

City of Seattle
OFFICE OF HEARING EXAMINER

HEARING EXAMINER
RULES FOR WHISTLEBLOWER RETALIATION CASES

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TABLE OF CONTENTS

Section 1 GENERAL PROVISIONS	1
1.01 Applicability	1
1.02 Interpretation of Rules	1
1.03 Petition for Rules	1
Section 2 RULES OF GENERAL APPLICATION	3
2.01 Scope of Rules	3
2.02 Definitions	3
2.03 Representation	4
2.04 Computation of Time	5
2.05 Expected Conduct and Appearance of Fairness	5
2.06 Filing and Service of Documents	5
2.07 Motions	6
2.08 Complaint	7
2.09 Supplemental Complaint by Charging Party	7
2.10 Amendment of the Complaint	8
2.11 Answer	8
2.12 Default	8
2.13 Withdrawal of Complaint	9
2.14 Notice of Hearing	9
2.15 Continuance of Hearing	9
2.16 Interference Prohibited	9
2.17 Disqualification or Recusal of a Hearing Officer	9
2.18 Prehearing Conference	10
2.19 Discovery	11
2.20 Failure to Provide Discovery/Sanctions	11
2.21 Subpoenas	12
2.22 Submission of Documentary Evidence Prior to Hearing	13
2.23 Presiding Official	13
2.24 Parties' Rights and Responsibilities	14
2.25 Amicus Curiae	14
2.26 Testimony	14
2.27 Evidence	15
2.28 Burden and Standard of Proof	15
2.29 Hearing Format	16
2.30 Hearing Officer's Decision	16
2.31 Record	16

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RULES FOR WHISTLEBLOWER RETALIATION CASES

SECTION 1 GENERAL PROVISIONS

1.01 APPLICABILITY

(a) These Rules For Whistleblower Retaliation Cases (“RWRC” or “Rules”) supplement the Seattle Municipal Code and ordinances, and other applicable law, for matters within the jurisdiction of the Hearing Examiner under Subchapter III of Chapter 4.20 SMC, the Whistleblower Protection Code, and govern administrative practice and procedure before the Hearing Examiner. In case of conflict between a RWRC and the Seattle Municipal Code or other applicable law, the Seattle Municipal Code or other applicable law controls.

(b) These Rules apply to all matters properly before the Hearing Examiner on or after the Rules’ effective date.

1.02 INTERPRETATION OF RULES

(a) The Hearing Examiner shall interpret the Rules for Whistleblower Retaliation Cases and determine their application.

(b) While a matter is pending before the Hearing Examiner, an affected party may request by motion that the Hearing Examiner issue a declaratory ruling on the applicability of a Rule to identified, existing circumstances. The motion must clearly identify the Rule and describe the circumstances for which the declaratory ruling is sought. Unless brought during a hearing, the motion must be in writing.

(c) When questions of practice or procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Washington Civil Rules for Superior Court for guidance.

1.03 PETITION FOR RULES (SMC 3.02.040)

Any interested individual may petition the Hearing Examiner requesting adoption, amendment or repeal of any rule. The petition shall be in writing, signed by the petitioner, and shall include:

- (a) The name and address of the petitioner; and
- (b) In the case of a petition for adoption, the substance of the requested rule, and a brief statement of the reason why adoption of the rule is necessary or desirable; or
- (c) In the case of a petition for amendment or repeal of a rule, the number of the rule to be amended or repealed, the substance of any requested amendment, and a brief statement of the reason why an amendment or repeal of the rule is necessary or desirable.

In accordance with SMC 3.02.040, no later than 60 days after a petition is submitted, the Hearing Examiner will either deny the petition in writing, stating the reasons for the denial, or initiate rulemaking proceedings concerning the subject of the petition in accordance with SMC 3.02.030.

SECTION 2 RULES OF GENERAL APPLICATION

2.01 SCOPE OF RULES

These rules apply to contested cases before the Hearing Examiner that arise under Subchapter III of Chapter 4.20 SMC, the Whistleblower Protection Code.

2.02 DEFINITIONS

The following definitions apply unless the context requires otherwise:

(a) "Affidavit" - a written or printed statement of facts confirmed by oath or affirmation of the one making it, before one having authority to administer oaths.

