orders or take such action as fairness requires. Upon notice and hearing, the Commissioner or the Presiding Officer may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

c. All ex parte communications in violation of this section shall be placed on the public record of the proceedings.

d. Any inquiries concerning filing requirements, the status of cases before the Presiding Officer, or docket information shall be directed to the Hearings Clerk at West Virginia Department of Energy, 1615 Washington Street, E., Charleston, West Virginia 25311. Telephone (304) 348-3500.

§38-1-2. Rules Applicable to Proceedings Initiated to Assess Civil Penalties.

2.1. Scope.

a. The rules in this Section govern, and are applicable, to proceedings initiated by the Commissioner to assess civil penalties under Section 19, Article 1A, Chapter 22A of the Code. In addition to the rules contained in this Section, the general rules of practice before the Department contained in Section 1 and the rules relating to hearings held by the Department contained in Section 3 are also applicable to such proceedings.

2.2. Assessment officer.

a. Within thirty (30) days after the effective date of these regulations, the Commissioner shall designate and appoint the inspectors-at-large and their designees to act as Assessment Officer(s) for the Department of Energy. It shall be the duty of the Assess-

ment Officer to review withdrawal orders and notices of violation, and prepare Notices of Assessment.

2.3. Assessment review officer.

a. Within thirty (30) days after the effective date of these regulations, the Commissioner shall designate and appoint a person or persons to act as Assessment Review Officer(s) for the Department of Energy. It shall be the duty of the Assessment Review Officer, upon request for a pre-hearing conference by an operator or miner who has been notified of a proposed civil penalty assessment pursuant to Section 19, Article 1A, Chapter 22A of the Code, to review the civil assessments, accept statements and documents from the party requesting the conference, and hold the requested pre-hearing conference pursuant to Section 2.8 of these rules.

2.4. How initiated: notice of assessment.

a. Upon the completion of any inspection of a coal mine, it shall be the duty of each mine inspector, or representative of the Department of Energy making said inspection, to deliver to the Assessment Officer a copy of each finding, order, or notice issued during said inspection or prior inspections, which has been abated by the operator or individual charged in said finding, order, or notice with a violation, or if not abated by the operator or individual, then delivery of each finding, order or notice shall be made within a reasonable time after the time for abatement has expired.

b. Within thirty (30) days after receipt of a copy of a notice or order issued by a mine inspector or authorized representative of the Department of Energy during a mine inspection, the Assessment Officer shall prepare a Notice of Assessment and forward the same to an Assessment Review Officer for service upon the person or persons charged with the violation of the state coal mine health and safety law, in accordance with the provisions of Section 1 of these rules.

c. Each Notice of Assessment shall contain:

1. the name of the operator, miner or other person charged with a violation;

2. the name and address of the mine inspector or representative of the Department of Energy discovering or witnessing the alleged violation and reporting the same to the Commissioner;

3. the health or safety rule or regulation or law which the Assessment Officer believes has been violated;

4. the time, date, location, and circumstances of the alleged violation;

5. the amount of the proposed penalty;

6. such other information as the Commissioner may require.

Any of the above information may become part of the Notice of Assessment by attaching the same thereto.

2.5. Procedures for assessment of civil penalties.

a. Within thirty (30) days after receipt of the Notice of Assessment, an Assessment Review Officer shall review the same and determine whether or not the proposed assessment should be recalculated using the guideline outlined in Section 19(a)(1), Article 1A, Chapter 22A of the Code.

b. The Assessment Review Officer shall, within thirty (30) days after receipt of the Notice of Assessment, by certified mail, return receipt requested, serve upon the operator or miner charged (1) a copy of the Notice of Assessment, (2) a copy of the notice or order which is the basis for the Notice of Assessment, and (3) a written statement indicating to the person charged with a violation that a civil penalty may only be assessed after the person charged with a violation has been given an opportunity for a public hearing and the manner in which the person charged with a violation may request a hearing.

c. The operator or miner shall have thirty (30) days from receipt of the Notice of Assessment to either (1) pay the penalty, (2) request, in writing, a conference with the Assessment Review Officer to provide information relating to the violation listed in the Notice of Assessment, or (3) request, in writing, a hearing on the violation in question pursuant to Section 3 of these rules. If the operator or miner does not exercise his right under this subsection within thirty (30) days of receipt of the Notice of Assessment, the Notice of Assessment will become a final Order of Assessment which will be due immediately and enforceable under Section 19, Article 1A, Chapter 22A of the Code.

