Responsiveness Summary
Office of Administrative Hearings Regulations
April 5, 2006

This Responsiveness Summary sets out the responses to the written public comments on the proposed regulations. Some responses describe how the proposed regulations were changed, but those descriptions reflect only the change made at the agency level. Wording, organizational and technical changes made as a result of the Department of Law review are not described below.

No.	Commenter	Comment	Response
Code of Hearing Officer Conduct: 2 AAC 64.010-090			
1	Hagan	"2 AAC 64.010(b) – why does .900-.990 not apply to independent contractors hired for the purpose of conducting hearings?"	They do apply to contract hearing officers. The language of 2 AAC 64.010(b) has been clarified. Thank you.
2	Walters	Regarding 2 AAC 64.040(c): "The parties' waiver of an objection to a disclosed potential conflict of interest should be permitted to be made on the record during a recorded hearing, and not restricted to a written document of waiver. … In workers' compensation proceedings, most potential conflicts of interest have been discovered in the early stages of the hearing. If a potential conflict of interest is discovered, and disclosed, the waiver of objection by the parties (if there is a waiver) is taken directly on the hearing record. This is expeditious, definitive (there is no delay – the hearing proceeds or does not proceed) and legally sound. Provision should be made for this in the proposed regulation."	Good suggestion. The language of 2 AAC 64.040(c) has been changed to allow for the waiver of conflict to be made on the oral record.
3	Hagan	"2 AAC 64.060(b)(2)(a) [sic] – this is inconsistent with 2 AAC 64.040(c) which requires waiver in writing."	The option for an oral waiver on the record has been added to 2 AAC 64.040(c). Thank you.
4	Alaska Comm'n on Judicial Conduct	Regarding 2 AAC 64.060(b)(3): "In the paragraph that addresses reliance on an opinion you may want to distinguish formal written advice from informal verbal opinions. In our procedures, there have very different implications."	The suggestion to distinguish between informal and formal opinions is a good one. The language in 2 AAC 64.060(b)(3) has been changed to do so.
5	Alaska Comm'n on	"In 2 AAC 64.070, addressing the filing of complaints	Confidentiality of the complaint is addressed in

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	Judicial Conduct	there is no indication as to whether these complaints are public or confidential. I would strongly suggest that they be confidential at least up to a certain point. Other statutes and personnel rules may, by implication, require this."	the General Provisions at 2 AAC 64.950(c)&(d).
6	Walters	Regarding 2 AAC 64.070(d): "In order to give other interested persons the opportunity to protect their interests, the person filing a complaint with the Chief ALJ should be required to serve copies of the complaint on: (1) the accused hearing officer/ALJ; (2) the opposing parties if the complaint in any way relates to litigation, and (3) on the supervisor of the hearing officer/ALJ. Rationale: (1) Whether or not the accused hearing officer/ALJ is given a mechanism for immediate response to an allegation, there is no basis for allowing the proceedings to initiate with absolutely no notice to the accused. (2) Also, as noted earlier, my experience is that these complaints typically arise in litigation, and opposing parties from the underlying litigation have a strong potential interest in proceedings in a side-forum that could have impact on the underlying litigation. (3) Notice to the supervisor is critical because the supervisor may see an immediate need to act on the matter to proactively protect the integrity of the proceeding through re-assignment of a case; or some other mechanism. Alternately, a supervisor may have information which indicates the allegation is baseless, and would want to protect the public interest by preventing the hearing officer/ALJ from having to engage in defending his/her actions while in the middle of conducting the underlying proceeding. Side-proceedings such as this complaint process are	The Code of Hearing Officer Conduct complaint process required by AS 44.64.050 is independent from, not part of, the hearing process for cases before the Workers' Compensation Board or any other hearing officers. A complaint that a hearing officer violated the code (or the prohibition in AS 44.64.050(a)) will not necessarily be connected to a specific case then being heard. Even if it is, the complaint review and consideration process does not become part of the case. The complaint process is not a substitute for case-specific requests to disqualify hearing officers. If the complainant is a case party and the allegations relate to the case, it is incumbent upon him/her to separately file a motion to disqualify the hearing officer. The complaint review and consideration process remains separate from the case. How any motion filed is resolved has no bearing on consideration of the complaint. If the complainant elects not to file a motion to disqualify, but instead wishes to initiate only an ethics complaint, to be considered and, if appropriate, investigated in due course, requiring service of the complaint on the hearing officer, supervisor and case parties would cause the very problem the comment fears.

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		inherently subject to potential partisan tactical abuse, and shining the brightest possible light on the complaint process through full notice and the participation of interested parties is the best safeguard."	No point would be served by injecting ethics complaints into case proceedings if the complaining party chooses not to do so. Meritorious complaints should be acted on, in due course, to protect the integrity of administrative hearing processes as a whole. Frivolous complaints can be dismissed without allowing them to become a distraction in pending cases, but not if the regulations required the complainant to inject the complaint into a case.
7	Walters	Regarding 2 AAC 64.080. "(1) Allegations of violation of AS 44.64.050(a) (prohibition of private practice of law) should be treated no differently than allegations of other types of violations. The proposed definition of the 'private practice of law' at 2 AAC 64.990(21) provides exceptions to the prohibition, and a 10-day opportunity to provide 'mitigating factors' should be provided for this category of allegation, as well. (2) The opportunity to provide evidence of mitigating factors concerning any alleged violation should be afforded to supervisors and all interested parties….. Rationale: (1) The supervisor may have ready access to, or direct knowledge of, mitigating factors. For example, if a hearing officer/ALJ disclosed a potential conflict of interest on the record, and the parties waived objection, the supervisor may want to forward the information to the Chief ALJ directly. Putting on my former hat as Chief of Adjudication for the Workers' Compensation Division, in the case of a clearly baseless complaint, I would definitely have responded to the Chief ALJ in the hope of preventing the hearing officer from having to engage with one of the parties in what would be essentially an	By statute, a complaint containing allegations which, if true, would constitute a violation of the statutory prohibition against the private practice of law by full-time hearing officers ***must*** be referred to the attorney general for investigation. AS 44.64.050(c)(1). In contrast, a complaint containing allegations which, if true, would constitute a violation of the ***code*** must be referred to the attorney general for investigation if the violation "would warrant disciplinary action" under the regulations. AS 44.64.050(c)(2). This distinction is why it was possible to include in the regulations mitigating factors for some categories of code violations, but not for the statutory prohibition against private practice. Nothing in the regulation precludes a hearing officer from accepting help (possibly including from his/her supervisor) in assembling mitigating factor information such as the waiver of conflict mentioned in the comment. But the hearing officer is the proper respondent to an ethics

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		adversarial forum. (2) If a party to litigation underlying the complaint has evidence of mitigating factors and believes the accusation is adversely affecting his or her interest, that party should have the opportunity to protect that interest by submitting the information to the Chief ALJ."	complaint made against him/her. The complaint is individual to the hearing officer; it is not made against the organizational unit for which he/she works. It is for the hearing officer to decide whether to claim mitigation. The ethics complaint process is inquisitorial, not adversarial. At the complaint filing, review and consideration stage covered by the OAH regulations, the hearing officer will not be facing off against the complainant, nor will case parties' interests be affected.
8	Department of Law	"2 AAC 64.090. Referral to Attorney General. The references to 'AS 44.64.050(c) ***and*** 2 AAC 64.080' should be to 'AS 44.64.050(c) ***or*** 2 AAC 64.080.' If a situation triggers the statutory reference, it does not need also to trigger the regulatory reference."	Good correction. The "and" has been changed to "or." Thank you.
9	Walters	Regarding 2 AAC 64.090. "Notice of the Chief ALJ's decision to refer, or not refer, a complaint to the attorney general should also be provided to the supervisors and other interested parties, based on the rationale discussed above."	The suggestion to copy the hearing officer's supervisor with the notice of referral is a good one because that would put the supervisor in a better position to accommodate the hearing officer's need to cooperate in the investigation. The hearing officer is free to share the notice of denial with his/her supervisor, but there is no particular need to directly copy the supervisor. The regulation already calls for the complainant to receive the notice of referral or denial. There are no other parties to the complaint process. Language has been added in 2 AAC 64.090(a) to include the supervisor on the notice of referral.
10	Alaska Assn ALJs	General comment: "The Alaska Association of Administrative Law Judges is a non-profit corporation	Thank you.

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		that is an affiliate of the National Association of Administrative Law Judges. Our Association supports the development of standards for ethical conduct by administrative law judges and hearing officers. We therefore applaud the State's actions to establish ethical standards for administrative judges and hearing officers in Alaska. We have encouraged our individual members to offer their comments on these specific proposed regulations."	
11	Dept. of Natural Resources (DNR)	General comment: "The definition of a hearing officer in AS 44.64.200 applies to '…an individual who presides over the conduct of an administrative hearing and *who is retained or employed by an agency for that purpose*…'. DNR does not employ hearing officers, but rather a few employees may perform this function in very limited situations. Since the definition applies only to employees specifically hired as a hearing officer I assume that neither the definition nor the requirements in 2 AAC 64 apply to DNR employees who may occasionally be called upon to act in that capacity."	It may well be that some state employees who only occasionally preside over hearings and who are not employed for the primary purpose of doing so would not be directly subject to the Code of Hearing Officer Conduct requirements in 2 AAC 64. However, the ethical standards embodied in that code transcend this specific code. If an agency's own hearing regulations or internal processes would allow an employee who occasionally serves as a hearing officer to sidestep the ethical standards necessary to provide a fair hearing that affords all parties due process of law, the agency's hearing process would be flawed and would be in need of reform. Moreover, as an executive branch employee, the occasional hearing officer would be subject to the Executive Branch Ethics Act, which addresses some of the same topics as in the Code of Hearing Officer Conduct. Whether a particular state employee is subject to the Code of Hearing Officer Conduct may require a determination under the circumstances of that

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			employee's employment or assignment to perform the hearing function. A complaint made under the Code of Hearing Officer Conduct will not be rejected out of hand just because the employee's job title is not "hearing officer," but appropriate consideration will be given to whether the employee against whom a complaint is made is, in fact, subject to the code and, if not, how the complaint should be handled.
12	Alaska Bar Ass'n	General comment: "[T]he Bar Association respectfully believes that the administrative regulations governing the conduct of administrative law judges and hearing officers should defer to the definitions adopted by the Supreme Court."	The Court's definitions serve different purposes than the narrow purpose of OAH's definitions. OAH's definitions set sidebars on the type of law-related work full-time state hearing officers can perform without violating the AS 44.64.050(a) prohibition against the "private practice of law" by these executive branch employees. If the purposes were similar, it might be possible to use one of the definitions the Court has approved for the Bar Rules, but they are not similar.
13	Alaska Comm'n on Judicial Conduct	General comment: "The Code of Judicial Conduct is much more detailed and comprehensive. You may want to adopt many of the provisions of the Alaska Code of Judicial Conduct by reference in the regulations to cover the many areas not currently covered by the draft regulations and the statutes."	Thank you for the suggestion. OAH considered do this but found adoption by reference of the judicial conduct code to be unworkable for executive branch hearing officers and contract hearing officers engaged to assist executive branch decisionmakers. Note, however, that the "fundamental canons of conduct" required by AS 44.64.050(b) to be included in the Code of Hearing Officer Conduct track closely with judicial canons. The commentary from the judicial conduct code, therefore, may be a useful guide, which is why 2 AAC 64.030(c) authorizes its use as guidance for interpreting and applying the

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			canons.
14	Alaska Comm'n on Judicial Conduct	General comment: "One major omission seems to be the unique role that a quasi-judicial officer plays when part of an executive branch department. Some statements acknowledging the uniqueness of that role, the need to insulate that position from some of the normal expectations of executive branch employees (such as contact with legislators, communicating directly with the public, etc.) and emphasizing the need for objectivity and separation from advocacy could be very useful."	These are excellent topics for training. Thank you for suggesting them. In regulations, which must be enforceable as such, however, generalized guidance or commentary does not fit.
15	Alaska Comm'n on Judicial Conduct	General comment: "[T]he *ex parte* provision should be greatly expanded. There are likely many more allowable *ex parte* communications in the administrative arena than in the judicial branch, but the parameters for these should be spelled out. So too, while the 'Conflicts' section is the most detailed, there are many other situations, apart from a conflict that would result in a judge's disqualification. Here adopting the guidelines set out in the Disqualification statute for judges could be very helpful (AS 22.20.020)."	Executive branch hearing officers probably do have more occasions than judicial branch judges to be in contact with people who appear before them one day and then deal with them about non-case matters the next. But that just makes it more difficult to prescribe a laundry list of which contacts are allowed and which are not. The risk of missing something is greater than if general principles are prescribed and the hearing officers are educated about how to avoid improper contacts. Though the same act, omission or condition that warrants discipline under the code of conduct may also provide grounds to seek disqualification, the purpose of the code of conduct is not to set standards for disqualification. Other laws address disqualification. The processes for disqualifying a hearing officer from a case are completely separate from the code of conduct complaint and investigation process.
16	Alaska Comm'n on	General comment: "Under the procedures for 'Corrective	The possible outcomes of a disciplinary action are