(b) "Business days" - days other than Saturday, Sunday, and national, state and City of Seattle holidays.

(c) "City" – City of Seattle.

(d) "City agency" – any department, office, board, commission, or committee of the City, or any subdivision thereof except public corporations and ad hoc advisory committees.

(e) "Code" – Seattle Municipal Code.

(f) "Commission" - Ethics and Elections Commission.

(g) "Cooperating Employee" – a City employee who:

1. In good faith makes a report of alleged improper governmental action pursuant to SMC 4.20.810.C;
2. Is perceived by the City as having reported pursuant to this chapter, but in fact, did not report;
3. In good faith provides information in connection with an inquiry or investigation of a report or testifies in any proceeding resulting from a report; or
4. Is perceived by the employer as having provided information in connection with an inquiry or investigation of a report made pursuant to this chapter, but in fact, has not done so.

(h) "Complaint" – a document that alleges whistleblower retaliation and is prepared by the Executive Director and filed with the Hearing Examiner.

(i) "Days" - calendar days.

(j) "Declaration" - a written or printed statement of facts declared or certified to be true and correct under penalty of perjury under the laws of the State of Washington.

(k) "Executive Director" – the Executive Director of the Ethics and Elections Commission.

(l) "Good faith" - the individual reporting or providing information has a reasonable basis in fact for reporting or providing the information.

(m) "Hearing Examiner" – the Seattle Hearing Examiner, a Deputy Hearing Examiner, or a Hearing Examiner pro tempore appointed by the Hearing Examiner.

(n) "Motion" - a request made to the Hearing Examiner for an order or other ruling.

(o) "Order" - a ruling, instruction, or other directive issued by the Hearing Examiner in response to a request or motion by a party, or on the Hearing Examiner's own initiative. Where allowed by law, an order may direct how the Hearing Examiner's decision is to be implemented and may be issued as part of that decision or separately.

(p) "Party" – the Executive Director, a Cooperating Employee who has filed a supplemental complaint, or the Respondent.

(q) "Regular business hours" - 8:00 a.m. to 5:00 p.m.

(r) "Respondent" – the City agency or employee alleged to have retaliated against a Cooperating Employee in violation of SMC 4.16.070.F and/or Subchapter III of Chapter 4.20 SMC.

(s) "Supplemental complaint" – a document that relates to a claim for damages for emotional distress and is prepared and filed by the Cooperating Employee as provided in these Rules

2.03 REPRESENTATION

(a) Only the following may appear before the Hearing Examiner in a representative capacity:

(1) an attorney entitled to practice before the Washington Supreme Court;

(2) with the permission of the Hearing Examiner, an attorney entitled to practice before the highest court of record in any other state or the District of Columbia, unless prohibited by Washington law;

(3) a legal intern under Rule 9 of the Washington Supreme Court Admission to Practice Rules.

(b) As provided in SMC 4.20.865.B.3, a cooperating employee who has filed a supplemental complaint is not subject to restrictions on representation in subsection (a).

2.04 COMPUTATION OF TIME

Unless otherwise provided by law, computation of any period of time under these Rules begins with the first day after the day on which the act or event that started the time period occurred. When the last day of the time period so computed is a Saturday, Sunday, or national, state or City holiday, the time period extends to the end of the next business day.

2.05 EXPECTED CONDUCT AND APPEARANCE OF FAIRNESS

(a) Anyone appearing before the Hearing Examiner shall conduct himself or herself with civility and courtesy toward everyone involved in the hearing.

(b) The appearance of fairness doctrine applies to proceedings under these Rules.

(c) No one with an interest in the outcome of a proceeding shall communicate or attempt to communicate *ex parte* with the Hearing Examiner or the Hearing Examiner's employees or representatives concerning a substantive matter in a proceeding governed by these Rules.

(d) If a prohibited *ex parte* communication occurs, the communication shall be publicly disclosed by the Hearing Examiner: any written communications, and a memorandum summarizing the substance of and participants in all oral communications, shall promptly be made available to the parties for review and an opportunity provided for them to rebut the communications.

2.06 FILING AND SERVICE OF DOCUMENTS

(a) Documents may be filed with the Hearing Examiner in hard copy, in electronic format through the e-File page of the Hearing Examiner's website (www.seattle.gov/examiner) or, subject to Rule 2.06(b), by electronic facsimile. Unless otherwise provided by the Hearing Examiner, if an e-Filed document is more than 10 pages in length, including exhibits, a hard copy of the document must be delivered to the Hearing Examiner.