2.6. Payment of assessment.

a. Upon receipt of the assessment by certified check or money order by the operator, miner or other person will close the case with respect to any civil penalties.

b. Payment of the assessment should be sent to the Commissioner, Department of Energy, 1615 Washington Street, E., Charleston, West Virginia 25311. Checks should be made payable to the West Virginia Department of Energy.

2.7. Conference.

a. Upon receipt of a request for a conference, the Assessment Review Officer shall arrange for a timely conference convenient to all parties and the Assessment Review Officer.

b. If the party or parties request a conference with the Assessment Review Officer, he may submit any additional information to the Assessment Review Officer which may be relevant to the fact of the violation or the amount of the penalty. Such information may be submitted prior to the conference and discussed during the conference. To expedite the conference, the Assessment Review Officer may contact the party or parties to discuss the case prior to such conference.

c. At and/or subsequent to the conference, the Assessment Review Officer will consider all relevant information on the violation(s) in question presented by the party or parties and is authorized to decrease, increase or leave the same amount of the assessed penalty on the basis of any new information presented to him. When the facts warrant a finding that no violation of the coal mine health and safety laws of this State occurred, a penalty will not be assessed and the subject notice of violation or order will be vacated.

d. If the party or parties appear in person and the issues are resolved, they may, at this time, tender payment of the amount agreed upon and thereby dispose of the case, or they may have twenty (20) days within which to submit payment to the Commissioner of the amount agreed upon and thereby dispose of the case. All such agreements must be writing and signed by both parties. Failure to tender payment of the agreed amount within the twenty (20) day period will result in the agreed amount being entered as the final order of the Commissioner, enforceable under Section

19, Article 1A, Chapter 22A of the Code if the agreed amount is the same or greater than the original assessed amount or if the agreed amount is less than the original amount, the agreed amount will be increased to the original assessed penalty, all at the discretion of the Assessment Review Officer.

e. If all issues cannot be resolved during a conference, the party or parties may tender payment for those violations upon which an assessment amount has been agreed as provided in Section 2.7(d) of these rules. Violations not resolved will be the subject of notice of hearing to assess civil penalty provided for in Section 2.8 of these rules.

2.8. Assessment of civil penalties - how initiated.

a. A proceeding for the assessment of a civil penalty shall be initiated by the Assessment Review Officer by filing a Notice of Assessment Proceeding with the Commissioner and by serving a copy of the notice on the party against whom a penalty is sought. Such notices shall be prepared, filed and served within thirty (30) days, after (1) an operator, miner, person or persons request a hearing after receipt of a Notice of Assessment, or (2) the Assessment Review Officer and a party charged with a violation are unable to resolve all issues concerning such violation during a conference as provided in Section 2.7 of these rules.

b. The Notice of Assessment Proceeding shall include a list of the alleged violations for which a civil penalty is sought to be assessed. In addition, the Notice of Assessment pertaining to each alleged violation contained on such list shall be included with the Notice of Assessment Proceeding.

c. Upon receipt of a Notice of Assessment Proceeding, the Commissioner shall immediately appoint a Presiding Officer for all proceedings relating thereto.

2.9. Answer.

a. A party against whom a penalty is sought shall file an answer within twenty (20) days after service of a Notice of Assessment Proceeding with the Commissioner. Notice to the party charged must be given at the time.

2.10. Contents of answer.

All answers shall contain:

a. A short and plain statement of the reasons why each of the violations listed in the Notice of Assessment Proceeding are contested, including whether a violation occurred; and

b. A request for a hearing, or an express waiver of the right to a hearing and a request for a formal consideration of the issues by the Presiding Officer.

