

**RULE 12 <sup>1</sup>**

**DISQUALIFICATION AND DISCIPLINARY APPEALS,  
HEARINGS AND PROCEDURES**

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<sup>1</sup> **Editor’s Note:** Rule 12, as amended effective 05-04-17, is only applicable to appeals filed with the Commission on or after March 9, 2013. (See *Notice of Adoption* of March 8, 2013.)

<sup>2</sup> **Editor’s Note:** The *Table of Contents* is part of the annotations and not part of the formal rule.

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**Section 1. Disqualification Procedures, Appeals, and Hearings:**

**A. Departmental Disqualification:**

1. Any Member of the Classified Service in the Fire and Police Departments shall be subject to dismissal from the Classified Service, by disqualification, for a failure or inability to meet the qualifications necessary to perform the essential functions of the position, with or without the reasonable accommodation of any mental or physical disability consistent with the provisions of any Federal or State statutes or Denver ordinances prohibiting discrimination on the basis of mental or physical impairment.
2. A dismissal based on disqualification shall generally be considered a separation under honorable circumstances except as noted herein. A Member so dismissed may be re-employed under the provisions of Charter § 9.4.3 and Commission Rule 11 § 4 ("Reemployment") provided that they can then establish that they are able to perform the essential functions of the position, with or without reasonable accommodation of any mental or physical disability.
3. However, a dismissal based on disqualification due to any violation of law which results in the Member's inability to obtain, maintain, or renew any license, certification, or other authorization required to perform the essential functions of the position shall not be considered a separation under honorable circumstances. Such individual shall not be eligible for rehire under the referenced provisions of the Charter and the Commission Rules governing Reemployment.

**B. Departmental Disqualification Procedures:**

Except for the disqualification of any probationary Member of the Classified Service, any dismissal of a Member based on disqualification shall, at a minimum, conform to all of the procedural requirements of Charter § 9.4.14 as they pertain to the departmental discipline of Members of the Classified Service.

**C. Appeal and Hearing Regarding Disqualification:**

Except for the disqualification of any probationary Member of the Classified Service, any Member dismissed on the basis of disqualification may file an appeal and request a hearing, and may appeal any Hearing Officer decision to the Commissioners or to the District Court, following the procedural requirements of Charter § 9.4.15 and of this Rule 12 as they pertain to the appeal and review of a departmental order of discipline, except that an appeal of a disqualification shall not be subject to the provision of this Rule 12 § 4(B) concerning Disciplinary Appeals Involving Special Circumstances.

## **Section 2. Departmental Disciplinary Procedures:**

### **A. Departmental Discipline:**

Any Member of the Classified Service in the Fire and Police Departments shall be subject to verbal or written reprimand, fine, suspension with or without pay, reduction in grade and/or rank, and/or discharge for a violation of the departmental rules and regulations.

### **B. Conform to Charter and Rules:**

1. Except for the discharge of any probationary Member of the Classified Service, and except for a disciplinary reprimand (verbal or written), the departmental procedures for any discipline shall conform to all of the procedural requirements of Charter § 9.4.14 and the respective departmental rules and regulations for administration of discipline.
2. A failure of the Chief or Executive Director of Safety to strictly follow all of the procedural standards established through the respective Departmental Rules and Regulations for administration of discipline shall not constitute a basis for reversing a disciplinary action on appeal unless it is shown that the lack of compliance violated the procedural due process rights of the Member as established by Charter or other binding legal authority or precedent.

### **C. Notice of appeal rights:**

For any departmental order imposing a disciplinary penalty of a fine, suspension, demotion, or discharge, the order shall contain a statement advising the Member of their right of appeal to the Commissioners, the time limits for the filing of a written appeal, and the mailing address and phone number of the Commission.

## **Section 3. Appealing a Departmental Order of Disciplinary Action:**

### **A. Discipline that May Be Appealed:**

With the exception of a disciplinary reprimand and the discharge of a probationary Member, any disciplinary action imposed on a Member of the Classified Service may be appealed to the Commission and be subject to review, first by a Hearing Officer and then by the Commissioners, pursuant to Charter § 9.4.15 and this Commission Rule 12.

### **B. Filing an Appeal and Request for Hearing:**

1. Any appeal for hearing shall be initiated by the filing of an Appeal of Disciplinary Action with the Commission and shall be filed in compliance with Charter § 9.4.15 (A).