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	Judicial Conduct	or Disciplinary Action' more detail could again be helpful. It would be useful to list, for example the possible outcomes or 'disciplinary actions.'"	not within OAH's purview. If a violation found, the attorney general reports it, along with recommendations for corrective or disciplinary action, to the agency that employs or engaged the hearing officer.
17	Alaska Comm'n on Judicial Conduct	General comment: "As to investigation and discipline, the statute refers to some kind of a 'hearing' but the regulations don't seem to provide a disciplinary hearing process."	Under AS 44.64.050(e), the attorney general's implementing regulations for the investigation process are to include "procedures for investigating and holding hearings on complaints."
18	Walters	General comment: "Conflict of interest allegations and recusal requests in [workers' compensation] proceedings have been dealt with by the hearing panels under the provisions of the A.P.A. at AS 44.62.450(c), and this procedure appears to be unchanged by AS 44.64.050."	The Code of Hearing Officer Conduct and related complaint/investigation process required by AS 44.64.050 are independent of any other processes, including case-specific processes on disqualification of hearing officers.
19	Walters	General comment: "The responsibility for the direction and discipline of the hearing officers, the assignment of cases, and the integrity of the workers' compensation proceedings lies with the hearing officers' chain of supervision within the Workers' Compensation Division. This is unchanged by AS 44.64.050."	A complaint alleging violation of the Code of Hearing Officer Conduct can lead to the attorney general recommending corrective or disciplinary action, but the decision on what, if any, disciplinary action to take has not been diverted from the line of supervision for the hearing officer.
20	Foster	General comment: "I have concerns that the proposed regulations may violate the GGU collective bargaining agreement and I hope you will examine this issue. I want you to know that my comments reflect my own opinion and [are] not offered to in any way represent the Workers' Compensation Division."	*See* response to Comment 22 below.
21	ASEA/AFSCME Local 52	General comment: "While ASEA/AFSCME Local 52 supports the concept of having presiding officers subject to the code of hearing officer conduct and executive branch ethics act, we have some concerns about	The Code of Hearing Officer Conduct complaint process required by AS 44.64.050 is independent from, not part of, the hearing process for cases before the Workers' Compensation Board or any

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		implementation and handling of complaints under the proposed rules. These comments are made in the context of hearings in worker's [sic] compensation cases. They may also be applicable to hearing officers working in other state agencies. These proposed regulation changes raise a number of concerns: First, the Chief Administrative Law Judge (ALJ) is not familiar with the context of hearings in workers [sic] compensation matters, for example, and therefore is not as well suited to consider a complaint as the presiding officer's supervisor who is familiar with the worker's [sic] compensation hearing environment. Also, the disciplinary route does not follow the line of supervision for the individual ALJ. We also have concerns over setting up a complaint procedure that could derail the hearing process under the Alaska Workers' Compensation Act for an indefinite period. This would have the effect of delaying necessary benefit determinations. To avoid this result, we would recommend that any procedure for handling complaints be structured so as to feed the case back into the chain of command as soon as possible."	other hearing officers. A complaint that a hearing officer violated the code (or the prohibition in AS 44.64.050(a)) will not necessarily be connected to a specific case then being heard. Even if it is, the complaint review and consideration process does not become part of the case. Indeed, even if the complainant is a case party and simultaneously makes a motion to disqualify the hearing officer on grounds related to the complaint's allegations, the complaint review and consideration process remains separate from the case. (How the motion is resolved has no bearing on consideration of the complaint.) That the law now provides an additional avenue for citizens to complain about alleged misconduct by hearing officers poses no greater risk of the hearing process being derailed than do the citizens' rights to complain to an employee's supervisor, to make an Executive Branch Ethics Act complaint, or to file a lawsuit. Any of those actions could distract some of the hearing officer's attention, but nothing in AS 44.64.050 or the code requires the hearing officer to take a time out from work on a case because someone is pursuing an ethics complaint. The chief ALJ's function is to "receive and consider" complaints, and to refer complaints in which the allegations, if true, would constitute a violation of AS 44.64.050(a) or of the code to the attorney general for investigation. If the attorney general finds a violation, that is reported to the agency that employs or engaged the hearing

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			officer, together with recommendations for corrective or disciplinary action. The decision on what, if any, disciplinary action to take has not been diverted from the line of supervision for the hearing officer. Also, neither the chief ALJ nor any other legally trained neutral charged with this function needs to have specialized knowledge of the hearing officer's work environment to consider whether allegations, if true, violate the code or AS 44.64.050(a).
22	ASEA/AFSCME Local 52	General comment: "Second, the hearing officers in the workers' compensation system are GGU members represented by ASEA/AFSCME Local 52. Discipline imposed against these persons is subject to the provisions contained in the collective bargaining agreement between the State of Alaska and ASEA/AFSCME Local 52."	The Code of Hearing Officer Conduct regulations do not provide for discipline of state employees. They create an ethics complaint process, as required by AS 44.64.050. If the complaint's allegations, if true, would constitute a violation of AS 44.64.050(a) or the code of conduct, the complaint is forwarded to the attorney general for investigation. If that investigation finds a violation, the attorney general ***recommends*** corrective or disciplinary action to the agency that employs or engaged the hearing officer. Presumably, implementation of that recommendation by the agency would follow normal procedures, including any applicable grievance procedure in a collective bargaining agreement.
23	ASEA/AFSCME Local 52	General comment: "Third, it is not clear what relationship the proposed rules have with the state's personnel rules. It is also not clear how these provisions relate to the complaint procedure set out in Article 4, Complaints; Hearing Procedures under the Chapter 52 of the Alaska Executive Branch Ethics Act."	The Code of Hearing Officer Conduct complaint process is a standalone process and its regulations are unrelated the personnel rules and the Executive Branch Ethics Act procedures. It is conceivable that the same alleged conduct could trigger both a code of conduct complaint and an

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			Executive Branch Ethics Act complaint, but the regulations are unconnected and the processes are separate.
24	ASEA/AFSCME Local 52	General comment: "Four, if a complaint was to be filed in the midst of a workers' compensation hearing, the unrepresented employee or employer, for that matter, could find themselves in the middle of a proceeding which has nothing to do with the need for workers' compensation benefits and in which they are ill prepared to navigate. While injured employee's counsel are entitled to attorney fees for their participation in workers' compensation cases, they would not be compensated by the Board for appearance or time spent in a disciplinary proceeding."	*See* response to Comment 6 (illustrating that the Code of Hearing Officer Conduct complaint process is not part of a specific case, even if conduct in the case spawns the allegations).
25	ASEA/AFSCME Local 52	General comment: "Five, the attorney general is a party, on occasion, in workers' compensation proceedings. It is inappropriate to allow a party to be involved in or take disciplinary or corrective action against a presiding officer."	The attorney general has the ultimate responsibility to advise and represent most state agencies, including agencies with regulatory authority over other agencies. The attorney general may be called upon both to represent the state before an agency and to advise the agency in the same proceeding. Potential conflicts usually are addressed by assignment—with different assistant attorneys general being assigned the different duties and by erection of ethical walls in the Department of Law. In some instances the attorney general will retain outside counsel. The potential for conflict between the attorney general's representation of the state before the workers' compensation board, representation of the board itself, and the duty under AS 44.64.050 to investigate code of conduct complaints is similar to the potential for conflict in other state

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			agencies. Workers' compensation proceedings are not unique in their potential for such conflicts. Actual conflicts can be addressed on a case-by-case basis.
26	ASEA/AFSCME Local 52	General comment: "Six, proceedings before the Worker's [sic] Compensation Board can be very contentious. It is certainly not beyond the realm of possibilities for counsel or parties to use the complaint process to derail a presiding officer they object to in hopes of securing a new presiding officer more to their liking. These provisions would give unscrupulous counsel another tool to use against presiding officers. * * * The new rules should provide safeguards against the inappropriate reference of unscrupulous complainants intending to remove hearing officers so as to replace them with hearing officers more to their liking."	A Code of Hearing Officer Conduct complaint is not a substitute for a motion to disqualify and is not filed in a specific case. A complaint cannot derail the hearing process unless the parties and the hearing office allow it to be injected into the hearing process. In 2 AAC 64.090(b), the regulations provide the safeguard of allowing for dismissal of complaints that do not meet the threshold for referral to the attorney general. *See also* responses to Comments 6 and 21.
27	ASEA/AFSCME Local 52	General comment: "[P]artisan interests have long wished for control over hearing officers in the workers [sic] compensation arena. A few or even one well-placed and vicious complaint, with or without merit, could go a long way toward harassing and eliminating hearing officers who are doing their job. Biting the bullet and properly applying the law can, at times, be a difficult process. I urge you to carefully draw the regulations to avoid using the complaint process as an opportunity to get rid of presiding officers who resist partisan interests."	The regulations cannot be drawn to prevent complainants from attempting to misuse the complaint process. Opportunities for abuse and misuse of the complaint process pose no greater risks that the right to file motions to disqualify, the ability to complain about a person to his/her supervisor, the right to make an Executive Branch Ethics Act complaint, or the right to file a lawsuit. Frivolous complaints can be dismissed at whatever stage their nature becomes apparent.
28	ASEA/AFSCME Local 52	General comment: "Alaska should follow the lead of other states in attempting to promote presiding officer independence. Hearings should be conducted in as	Agreed. This comment underscores the wisdom of the law that places the Code of Hearing Officer Conduct complaint screening function in the

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		neutral and independent manner as possible as the presiding officer ascertains facts and applies the law to those facts. Presiding officers deserve protections from potential interjection of political or personal considerations into the decision making process."	hands of the chief ALJ of the independent OAH and entrusts the investigation process to the attorney general.
29	ASEA/AFSCME Local 52	General comment: "Any procedure established for determining code of conduct or ethics violations should also reflect due process protections for presiding officers. We are concerned that the misuse of the complaint process could have a 'chilling effect' on the ability of presiding officers to discharge their responsibilities in handling cases."	*See* responses to Comments 6, 21, 26 and 27.
30	ASEA/AFSCME Local 52	General comment: "The proposed rules represent a laudable effort to make presiding officers subject to code of conduct and ethics rules; however, the provisions are fatally flawed in that they violate the existing rights of GGU members under the state's collective bargaining agreement."	Thank you; *but see* responses to Comments 7, 19, 21 and 22 (illustrating that the code of conduct complaint process does not entail disciplinary action taken by someone outside the hearing officer's chain of supervision and does not violate the GGU agreement).
31	Wielechowski	General comment: " The proposed complaint process does not address the rights of hearing officers under the State's collective bargaining agreement. Under the State's collective bargaining agreement with the GGU, for instance, complaints and discipline of hearing officers are specifically governed under the terms and conditions of the parties' collective bargaining agreement. Moreover, under the Alaska Public Employment Relations Act, AS 23.40.070, et. seq. ('PERA'), discipline of bargaining unit members is a mandatory subject of bargaining. Accordingly, the application of these regulations against bargaining unit members would appear to be in violation of PERA. Without this problem being addressed, I believe the	*See* responses to Comments 19, 21 and 22 above (illustrating that a complaint can lead to recommended disciplinary action but implementation is by the employing agency and presumably would follow normal procedures, including any applicable grievance procedure in a collective bargaining agreement).

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		proposed rules are fatally flawed as they pertain to bargaining unit members."	
32	Wielchowski	General comment: "I am concerned about the lack of due process safeguards for presiding officers facing complaints. It doesn't take much of an imagination to envision circumstances where unhappy parties could use the complaint process to disparage the presiding officer or to challenge a presiding officer with whom they anticipate an adverse ruling or decision. When such complaints occur, it can be very difficult for the presiding officer or to challenge a presiding officer with whom they anticipate an adverse ruling or decision. When such complaints occur, it can be very difficult for the presiding officer to effectively respond to defend themselves without endangering the respect for the office. While it is desirable to set high standards for judicial conduct and we agree that codes of conduct and ethical act standards make good common sense, I would urge this body to consider ways to mitigate the effects that illegitimate complaints could have and their chilling effect on presiding officers."	The Code of Hearing Officer Conduct complaint process is separate from the processes for any case the hearing officer may be hearing. Even if the complaint relates to conduct in a case, the two can be kept separate. *See also* responses to Comments 6 and 9.
Hearing Procedures: 2 AAC 64.100-370			
33	Department of Law	"2 AAC 64.100. Purpose, Applicability, and Effect of Hearing Procedures. We suggest that a reference to AS 44.64.060 be added to the list of statutory authorities for this proposed regulation, because the statute in subsection (a) established the law governing hearings."	Good suggestion. The reference has been added.
34	Human Rights Commission	"[T]he Commissioners believe that it would not be appropriate to apply the majority of the proposed regulations to Commission proceedings. The	It was not intended that procedural regulations in 2 AAC 64.100-370 apply to hearings or other proceedings in which OAH provides an ALJ to

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		Commissioners therefore propose that OAH's final regulations on hearing procedures are not made mandatory for Commission proceedings, and that such procedures be established by a separate rule making effort by the Commission in consultation with OAH. * * * Application of many of the regulations in OAH's proposal would be contrary to the Commission's statutory mandated and would effectively serve to subject Commission hearings to the requirements of AS 44.64.060 despite the legislature's exclusion of the Commission from this section."	assist the agency in conducting a hearing or proceeding subject to a statutory exemption from AS 44.64.060. Human Rights Commission cases and a few other categories of cases are exempt from the procedures in AS 44.64.060, but OAH supplies an ALJ to help the agency (board/commission) conduct the hearing or proceeding. Those hearings and proceedings will be conducted in accordance with applicable statutory or regulatory procedures, though as a practical matter some case management tools (e.g., use of referral form and notice of assignment) may resemble procedures described in OAH's regulations. The applicability language of 2 AAC 64.100(b) has been changed to address this situation.
35	Human Rights Commission	"2 AAC 64.100 Subsection (a) of this section states that the purpose of the regulation is to implement procedures required b AS 44.64.060. Subsection (b) then states that OAH's proposal applies to all administrative hearings. Read together, these subsections created some ambiguity as to which agencies the proposal actually does apply. It appears that only three agencies, including the Commission, are included in the bill as agencies not subject to AS 44.64.060. The Commissioners believe that, as an agency specifically exempted from AS 44.64.060, OAH's regulations should exempt the Commission from mandated adherence to these procedures. The Commissioners note that OAH's authority to supersede other agencies' regulations appears to be limited to its authority to prescribe regulations under AS 44.64.060, the provisions to which,	You are correct that Human Rights Commission cases are exempt from application of AS 44.64.060. The applicability language of 2 AAC 64.100(b) has been changed to clarify that a hearing or proceeding conducted by another agency, with assistance from an administrative law judge employed or retained by the office, will not become subject to the AS 44.64.060-related procedures if statutorily exempted from AS 44.64.060.