2.11. Summary disposition.

a. Failure to answer. Where the party charged with a violation(s) fails to timely file an answer to the Notice of Assessment Proceeding, such party will be deemed to have waived his right to hearing, and the Notice of Assessment shall be forwarded to the Commissioner for entry as a final order.

b. Failure to appear at hearing. When a person charged with a violation fails to appear at a hearing conducted under Section 3 of these rules, the Commissioner may dispose of the case or otherwise formally consider it in accordance with the provisions contained in Section 3 of these rules.

2.12. Decisions and orders after hearing or formal consideration of the case.

a. After the filing of an answer in a case, the Presiding Officer shall schedule and conduct a hearing regarding the case or otherwise formally consider it in accordance with the provisions contained in Section 3 of these rules.

b. Where, after hearing or after submission of the case and consideration of the record as a whole or in the event a hearing is waived, the Presiding Officer finds that a violation of the coal mine health and safety laws of this State has occurred, he shall determine the amount of the penalty which is warranted in accordance with Section 19, Article 1A, Chapter 22A of the Code, and these rules, and incorporate in a decision concerning the violation findings of fact, conclusions of law and an order setting forth the amount of any penalty and a requirement that the penalty be paid. Each decision and order against an operator shall contain findings of fact on each of the following criteria: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, the gravity of the alleged violation, and the demonstrated good faith of

the operator charged in attempting to achieve rapid compliance after notification of the alleged violation.

c. Where, after hearing or after submission of the case and consideration of the record as a whole in the event a hearing is waived, the Presiding Officer determines that no violation occurred, he shall incorporate in a decision concerning the violation findings of fact, conclusions of law and an order vacating the notice of violation or order and dismissing the proceeding to assess civil penalty.

d. In proceedings where the Presiding Officer is not the Commissioner, the record in the case and the decision and order of the Presiding Officer shall be forwarded to the Commissioner for his review. The Commissioner shall approve, alter and approve or reject the decision and order of the Presiding Officer. In the event the Commissioner rejects the decision and order of the Presiding Officer, the Commissioner shall forthwith prepare a final decision and order to replace the decision and order rejected.

e. A copy of all decisions and orders prepared by or approved by the Commissioner shall be served, by certified mail, upon all parties and, unless the decision and/or order otherwise provides, the decision and order so served shall become effective immediately following service unless a party makes application for rehearing or modification in accordance with Section 3.13 of these rules.

§38-1-3. Hearings.

3.1. Scope.

a. Unless otherwise specified in these or other rules and regulations, the rules in this Section shall govern and apply to hearings conducted by the Commissioner other Presiding Officer or by the Department pursuant to the authority provided in the laws of this State or rules and regulations promulgated pursuant thereto.

3.2. Conduct of hearings.

A Presiding Officer shall conduct every hearing.

3.3. Powers of presiding officers.

a. The Presiding Officer in connection with conducting a hearing and subject to the rules set forth

in this section, may:

1. Administer oaths and affirmations;
2. Issue subpoenas in accordance with the provisions of Section 1, Article 5, Chapter 29A of the Code;
3. Rule upon offers of proof and receive relevant evidence;
4. Permit evidentiary depositions to be taken and read as in civil actions in the circuit courts of this State;
5. Permit discovery depositions;
6. Regulate the course of the hearings;
7. Dispose of procedural requests or similar matters;
8. Hold conferences for the settlement or simplification of the issues with the consent of the parties; and
9. Take any other action in connection with such hearing authorized by law.

b. In any case where the Presiding Officer is not the Commissioner, such Presiding Officer may, on his own motion, and shall, at the request of any party, certify any interlocutory ruling to the Commissioner where he determines (1) that such ruling involves a controlling question of law, and (2) that an immediate decision on the question by the Commissioner may materially advance the ultimate disposition of the matter before him.

c. In no case shall a Presiding Officer other than the Commissioner enter a final order or decision.

