

### § 26.3

(9) To make and file determinations; and

(10) To exercise such other authority as is necessary to carry out the responsibilities of the hearing officer under subpart A of this part.

#### § 26.3 *Ex parte* communications.

(a) *Definition.* An *ex parte* communication is any communication with a hearing officer, direct or indirect, oral or written, concerning the merits or procedures of any pending proceeding that is made by a party in the absence of any other party.

(b) *Prohibition of ex parte communications.* *Ex parte* communications are prohibited except where:

(1) The purpose and content of the communication have been disclosed in advance or simultaneously to all parties; or

(2) The communication is a request for information concerning the status of the case.

(c) *Procedure after receipt of ex parte communication.* Any hearing officer who receives an *ex parte* communication that the hearing officer knows or has reason to believe is unauthorized shall promptly place the communication, or its substance, in all files and shall furnish copies to all parties. Unauthorized *ex parte* communications shall not be taken into consideration in deciding any matter in issue.

#### § 26.4 Sanctions.

(a) The hearing officer may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) If a party refuses or fails to comply with an order of the hearing officer, including an order compelling discovery, the hearing officer may enter any appropriate order necessary to the disposition of the hearing including a determination against the noncom-

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plying party, including but not limited to, the following:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, regard each matter about which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; or

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the order.

(d) If a party fails to prosecute or defend an action brought under subpart A of this part, the hearing officer may dismiss the action or may issue an initial decision against the non-prosecuting or defending party.

(e) The hearing officer may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

#### § 26.5 Disqualification of hearing officer.

(a) When a hearing officer believes there is a basis for disqualification in a particular proceeding, the hearing officer shall withdraw by notice on the record and shall notify the Secretary and the official initiating the action under appeal.

(b) Whenever any party believes that the hearing officer should be disqualified from presiding in a particular proceeding, the party may file a motion with the hearing officer requesting the hearing officer to withdraw from presiding over the proceedings. This motion shall be supported by affidavits setting forth the alleged grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the hearing officer shall proceed no further in the case until the matter of disqualification is resolved.

(d) If the hearing officer does not withdraw, a written statement of his or her reasons shall be incorporated in the record and the hearing shall proceed, unless the decision is appealed in accordance with the procedures set forth in § 26.27.