(b) Documents are deemed filed with the Hearing Examiner on receipt at the Office of Hearing Examiner on business days during regular business hours unless the Hearing Examiner has specified otherwise. Documents filed in any format on non-

business days, or outside regular business hours, are deemed filed on the next business day.

(c) A party may file no more than 15 pages with the Office of Hearing Examiner by electronic facsimile without the prior permission of the Hearing Examiner.

(d) Service of the original summons and complaint shall be by personal service or by other manner of service provided by Superior Court Civil Rule 4.

(e) Unless otherwise provided by law, by the Hearing Examiner, or by agreement of the parties, all documents other than the summons and complaint shall be served on all parties personally, by first-class, registered, or certified mail, or by facsimile transmission. City agencies may serve other City agencies through the City's regular interoffice mail. Proof of service must be filed with the Hearing Examiner.

(f) Unless otherwise provided by the Hearing Examiner, or by agreement of the parties, service is complete at the time documents are personally delivered, or confirmed as having been successfully transmitted by facsimile. Unless earlier receipt is shown, service by mail is complete on the third day after deposit in the regular facilities of the US mail of a properly stamped and addressed letter or packet unless the third day falls on a non-business day, in which case service is complete on the first business day after the third day.

2.07 MOTIONS

(a) All motions shall be addressed to the Hearing Examiner and shall state the order or relief requested and the grounds for the motion. All motions other than those made during a hearing shall be in writing. Every motion, response, and accompanying paper, shall be served on each party representative on the day it is filed with the Hearing Examiner. (See RWRC 2.06 on Filing and Service of Documents.)

(b) Within 7 days after service of a written motion, or such other time as the Hearing Examiner may designate, any other party may file a written response. After the Hearing Examiner has received any written responses, or the 7 days or other designated time has elapsed, the Hearing Examiner may rule on the motion. Failure of a party to file a timely response may be considered by the Hearing Examiner as evidence of that party's consent to the motion.

(c) The Hearing Examiner may provide for the filing of a reply or other additional briefing on a motion, and may call for oral argument prior to ruling.

(d) For motions made at hearing, and motions made for the extension of time or to expedite the hearing, the Hearing Examiner may waive the requirements of this section and may also rule upon such motions orally.

(e) Motions to dismiss or other dispositive motions, and motions to exclude evidence (testimony or exhibits), shall be filed at the earliest possible time in the proceedings in order to allow time for the other party to respond, as provided in subsection (b) above, and to ensure that the Hearing Examiner will consider the motions on the merits.

2.08 COMPLAINT

(a) A complaint filed by the Executive Director shall include the following:

- (1) a caption identifying the parties to the case;
- (2) a statement that the Executive Director has investigated the matters alleged in the complaint and issued a finding that there is reasonable cause to believe that the respondent engaged in, or continues to engage in, conduct that constitutes retaliation;
- (3) a concise statement of the conduct alleged to constitute retaliation; and
- (4) a request for relief, setting out the terms of relief believed to be appropriate if the matters alleged in the complaint are proved.

(b) The Executive Director shall serve the complaint and a summons on the respondent and any other interested parties as provided in RWRC 2.06(c) and file the summons and complaint with the Hearing Examiner. The summons shall be in the usual form provided by law and shall include the following:

- (1) a statement that pursuant to these Rules, the respondent is required to respond within 20 days of the filing of the complaint; and
- (2) a statement that a cooperating employee who alleges damages for emotional distress may elect to participate in the hearing independently of the Executive Director by filing a notice of ancillary appearance and a supplemental complaint as provided in RWRC 2.09 and 2.06.

2.09 SUPPLEMENTAL COMPLAINT BY THE COOPERATING EMPLOYEE

(a) A cooperating employee who wishes to claim damages for emotional distress, shall file a notice of ancillary appearance and a supplemental complaint with the Hearing Examiner within 20 days after service of the summons and complaint on the cooperating employee, and shall serve them on the respondent and Executive Director as provided in RWRC 2.06 for service of the summons and complaint.