3.4. Notice of hearing: contents of notice.

a. Unless otherwise specified in these rules, no hearing shall be conducted under these rules or otherwise unless the parties to the proceeding shall have received at least ten (10) days written notice.

b. Each written notice of the hearing shall contain the date, time, and place of the hearing and a short and plain statement of the matters which are to be the subject of or asserted at the hearing. Such

notice shall be given in accordance with the provisions of Section 2, Article 7, Chapter 29A of the Code.

3.5. Date, time, and place of hearing.

a. The date, time, and place of each hearing shall be determined by the Presiding Officer on the bases of convenience to parties and witnesses. Any request for postponement or relocation of a hearing shall be filed and served on all parties no later than five (5) days prior to the originally scheduled date. Such request may be granted upon showing of good cause.

3.6. Representation at hearings.

a. At hearings held pursuant to these rules, any party may represent himself or be represented by an attorney-at-law admitted to practice before the courts of any state or the District of Columbia. In addition, any party which is also an operator may be represented by a full-time employee, and any miner may be represented by the representative of miners.

3.7. Waiver of evidentiary presentation.

a. Any party who desires to submit written pleadings, comments or information in lieu of an evidentiary hearing may submit such documents for the Presiding Officer's consideration in the matter in the event hearing is waived as provided in subsection (b) of this section.

b. Parties entitled to an evidentiary hearing may waive such right in writing, but unless all entitled parties file timely waivers, a hearing will be conducted. Such waivers must be unequivocal and request the Presiding Officer to decide the matter at issue on the pleadings and written record of the case, including any stipulations the parties might enter or any documents filed in accordance with subsection (a) of this section.

c. When a hearing is waived under the provisions of this section, the written record in the case shall be submitted to the Presiding Officer for decision.

3.8. Burden of proof.

a. In proceedings under the coal mine health and safety laws of this State, the party initiating the proceeding shall have the burden of proving his case

by a preponderance of the evidence provided that (a) in a penalty proceeding, the Department shall have the burden of proving its case by a preponderance of the evidence, and (b) whenever the violation of any provisions of the state coal mine health and safety laws is an issue, the Department shall have the burden of proving the violation by a preponderance of the evidence.

3.9. Proposed findings, conclusions and orders.

a. The Presiding Officer may request the submission by parties of proposed findings of fact, conclusions of law, and orders, together with a supporting brief. Such proposals and briefs shall be served upon all parties, and shall contain adequate reference to the record and authorities relied upon.

3.10. Hearings to be public.

a. All hearings conducted under these rules shall be open to the public.

3.11. Decisions and orders.

a. Within sixty (60) days after conclusion of the hearing or after submission of the case and consideration of the record as a whole in the event a hearing is waived, the Presiding Officer shall render a decision and order which shall be in writing and shall include a statement of (a) findings and conclusions and the reasons or basis therefore on the material issues of fact and law, and (b) the appropriate ruling or order granting in part, or denying the relief sought.

b. In proceedings where the Presiding Officer is not the Commissioner, the Presiding Officer shall issue and serve a copy of the recommended decision upon all parties by certified mail. The record in the case and the original recommended decision shall be forwarded to the Commissioner. Within fifteen (15) days of the service of the recommended decision a party adversely affected or aggrieved by such decision may file with the Commissioner, and serve upon all parties, a petition for rehearing pursuant to Section 3.12(b) of these rules setting out with particularity the grounds for requesting such rehearing. The Commissioner shall approve, alter, remand or reject the recommended decision and order of the Presiding Officer, the Commissioner shall, in accordance with the provisions of Section 3.12(e) of these rules, prepare a final decision and order to replace the recommended decision and order rejected.

c. A copy of all decisions and orders prepared or approved by the Commissioner shall be served, by certified mail, upon all parties and, unless the decision and/or order provides the decision and order so served shall become effective immediately following service.