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		again, the Commission is not subject."	
36	Hagan	"2 AAC 64.100(b) – clarify to ensure that this also applies to hearings conducted by contractors hired to conduct hearings."	The procedural regulations in 2 AAC 64.100-.370 apply to hearings conducted by OAH, whether by an in-house ALJ or a contract hearing officer. The OAH procedural regulations do not apply to hearings conducted by state agencies using contract hearing officers when the hearings are not conducted by OAH.
37	Division of Insurance	"All of my comments on these proposed regulations pertain only to hearings on insurance matters being held under AS 44.64.030(a)(18) and other insurance matters that the Director of the Division of Insurance may request the office of administrative hearings to handle. Overall, anything in these regulations that conflicts with existing law in Title 21 could create procedural problems in a hearing under the Alaska insurance code held by the office of administrative hearings. 2 AAC 64.100(c). The statutory provisions of AS 21 should prevail when substantive or procedural elements conflict with these regulations."	Under AS 44.64.060(a), OAH's procedural regulations may supersede other agency's procedural ***regulations*** pertaining to the conduct of hearings and hearing-related processes but not statutes. The AS 21 statutes applicable to hearing processes will govern the insurance hearings OAH conducts unless and until those statutes are changed. OAH's regulations are procedural and thus they should not conflict with the substantive elements of AS 21. The language of 2 AAC 64.100(c) makes clear that OAH's procedural regulations supersede conflicting agency ***regulations*** only, not statutes.
38	Department of Law	Regarding 2 AAC 64.100: "We recommend that 2 AAC 64.100(c) be changed to read: '(c) The procedures in 2 AAC 64.100 – 2 AAC 64.370 and 2 AAC 64.900 – 2 AAC 64.990, or ordered by an administrative law judge under those regulations, <u>apply in hearings and proceedings as provided in this section. To the maximum extent possible without conflicting with applicable statutes, these procedures</u> supersede any conflicting procedures in the regulations of the referring	Good clarification. The language in 2 AAC 64.100(c) has been changed to include it. Thank you.

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		agency or the agency whose decision is the subject of the administrative hearing.' The reason is that the proposed change more accurately describes when OAH procedural regulations can supersede agency regulations."	
39	Human Rights Commission	"2 AAC 64.110 Since this section relates primarily to persons contesting agency decisions, it does not appear to apply to Commission hearings."	Though it may not be necessary for Human Rights Commission cases to be subject to 2 AAC 64.110, nothing in the regulation is inconsistent with how such cases are initiated or with the direction in that regulation that a notice of appeal or hearing request is not to be filed with OAH except as otherwise provided by statute (i.e., in tax cases for which OAH has original jurisdiction).
40	Human Rights Commission	"2 AAC 64.120 This section would require submitting to OAH a copy of the record relied upon to support the agency decision which is the subject of the hearing. This was one of the requirements about which the Commissioners voiced specific concerns in their earlier comments on SB 203 [describing the incompatibility of such a requirement with pre-filing a record. R]equiring the Commission to adhere to this provision would subject the Commission to a procedure about which it raised previous serious concerns and from which it was legislatively exempted."	A Human Rights Commission case proceeds like an original action. Once conciliation has failed, the Commission requests assignment of an ALJ to conduct the hearing. At that stage, it is sufficient for the Commission to provide OAH with a copy of the complaint and the notice of failure of conciliation. The evidence to be relied on in determining whether a violation has occurred is presented through the hearing process.
41	Division of Insurance	"All of my comments on these proposed regulations pertain only to hearings on insurance matters being held under AS 44.64.030(a)(18) and other insurance matters that the Director of the Division of Insurance may request the office of administrative hearings to handle. Overall, anything in these regulations that conflicts with	The requirement that the agency submit to OAH the record relied on to support the decision is statutory (*see* AS 44.64.060(b)) and thus cannot be waived in the regulations. Additionally, OAH's statutory mandate to resolve cases in a timely manner (most with a proposed decision issued within 120 days after the date the hearing request

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		existing law in Title 21 could create procedural problems in a hearing under the Alaska insurance code held by the office of administrative hearings. 2 AAC 64.120(4). The requirement of a copy of the record under 2 AAC 64.120(4) could become burdensome and is premature in the process. Many times, after a hearing is requested but even before a prehearing conference is held or before an actual hearing, the parties negotiate a settlement. The party who has requested a hearing has been served by the division with an order or other charging document that sets out why the division is taking action. What led the division to action could very well include confidential information and privileged information such as deliberative or attorney/client communications, which should not be considered in the hearing process. At the time of hearing, if not before, documents that are to be considered as evidence are provided both to the subject of the hearing and the administrative law judge."	was filed with the referring agency) does not lend itself to OAH waiting to see what the case is about until the parties have exhausted settlement options. OAH is able to manage the cases it hears to allow the parties a reasonable opportunity to explore settlement possibilities. But to keep cases from languishing, it is important that agencies comply with the statutory requirement to provide a copy of the record relied on for the challenged decision at the referral stage. This is not to say that every document the agency possesses must be submitted at that stage. The cases OAH hears range from purely on-the-record appeals to original actions (for which no agency decision has yet been made). Most fall somewhere in between these two extremes and thus there will be a record at the referral stage on which the agency relied to make the decision challenged, but additional documents will be presented during an evidentiary hearing. To determine what, if any, record must be submitted at the time of referral, it may help the agency to think in terms of whether it has made a decision that is being challenged or has simply given notice of a planned action (e.g., assessment of an administrative penalty, intent to take disciplinary action, etc.) but will have to make the case for taking such action through the hearing process. If the former type, the agency record relied on for the decision challenged must be

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			submitted to OAH at the referral stage. If the latter type, the record supporting the action the agency wants to take might be developed entirely through the evidentiary hearing and prehearing processes arranged between the parties and the ALJ.
42	Division of Occupational Licensing (now known as the Division of Corporations, Business and Professional Licensing)	"Under 2 AAC 64.120(4), "***a copy of the record relied on to support the decision***" is required to be included with the packet of materials when a request for hearing is referred to the hearing office. This language is based on AS 44.64.060(b). It is unclear exactly what this would include. In the past, we have included only copy of the denial letter or accusation that defines the issues and the basis for the decision. For license denials and summary suspensions, the information which could potentially be provided to the Office of Administrative Hearings with the referral package could include items such as complete copies of application files, complete copies of investigation files, copies of taped interviews and/or board meetings [sic]. AS 44.64.060(b) requires this to occur within 15-days of receiving a request for hearing. In cases where an accusation is filed, there has been no decision made. An investigation file could literally consist of boxes of records and due to the nature of these records would contain sensitive information."	What the record relied on includes varies widely among the case types, and likely even from case to case within a type. Only the agency that made the decision challenged can know what it in fact relied on in making the decision, but the starting point in all cases is the decision that was made. And only the documents actually relied on must be submitted at the referral stage. Depending on the case type, other evidence supporting the decision, or a planned action flowing from the decision (e.g., penalty assessment, disciplinary action, etc.) can be admitted through the hearing process. *See also* response to Comment 41 above for further on how the record submitted at the referral stage may differ between cases commenced by accusation versus notice of decision.
43	Division of Occupational Licensing	Also regarding 2 AAC 64.120(4): "AS 44.64.060(b) also requires that any information provided to the office that is confidential by law to [sic] be identified by the agency. Therefore, division staff would also be required	You are correct that an agency should not file with OAH any documents that are not provided to or available to the other parties to the case, and not just to avoid the appearance of an in

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		to identify any confidential information in a license or application file, as well as in the investigative records would include significantly more confidential material that is not easily segregated from information that may be disclosed. It would be difficult to gather this information within the time allotted to submit the initial referral. If an investigation is considered "open" until after the matter is resolved through the hearing process, all of the material is considered confidential until it is entered as an exhibit and a determination made whether it should be entered "under seal". Finally, if the division provides the administrative hearing office with copies of records that are not exchanged with the other party or eventually admitted as exhibits, we are concerned that this may have the appearance of an ex-parte communication. From the public perspective, this could potentially be interpreted as the division attempting to bias the administrative law judge."	appropriate *ex parte* communication. The other parties must have access to the full record to have a meaningful opportunity to prepare their case or defense. Documents can be segregated, with confidential ones grouped together, or they can be individually marked or otherwise identified (e.g., on an index) as confidential. There is no one best way to identify confidential documents that crosses all case types OAH hears. An ALJ has the discretion to order documents filed under seal if necessary to minimize the risk of disclosure of confidential information to non parties. As to the comment's concern about the difficulty of segregating confidential information in the time allowed by AS 44.64.060(b), please see the responses to Comments 41 and 42 above.
44	Division of Insurance	"All of my comments on these proposed regulations pertain only to hearings on insurance matters being held under AS 44.64.030(a)(18) and other insurance matters that the Director of the Division of Insurance may request the office of administrative hearings to handle. Overall, anything in these regulations that conflicts with existing law in Title 21 could create procedural problems in a hearing under the Alaska insurance code held by the office of administrative hearings.	The provisions in 2 AAC 64.130 require agencies who deny a hearing request ***under AS 44.64.060(b)*** to send a copy of the notice of denial, including the reasons, to the chief ALJ. The requirement to issue a notice of denial is statutory; it is found in AS 44.64.060(b) itself. The regulation simply implements that statutory requirement by directing parties to send the notice of denial to the chief ALJ. This is not inconsistent with AS 21.06.180(b), which deals with providing

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		2 AAC 64.130. This section is not consistent with AS 21.06.180(b) and (c)."	hearings, not denying hearing requests. A regulation directing agencies to send a copy of the statutorily required notice of denial to the chief ALJ also is not, in and of itself, inconsistent with AS 21.06.180(c). The regulation is explicitly limited to notices of denial of hearing requests denied under AS 44.64.060(b). It does not expand the universe of hearing request denials about which agencies must keep OAH informed. AS 21.06.180(c), in effect, allows the director of the Division of Insurance to deny a hearing request by not responding to it (i.e. by not issuing a notice of denial or other responsive document). If the division construes a section 180(c) denial-by-inaction as outside the scope of an AS 44.64.060(b) denial, then there is no conflict. If the division instead construes a section 180(c) denial-by-inaction as a denial under AS 44.64.060(b), then it is the latter statute that presents the problem, not the implementing regulation.
45	Division of Occupational Licensing	"2 AAC 64.130 requires an agency that denies a hearing request to deliver a copy of the notice of denial, including a statement of the reasons for the denial to the chief administrative law judge. The division's concern is that sometimes applicants request a hearing before the Board has the opportunity to act on the applicant's matter. The division would not entertain such a request until the Board is able to take action. Since the division is technically denying the	Yes. A hearing request denied as premature is as much a denial as one denied on other grounds. A copy of the written notice sent to the party, explaining that the hearing request is being denied as premature because no agency or board action triggering a right to hearing has yet occurred would suffice to meet OAH's mandate to track denials of hearing requests.