(b) A supplemental complaint may adopt by reference the complaint filed by the Executive Director and shall include the cooperating employee's request for damages for emotional distress and any additional allegations of fact and citation of legal authority in support of the request.

(c) A cooperating employee who files a notice of ancillary appearance and a supplemental complaint may offer proof at the hearing consistent with the supplemental complaint.

(d) If the cooperating employee does not file a timely notice of ancillary appearance and supplemental complaint, the case in support of the complaint shall be presented solely by the Executive Director.

2.10 AMENDMENT OF THE COMPLAINT

A complaint or supplemental complaint may be amended only with the permission of the Hearing Examiner. Permission shall be given when justice will be served by the amendment and all parties are allowed time to respond to additional or expanded allegations that they could not have reasonably foreseen.

2.11 ANSWER

The respondent shall file an answer to the complaint with the Hearing Examiner and serve a copy on all parties of record no later than 20 days after the date the complaint is filed. An answer to a supplemental complaint must be filed with the Hearing Examiner and served on all parties of record no later than 20 days after the date the supplemental complaint is filed. A cooperating employee who is not represented by counsel shall be served by delivering a copy of the answer, addressed to the cooperating employee, to the Executive Director.

2.12 DEFAULT

(a) When a respondent has failed to appear, plead, or otherwise defend as provided by these Rules, and that fact is made to appear by motion and proof of service of the pleadings and notice of hearing, a motion for default may be filed with the Hearing Examiner. A copy of the motion and proof of service must be served on all other parties.

(b) The Hearing Examiner shall rule on the motion for default no sooner than seven days after the date the motion was served, and may call for argument prior to ruling on the motion.

(c) If the motion for default is granted, the Hearing Examiner shall decide whether a hearing is required to determine the appropriate relief to be afforded. A party who has been found in default shall have all rights of a party at any hearing held to determine relief.

(d) The Hearing Examiner may set aside a default for good cause shown by motion and affidavit or declaration, and upon such terms as the Hearing Examiner deems just.

2.13 WITHDRAWAL OF COMPLAINT

The complaint or any part thereof may be withdrawn if the parties agree to a settlement of all or a part of the case, or for other reasons, and upon such terms and conditions as the Hearing Examiner finds just and reasonable. If the complaint or any part is withdrawn upon an agreed settlement, the agreement shall be reduced to writing, signed by the parties, approved by the Commission if required by SMC 4.20.860.F, and filed with the Hearing Examiner, who shall then sign an order dismissing the complaint.

2.14 NOTICE OF HEARING

(a) Upon receipt of a complaint and answer, the Hearing Examiner shall promptly set and give notice of a date for the hearing, which shall be no earlier than 60 and no later than 120 days from the date the complaint was filed, unless otherwise ordered by the Hearing Examiner. The Hearing Examiner shall give notice of the date of the hearing to the Commission, all counsel of record, and all parties not represented by counsel. The hearing may be had on shorter notice when the Hearing Examiner determines that substantial injury to a party would otherwise result. The notice shall include:

- (1) a statement of the time, date, place and nature of the proceeding;
- (2) a statement of the legal authority for the hearing, including a reference to the applicable law;
- (3) a short and plain statement of the matters asserted in the complaint; and
- (4) a statement of how the parties may obtain a copy of these Rules.

(b) A copy of the notice of hearing and certificate of service shall be made part of the case record.

2.15 CONTINUANCE OF HEARING

The Hearing Examiner may continue a scheduled hearing on the Examiner's own motion, or on the motion of a party for good cause shown.

2.16 INTERFERENCE PROHIBITED

In performing adjudicative functions, the Hearing Examiner is an independent official and is not responsible to, or subject to the supervision or direction of, any elected official, any officer or employee of any department, or anyone else whether or not associated with City government.

2.17 DISQUALIFICATION OR RECUSAL OF HEARING EXAMINER

(a) In the event of personal bias, prejudice, financial interest, or other reason substantially affecting objectivity, the Hearing Examiner shall recuse himself or herself from hearing a matter.

(b) Prior to hearing, a party who reasonably believes that the Hearing Examiner assigned to a matter cannot remain objective in hearing it due to personal bias, prejudice, financial interest, or other substantial reason, may request by written motion and an affidavit of prejudice that the Hearing Examiner be disqualified from hearing the matter. The motion and affidavit should be made at the earliest possible time, preferably no later than 20 days after the date the notice of hearing was issued. The affidavit of prejudice must set forth in detail the reasons for the belief that the Hearing Examiner cannot remain objective in hearing the matter.