3.12. Re-opening; re-hearing; modification.

a. Applications for re-opening a proceeding after hearing or submission and before decision shall be made by petition filed prior to service of a final decision. Such petition shall state specifically the grounds relied upon and, if it be for the purpose of introducing additional evidence, shall also state the nature and purpose of the evidence to be adduced.

b. Applications for re-hearing or re-argument after decision shall be made by petition filed within fifteen (15) days after service of the recommended or final decision. Such petition shall state specifically the grounds relied upon and, if any decision and order is sought to be vacated, reversed or modified by reason of (1) matters arising since the decision; (2) consequences which would result from compliance with the decision and order; or (3) facts not in the possession of petitioner prior to decision, such reason shall also be stated.

c. Applications for modification of decisions and orders of the Department, which seek only a change in the date of such decisions and orders shall take effect, shall be made by petition filed within fifteen (15) days after service of the final decision, except that, in the event of an unforeseen emergency satisfactorily shown by the petitioner, such relief may be sought informally by telegram or otherwise, upon notice to all parties or attorneys who appeared in the proceeding.

d. A copy of each petition filed under this section shall be served on all other parties to the original proceeding and each petition shall be accompanied by a certificate showing service upon such parties. Within ten (10) days after such service, an adverse party may file and serve a reply to the petition.

e. Upon the filing of a reply or upon the failure of an adverse party to reply within ten (10) days after service of a copy of the petition of such party, the Commissioner shall consider the petition, the replies thereto, and the record of the proceeding, and, if he or she determines a hearing upon the petition to be nec-

essary, shall, after ten (10) days notice send to all parties to hold such hearing in accordance with the provisions of Section 3 of these rules. Within thirty (30) days after consideration of the petition, the replies thereto and the record of the proceeding, the Commissioner shall issue an order either granting in part or denying the relief requested in the petition.

§38-1-4. Rules Applicable to Proceedings for Modification, Extension, Termination or Review of Orders and Notices.

4.1. Scope.

a. The rules in this Section govern and are applicable to review proceedings initiated pursuant to Section 15, Article 1A, Chapter 22A of the Code, by operators or representatives of miners in any mine affected by orders and notices of violation issued pursuant to the provisions of Sections 13 and 14, Article 1A, Chapter 22A of the Code. In addition to the rules contained in this Section, the general rules of practice before the Department contained in Section 1 and the rules relating to hearings held by the Department contained in Section 3 are also applicable to such proceedings.

4.2. By whom modification, extension, termination or review proceedings may be initiated.

a. The following persons may initiate proceedings for modification, termination or review of notices of violation or orders:

1. an operator issued an order pursuant to the provisions of Section 13, Article 1A, Chapter 22A of the Code;

2. any representative of miners in any mine affected by such a withdrawal order or by any modification or termination of such order;

3. an operator issued a notice of violation pursuant to subsection (b), Section 13, Article 1A, Chapter 22A of the Code, if he believes that the time fixed in such notice for the abatement of the violation is unreasonable;

4. any representative of miners in any mine affected by such a notice of violation, if he believes that the time fixed in such notice for abatement of the violations is unreasonable;

5. any operator affected by an order issued under Section 14, Article 1A, Chapter 22A of the Code; or

6. any representative or miners in a mine affected by an order issued under Section 14, Article 1A, Chapter 22A of the code.

b. For purposes of Section 4 of these regulations the mine "affected" by any order or notice shall be deemed to be the mine at which the violation in question allegedly occurred or at which the imminent danger giving rise to the withdrawal order was allegedly found to exist.

4.3. Initiation of proceedings.

a. Proceedings for the review of an order issued pursuant to the provisions of Sections 13 and 14, Article 1A, Chapter 22A of Code, a modification or termination thereof, a notice of violation issued pursuant to the provisions of Section 13, Article 1A, Chapter 22A of the Code, or a modification or termination thereof, shall be initiated by those parties entitled to seek review as designated in Section 4.2 of these rules, by filing an application for review.

b. An application for review shall be filed with the Commissioner within thirty (30) days of receipt of the applicant for the order or notice of violation sought be reviewed or within thirty (30) days of receipt of any modification or termination of a notice of violation or an order where review of such modification or termination of a notice of violation or an order where review of such modification or termination is sought. A copy of the application for review shall be served upon all other parties by the party making application for review.

c. An operator's failure to file an application for review of an order or notice of violation shall not preclude the operator from challenging the fact of violation or raising any other pertinent matter in a proceeding under Section 2.8 through 2.12 of these rules

4.4. Answer.

a. Any party, other than the Department of Energy, desiring to participate in the proceeding in opposition to the application for review shall file an answer within fifteen (15) days of service of such application for review.