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		request for a hearing pending Board action, do we need to report those denials?"	
46	Human Rights Commission	"2 AAC 64.130 This section applies to denial of a hearing request but cannot apply to Commission proceedings because it is the Commission itself, in accordance with its statutory mandate, which must request that OAH conduct a hearing."	Correct. By its own terms, 2 AAC 64.130 comes into play only when an agency denies a hearing request under AS 44.64.060(b). Since Human Rights Commission cases are not subject to AS 44.64.060, the Commission's decisions not to proceed to a hearing in particular cases would not constitute AS 44.64.060 notices of denial.
47	Department of Law	"2 AAC 64.140. Stay of Decision. The phrase 'effectiveness of the agency decision' at the beginning of this proposed section should be changed to 'the agency decision.'"	Though the suggested change would make the regulation's language shorter and crisper, it would also make it less precise. The "decision" is what the agency decided, or perhaps a written document embodying what the agency decided. Taken literally, a staying of the "decision" would not accomplish the aim of a stay, which is to prevent the decision from taking effect.
48	Division of Insurance	"All of my comments on these proposed regulations pertain only to hearings on insurance matters being held under AS 44.64.030(a)(18) and other insurance matters that the Director of the Division of Insurance may request the office of administrative hearings to handle. Overall, anything in these regulations that conflicts with existing law in Title 21 could create procedural problems in a hearing under the Alaska insurance code held by the office of administrative hearings. 2 AAC 64.140. This provision conflicts with the provisions of AS 21.06.190. Again, statute should trump	An existing, valid statute will "trump" an OAH procedural regulation in the event of a conflict. Under AS 44.64.060(a), OAH's procedural regulations can, in effect, supersede an agency's existing *regulations* but not a valid statute. The provision in 2 AAC 64.140 authorizing an ALJ to exercise the stay granting/vacating authority existing under a statute or an agency's regulation, however, does not conflict AS 21.06.190. That section prescribes the rules for granting a stay (including an automatic stay), as well as for when a party needs to get an order from superior court. Nothing in 2 AAC 64.140 varies those rules, nor

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		regulation."	does the regulation give the ALJ stay-related authority not otherwise provided by law and delegated to the ALJ.
49	Human Rights Commission	"2 AAC 64.140 This section does not apply to Commission hearings because there is no final agency action to be stayed."	Correct.
50	Hagan	"2 AAC 64.150 – change 'distributed' to 'distribute'."	The typographical error has been corrected. Thank you.
51	Division of Occupational Licensing	"First, as proposed, 2 AAC 64.160(a) states that 'A party to an administrative hearing may be represented by an attorney or may represent **himself or herself**' (emphasis added). For some cases referred to the Office of Administrative Hearings, the division plans to represent itself through its paralegal. We are concerned that, as proposed, the pronouns 'himself or herself' refer to the respondent requesting the hearing but not 'the agency via agency staff'."	Good point. The intent was not to preclude agency parties or non-human entities from being "self-represented" by an employee or officer. The language of 2 AAC 64.160(a) has been changed to clarify this. ***HOWEVER, nothing in this response or in the regulation is intended to express an opinion on whether or when a non-attorney representative or assistant to a party engages in the unauthorized practice of law. Individuals concerned about that should consult the Alaska Bar Association.***
52	Division of Occupational Licensing	"Second, 2 AAC 64.160(a) also specifically allows for '… a self-represented party to be assisted at any stage in the administrative hearing by a person **who is not an attorney …**' (emphasis added). The division's concern is whether this language could be interpreted to preclude a self-represented party from deciding to be represented or assisted by an attorney during the course of the hearing process."	The intent of the language was to assure self-represented parties that they can be ***assisted*** by non attorneys such as relatives and friends during prehearing processes, at the hearing or in post-hearing processes, if any. Nothing in 2 AAC 64.160(a) precludes a party from being represented by an attorney if the attorney does not enter an appearance at the outset of the case. *See also* response to Comment 51 above regarding unauthorized practice of law.
53	Department of Law	"2 AAC 64.160. Representation. Proposed 2 AAC 64.100(a) provides that a party to an	*See* response to Comments 51 and 52 above and related changes made in 2 AAC 64.160 to clarify that an agency or non-human entity can be

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		administrative hearing may 'represent himself or herself,' and may be assisted by a person who is not an attorney. We ask that this proposed regulation be revised to clarify that the agency is also a party and may appear through a representative who is not an attorney. Agency staff commonly appear on behalf of an agency in administrative hearings."	represented by an officer or employee.
54	Department of Law	Further regarding 2 AAC 64.160: "We agree generally with the requirements in subsection (b) for a party or the party's attorney to file an entry of appearance that provides identifying information, except the requirement for an attorney to provide a list of all of the states in which the attorney is licensed. Confirming an attorney's licensed status in Alaska by requiring the attorney's Alaska Bar Association membership number should be sufficient for OAH's purposes without being unduly burdensome."	Not all attorneys appearing in administrative hearings and proceedings in Alaska are admitted to the Alaska bar. Some may be in-house counsel or executives acting for companies. Others may be affiliated with Alaska law firms but not licensed in the state. Still others may be attorneys who elect to navigate the not-well-charted waters of multi-jurisdictional practice, assuming as they do whatever risks may attach to appearing before administrative tribunals in states in which they are not licensed. It is not unreasonable for OAH to require such attorneys to disclose their states of licensure. The commenter's point that identifying all states of licensure for attorneys licensed in Alaska poses an unnecessary burden is well taken. The language of 2 AAC 64.160(b) has been changed to require disclosure of licensure in other states only by attorneys not licensed in Alaska.
55	Division of Insurance	"All of my comments on these proposed regulations pertain only to hearings on insurance matters being held under AS 44.64.030(a)(18) and other insurance matters that the Director of the Division of Insurance may request the office of administrative hearings to handle.	The regulation on intervention (2 AAC 64.180) provides for intervention to occur in accordance with applicable law. To the extent that AS 21 provides for intervention in insurance cases and is also the only applicable law on that subject,

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		Overall, anything in these regulations that conflicts with existing law in Title 21 could create procedural problems in a hearing under the Alaska insurance code held by the office of administrative hearings. 2 AAC 64.180. Intervention in an insurance case should be determined by AS 21 standards."	intervention in insurance cases will "be determined by AS 21 standards."
56	Human Rights Commission	"2 AAC 64.210 This section pertains to 'fast-track' hearings, and would not apply to Commission procedures because there are no mandates to conduct hearings within specific time frames."	Correct.
57	Division of Occupational Licensing	"2 AAC 220(b)(8) contemplates a discovery process and exchange of documents. If an 'abbreviated record' were initially submitted, would this establish an appropriate time frame to submit a copy of the complete record if the 'abbreviated record' cannot be stipulated to?"	If the case is one in which a discovery process is appropriate, the exchange of documents as part of that process might include the agency party providing other ***parties*** with copies of record documents, or of the complete agency record (or access to it and an opportunity to make copies), but the submittal to OAH of the record the agency relied on in making the decision challenged cannot be delayed past the AS 44.64.060(b) deadline. To manage the case efficiently and effectively, the ALJ needs the record relied on from the outset of the case. *See also* response to Comment 103 below regarding 2 AAC 64.370(a)(2) and your question about use of an abbreviated record.
58	Human Rights Commission	"2 AAC 64.230 This section applies to voluntary dismissals by the person requesting the hearing and would not be applicable to Commission proceedings. As described above, pursuant to AS 18.80.120, a hearing is	Correct.

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		mandatory if a finding of substantial evidence is made and efforts to conciliate the matter are not successful."	
59	Division of Occupational Licensing	"2 AAC 64.230(a) indicates that 'the party who requested the administrative hearing may, **without consent of the other parties**, voluntarily dismiss the case at any point prior to issuance of a proposed decision' (emphasis added). The division's concern is that this regulation does not clearly indicate that the consequence to a party requesting a dismissal, especially in a case where our division has filed an accusation under AS 44.62.360, may be a default proceeding under AS 44.62.530 resulting in license action."	Good point. In addition to a default hearing, other possible consequences of voluntary dismissal include imposition of a penalty, application of a pre-existing order (including a default order), or forfeiture of the right to challenge an agency action. The language of 2 AAC 64.230(a) has been changed to clarify that the right to voluntarily dismiss a hearing request does not relieve the party from the legal consequences of doing so. Thank you.
60	Department of Law	"2 AAC 64.230. Voluntary Dismissal. We recommend that this section be revised to clarify the effect of a voluntary dismissal. If an administrative hearing follows a denial of a license application, for example, and the applicant withdraws the request for the hearing, the initial decision of the licensing board denying the license application would become final. However, what is the effect of a voluntary dismissal when the respondent has requested the hearing, as, for example, in a disciplinary action against a licensee following the issuance of an accusation? If the respondent (who requested the hearing) seeks a voluntary dismissal as proposed under 2 AAC 64.230(a), are the allegations in the accusation deemed proven? This may be important for *res judicata* purposes in subsequent proceedings. We also are unclear from the regulations how voluntary dismissal will be handled in	*See* response to Comment 59 above and related clarification in 2 AAC 64.230. It is not for OAH's procedural regulations to speak to the preclusive or other legal effects of a voluntary dismissal (e.g., whether allegations are deemed admitted; whether the voluntary dismissal would support a finding of *res judicata* in a subsequent proceeding) insofar as such effects are substantive, not procedural. In some contexts, those questions are answered by existing law—e.g., the Administrative Procedure Act requirement for a default hearing before sanctions can be imposed against a licensee. If a case is initiated in some manner other than by a request (includes hearing request; notice of appeal; notice of defense to accusation), then

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		those proceedings that are not initiated by a request, such as some of the proceedings in the Division of Insurance."	there would be no requestor and thus 2 AAC 64.230 would not apply. Whether the referring agency could, in effect, "voluntarily dismiss" the matter by, for instance, withdrawing the referral, is left to the governing statutes or agency regulations on that point.
61	DNR	"2 AAC 64.240. DNR supports this section. It is useful to have the requirements be specifically outlined to prevent unnecessary delays."	Thank you.
62	Department of Law	"2 AAC 64.240. Documents Exchange, Discovery and Subpoenas. We question whether proposed paragraph (b)(3) exceeds the statutory authority of the OAH, because it would allow an ALJ to order discovery for 'good cause,' which the regulation appears to define more broadly than the due process requirement of a fair hearing. Unless authorized by an applicable statute, discovery should be allowed only when constitutionally required. We suggest that 2 AAC 64.240(b)(3) be changed to read: 'the administrative law judge finds that discovery is needed to provide due process of law and issues an order describing the nature and scope of the necessary discovery.'"	The comment provides no legal support for the assertion that "discovery should be allowed only when constitutionally required" and OAH's research revealed none. Certainly, refusal to order discovery, under some circumstances, might lead to a denial of due process—e.g., if it prevents a party from being able to effectively cross examine opposing witnesses. Under other circumstances, due process may not come into play at all with discovery requests. Instead, the purpose of discovery may be to facilitate an efficient hearing process. Fundamentally, discovery is a ***process*** meant to lead to information a party may need, or simply want, to evaluate the party's case, organize the party's presentation of evidence, and prepare to refute the other party's evidence or arguments. The alternative to prehearing discovery is to bring all the documents and all the witnesses to the hearing and sort out what is material and what is not on the oral record.

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			In some cases, that is the most efficient way to proceed, and allowing prehearing discovery would serve only to delay resolution of the case. In others, allowing prehearing discovery may be a worthwhile investment because it might lead to a shorter, better organized and thus more efficient hearing. Limiting authority to order discovery to only those situations in which denying it could impede a party's exercise of due process rights restricts the ALJ's ability to use discovery orders as a case management tool. OAH is required to establish, by regulation, "procedures for administrative hearings conducted by the office." AS 44.64.060(a). OAH's statutory authority also includes adopting regulations to carry out the duties of the office and to implement AS 44.64. *See* AS 44.64.020(a)(11). The goals of AS 44.64 include providing "timely, efficient, and cost-effective" adjudication services. AS 44.64.020(b)(1). OAH has statutory authority to adopt regulations to make the hearing process efficient and cost-effective. A regulation allowing the ALJ to order discovery for "good cause" is a reasonable way to do this. As to the comment's suggestion that "good cause" is the wrong standard, OAH's research shows the contrary: "good cause" is an appropriate standard to use in administrative hearings when discovery is not an entitlement. "Good cause" is the standard under the Administrative Procedure Act for an

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			ALJ or hearing officer to order discovery when a party does not have a right to it. *See* AS 44.62.440(a) (requiring good cause to order discovery in the absence of a stipulation in APA hearings). Some state agencies have adopted hearing regulations using the "good cause" standard. *See* 3 AAC 08.930(d); 12 AAC 12.820; 18 AAC 15.240. Unlike court rules for civil litigation, 2 AAC 64.240 does not start from the premise that discovery is allowed. Like the APA and the cited agency regulations, it starts from the premise that discovery is not automatically allowed. Instead, it will be allowed only if (1) a statute authorizes it; (2) the parties agree to it; or (3) the ALJ finds "good cause" to order it.
63	Levesque	Regarding 2 AAC 64.240(a)&(b): "One of the stated purposes in the Notice of Proposed Regulations for the regulations be [sic] promulgated is 'for development of the record'. However, the regulations governing discovery restrict this stated purpose in not allowing liberal discovery so that the parties may establish their case. Parties may not be able to stipulate to a discovery plan. Whether or not discovery should be conducted or the scope of discovery, should not be left to the discretion of the administrative law judge. In an administrative agency appeal in which the purpose is to develop a factual record and apply unique agency expertise, the parties should be allowed to conduct discovery as a matter of right unless stipulated otherwise by the parties. Preclusion of conducting discovery is in contradiction to the purpose of fair adjudication and	Discovery as a matter of right is not the norm in administrative adjudications. *See* response to Comment 62 above (discussing in detail the reasons why it makes more sense to begin from the premise that discovery is not a matter of right unless a statute, stipulation or order so provides). In an administrative adjudication in the nature of an original action or a hybrid appeal/evidentiary proceeding, discovery may be useful or even necessary. In a true appeal, however, the parties generally are not permitted to go outside the record to prove their points on appeal. A regulation is not rendered ambiguous simply because the parties and ALJ need to read it in conjunction with other applicable laws.