(c) The fact that a Hearing Examiner has considered the same or a similar issue in another case, or has made a ruling adverse to the interests of the party in the same or another case, is not a basis for disqualification.

(d) The Hearing Examiner shall rule on the motion and state the basis for the ruling. In case of disqualification or recusal of the Hearing Examiner, the matter shall be assigned to a different Hearing Examiner.

2.18 PREHEARING CONFERENCE

(a) On the Hearing Examiner's own initiative, or at the request of a party, the Hearing Examiner may direct that a conference be held prior to the hearing to consider:

- (1) Clarification and simplification of the issues;
- (2) Disclosure of witnesses to be called and exhibits to be presented;
- (3) Stipulations of fact and concerning the authenticity and contents of documents;
- (4) Discovery;
- (5) Motions;
- (6) Other matters deemed by the Hearing Examiner appropriate for the orderly and efficient disposition of the case.

(b) The Hearing Examiner shall give notice to all parties of any prehearing conference. Notice may be written or oral.

(d) All parties shall be present or represented at any prehearing conference unless a party has waived the right to be present or represented and been excused by the Hearing Examiner.

(e) Following the prehearing conference, the Hearing Examiner shall enter an order reciting the actions taken and deadlines imposed, and ruling on any motions made at the conference.

2.19 DISCOVERY

Prehearing discovery is permitted as follows:

(a) Depositions may be taken and used in the manner provided by Washington Civil Rules for Superior Court 26, 27, 29, 30, 31 and 32. Whenever those rules refer to the court, the Hearing Examiner shall be substituted. Depositions shall be transcribed upon the request of any party and payment of the reasonable costs of transcription.

(b) Interrogatories may be propounded and used in the manner provided by Washington Civil Rules for Superior Court 26, 29 and 33, except that the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 20 days, or such shorter or longer time as the Hearing Examiner may allow upon motion filed and served after the interrogatories have been served. Whenever Civil Rules 26, 29 and 33 refer to the court, the Hearing Examiner shall be substituted.

(c) Requests for admission of fact may be served on a party in the manner provided by Washington Civil Rules for Superior Court 26, 29 and 36, except that the party upon whom the requests have been served shall serve a response on the party submitting the requests within 20 days, or such shorter or longer time as the Hearing Examiner may allow upon motion filed and served after the requests for admission have been served. Whenever Civil Rules 26, 29 and 36 refer to the court, the Hearing Examiner shall be substituted.

(d) Requests for production of documents and tangible things, and for entry upon land may be made in the manner provided by Washington Civil Rules for Superior Court 26, 29 and 34, except that the party upon whom the requests have been served shall serve a response on the party submitting the requests within 20 days, or such shorter or longer time as the Hearing Examiner may allow upon motion filed and served after the requests have been served. Whenever Civil Rules 26, 29 and 34 refer to the court, the Hearing Examiner shall be substituted.

(e) Requests for a physical or mental examination may be made in the manner provided by Washington Civil Rules for Superior Court 26, 29 and 35. Whenever Civil Rules 26, 29 and 35 refer to the court, the Hearing Examiner shall be substituted.

2.20 FAILURE TO PROVIDE DISCOVERY/SANCTIONS

(a) If under Rule 2.20 a deponent fails to answer a question propounded or submitted, or a corporation or other entity fails to make a designation, or a party fails to answer or respond to an interrogatory or request for production submitted, or a party fails to respond that a requested inspection will be permitted or fails to permit inspection as requested, a party may file and serve a motion for an order compelling the requested

discovery. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. If the motion is denied, the Hearing Examiner may enter a protective order as provided in Civil Rule 26(c). If the motion is granted, the Hearing Examiner shall direct the deponent to answer, or shall direct the party or designated representative to provide or permit the requested discovery. If a deponent or party fails to comply with the Hearing Examiner's order, the Hearing Examiner may enter such oral or written orders regarding the failure as are just including, but not limited to the following:

- (1) infer that the admission, testimony, documents or other evidence sought would have been adverse to the party;
- (2) order that the matter which was the subject of the order be taken as established adversely to the party;
- (3) order that the party may not introduce into evidence or otherwise rely upon the testimony of the individual, officer or agent, or the documents or other evidence, that was the subject of the order;
- (4) permit the use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown without regard to the disobedient party's objection;
- (5) order that a pleading or part thereof, or a motion or other submission by the party that was the subject of the order be stricken, or that a decision be rendered against a party, or both.