4.5. Contents of application and answer.

a. An application for review and an answer shall comply with applicable general requirements and shall contain:

1. A short and plain statement of (i) such party's position with respect to each issue of law or fact which the party contends is pertinent to the legality or correctness of the order or notice; and (ii) the relief requested by such party;

2. A statement of whether the party submitting the document requests a public hearing or waives it as provided in Section 3.7 of these rules. Where an answer does not include an unequivocal waiver, a party shall be deemed to have requested a hearing and initial decision.

b. A copy of the order or notice sought to be reviewed shall be attached to each application for review.

4.6. Proceedings after application; decision and order.

a. Upon receipt of an application for review the Commissioner shall cause an investigation of the matter to be made as he or she deems appropriate and shall appoint a Presiding Officer for all proceedings relating to such application.

b. In the event the application has requested a hearing in the application for review, the Presiding Officer shall give notice of and conduct such hearing in accordance with the provisions of Section 3 of these rules. In the event the applicant has waived a hearing in accordance with the provisions of Section 3.7 of these rules, the Presiding Officer shall promptly consider the pleadings and all documents submitted therewith by the parties.

c. Within sixty (60) days after conclusion of the hearing or after consideration of the pleadings and documents filed therewith in the event a hearing is waived, the Presiding Officer shall issue a written decision and order incorporating therein findings of fact and conclusions of law, vacating, affirming, modifying, extending, or terminating the notice of violation, the order or the modification or termination of such notice or order.

d. In proceedings where the Presiding Officer is

not the Commissioner, the record in the case and the decision and order of the Presiding Officer shall be forwarded to the Commissioner for his review. The Commissioner shall approve, alter and approve, or reject the decision and order of the Presiding Officer. In the event the Commissioner rejects the decision and order of the Presiding Officer, the Commissioner shall forthwith prepare a decision and order to replace the decision and order rejected.

e. A copy of all decisions and orders prepared or approved by the Commissioner shall be served, by certified mail, upon all parties and each order so served shall become effective upon service.

4.7. Temporary relief; when appropriate.

a. As part of an initial application for review, or at any time during which an application for review is pending, an applicant may file a written request for temporary relief from any modification or termination of any order, or from any order issued under Section 13, Article 1A, Chapter 22A of the Code.

b. If the application for temporary relief is incorporated in the application for review, the applicant shall incorporate in such application a detailed statement giving reasons why temporary relief is appropriate under the circumstances.

c. If the application for temporary relief is made at any time after the application for review has been filed, the application for temporary relief shall be in the form provided for in Section 1.8 of these rules and shall specify the status of the review proceeding and the reasons why the application for temporary relief is being made. When an application for temporary relief is made after an application for review has been filed, a copy thereof shall be served upon all parties to the proceeding.

d. The Presiding Officer may, upon consideration of the request for temporary relief, grant such relief as he deems appropriate: Provided, that no temporary relief shall be granted unless:

1. a hearing has been held in which all parties were given an opportunity to be heard;

2. the applicant shows that there is substantial likelihood that the final decision and order will be favorable to the applicant; and

3. such relief will not adversely affect the health and safety of miners in the coal mine.

e. Under no circumstances shall temporary relief be granted in the case of a notice issued under Section 13(b), Article 1A, Chapter 22A of the Code.

f. Any temporary relief granted by a Presiding Officer who is not the Commissioner shall be subject to review by the Commissioner.