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		parties being able to prove their points on appeal. Additionally, 2 AAC 64.240 is ambiguous in that it may not be clear whether a statute requires discovery in an administrative proceeding and which statute applies."	
64	Human Rights Commission	"2 AAC 64.240 Provisions of this section would limit the ability of the parties to conduct discovery unless permitted by statute or the administrative law judge. Under AS 18.80.120 it is implied that the parties have a right to formal discovery. [Footnote omitted.] Applying this section to Commission prehearing procedures could therefore be contrary to statute and potentially violation parties' due process rights."	In 2 AAC 64.240(b)(1), the regulation allows for discovery if a statute so provides. If AS 18.80.120 provides for discovery, discovery would be allowed. Also, the ALJ could order discovery if the ALJ determines that allowing discovery is necessary to protect the parties' due process rights. *See also* response to Comment 62.
65	Department of Law	Regarding 2 AAC 64.240(c) "[P]roposed subsection (c) may exceed the OAH's authority. The statutes cited as authority for this regulation do not give the ALJ the power to issue subpoenas. In the absence of a statute (such as the APA) authorizing the issuance of subpoenas, we question whether the OAH can create such powers by regulation."	The intend of 2 AAC 64.240(c) is not to create subpoena power for OAH ALJs but rather to provide for the exercise of such authority when, under AS 44.64.040, OAH is exercising "the powers authorized by law" for an agency and that agency has subpoena authority. The language in 2 AAC 64.240(c) has been changed to make this clearer.
66	Hagan	"2 AAC 64.240(c) – three miles isn't very far – I would guess that subpoenas won't be used very much under those conditions. Also, this would seem to mean that a witness could get their parking fees reimbursed if they had to travel 3.1 miles to appear but not if they only traveled 2.9 miles to appear. It may be more appropriate to define expenses that are reimbursable rather than use the mileage threshold."	The intent was to use 30 miles as the benchmark for requiring reimbursement of witness' travel expenses, consistent with the benchmark used by the Administrative Procedure Act (APA) and the court system. Thank you for catching this error; 2 AAC 64.240(c) has been revised to use 30 instead of 3 miles.
67	Levesque	"Paragraph (c) of 2 AAC 64.240 provides that witness travel expenses shall be paid if the witness must travel more than 3 miles from his home. Three (3) miles will	*See* response to Comment 66 above. Thank you for catching the error.

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		cause an undue administrative burden in that most witnesses will have to travel more than three (3) miles to get to any hearing. The 3 mile provision should be changed to thirty (30) miles, which is more reasonable and in conformance with Alaska Administrative Rule 7(b). Therefore, Paragraph (c) of 2 AAC 64.240 should be revised …" to replace three with 30.	
68	DNR	"2 AAC 64.250. DNR supports this section. It is very useful to have the opportunity to move for summary adjudication if there is the possibility that the request for hearing or appeal is specious."	Thank you.
69	Levesque	"Paragraph (b) of 2 AAC 64.250 fails to provide an opposing party an opportunity to conduct discovery in order to obtain evidence not within its control in order to prove that a genuine dispute exists on an issue of material fact. Paragraph (b) should therefore be amended to …" include the sentence: "The administrative law judge may order depositions to be taken or discovery to be had as necessary to allow an opposing party the opportunity to discover essential facts to justify the party's opposition."	Discovery is addressed by 2 AAC 64.240. The tools in that regulation are flexible enough to allow the ALJ to order discovery needed to effectively oppose a summary adjudication motion.
70	Human Rights Commission	"2 AAC 64.250 This section would establish procedures for summary adjudication. Currently, Commission regulations do not allow parties to file motion [sic] for summary decisions, and this provision is contrary to the Commission's past practice. Pending legislation, if passed, would provide for such motions in Commission hearing procedures. If the legislation is adopted this section would not be inconsistent with Commission process."	Understood.
71	Human Rights Commission	"2 AAC 64.260 Subsection (a) of this section would allow hearings to be held without development of an	Subsection (a) of 2 AAC 64.260 recognizes that a case can be heard in a number of ways, including

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		evidentiary record, which would be contrary to the rights of parties to Commission hearings. Alaska Statute 18.80.120 specifically provides for the taking of testimony and evidence at the hearing."	through an evidentiary hearing. If an evidentiary hearing is authorized for the case type and necessary to resolution of disputed fact issues, an evidentiary hearing will be held.
72	Division of Occupational Licensing	"Under 2 AAC 64.260, there is no certain location where the hearing officer is required to be. The division would be concerned with travel costs associated with conducting hearings. The language in 2 AAC 260(b) refers to 'with regard to any requirements of law' as a contributing factor that is considered. However, it is not clear from the proposed regulation that, in accordance with AS 44.64.060(a), the provisions of AS 44.62.410 (Time and place of hearings) in the Administrative Procedure Act prevail over this regulation."	Travel costs can be a concern, but ultimately cost issues must yield to the rights of the parties to a fair and efficient hearing. Experience shows that travel costs typically are a relatively small part of the costs of the hearing function. The regulation does not need to explicitly call out the Administrative Procedure Act or any other laws that address the location of a hearing for a case subject to those laws. If an applicable law provides requirements for the location of a hearing, or sets out a process for determining the location, that law will be followed.
73	Department of Law	"2 AAC 64.260. Hearings. Subsection (a) describes three ways that a hearing may be conducted, but it does not specify who decides the method to be used in a given case or why. We suggest that you state that the administrative law judge will decide depending on the existence of disputes of fact and the need to make credibility findings or to cross-examine."	Thank you for the suggestion. The language of 2 AAC 64.260(a) has been changed to make clear that the ALJ determines what kind of hearing to conduct, subject to the requirements of law or of an agreement for voluntary referral of a case.
74	Department of Law	Regarding 2 AAC 64.260: "Because it may be difficult to gauge a witness' demeanor, judge credibility, and effectively cross-examine on the telephone, implicating due process rights, we suggest that subsection (c) provide that an ALJ ***may*** allow telephonic participation under standards such as those set out in AS 44.62.410(b)."	Starting from the position that all parties and witnesses must appear in person unless telephonic participation is specifically requested and approved using standards such as those in AS 44.62.410(b) is not realistic for a docket as broad as OAH's, with parties located throughout the state and around the globe. In some case categories (representing several hundred cases

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		We suggest that the regulations clarify when the ALJ should also appear in person at the designated hearing site and note that, although AS 44.62.410(b) allows a party or witness to participate telephonically, it does not explicitly authorize the hearing officer to do so. This is important because a personal appearance before the hearing officer can be required by due process. In *Whitesides v. State, Department of Public Safety*, 20 P.[3]d 1130 (Alaska 2001), the Alaska Supreme Court reversed a revocation of a driver's license for refusal to take a breath test [sic] because the administrative hearing officer denied the driver's request for an in-person hearing and conducted the hearing over the telephone. The court held that proceeding by telephone violated the driver's right to due process of law. 20 P.3d at 1139."	each year) the hearing is supposed to be held within seven, ten or 30 days after the party requests it. Requiring parties to appear, and have their witnesses appear, in person at one of two OAH locations on such short notice, unless they request telephonic participation and the other party does not object or the ALJ finds good cause is not reasonable. Even if a law does not dictate that an in-person hearing be held, the parties are nonetheless given the opportunity to appear in person before the ALJ at the designated hearing site. Most elect to participate telephonically. For a telephonic hearing, the designated location of the hearing is where the ALJ is at and the other parties are considered to be appearing telephonically in that location. In most cases, this is an Anchorage or Juneau location. If a law, or due process, or even sometimes just the convenience of the parties and witnesses, dictates, OAH ALJs travel to specially designated locations to conduct in-person hearings. Even if no law speaks to whether the hearing should be in person, a party can always request an in-person hearing and, if the ALJ finds that due process concerns or other good cause supports providing an in-person opportunity, the request is accommodated. The *Whitesides* case does not stand for the

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			proposition that a regulation allowing parties and witnesses to participate by telephone violates someone's due process rights. In that case, the licensee specifically requested an in-person hearing; the request was denied. The court found a due process violation because the licensee's credibility was in question and he wanted an in-person hearing. Nothing in 2 AAC 64.260(c) would preclude a party in an OAH case from requesting and receiving an in-person hearing. The language in 2 AAC 64.260(c) has been modified slightly to make more clear that the telephonic participation option is subject not only to a contrary order of the ALJ but also to the dictates of applicable law (which would include constitutional due process protections).
75	Department of Law	Regarding 2 AAC 64.260: "The regulation could also contain a provision requiring that the party presenting by telephone bear the cost of that presentation. See AS 44.62.410(b)."	Thank you for the suggestion. Language has been added to clarify that the party/attorney bears the cost unless otherwise ordered by the ALJ.
76	Hagan	"2 AAC 64.270(a) – change 'prescribed' to prescribe'."	The typographical error has been corrected. Thank you.
77	Department of Law	"2 AAC 64.270. Motions. We ask that subsection (a) be changed to allow a reply or, alternatively, to add language that 'leave to reply shall be freely granted.'"	Under 2 AAC 64.270(a), the ALJ can allow (or require) a reply to be filed. This can be done by agreement in a prehearing order or on a motion-specific basis if the moving party asks for leave to reply, or even if the ALJ decides that a reply would be helpful and takes the initiative to order one. Allowing replies as a matter of right across an entire, diverse docket composed mainly of cases that are supposed to be heard and decided in a matter of just a few months would serve only to

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			delay cases unnecessarily. No motion could be treated as ripe for action until the time had run for the reply.
78	Levesque	"2 AAC 64.270 does not provide for the filing of a reply by the moving party in motion practice. In the interest of justice the party who has the burden of proof should be permitted the opportunity to respond to the adverse party's arguments. The last sentence of paragraph (a) should be amended to …" permit a reply if filed within five days.	*See* response to Comment 77 above.
79	Human Rights Commission	"2 AAC 64.270 Subsection (a) of this section would establish a fifteen day time limit to respond to motions and would not permit a reply. Commission hearings are conducted after full discovery and in trial-type settings, and as such, the Commission has found the Alaska Civil Rules of Procedure more appropriate for the governance of motions [sic] practice. Opposition to motions have therefore been required within ten days of the motion and replies have routinely been allowed three days thereafter. The proposed rule would alter this practice, even though the Commission's timelines already comport with the times proposed by the regulation."	The Commission's timelines will be followed if established in statute or regulation. If the Commission adopts the Civil Rules, they will be followed. The vast majority of cases heard by OAH, however, are not well suited to the formality of the Civil Rules. The regulation provides flexibility for the ALJ to allow replies but does not entitle parties to file replies as a matter of course. This is similar to the rule on replies in motion practice for appeals in the court system. *See* Alaska R. App. P. 503.
80	Human Rights Commission	Regarding 2 AAC 64.270: "Subsection (b) of this section applies to, among other things, remands to the agency and voluntary dismissals. Because of the Commission's unique process and the absence of a final agency action prior to a hearing, remand cannot be an appropriate action at the hearing stage. The inapplicability of voluntary dismissal is also discussed above. These two provisions would therefore not apply to Commission hearings."	Understood. *See also* response to Comment 58 above on voluntary dismissal.
81	Levesque	Regarding 2 AAC 64.280: "A request and provision for	The ALJs have the discretion to allow oral

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		oral argument should be a matter of right in adjudicating dispositive motions, even if they do not fully decide all issues of the case. Paragraph (a) of 2 AAC 64.280 should be amended to …" add "any motion for summary adjudication" to the motions for which the ALJ will allow oral argument.	argument on a summary adjudication motion that would dispose of only some issues in the case. Making oral argument a matter of right if a party requests it on a motion for partial summary adjudication would mean that the process is slowed down waiting out the clock to see if a party will request oral argument.
82	Department of Law	"2 AAC 64.290. Evidence. We recommend that the list of reasons to allow undisclosed evidence, which appears at the end of subsection (a), be expanded to include the use of rebuttal evidence that became relevant, but which was not otherwise subject to disclosure."	Good suggestion. Language has been added to 2 AAC 64.290(a) to make clear that the ALJ can admit rebuttal evidence that responds to another party's evidence admitted after the disclosure deadline.
83	Division of Retirement and Benefits	"2 AAC 64.290(c), which permits testimony to be given by affidavit Proposed regulation 2 AAC 64.290(c) allows a party to submit at hearing testimonial evidence by affidavit in lieu of live testimony. This office is concerned that this provision may violate the Division's and a member or beneficiary's right to cross-examine a witness who has provided the affidavit. Adoption of a regulation similar to AS 44.62.470 will address our concern. Under AS 44.62.470, before the hearing date, a party may file and serve an affidavit that the party intends to rely upon as evidence. Unless the other party timely files a request to cross-examine the witness, the affidavit is admitted into evidence."	Good observation. The intent was that the ALJ would, by order, condition the use of affidavits in lieu of live testimony so as not to preclude a party from cross examining witnesses and to ensure that the testimony can be properly evaluated. An approach such as used in AS 44.62.470, however, is too rigid for many categories of cases in OAH's docket. AS 44.62.470 requires prefiling and service of affidavits ten days in advance of the hearing and dictates the form of the notice which must accompany the affidavits. For the fast-track cases in OAH docket (e.g., hundreds of child support cases, as well as summary suspension and cease and desist order cases, procurement cases and others) prefiling is not always practical. But the ALJ can condition the use of affidavits in lieu of live testimony such that

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			a party who objects to and would be prejudiced by use of the affidavits is afforded an opportunity to cross examine the affiant or refute the evidence through, for instance, a limited supplemental hearing or post-hearing submittals. In cases that are not fast-tracked, the ALJ can, by prehearing order, require prefiling and service of affidavits at whatever point in the prehearing process makes sense in the particular case. The language of 2 AAC 64.290(c) has been changed to make it more clear that the ALJ will condition use of affidavits in lieu of live testimony as necessary to ensure that, on a case-by-case basis, use of affidavits will satisfy due process requirements.
84	Human Rights Commission	"2 AAC 64.290 Subsection (c) of this section would allow testimony by affidavit. This provision is contrary to a party's right to cross-examine a witness which, again, is implied in AS 18.80.120. [Footnote omitted.] Issues of witness credibility and demeanor, which can only be resolved by live testimony, are crucial in Commission hearings where discriminatory intent and motive are often elements of the case. The Commission's current practice, which is consistent with the Administrative Procedures Act, is to allow affidavit testimony only after notice and the opportunity to request cross-examination. [Footnote omitted.] This provision is therefore inconsistent with the Commission's current statutes and regulations."	*See* response to Comment 83 above.
85	Department of Law	Regarding 2 AAC 64.290(c): "We are concerned that proposed 2 AAC 64.290(c) may violate a party's due	*See* response to Comment 83 above.