2. In accordance with the Charter § 9.4.15 (A.), the appeal shall be filed in writing within ten (10) calendar days from the date of completion of service of the Executive Director of Safety’s Departmental Order of Disciplinary Action on the Member. The Notice of Appeal may be filed by the affected Member or by the Member’s attorney. Such appeal shall include the following:
  - a. The Classified Member’s full name and contact information,
  - b. A copy of the Executive Director of Safety’s Departmental Order being appealed, in whole or part, with any attachments as served upon the Member; and
  - c. A written summary of the Member’s objections to the Departmental Order.
3. If an attorney files the appeal and request for hearing on behalf of a Member, the Notice of Appeal shall also contain the full name, mailing address, telephone number, and registration number of the attorney.
  - a. If the attorney is representing the Member only for limited purposes, the attorney shall so state in the Notice of Appeal.
  - b. Having made entry of appearance on behalf of a Member, an attorney of record may only request withdrawal of their representation by a motion to be filed with the Commission.
4. Upon receipt of an appeal, the Commission shall file a copy of the appeal with the Executive Director of Safety, Office of the City Attorney, and the Chief of the respective Department.
5. Any technical deficiency in a timely filed appeal may be corrected by the filing of a corrected appeal with the Commission. Any request to substantively amend an appeal shall be made by motion to the Commission. Upon the filing of a corrected or amended appeal, the Commission shall file a copy with the Executive Director of Safety, City Attorney, and all affected parties.

**C. Request for an Expedited Hearing:**

1. In accordance with the provisions of Charter § 9.4.15.A, a Member may request an expedited hearing to be commenced within thirty (30) days of the selection of the Hearing Officer.
2. Any request for an expedited hearing shall be contained within or attached to any appeal timely filed

**Section 4. Assignment of a Hearing Officer:**

**A. Assign within five (5) Calendar Days:**

Within five (5) calendar days after receiving a Notice of Appeal, the Commission shall randomly assign a Hearing Officer to the case from the entire pool of those Hearing Officers retained by the Commission. The Commission shall promptly notify the parties in writing of the name and date of assignment of the Hearing Officer.

**B. Reassignment of Cases:**

If the reassignment of a case to a different Hearing Officer is necessary, the new Hearing Officer shall be randomly selected from the remaining pool of Hearing Officers.

**C. When the Hearing Officer is Unavailable:**

When the parties have identified mutually available dates for a hearing within the time specified in Rule 12 § 6 (A) or (B), and the assigned Hearing Officer is unavailable on those dates, the Hearing Officer shall promptly notify the Commission. The Commission shall then, if possible, randomly reassign the case to another Hearing Officer who has the requisite availability. Likewise, in any circumstance where a hearing will be significantly delayed solely due to the lack of availability of the assigned Hearing Officer, the Hearing Officer shall promptly notify the Commission and the Commission shall then, if possible, randomly reassign the case to another Hearing Officer who has the requisite availability.

**D. Consolidation of Cases:**

Upon the filing of any motion to consolidate two or more cases<sup>[BSK1]</sup>, the Hearing Officer who has been assigned to hear the appeal with the lowest assigned case number shall rule on the motion. When two or more cases are consolidated they shall be consolidated under the appeal with the lowest assigned case number.

**Section 5. Assignment of a Settlement Officer:**

**A. Selection Procedure:**

In a proceeding before the Hearing Officer, at the request of any of the parties, or the Hearing Officer, the Commission shall randomly select, from the remaining pool of Hearing Officers, a Settlement Officer to mediate any or all disputed issues of the appeal.

**B. Duties of a Settlement Officer**

1. The Settlement Officer shall function as a mediator and shall assist the parties in exploring options for achieving a mutually agreeable resolution, in whole or in part, of the disputed issues. The Settlement Officer shall determine when continued settlement discussions are appropriate. Settlement discussions should be concluded when there is a lack of reasonable and timely progress in settlement discussions. The Settlement Officer shall inform the Hearing Officer and/or the Commission, as appropriate, when the settlement discussions have been successfully or unsuccessfully concluded.
2. The Settlement Officer shall be provided access to the case file, in whole or in part, as deemed necessary.
3. Any appealed issue(s) not resolved before the Settlement Officer shall then be heard before the Hearing Officer at the scheduled appeal hearing.
4. The Settlement Officer shall regularly report the following mediation status information to the Hearing Officer or the Commission, as appropriate: (a) record of conference attendance, (b) periodic confirmation that the parties are actively involved in ongoing settlement discussions; and (c) confirmation of the conclusion of settlement discussions, and whether the settlement process was successful or unsuccessful in resolving the matters in the dispute, either in whole or in part.
5. The Settlement Officer, with the agreement of both parties, may assist the parties in drafting a settlement agreement and/or an appropriate document for submission to the Hearing Officer or the Commission, as applicable, in order to achieve a full or partial resolution of the case.