4.8. Expedition of proceedings.

a. As part of an initial application for review, or at any time after the filing of an application for review, party may move the Presiding Officer to expedite the hearing and decision of the case. Such motion shall be in writing and accompanied by supporting documents that establish the party's claim of exigent circumstances warranting expedition.

b. A copy of all such motions for expedition shall be served upon all other parties by the applicant.

c. The Presiding Officer shall promptly review the motion and may advance the matter on his calendar or expedite the proceedings as he deems appropriate.

d. Where expedited proceedings are requested under this Section, periods of time for filing applications, answers or responses, or for holding hearings, as provided elsewhere in these rules, may be waived by agreement of the parties or altered by order of the Presiding Officer.

e. Any motions granted in this section by a Presiding Officer who is not the Commissioner shall be subject to review by the Commissioner.

§38-1-5. Rules Applicable to Proceedings Initiated Upon Petition for Declaratory Ruling.

5.1. Scope.

a. The rules in this Section govern and are applicable to proceedings initiated pursuant to Section 1, Article 4, Chapter 29A of the Code on petition of any interested person for a declaratory ruling to be issued by the Department of Energy with respect to the applicability to any person, property or statement of facts of any rule or statute enforceable by the Department of Energy. In addition to the rules contain-

ed in the Section, the general rules of practice before the Department contained in Section 1 and the rules relating to hearings held by the Department contained in Section 3 are also applicable to such proceedings.

5.2. Scope.

a. Any interested person may initiate proceedings for a declaratory ruling by the Department with respect to the applicability to any person, property or statement of facts of any rule or statute enforceable by it.

5.3. Initiation of proceedings.

a. Proceedings for a declaratory ruling pursuant to Section 1, Article 4, Chapter 29A of the Code shall be initiated by filing a petition for declaratory ruling with the Department of Energy.

5.4. Answer.

a. Any party, other than the Commissioner, desiring to participate in the proceeding in opposition to the petition for declaratory ruling shall file an answer within fifteen (15) days of service of such petition.

5.5. Contents of petition and answer.

a. A petition for declaratory ruling and an answer shall comply with applicable general requirements and shall contain:

1. A short plain statement of (i) such party's position with respect to each issue of law or fact which the party contends is pertinent to the applicability to a person, property or statement of facts of any rule or statute enforceable by the Department; and (ii) the construction of the rule or statute advanced by such party;

2. A statement of whether the party submitting the document request a public hearing or waives such hearing as provided in Section 3.7 of these rules. Where a pleading does not include a request for public hearing, a party shall be deemed to have waived such hearing pursuant to Section 3.7 of these rules.

b. Documents may be attached to pleadings as exhibits.

5.6. Proceedings after petition; decision and order

a. Upon receipt of a petition for declaratory ruling the Commissioner may cause an investigation of the matter to be made as deemed appropriate and may appoint a Presiding Officer for all proceedings relating to such petition. If the Commissioner declines to issue a declaratory ruling in response to such petition, he shall notify all parties in writing.

b. In the event a party has requested a hearing in the petition or an answer, the Presiding Officer shall give notice of and conduct such hearing in accordance with the provisions of Section 3 of these rules. In the event the party has waived a hearing in accordance with the provisions of Section 5.5 of these rules, the Presiding Officer shall promptly consider the pleadings and all documents submitted therewith by the parties.

c. Within sixty (60) days after conclusion of the hearing or after consideration of the pleadings and documents filed therewith in the event a hearing is waived, the Presiding Officer shall issue a written decision and order incorporating therein findings of fact and conclusions of law stating the applicability to

any person, property or statement of facts of the rule or statute enforceable by the Department which is the subject of the petition. Such decision and order shall state whether or not such ruling is binding between the Department and the petitioner. Such ruling shall not be binding upon any person other than the petitioner.

d. In proceedings where the Presiding Officer is not the Commissioner, the record in the case and the decision and order of the Presiding Officer shall be forwarded to the Commissioner for his review. The Commissioner shall approve, alter and approve or reject the decision and order of the Presiding Officer. In the event the Commissioner rejects the decision and order of the Presiding Officer, the Commissioner shall forthwith prepare a decision and order to replace the decision and order rejected.

e. A copy of all decisions and orders prepared or approved by the Commissioner shall be served, by certified mail, upon all parties and each order so served shall become effective upon service.