


Transmittal No. 91-OAH-FH-3

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS

TO: All Administrative Law Judges
and Professional Staff

DATE: May 23, 1991

FROM: Sharon Silversmith 

SUBJECT: Hearings: Recusal of
Administrative Law Judges

Governor's Executive Order No. 131, which was issued on December 4, 1989, requires that certain State agencies which conduct adjudicatory proceedings have an Administrative Adjudication Plan. The Plan must include a procedure for any party to an adjudicatory hearing to request recusal of a hearing officer.

The Administrative Adjudication Plan established by this Department provides that the Department will establish recusal procedures. The attached regulations which were filed on May 13, 1991 and which are effective May 29, 1991, establish a procedure for the removal of hearing officers holding various types of hearings, including special hearings. This includes hearings involving Public Assistance, Medical Assistance (MA), food stamps, Home Energy Assistance Program (HEAP) grants, and a variety of social services programs. In addition, the proposed regulations apply to hearings involving operators of residential care facilities for adults and children, operators of day care facilities and providers of MA.

A party to the hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing. The grounds for removal are that the hearing officer has:

- o previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or
- o any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or
- o displayed bias or partiality to any party to the hearing.

In addition the hearing officer may independently determine to remove himself or herself from presiding at a hearing on the same grounds.

The request for removal made by a party must:

- o be made in good faith; and
- o be made at the hearing in writing or orally on the record; and
- o describe in detail the grounds for requesting that the hearing officer be removed.

Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing. Please consult with your supervisor prior to making a determination on a recusal request.

If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the General Counsel or her designee.

The determination of the hearing officer not to remove himself or herself will be reviewed by Susan V. Demers until further notice. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

The regulations require that the General Counsel or her designee issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing. The written determination of the general counsel or the general counsel's designee will be made part of the record.

While the General Counsel or her designee reviews the hearing officer's determination not to recuse himself or herself, the hearing decision itself will be held in abeyance. Where the General Counsel determines that the hearing officer should have been removed from presiding at the hearing, a decision will be issued stating the determination and remanding the matter for a de novo hearing. Where the General Counsel or her designee determines that the hearing officer properly determined not to remove himself or herself from presiding at the hearing, the hearing decision will include a discussion of the determination of the General Counsel or her designee on the recusal issue.

Any case where a determination not to recuse is made should be promptly drafted and returned to your supervisor so that the review process can be started immediately to ensure that the review and written determination can be completed within 15 business days of the close of the hearing.

Supervisors should then promptly notify Phil Nostramo, Sebastian Addamo or Robert McDougall as appropriate.

Effective May 29, 1991, for hearing officers holding Part 358 hearings, you must add the attached language to your opening statement.

We will be adding this language to the next edition of the Green Sheet.

RECUSAL LANGUAGE FOR OPENING STATEMENT

If I have ever dealt with your case, except as a hearing officer, have any interest which no longer makes me independent or I display bias or partiality to any party at this hearing, you have the right to ask that a different hearing officer be assigned to this case.

IF RECUSAL IS REQUESTED

I will decide if another hearing officer should be assigned. If I decide that another hearing officer should not be assigned, the hearing will continue; however, before the hearing decision is issued, the General Counsel or the General Counsel's designee will review your request that I be removed.

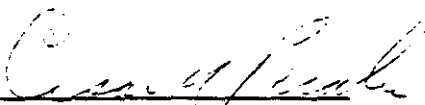
If it is decided that I should have been removed, this hearing will be rescheduled with another hearing officer.

STATE DEPARTMENT OF SOCIAL SERVICES
ALBANY, NEW YORK

Pursuant to the provisions of Sections 20(3)(d), 22(3)(f), 22(3), 34(3)(f), 390(12), 424-a, 455 and 460-d of the Social Services Law, I, Cesar A. Perales, Commissioner of Social Services do hereby amend section 343.8; amend subdivision (j) of section 358-3.4; redesignate subdivision (k) of section 358-3.4 as subdivision (l); adopt a new subdivision (k) of section 358-3.4; amend subdivision (e) of section 358-4.3; add subdivision (c) to section 358-5.6; amend subdivision (n) of section 418.20; redesignate paragraphs (5) and (6) of subdivision (g) of section 421.24 as paragraphs (6) and (7) and add a new paragraph (5) to such subdivision; amend section 434.6; and redesignate subdivisions (c) through (e) of section 519.13 as subdivisions (d) through (f) and add a new subdivision (c) to such section of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR, effective upon publication of the Notice of Adoption in the New York State Register.

