

Department of Justice

§ 68.38

prohibition against *ex parte* communications. The Administrative Law Judge shall state in the record the cause for barring an attorney or other individual from participation in a particular proceeding. The Administrative Law Judge may suspend the proceeding for a reasonable time for the purpose of enabling a party to obtain another attorney or representative.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534-91, 56 FR 50053, Oct. 3, 1991]

§ 68.36 *Ex parte* communications.

(a) *General.* Except for other employees of the Executive Office for Immigration Review, the Administrative Law Judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. Communications by the Office of the Chief Administrative Hearing Officer, the assigned judge, or any party for the sole purpose of scheduling hearings, or requesting extensions of time are not considered *ex parte* communications, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.

(b) *Sanctions.* A party or participant who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534-91, 56 FR 50053, Oct. 3, 1991]

§ 68.37 Waiver of right to appear and failure to participate or to appear.

(a) *Waiver of right to appear.* If all parties waive in writing their right to appear before the Administrative Law Judge or to present evidence or argument personally or by representative, it shall not be necessary to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Hearing Officer or the Administrative Law

Judge. Where such a waiver has been filed by all parties and they do not appear before the Administrative Law Judge personally or by representative, the Administrative Law Judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case and decision shall be based on them.

(b) *Dismissal—Abandonment by party.* A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if:

(1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge; or

(2) Neither the party nor his or her representative appears at the time and place fixed for the hearing and either

(i) Prior to the time for hearing, such party does not show good cause as to why neither he or she nor his or her representative can appear; or

(ii) Within ten (10) days after the time for hearing or within such other period as the Administrative Law Judge may allow, such party does not show good cause for such failure to appear.

(c) *Default—Failure to appear.* A default decision, under § 68.9(b), may be entered, with prejudice, against any party failing, without good cause, to appear at a hearing.

[54 FR 48596, Nov. 24, 1989. Redesignated and amended by Order No. 1534-91, 56 FR 50053, 50056, Oct. 3, 1991; Order No. 1635-92, 57 FR 57672, Dec. 7, 1992]

§ 68.38 Motion for summary decision.

(a) A complainant, not fewer than thirty (30) days after receipt by respondent of the complaint, may move with or without supporting affidavits for summary decision on all or any part of the complaint. Motions by any party for summary decision on all or any part of the complaint will not be entertained within the twenty (20) days prior to any hearing, unless the Administrative Law Judge decides otherwise. Any other party, within ten (10) days after service of a motion for summary

decision, may respond to the motion by serving supporting or opposing papers with affidavits, if appropriate, or countermove for summary decision. The Administrative Law Judge may set the matter for argument and/or call for submission of briefs.

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

(c) The Administrative Law Judge shall enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

(d) *Form of summary decisions.* Any final order entered as a summary decision shall conform to the requirements for all final orders. A final order made under this section shall include a statement of:

(1) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and

(2) Any terms and conditions of the final order.

(e) *Hearings on issue of fact.* Where a genuine question of material fact is raised, the Administrative Law Judge shall set the case for an evidentiary hearing.

[Order No. 2203-99, 64 FR 7078, Feb. 12, 1999]

§ 68.39 Formal hearings.

(a) *Public.* Hearings shall be open to the public. The Administrative Law Judge may order a hearing or any part thereof closed, where to do so would be in the best interests of the parties, a witness, the public, or other affected persons. Any order closing the hearing shall set forth the reasons for the decision. Any objections thereto shall be made a part of the record.

(b) *Jurisdiction.* The Administrative Law Judge shall have jurisdiction to decide all issues of fact and related issues of law.

(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the right to present evidence, to conduct such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, and argument.

(d) *Rights of participation.* Every party shall have the right to make a written or oral statement of position. At the discretion of the Administrative Law Judge, participants may file proposed findings of fact, conclusions of law, and a post hearing brief.

(e) *Amendments to conform to the evidence.* When issues not raised by the request for hearing, prehearing stipulation, or prehearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues. The Administrative Law Judge may grant a continuance to enable the objecting party to meet such evidence.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534-91, 56 FR 50053, Oct. 3, 1991]

§ 68.40 Evidence.

(a) *Applicability of Federal rules of evidence.* Unless otherwise provided by statute or these rules, the Federal Rules of Evidence will be a general guide to all proceedings held pursuant to these rules.

(b) *Admissibility.* All relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence. Stipulations of fact may be introduced in evidence with respect to any issue. Every party shall have the right to present his/her case or defense