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		process right to cross-examine witnesses because it allows testimonial evidence to be by affidavit in lieu of live testimony. … In *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819 (Alaska 1974), the court examined the importance of allowing cross-examination during an administrative adjudication under the Workers' Compensation Act. The employer and insurance carrier appealed the board's denial of their request to cross-examine a physician who had authorized a medical report that the employee had submitted as evidence. The court held that there was an absolute right to cross-examine the physician. The court emphasized that 'the statutes permitting informal administrative proceedings, AS 44.62.460(d) and AS 23.30.135(a), were never intended to and *could not* abrogate the right to cross-examination in an adjudicatory proceeding.' 519 P.2d at 824 (emphasis added). The *Schoen* court relied on *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *Schoen*, 519 P.2d at 824. In *Goldberg*, a welfare recipient challenged the procedures terminating welfare benefits. With respect to the right to cross-examine witnesses, the United States Supreme Court rules that 'where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' We suggest that the regulation provide a procedure similar to the one in the APA for the admissibility of affidavits. Under AS 44.62.470, before the hearing, a party may file and serve an affidavit to be relied upon as evidence. Unless the other party timely files a request to	

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		cross-examine the witness, the affidavit is admitted into evidence. The Alaska Supreme Court has indicated that this procedure 'may survive constitutional and statutory scrutiny on a case-by-case basis because the system would subject the right to cross-examination to waiver rules without denying the right altogether.' *Schoen*, 519 P.2d at 823."	
86	Department of Law	"2 AAC 64.300. Official Notice. We recommend that subsection (a) be changed to read 'may take official notice of a fact that **<u>may be</u>** [IS] judicially noticed…'[.]	Good clarification. The verb has been changed.
87	Department of Law	Regarding 2 AAC 64.300(b): "We recommend that the phrase 'if otherwise allowed by law' be deleted from the end of proposed subsection (b). The final decisionmaker possesses the authority provided in the applicable statutes, and the OAH does not have the power to change that authority."	The phase "if otherwise allowed by law" does not change or purport to change a final decisionmaker's authority. It was included to reinforce the point that the OAH regulation's acknowledgment that some agency decisionmakers may have legal authority to take official notice of facts within their expertise does not ***expand*** the decisionamaker's legal authority to do so. As such, the phrase is not strictly necessary and could be deleted, but including it does no harm and may make matters concerning official notice clearer for lay readers of the regulation.
88	Division of Retirement and Benefits	"2 AAC 64.310, which allows a party to supplement the record Under proposed 2 AAC 64.310, before OAH issues either a proposed or final decision, a party may supplement the record if there is good cause shown to allow the party to supplement the record. We are	Language has been added to 2 AAC 64.310, to make clear that an opposing party who objects to supplementation of the record will be afforded a reasonable opportunity to refute the supplemental evidence.

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		concerned that the regulation does not guarantee parties to a PERS or TRS appeal with [sic] an opportunity to rebut the new evidence. We recommend that the proposed regulation be deleted or amended not to allow a party to supplement the record. Alternatively the regulation could be amended to provide that if the administrative law judge finds that there is good cause to permit a party to supplement the record, the OAH will provide the opposing party with an opportunity to respond to the additional evidence if the OAH finds that the other party would be prejudiced if it were not allowed to rebut the evidence."	
89	Department of Law	"2 AAC 64.310. Supplementation of the Record. Proposed 2 AAC 64.310 permits a party to supplement the record prior to the issuance of a proposed decision or final decision if there is good cause shown. The regulation does not explicitly provide an opportunity for the other parties to rebut or respond to the additional evidence. This regulation may not be applied in a manner conflicting with the right to cross-examine. *See Bostic v. State, Dept. of Revenue*, 968 P.2d 564 (Alaska 1998) (holding that a father's due process rights were violated when the hearing officer supplemented the record after the hearing but did not provide the father an opportunity for rebuttal); *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819. We suggest that the regulation be expanded to provide that, if the administrative law judge supplements the record, another party may respond to the additional	*See* response to Comment 88 above.

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		evidence."	
90	Division of Occupational Licensing	"2 AAC 64.310 allows either party to supplement the record. Would it be appropriate to provide a complete copy of the record at that point?"	Supplementation of the record necessarily means adding something new that is not already in the record (usually documents but sometimes additional testimony). Supplementation does not occur in all cases and is allowed only for good cause. Supplementation is not a substitute for submitting the record relied on at the referral stage or developing the record during the hearing process.
91	Department of Law	"2 AAC 64.320. Failure to Participate. We have concerns about subsection 2 AAC 64.320(b), which provides: 'If the agency representative fails to participate, the administrative law judge may consider that failure to be an admission that the contested decision is incorrect and may, if consistent with the law and the existing record, decide the case in favor of the party who filed the notice of appeal or hearing request, and order appropriate relief.' First, not all hearings involve reconsideration of an initial agency decision. The effect of this regulation on these other hearings is unclear. Second, an agency in many cases represents the public interest. The public interest is not served if a meritorious agency position fails due to the mistake or carelessness of its representative. Also, the last sentence of proposed subsection (b), that the ALJ may 'decided the case in favor of the party' overstates the ALJ's authority, which in most cases is only to issue a proposed decision, and not to decide the case. The language of proposed	OAH functions as a proposer of (or in most tax appeals and retirement and benefits appeals, a maker of) executive branch decisions meant to correct executive branch errors, or if no error has been made, to validate the executive branch decision. If OAH is hearing a case on behalf of a principal agency head, a board or commission, or another executive branch decisionmaker and the subordinate employee or division whose action is challenged or who is supposed to be prosecuting some type of enforcement action fails to participate, that decisionmaker needs to make a final executive branch decision. The decisionmaker is capable of looking after the public interest. The decisionmaker could not justify going forward with default hearings or entering default orders against private parties who fail to participate but do nothing when subordinates fail to participate. The same is true for cases in which OAH is the final executive branch decisionmaker.

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		subsection (d) may be intended to address this, but that intent is unclear."	This is not to say that OAH will proceed in the absence of the agency's (or the private party's) representative precipitously. Reasonable notice and opportunity to cure a non-participation or other default situation is the norm. But if despite such notice the party (agency or private) fails to participate, the final decisionmaker must act. Concerning the last sentence of 2 AAC 64.320(b), subsection (d) is intended to (and does) ensure that in cases for which OAH is not the final decisionmaker by law or under a delegation, the proposed decision requirement will be met even in the event of a lack of participation. To address the concern that that intent might not be clear, language has been added to both subsections (a) and (b), to clarify that the ALJ will decide *or propose* that the case be decided as described.
92	Department of Law	Regarding 2 AAC 64.320(c): "Subsection (c) would establish a duty to participate in the administrative adjudication and set a standard for the waiver of the rights of persons not participating whose interests are affected by the administrative decision. We question whether OAH has this authority."	The intent was not to create a new duty to participate or risk waiver of the ability to protect an interest but rather to put third parties on notice that they may need to meaningfully participate or risk injury to their interest. This risk exists as to various parties under a number of different laws that apply to cases heard by OAH. The verb form in the first sentence of 2 AAC 64.320(c) has been changed to clarify that no new duty is being created.
93	Hagan	"2 AAC 64.330 – change 'rejected' to 'rejecting'."	The typographical error has been corrected. Thank you.
94	Department of Law	"2 AAC 64.340. Decisions.	Thank you for the suggestions. The implication has been made clear by the addition of a sentence

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		The implication of 2 AAC 64.340 is that the final decisionmaker should not act on a proposed decision during the time allowed for the parties to request an action listed in AS 44.64.060(e)(1)-(5). If this is the intention, we recommend that the implication be made express. The proposed regulation also could state when the time for filing an appeal begins to run and require that the final administrative decision include a statement informing the parties of the time period for filing an appeal in superior court. *See* Rule 602(a)(2), Alaska Rules of Appellate Procedure, [sic] *Paxton v. Gavlak*, 100 P.3d 7 (Alaska 2004)."	to 2 AAC 64.340(b). The second suggestion, though conceptually a good one, is not workable for OAH's docket. In most case categories, the decision is considered final when issued but not in all. *See, e.g.*, AS 43.05.465(f). Also, the varied ways that different laws address running of the appeal period relative to issuance of a "final decision" or as affected by reconsideration make it impossible to articulate a simple regulation addressing these subjects across the entire existing docket, let alone for a docket that is expanding. OAH routinely includes the finality statement and notice of appeal period in the orders prepared for the final decisionmaker's use. Existing law on this is clear enough; there is no need to add that requirement to OAH's regulation.
95	Hagan	"2 AAC 64.340 – does this section mean that a proposed decision issued by a hearing officer gets distributed to the parties prior to being adopted by the final decisionmaker? I believe this is a change from the current process, at least for contract claims and procurement appeals. I have never had a proposed decision transmitted to me prior to it being adopted by the Commissioner as his decision. I don't see what purposes it serves for this type of hearing. The party who the decision favors will want it adopted and the other party won't so maybe procurement appeals and contract claims should be exempted from this section. Also, this section should refer to 2 AAC 64.350 which defines what things can be changed in a proposed decision and	Yes. By statute, the "proposed decision" of the ALJ must be distributed to the parties. *See* AS 44.64.060(e). This is a change for many categories of cases but not for cases heard under the APA. Contract and procurement cases cannot be exempted by regulation from this statutory requirement, nor do they need to be exempted. The proposed decision/proposed action opportunity serves purposes that are equally valuable in contract and procurement cases as in other cases. For example, one purpose is to make the hearing process more efficient, which this procedure does by allowing the parties to identify what would otherwise be grounds for

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		under what circumstances to prevent the parties from thinking that they can influence the decision."	reconsideration following a final decision but to do so earlier in the process, so that (A) there is no need for a post-final-decision reconsideration step and (B) it is practical for the ALJ's written decision to take effect by operation of law if the final decisionmaker does not act on the proposed decision within the time allowed by the statute. It is not necessary or appropriate for this section to refer to 2 AAC 64.350 because (A) it already refers to the statutory provisions governing what can be raised in the "proposed action" document and (B) 2 AAC 64.350 does not "define what things can be changed in a proposed decision …" but rather addresses the circumstances under which post-final-decision reconsideration requests may be made and establishes that requests to correct manifest errors can be made, notwithstanding the unavailability of reconsideration or the fact that the decision function has shifted from the ALJ to the final decisionmaker.
96	Division of General Services	"2 AAC 64.340. DECISIONS reads: (a) Unless an administrative hearing is exempted by statute from the AS 44.64.060 hearing procedures, the administrative law judge assigned to hear the case shall issue the proposed decision in accordance with AS 44.64.060(d) and (e). The office shall distribute a copy of the proposed decision, in adoptable form, to the parties and to the final decisionmaker.	The requirement to issue a proposed decision and give the parties an opportunity to react by filing a written proposed action document is statutory under AS 44.64.060. The regulation simply implements the statutory requirement. The law does not exempt procurement appeals and contract claims from that process and OAH has no authority to do so through its implementing regulations. In short, that process now is part of the formal appeal process.