Dated: May 9, 1991

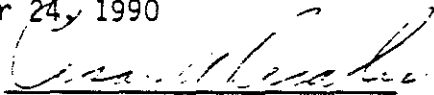
Signed:


Commissioner

This is to certify that this is the original of an order of the State Department of Social Services made on May 13, 1991 amending section 343.8, amending subdivision (j) of section 358-3.4; redesignating subdivision (k) of section 358-3.4 as subdivision (l); adopting a new subdivision (k) of section 358-3.4; amending

subdivision (e) of section 358-3.4;
adding subdivision (c) to section
358-5.6; amending subdivision (n)
of section 418.20; redesignating
paragraphs (5) and (6) of
subdivision (g) of section 421.24
as paragraphs (6) and (7) and
adding a new paragraph (5) to such
subdivision; amending section
434.6; and redesignating
subdivisions (c) through (e) of
section 519.15 as subdivisions (d)
through (f) and adding a new
subdivision (c) to such section of
the Official Regulations of the
State Department of Social
Services, being Title 18 NYCRR, a
summary of which was published in
the New York State Register on
October 24, 1990

Dated: May 9, 1991

Signed: 

Commissioner

The current language of section 343.8 is designated as subdivision (a) of section 343.8 and a new subdivision (b) is added to read as follows:

(b) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(1) The grounds for removing a hearing officer are that such hearing officer has:

(i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

(iii) displayed bias or partiality to any party to the hearing.

(2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

(3) The request for removal made by a party must:

(i) be made in good faith; and

(ii) be made at the hearing in writing or orally on the record; and

(iii) describe in detail the grounds for requesting that the hearing officer be removed.

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(4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

(6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(7) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

Subdivision (j) of section 358-3.4 is amended to read as follows:

(j) to have the fair hearing held at a time and place convenient to you as far as practicable, taking into account circumstances such as your physical inability to travel to the regular hearing location; [and]

Subdivision (k) of section 358-3.4 is redesignated as subdivision (l) of such section and a new subdivision (k) is adopted to read as follows:

(k) to request removal of a hearing officer in accordance with section 358-5.6 of this Part; and

Subdivision (e) of section 358-4.3 is amended to read as follows:

(e) Social service agencies have those hearing rights which appellants have as set forth in subdivision 358-3.4(d) (adjournment), 358-3.4(e) (representation), 358-3.4(g) (present evidence, question witnesses, examine documents), and 358-3.4(h) (bring witnesses), and 358-3.4(k) (removal of hearing officer) of this Part.

Subdivision (c) is added to section 358-5.6 to read as follows:

(c) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(1) The grounds for removing a hearing officer are that such hearing officer has:

(i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

(iii) displayed bias or partiality to any party to the hearing.

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(2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

(3) The request for removal made by a party must:

(i) be made in good faith; and

(ii) be made at the hearing in writing or orally on the record; and

(iii) describe in detail the grounds for requesting that the hearing officer be removed.

(4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

(6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(7) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

The current language of subdivision (n) of section 418.20 is designated as paragraph (1) of subdivision (n) of section 418.20 and a new paragraph (2) is added to such subdivision to read as follows:

(2) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(i) The grounds for removing a hearing officer are that such hearing officer has:

(a) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(b) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

(c) displayed bias or partiality to any party to the hearing.

(ii) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in subparagraph (i) of this paragraph.

(iii) The request for removal made by a party must:

(a) be made in good faith; and

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(b) be made at the hearing in writing or orally on the record; and

(c) describe in detail the grounds for requesting that the hearing officer be removed.

(iv) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(v) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

(vi) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(vii) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(viii) The written determination of the general counsel or the general counsel's designee will be made part of the record.

Paragraphs (5) and (6) of subdivision (g) of section 421.24 are redesignated as paragraphs (6) and (7) and a new paragraph (5) is added to read as follows:

(5) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(i) The grounds for removing a hearing officer are that such hearing officer has:

(a) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(b) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

(c) displayed bias or partiality to any party to the hearing.

(ii) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in subparagraph (i) of this paragraph.

(iii) The request for removal made by a party must:

(a) be made in good faith; and

(b) be made at the hearing in writing or orally on the record; and

(c) describe in detail the grounds for requesting that the hearing officer be removed.

(iv) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

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(v) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

(vi) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(vii) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(viii) The written determination of the general counsel or the general counsel's designee will be made part of the record.

The current language of section 434.6 is redesignated as subdivision (a) of section 434.6 and a new subdivision (b) is added to read as follows:

(b) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(1) The grounds for removing a hearing officer are that such hearing officer has:

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(i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

(iii) displayed bias or partiality to any party to the hearing.

(2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

(3) The request for removal made by a party must:

(i) be made in good faith; and

(ii) be made at the hearing in writing or orally on the record; and

(iii) describe in detail the grounds for requesting that the hearing officer be removed.

(4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

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(6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(7) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

Subdivisions (c), (d) and (e) of section 519.15 are redesignated as subdivisions (d), (e) and (f) respectively and a new subdivision (c) is added to read as follows:

(c) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(1) The grounds for removing a hearing officer are that such hearing officer has:

(i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

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(iii) displayed bias or partiality to any party to the hearing.

(2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

(3) The request for removal made by a party must:

(i) be made in good faith; and

(ii) be made at the hearing in writing or orally on the record; and

(iii) describe in detail the grounds for requesting that the hearing officer be removed.

(4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel or the general counsel's designee.

(6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

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(7) The general counsel or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

(Deleted material [brackets]; new material underlined).