(b) If a deponent or party fails to make discovery, or to comply with an order of the Hearing Examiner, the Hearing Examiner may also invoke the aid of the City Attorney, who shall apply to the appropriate court for an order or other action as necessary to secure enforcement of the Hearing Examiner's discovery orders.

2.21 SUBPOENAS

(a) A party may file a motion for a subpoena to require a person to appear and testify at a deposition or hearing, or for a person to produce at a prehearing conference, deposition, or hearing, specified documents or other physical exhibits within the person's custody and control.

(b) A request for a subpoena for a person shall include the person's name and address, show the relevance of that person's testimony, and demonstrate the reasonableness of the scope of the subpoena sought. A request for a subpoena for documents or other physical exhibits shall include the name and address of the person who is to produce the documents or other physical exhibit, specify the materials to be produced, indicate the relevance of the materials subpoenaed to the issues in the case, and demonstrate the reasonableness of the scope of the subpoena sought.

(c) The party requesting the subpoena shall be responsible for serving it. An affidavit or declaration of personal service or mailing shall be filed with the Hearing Examiner and a copy served on all other parties.

(d) Unless otherwise allowed by the Hearing Examiner, subpoenas shall be served no later than 7 days prior to the date the appearance or production is ordered.

(e) A subpoena may be issued with like effect by an attorney of record in the proceeding. The issuing attorney must sign the subpoena.

(f) Unless otherwise allowed by the Hearing Examiner, any motion to limit or quash a subpoena shall be filed with the Hearing Examiner no later than 5 days after the date the subpoena was received.

(g) Requests for subpoenas and the rulings upon such requests may be made *ex parte* unless otherwise ordered by the Hearing Examiner. Requests for subpoenas normally require at least 2 business days for the Office of Hearing Examiner to process.

2.22 SUBMISSION OF DOCUMENTARY EVIDENCE PRIOR TO HEARING

If the Hearing Examiner determines that it would assist the orderly and efficient process of the hearing, the Examiner may require:

(a) that all documentary evidence that is to be offered during the hearing be filed with the Examiner, and a copy served on the parties, sufficiently in advance of the hearing to permit study by the parties in preparation of cross-examination and rebuttal evidence, and that documentary evidence not submitted in advance not be admitted in evidence without a clear showing that the offering party had good cause for failing to produce the evidence when required; and

(b) that all documents submitted in advance of the hearing pursuant to subsection (a) be deemed admitted unless a party files a written objection to the authenticity or admissibility of a document prior to the hearing. Upon a clear showing of good cause for failure to file a written objection, the Hearing Examiner may permit a party to challenge the authenticity or admissibility of the document at hearing.

2.23 PRESIDING OFFICIAL

The Hearing Examiner conducting a hearing has the duty to ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the proceedings, to gather facts necessary for making the decision, and to maintain order. The Examiner has all powers necessary to these ends including, but not limited to the power to:

- (1) determine the order of the presentation of evidence;
- (2) administer oaths and affirmations;
- (3) issue subpoenas;
- (4) rule on offers of proof and receive evidence;
- (5) rule on procedural matters, objections and motions;
- (6) question witnesses and request additional exhibits;

- (7) permit or require oral or written argument, briefs, proposed findings of fact and conclusions, or other submittals the Examiner finds appropriate, and determine the timing and format for such submittals;
- (8) regulate the course of the hearings and the conduct of the parties and others; and
- (9) hold conferences for settlement, simplification of issues, or for any other proper purpose.

2.24 PARTIES' RIGHTS AND RESPONSIBILITIES

(a) Each party, including a cooperating employee who has filed a supplemental complaint, has the right to notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the full disclosure of facts and a fair hearing.

(b) Parties have the right to be represented by an attorney; representation by an attorney is not required.

(c) When a party has designated a representative, the representative shall exercise the rights of the party.