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		(b) The parties may, but are not required, to request that the final decisionmaker take one of the actions listed in AS 44.64.060(e)(1)-(5) in response to the decision… We feel the distribution of the proposed decision to the parties and allowing the parties to request additional action will allow an opportunity for requests and arguments to be presented outside the formal appeal arena. This process will add an additional and unnecessary step that will delay issuance of the final decision and increase the parties' costs and efforts. The hearing officer's proposed decision should be submitted to the final decisionmaker and based on conclusions determined by the assigned hearing officer. We also believe that this provision is in conflict with AS 36.30.680, which requires the Commissioner to send a decision to all parties within 20 days after receipt of a recommended decision from the hearing officer."	This proposed decision/proposed action process should make the appeal process more efficient because it obviates the need for a post-final-decision reconsideration step and it ensures that the parties have an opportunity to point out actual or perceived errors in the decision while it is still a proposed decision. The final decisionmaker then has the ability to address these issues before the decision becomes final, but if the final decisionmaker does nothing in response to a proposed action, the decision will still become final by operation of law. The parties do not have to take advantage of the statutory right to file a proposed action document and one party is not entitled to respond to the other's (additional briefing or argument is not contemplated) so this statutorily mandated process need not increase the parties' costs and efforts. For categories of cases in which the final decisionmaker must act within a shorter time frame than AS 44.64.060 contemplates for the proposed decision/proposed action/final decision process, OAH can shorten the time allowed for the parties to file their proposed action. AS 44.64.060 provides that parties may have up to 30 days to file a proposed action document after the proposed decision is distributed. In fast-tracked cases for which there is a legal or practical need for a final decision to be issued as soon as

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			practical after the proposed decision is issued, the proposed action filing deadline is set at ten days. *See* 2 AAC 64.340(b). The statutory requirement for the Commissioner to issue a decision within 20 days after the proposed decision was transmitted (instead of the 45 days allowed by AS 44.64.060) makes the case about which the comment is concerned "fast track" by definition. *See* 2 AAC 64.210. Thus, any conflict that might have arisen between the time lines in AS 44.64.060 and AS 36.30.680 has been resolved by the regulation.
97	Human Rights Commission	"2 AAC 64.340 Subsections (a) and (b) of this section, by their terms, do not apply to proceedings not governed by AS 44.64.060 and therefore do not apply to Commission hearings. Subsection (d) of this section applies to appeals of agency decisions and thus would not apply to Commission proceedings."	Correct.
98	Division of Occupational Licensing	"First, under 2 AAC 64.340(b), the term 'distribution' is not clearly defined. Our division's concern is determining a specific date when the deadlines under this section begin. The potential for confusion is augmented by 2 AAC 64.900(b) that provides additional days for documents 'distributed' by mail. For example: If one party is provided notice by facsimile and another party is sent notice by mail, when would the response period begin? Is it the intent to create different deadlines for each party?"	OAH calculates the deadline for a proposed action filing from the date it distributes the decision to the parties and includes that deadline in the transmittal notice. Confusion is avoided by setting a date certain deadline in the notice. The deadline is the same for all parties. Since the vast majority of proposed decisions are distributed by mail, the deadline set includes the additional three days. If the distribution to all parties in a case was by facsimile, the three days would not be added.
99	Division of	"Second, the division prefers to continue 'distributing'	OAH distribution of final decisions, when the law

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	Occupational Licensing	the final decision to the parties and is concerned that the language in 2 AAC 64.340(c) would preclude doing that."	does not require that the final decisionmaker him/her/itself do so directly, addresses several concerns. First, this ensures that OAH receives the decision. This is important both so that OAH can make the final decision part of the official hearing record, which would be prepared for the court in the event of an appeal, and so that OAH can satisfy its mandate to publish all non-confidential decisions of state agencies. Second, distribution by the independent central hearing panel, rather than by agency staff, who may in fact be (or might be misperceived as being) connected to the agency's advocacy function, improves the public perception of distance between the regulatory and enforcement functions of agencies and the neutral hearing function. Third, if the final decisionmaker fails (or elects not) to act on the proposed decision within the time allowed by AS 44.64.060(e), OAH needs to be in a position to promptly distribute a notice informing the parties that the proposed decision became final by operation of law. Otherwise, the running of the appeal period and final certainty about the decision will be delayed.
100	DNR	"2 AAC 64.350 DNR supports this section. It provides focused requirements for having a reconsideration of a decision. It is useful to preclude an endless do-loop of reconsiderations."	Thank you.
101	Division of Occupational Licensing	"Our division is concerned with the provision under 2 AAC 64.350 that essentially prohibits reconsideration of a final decision made in an administrative hearing under AS 44.64.060.	Subsection (b) of 2 AAC 64.350 provides as follows: "In an administrative hearing subject to AS 44.64.060, a final decision shall not be subject to reconsideration, other than to correct

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		It is our understanding that, in accordance with AS 44.64.060(a), the provisions of AS 44.62.540 (Reconsideration) in the Administrative Procedure Act would prevail over this regulation."	typographical or other manifest errors, ***unless reconsideration is specifically provided for under an applicable statute***." (Emphasis added.) Thus, an applicable statute will prevail and the regulation acknowledges this.
102	Levesque	"Paragraph (c) of 2 AAC 64.350 provides that a reconsideration request may be made if authorized by a statute or regulation. This provision is ambiguous in that it may not be clear whether a statute or other regulation provides for reconsideration. A request for reconsideration should be permitted if it is shown that in reaching his/her decision the administrative law judge (1) overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; overlooked or misconceived some material fact or proposition of law; overlooked or misconceived a material question of the case; or the law applied in the ruling has subsequently changed by court decision or statute."	Reconsideration is of a *final* decision. The vast majority of the cases OAH hears require issuance of a proposed decision. *See* AS 44.64.060. The parties have an opportunity to advocate for a different result than recommended in the proposed decision, using standards similar to those suggested in the comment. In effect, by statute, the parties get a chance at pre-final-decision reconsideration of the ALJ's findings and analysis. Once the final decisionmaker has acted, it makes little sense to repeat this process unless a law applicable to that final decisionmaker gives the parties a right to request that the final decisionmaker reconsider his/her/its decision to adopt (or change) the ALJ's proposed decision. The only category of cases exempt from AS 44.64.060 for which OAH is, by law, the final decisionmaker are tax appeals under AS 43.05.405 *et seq*. Reconsideration is already addressed in statute for those appeals. *See* AS 43.05.465(c)&(d).
103	Division of Occupational Licensing	"2 AAC 64.370(a)(2) provides for the option for the parties to stipulate to an 'abbreviated record'. It is not clear when this stipulation process is to occur. Is it possible to submit an 'abbreviated record' with the referral package which according to 2 AAC 64.120(4)	Though 2 AAC 64.370(a)(2) acknowledges that in some cases the parties might stipulate to have the case heard on an abbreviated record, that regulation is not a source of authority to do so. Rather, it merely acknowledges the possibility in

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		requires 'a copy of **the record** relied on to support the decision'?"	the context of describing what the administrative hearing record will consist of once the case is complete. Parties wishing to limit the record by stipulation can discuss the matter with the assigned ALJ at a prehearing conference, or can file a written stipulation for the ALJ's consideration, at any point after the case is assigned to an ALJ. The requirement to submit a copy of the record relied on for the decision is statutory and the statute makes no provision for submittal of an "abbreviated record" irrespective of whether the parties might ultimately agree to the case being heard on a subset of the record relied on.
104	Department of Law	"2 AAC 64.370. Administrative Hearing Record. It might be helpful for the regulations to specify the format for the administrative record, whether it must be assembled in chronological order, or numbered, etc."	The court rules govern the format, order, numbering, etc., of the record when OAH prepares it for the court on appeal.
105	Levesque	"Paragraph 4 of 2 AAC 64.370 only provides that only recordings or oral proceedings prepared at the direction of the office or a court are included as part of the administrative hearing record. This provision should be expanded to include all recordings of any oral proceedings even if not ordered to be prepared, in the case that a party voluntarily prepares a transcript of the proceedings and files that transcript with the office to be included as part of the administrative hearing record."	Official transcripts, prepared and certified by a neutral transcriptionist, might on occasion properly find their way into the record—e.g., a deposition transcript introduced as an exhibit. But as to the oral proceedings before the ALJ, a transcript prepared voluntarily by a party is not part of the official record. Allowing a party to, in effect, supplement the record with the party's own transcript of what was said would be inappropriate under most circumstances. It will not be allowed as a matter of course in OAH's regulations.
106	Department of Law	Regarding 2 AAC 64.370(b): "Subsection (b) of the proposed regulation provides that, if a decision in an	Nothing in 2 AAC 64.370(b) affects an appellant's obligation under the court rules to pay

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		administrative hearing is appealed to a court, the office will prepare the administrative record and transmit it to the court. We are concerned with the last sentence of 2 AAC 64.370(b), which states: 'The agency whose decision is appealed shall arrange for direct payment to or reimbursement of the office's costs of record preparation, including copying charges and transcript preparation costs, which will be charged at the office's actual costs.' The rule is that the appellant pays the costs. Appellate Rule 604(b)(1(B)(iv) requires the appellant to bear the cost of the preparation of the record. We do not want any obligation that the agency may have to obtain the payment to interfere with the fact that the payment may actually be borne by another party."	for record preparation costs. The regulation uses the phrase "shall arrange for direct payment or reimbursement" precisely so that the agency (or the Department of Law on the agency's behalf) can make an appropriate "arrangement" with whoever is responsible for payment.
107	Hagan	"I believe that it is an unfair burden on the parties to be required to distribute copies of documents to all the other parties, to prepare proofs of service and other quasi-legal documents, to mark and number documents in a certain fashion, etc. because this requirement either necessitates hiring an attorney or requires knowledge of legal processes. Most agency staff involved in these procedures are not lawyers and most private individuals or small businesses aren't lawyers and can't afford to hire one. State agencies do have access to the Dept. of Law for such matters, but for small issues, agencies shouldn't have to involve Dept. of Law if they choose not to or can't afford to. I believe that distribution of copies of documents to the appropriate parties should be a function of OAH, or if that is not possible, at least eliminate the requirements for documents to be accompanied by proof of service, and to be marked in a specific fashion, and other such similar quasi-legal	The skills required are reading, counting, numbering, writing, copying and mailing. These are not uniquely legal skills and do not require legal training. The mechanics of distributing copies, writing down and certifying the names of the people who have been sent documents (i.e., preparing a proof of services), and marking and numbering exhibits are far less complicated and require less training and fewer skills than advocating the party's position (e.g., picking which documents to use, writing up the argument, selecting witnesses/preparing testimony, etc.). If the self-represented party (agency or private) is incapable of performing the rudimentary clerical skills needed, that party probably will need some assistance to effectively represent his/her agency or him/herself. As the independent, neutral entity tasked with hearing the case and rendering an

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		requirements. Or, the other option is to prepare an instructional packet containing simple step by step instructions for submitting motions, documents into the record, etc, and include sample forms and documents, to provide to those parties that are non-represented and maybe haven't been through this process before. I have been through this process a couple of times lately, and in my experience, the hearing officers (and the paralegals) are not very good at explaining such things. I think that they assume that the parties have done this before and know that such things are required."	objective decision, OAH is not responsible for performing the advocacy functions of a party, nor would it be appropriate for OAH to do so. Parties pursuing claims or appeals, or defending agency action, must bear their own burdens of doing so. OAH has been exploring the extent to which it can provide document templates (forms) that would work across such a varied docket without resulting in confusion, and within the limits of OAH's resources. If OAH is able to come up with such forms they will be made available on OAH's website.
108	DNR	"The regulations, hearings, motions, oral arguments, etc., seem very similar to court proceedings and appear somewhat redundant with the existing legal process. The costs to an agency between a court appeal and an administrative appeal of this nature appear to be equal in terms of staff time and preparation; the additional cost for a hearing officer increases the costs of a normal proceeding in court."	The procedures available for use in OAH-conducted hearings necessarily must include some that are similar to court proceedings so that the parties are afforded due process at the administrative adjudication stage. The regulations, however, provide sufficient flexibility for the ALJ to conduct a hearing and manage prehearing procedures much less formally. OAH's jurisdiction spans complex tax, professional licensing and retirement benefits cases to the simplest of one-issue, undisputed fact cases. For some of the more complex cases (e.g., denial of a medical, dental, engineering, nursing, land surveyor, veterinarian, architect, or other professional license; claim for occupational disability; oil and gas tax dispute) and for the cases that are not purely on-the-record appeals, the more court-like processes may be vital. For a really simple case, something more akin to the

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			most minimal court process such as a one-hour telephonic hearing at which motions are considered, evidence is taken and a tentative decision is reached on the record may be more appropriate. OAH ALJs have the flexibility to tailor the process to fit the needs of the case, and to make the hearing process efficient and cost effective for all parties.
109	Levesque	General comment: "Many of the proposed regulations contain provisions such as 'time allowed by law', 'set by the applicable law' or 'allowed by law.' References such as these are unclear, as it is unknown which law or regulations would apply. For instance, in 2 AAC 64.180, Intervention, a party may be allowed to intervene 'under the standards set by the applicable law'. One should not be required to attempt to decipher which law it is that would apply. Similar, under 2 AAC 64.240(c) witness fees are to be paid as 'allowed by law'. Again, it is not clear what law provides the amount of witness fees to be paid. Is the fee governed by the Alaska administrative rules, Civil rules, Administrative procedures [sic] Act, or some other law or regulation?"	OAH's procedural regulations are meant to prescribed *procedures* to apply in more than 40 categories of cases, each of which is governed by some other "applicable law" (statutes, regulations or both). Sometimes the "applicable law" not only sets the substantive standards but also prescribes procedures. It is incumbent upon a party (or that party's counsel) to learn about and follow the underlying law, as well as to follow OAH's procedural regulations. That may mean the party needs to learn about the APA procedures, and some additional procedures in an agencies' hearing-related regulations, as well as the applicable substantive law. OAH's procedural regulations supersede other procedural regulations only, and then only if the two procedures conflict.
110	Levesque	General comment: "In order to allow for clear rules of conduct of complex appeals, it appears prudent to include a provision that by stipulation of the parties and/or order of the administrative law judge that the proceedings may be governed by the Alaska Rules of Civil Procedure. Although the Office of Administrative Hearings contemplates adjudicating appeals of many matters for which an expedient and efficient disposition	Thank you for the suggestion, but OAH does not need a specific regulation for the ALJs and the parties to stipulate to a prehearing order tailored to manage a complex case efficiently. The Alaska Rules of Court (civil and appellate procedure) were written for court proceedings. By their very nature, administrative proceedings are supposed to be less formal, even if the issues and evidence