(d) Unless otherwise provided by order of the Hearing Examiner, if a party expects to offer a document as an exhibit at the hearing, the party shall supply a copy of the document to every other party.

2.25 AMICUS CURIAE

The Hearing Examiner may grant a written motion seeking permission to file a brief *amicus curiae* if the Examiner determines that the brief would assist the Hearing Examiner. The motion shall not exceed six double-spaced pages and shall state the movant's identity and interest in the case, the specific issues to be addressed in the brief, and the reasons the movant believes additional briefing is needed. The Hearing Examiner may permit *amicus curiae* to present oral argument if the Examiner determines that it would assist the Examiner and sufficient time is available.

2.26 TESTIMONY

(a) All testimony before the Hearing Examiner shall be taken under oath or affirmation. All witnesses are subject to cross-examination.

(b) The rules of privilege apply to the extent recognized by law.

(c) The Hearing Examiner may allow testimony via teleconference or videoconference or similar electronic means. Each party to the proceeding shall have the opportunity to hear (or for a videoconference, to both hear and see) testimony given in

this manner and to question the person giving such testimony. Any costs associated with electronic conferencing shall be borne by the party requesting it.

2.27 EVIDENCE

(a) Relevant, material and reliable evidence shall be admitted. Such evidence includes that on which responsible individuals would commonly rely in the conduct of their important affairs. Irrelevant, unreliable, immaterial, and unduly repetitive evidence shall be excluded.

(b) Documentary evidence may be received in the form of copies or excerpts. The Hearing Examiner may require that the parties be given an opportunity to compare the copy with the original, and that the complete document from which an excerpt is taken be made available for inspection by all parties.

(c) The Hearing Examiner may take official notice of judicially cognizable facts. Before a decision is issued, parties must be notified of the facts noticed and their source, and afforded an opportunity to contest or rebut them. The Hearing Examiner may utilize his or her experience, technical competence and specialized knowledge in evaluating the evidence.

(d) A Hearing Examiner ruling or decision may refer to and utilize any part of the Code.

2.28 BURDEN AND STANDARD OF PROOF

(a) In any proceeding against an individual employee for retaliating against a cooperating employee in violation of SMC 4.16.070.F, the Executive Director has the burden of proving retaliation by a preponderance of the evidence.

(b) In any proceeding against a City agency, the Executive Director has the burden of proving a prima facie case of the cooperating employee's status under SMC 4.20.805, the timeliness of the cooperating employee's complaint under SMC 4.20.860.A.1, and the adverse change alleged to be retaliation against the cooperating employee. The City agency must then show that no retaliation occurred by proving by a preponderance of the evidence that the cooperating employee's status as a cooperating employee was not a contributing factor in the agency's decision to implement an adverse change against the cooperating employee.

(c) The cooperating employee has the burden of proving by a preponderance of the evidence that the emotional distress claimed in the supplemental complaint was caused by the alleged retaliation.

2.29 HEARING FORMAT

The hearing is informal in nature but structured to elicit relevant evidence efficiently while providing the parties a fair opportunity for hearing. The hearing shall include the following elements in an order determined by the Hearing Examiner to be appropriate to the case:

- (a) Hearing Examiner's introductory statement;
- (b) parties' brief opening statements (optional);
- (c) presentation of Executive Director's case;
- (d) presentation of cooperating employee's case if the cooperating employee has filed a supplemental complaint;
- (e) presentation of respondent's case;
- (f) opportunity for rebuttal; and
- (g) parties' closing arguments.

2.30 HEARING EXAMINER'S DECISION

(a) The Hearing Examiner shall issue a written decision and provide a copy to each party within 30 days from the date on which the record is closed. A copy of the decision and the certificate of service shall be made part of the case record. The decision shall also be filed as a public record in the Office of the City Clerk.

(b) The decision shall include a brief summary of the evidence considered, findings of fact, conclusions of law, a ruling on the requested relief and a brief statement of the reasons for the ruling, and information regarding any subsequent procedural steps available for appealing the decision.

2.31 RECORD

The case record includes the following:

- (a) all pleadings;
- (b) all exhibits admitted;
- (c) a statement of any matters officially noticed and any responses by the parties;
- (d) the findings, conclusions and decision of the Hearing Examiner; and
- (e) the recording of the hearing.