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		is contemplated, there may be appeals that require more structure than can be provided for by the regulations proposed for the Office of Administrative Hearings."	are complex. Though an ALJ and the parties may, from time to time, agree to look to the civil or appellate rules as a guide, it is unlikely that stipulating to application of the civil rules or appellate rules in their entirety would ever be necessary.
111	Levesque	General comment: "It was unclear from the Notice of Proposed Regulations the date on which the adopted regulations would become effective. Will the adopted regulations apply to existing appeals being handled by the Office of Administrative Hearings? Furthermore, for appeals that were transferred mid-stream to the Office of Administrative Hearings from other agencies, which regulations will apply to those proceedings? Will the rules being used in the transferring agency continue in effect through the remainder of the appeal when it is transferred to the Office of Administrative Hearings? It is unclear which regulations will apply when appeals have previously been governed under a different set of regulations."	The regulations will take effect 30 days after they have been filed with the Lieutenant Governor. They will be applied to cases already pending before OAH to the extent not inconsistent with pre-existing orders for those cases. The OAH regulations embody many of the practices already being applied through prehearing orders or under individual agency regulations, and they do not conflict with (and thus will not superseded) very many existing regulations.
General Provisions: 2 AAC 64.900-990			
112	Division of Occupational Licensing	"2 AAC 64.900(a) appears to be a restatement of AS 01.10.080 and it appears that it is not necessary to repeat that statutory provision here. The division's concern would be with any conflicts to [sic] the statute that may arise."	AS 01.10.080 provides as follows: "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." As such, that rule appears to address computation of time only for acts "required to be done" and only if the acts are "provided by law." If OAH's regulations simply incorporated AS 01.10.080 by reference, parties likely would be confused about how time periods are computed for acts permitted (rather than

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			required) in an exercise of an agency's discretion (e.g., under an ALJ's scheduling order). They also would have no clear guidance on whether the act needs to be done by Friday if the last day counts out to a Saturday or Sunday.
113	Department of Law	"2 AAC 64.910. Adjustment of Deadlines. We recommend that the exception in 2 AAC 64.910, allowing adjustment of deadlines, be amended to read: 'Except as provided by a statute that prescribes a deadline and expressly states that a deadline cannot be adjusted," [sic] an administrative law judge, for good cause shown …' Our concern is that the OAH retain maximum discretion. As written, the regulation would appear to allow adjustment only when the particular deadline did not appear in statute. However, the Alaska Supreme Court has provided that statutory deadlines can be 'directory' and not 'mandatory' and has allowed directory deadlines to be adjusted. *See LeCornu v. State*, 2003 WL 393766 (Alaska, Feb[.] 19, 2003); *Kenai Peninsula Borough v. State, Dept. of Community & Regional Affairs*, 751 P.2d 14 (Alaska 1988); *Copper River School Dist. V. State*, 702 P.2d 625, [sic] (Alaska 1985); *City of Yakutat v. Ryman*, 654 P.2d 785 (Alaska 1982)."	The qualification language "does not permit adjustment of them" that the comment proposed to replace will provide OAH ALJs with sufficient discretion to extend directory statutory deadline. To adopt the comment's proposed substitute language might be overreaching. Just because a statute does not "explicitly state that a deadline cannot be adjusted" does not mean the deadline is directory. A deadline can be mandatory (rather than directory) if the law imposes a consequence for failure to meet the deadline. For instance, AS 44.64.060(f) provides that "[i]f a final decision is not issued timely in accordance with [AS 44.64.060(e)], the administrative law judge's proposed decision is the final agency decision." Thus, the AS 44.64.060(e) final decision deadline is one example of a deadline that cannot be adjusted, even though the statute does not expressly forbid adjustment. Other laws OAH may be called upon to apply could have similar mandatory deadlines—made mandatory by imposition of consequences rather than express prohibition.
114	Department of Law	"2 AAC 64.920. Method of Filing and Service. We believe the language of subsection (c) would be clearer if it were revised to read 'if a party is represented	Good point. The language has been changed but to speak of representation by an attorney "in the matter before the ***office*** …" rather than the ALJ. This provides the sought-after clarification but

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		by an attorney in the matter before the administrative law judge ….'"	more accurately.
115	Hagen	"2 AAC 64.930(b) – some parties may not have this capability or knowledge."	The "capability and knowledge" to number exhibits and number the pages of multi-page exhibits should be possessed or easily developed by any person who has the capacity to represent him/herself or his/her agency. This requires nothing more complex that being able to count and to write numbers and a party identifier on the documents the person intends to file. If a party is truly incapable of doing this, the ALJ has the discretion under 2 AAC 64.930(b) to "otherwise order[]" (e.g., relieve the incapable party from this obligation or provide direction on how to comply in the prehearing order). OAH staff can, and frequently do, field questions about how to mark exhibits.
116	Department of Law	"2 AAC 64.950. Confidentiality. Because of the requirements of Alaska's public records laws (AS 40.25.110, 40.25.120) and the absence of authority in the OAH to prohibit the disclosure of records that are available to the public by law, we recommend that the language of subsection (b) be changed to read: '…facilitate efficient resolution of the case and is otherwise allowed by law' and '…protect the privacy of a non-party and is otherwise allowed by law.'"	Alaska's Public Records Act pertains to *records*, not to the conduct of proceedings. It exempts from disclosure records required by state law to be kept confidential. Nothing in the language of 2 AAC 64.950 is meant to allow an agency party to deny disclosure in response to a public records act request if the agency separately maintains as a non-exempt public record copies of the same documents filed under seal with OAH. The purpose of 2 AAC 64.950 is to provide a mechanism for a hearing to be held in a timely and efficient manner, with the parties having access to documents and information needed to exercise their due process

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			and other legal rights, without fear of untoward consequences due to premature or inappropriate disclosure of confidential information. Adding the "and is otherwise allowed by law" phrase suggested by the comment is not necessary to ensure that agency parties, OAH and final agency decisionmakers will be able to comply with the Public Records Act. That language, therefore, has not been added, but the first sentence of the regulation has been revised to assure parties that the ALJ also can use the filed-under-seal protection for information *required by law* to be kept confidential.
117	Levesque	Regarding 2 AAC 64.950: "The proposed regulations contemplate that parties may obtain and use confidential records for purposes of the hearing. It is suggested that a specific provision allowing for entry of Confidentiality Agreements to accommodate parties' concerns may resolve disputes relating to confidential information and documents."	An OAH regulation is not necessary for parties to an administrative adjudication to enter into confidentiality agreements.
118	Levesque	Regarding 2 AAC 64.950(a): "Paragraph (a) should be revised to require that a party claiming confidentiality of any document bears the burden of identifying the document as confidential and identify[ing] the law or order that requires the document to be confidential."	Thank you for the suggestion. The language of 2 AAC 64.950(a) has been revised to clarify that not only the party filing the document, but a party claiming it to be confidential, must identify it as such and identify the supporting law or order.
119	Levesque	Regarding 2 AAC 64.950(b): "Paragraph (b) should be expanded to provide that documents may be filed under seal and kept confidential if such is required to facilitate a **fair** resolution of the case, as well as an efficient resolution. The word 'fair' should be inserted into paragraph (b) …"	The comment makes a good point that a fair adjudication may, in some cases, require filing of confidential documents. The language of 2 AAC 64.950(b) has been changed accordingly.
120	Hagan	"2 AAC 64.990(8) – change 'decide' to 'decision'."	The typographical error has been corrected. Thank

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			you.
121	Department of Law	"In 2 AAC 64.990(8) the word 'decision' should be substituted for 'decide.'"	The typographical error has been corrected. Thank you.
122	Hagan	"2 AAC 64.990(13) – this definition references 'decisionmaker'. Is this meant to be the same thing as 'final decisionmaker' or is 'decisionmaker' someone else? The text of the regulations requires that such communications not take place between the hearing officer (or administrative law judge) and any of the parties. Yet this definition seems to exclude hearing officers (and ALJs)." "Ensure that references to 'final decisionmaker' and 'decisionmaker' are consistent throughout the document. If the two terms mean something different, they should both be defined. If they mean the same thing, then references to 'decisionmaker' should be changed to 'final decisionmaker'."	In the context of *ex parte* contacts, it is improper to contact either the final decisionmaker or the intermediate one—e.g., an ALJ who prepares proposed decisions or a hearing officer who is one member of the final decisionmaker panel but also makes interim decisions by him or herself. In these regulations, "final decisionmaker" is a term of art. "Decisionmaker" standing alone (as it does in 2 AAC 64.990(13)) was intended to be a plain English term. A parenthetical phrase has been added in that definition to make clear that it includes both final and intermediate decisionmakers.
123	Alaska Bar Ass'n	Regarding 2 AAC 64.990(20): "It appears that 2 AAC 64.[990](20) would define the 'practice of law' in very broad terms that go beyond what the Alaska Supreme Court has described as the 'practice of law' in Bar Rule 63. Although 2 AAC 64.[990](21) would permit these activities if performed without compensation for a private person or non-governmental entity and if they don't interfere with the judge's or hearing officer's duties, there is a significant potential for confusion by defining activities as the 'practice of law' when the Alaska Supreme Court has not." * * *	The definition of "practice of law" in 2 AAC 64.990(21) applies only for the very narrow purpose of implementing AS 44.64.050(a)—a statute that prohibits the private practice of law by full-time hearing officers. As such, it should not be confused by readers of the OAH regulations as setting standards for licensure or for appearing before the courts. It is necessarily broad because its purpose is to implement a prohibition against full-time state hearing officers dividing their attention between their full-time legal job as a neutral, presiding over adjudications, and a private practice. The prohibition also applies to serving in "any other judicial or quasi-judicial

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		"Bar Rule 63 [states]: For purposes of AS 08.08.230 (making unauthorized practice of law a misdemeanor), 'practice of law' is defined as: (a) representing oneself by words or conduct to be an attorney, and, if the person is authorized to practice law in another jurisdiction but is not a member of the Alaska Bar Association, representing oneself to be a member of the Alaska Bar Association; and (b) either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii) for compensation, providing advice or preparing documents for another which affect legal rights or duties."	capacity …." AS 44.64.050(a). A broad definition is justified to achieve the intent of the law. Adopting the "practice of law" definition from Bar Rule 63 would be problematic for two reasons. First, the Bar Rule does not consider any legal work, except representing others in adjudicative proceedings, to be the practice of law unless the work is performed "for compensation." To give effect to the intent of AS 44.64.050(a), full-time hearing officers need to refrain from doing other kinds of legal work, not just representing parties in adjudicative proceedings. Second, a generalize prohibition such as would result if the Bar Rule were adopted would leave hearing officers, as well as members of the public who may need to consider whether to make an ethics complaint, with something much less concrete than a detailed list of activities that are prohibited as in the regulation as proposed.
124	Alaska Bar Ass'n	"The Bar Association has been working with the Alaska Supreme Court for many years to devise a definition of the practice of law for the injunctive purposes of As 08.08.210. A proposal … will be on the Board's September 8-9, 2005 meeting agenda… In anticipation of an adopted definition of the practice of law by the Court, may we suggest that 2 AAC 64.[990](20) be modified to read: (20) 'practice of law' means those activities defined by the Alaska Supreme Court in the Alaska Bar Rules to constitute the unauthorized practice of law by non-lawyers."	Thank you for the suggestion, but in light of the fact that the court has not yet adopted the anticipated rule, and for the reasons in the response to Comment 123, OAH will refrain from incorporating the anticipated rule at this time.
125	Alaska Bar Ass'n	"Further, 2 AAC 64.[990](20)(5) through (8), describe	These activities may not require a license to

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		activities that the Alaska Supreme Court, to our knowledge, has never classified as the 'practice of law.' While lawyers have no doubt acted in these capacities, the Bar Association is aware of no requirement that guardians, conservators, guardians ad litem, mediators, arbitrators, conciliators, facilitators, labor negotiators, or legislative lobbyists be lawyers authorized to practice."	practice, but when performed by a lawyer who is committed to work full-time as a hearing officer, they are among the types of law-related work that can lead to conflicts with the hearing docket or cause the hearing officer to take positions on behalf of a client that are inconsistent with decisions the hearing officer may be called upon to make as a neutral decisionmaker. No other commenters expressed concern about inclusion of these activities in the list.
126	McKeen	"I have two questions about 2 AAC 64.990(21). [1] Can a hearing officer or administrative law judge represent friends or family members or anyone without charge? That would seem to be the purpose of the requirement that the practice be 'for pay or other compensation' and I am assuming that is what the regulation intends. But the definition goes on to say 'but does not include public service activities performed without compensation.' I thought it did not include activities performed without compensation, not merely public service activities. I suggest that OAH clarify whether the regulation permits administrative judges and hearing officers from advising and/or representing private clients without pay. I am in favor of allowing that but I think whatever the meaning of the regulation, it should be clarified on that point.	Yes, a hearing officer or ALJ can represent people without charge, as long as the representation does not include activities that are "inconsistent with the hearing officer's or administrative law judge's employment duties." 2 AAC 64.990(21). The definition has been simplified, and clarified, by removal of the substantive standard embedded therein (which now is included in the operative provisions of the code of conduct regulations).
127	McKeen	"I have two questions about 2 AAC 64.990(21). * * * [2] What is the meaning of 'public service' activities? I usually think of 'public service' as meaning government service but I do not think that is the meaning here. Was it meant to allow participation in a pro bono program? Or something else entirely?"	Public service activities could include many things—e.g., serving on a non-profit's board or a local government committee, or performing some types of *pro bono* legal work. It is not the intent of the regulations to limit public service activities to "government service."