**Section 6. Procedures for Disciplinary Appeals Process:**

**A. General Hearings:**

1. In the absence of a request for expedited hearing, the setting of a date(s) for the hearing shall occur within fifteen (15) days of the date of assignment of the Hearing Officer unless a later date(s) is agreed to by the parties or ordered by the Hearing Officer upon a showing of good cause.
2. The hearing shall be scheduled to commence within sixty (60) days from the date of the assignment of the Hearing Officer.

**B. Expedited Hearings:**

Upon a timely request for an expedited hearing, and unless a later date(s) is agreed to by all parties, or is so ordered by the Hearing Officer after a showing of good cause:

1. The setting of a date(s) for the hearing shall occur within seven (7) days of the date of assignment of the Hearing Officer; and
2. The hearing shall be scheduled to commence within thirty (30) days of the date of assignment of the Hearing Officer.
3. For good cause, the Hearing Officer may grant a Motion of Extension of Time to each party up to seven (7) days maximum. However, the combined total shall not exceed fourteen (14) days.
4. Any extension of time beyond fourteen (14) days provided in subparagraph (3) above shall require a written request from the Hearing Officer to the Commission for approval.

**C. Length of Hearing.**

A hearing regarding a disciplinary penalty of only fined days or fined time should last no longer than one (1) day. If the disciplinary penalty in question at the hearing involves a suspension or demotion as the most severe discipline imposed, the hearing should last no longer than two (2) days. A hearing involving a penalty of dismissal or disqualification from the Classified Service should last no longer than three (3) days. The duration of a hearing may be extended by the Hearing Officer for good cause. [BSK2] Whatever length of hearing is determined appropriate, each party shall in principle be entitled to half of the total time allotted in order to present the party's case.

**D. Computation of Time:**

1. Except as otherwise provided for in these rules, the computation of time for all matters related to disciplinary or disqualification actions, appeals, and hearings shall be as follows: Days shall mean calendar days. (*Adopted October 13, 1995*).
2. The day of the act, event, or default from which the designated period begins to run shall not be counted. The last day of the period so computed shall be counted, unless it is a Saturday, Sunday, Holiday, or other non-business day of the Commission. In such event, the time runs until the end of the next day that is a Commission business day.
3. The last day of the period so computed shall end with the close of the Commission business day.

**E. Filing of Motions and Briefs before a Hearing Officer or the Commissioners:**

1. Prior to the filing of any motion, the moving party shall have a duty to confer (or make reasonable, good faith efforts to confer) with opposing counsel or a *pro se* party to resolve the disputed matter and/or to determine whether the opposing party has any opposition to the proposed motion. The moving party shall state in the motion the specific efforts to comply with this rule and whether the opposing party has noted any opposition or the lack of opposition to the motion. If the motion is unopposed, it shall be titled “Unopposed Motion for \_\_\_\_\_.”
2. For matters before a Hearing Officer, any pre-hearing statements, motions, briefs, and other documents filed outside of a hearing shall be filed at the Commission’s office, electronically by e-mail, as provided herein below.
3. When filing documents with the Commission’s office, a copy shall also be simultaneously served on the opposing party in person, by mail, by e-mail or by facsimile at the street, mailing, or e-mail address, or facsimile number, of record in the appeal. All documents filed and served shall include a certificate of mailing/service. If the opposing party has an attorney, the document shall be served on the attorney.
4. If ordered to file directly with the Hearing Officer, the original shall be filed with the Commission and a copy or second original shall be filed with the Hearing Officer. Service on the opposing party and the attachment of a certificate of mailing/service is required.
5. All filings shall be on 8.5” by 11” white paper, with one and one-half inch top margins, one-inch (1”) side and bottom margins, and 12-point font. Motions and pre-hearing statements, etc. may be single-spaced. Hearing briefs should be double-spaced. Briefs in excess of ten (10) pages, not including tables or attachments, are discouraged. (See additional rules regarding the filing of briefs in appeals before the Commissioners.)

**F. Response to Motions:**

*(Adopted March 27, 1998)*

1. Except for unopposed or stipulated motions and except as otherwise noted in these Rules, before any motion is considered by the Hearing Officer or the Commissioners, a party to a disciplinary appeal shall have ten (10) days (from the date of the filing of the motion) to file a written response to any motion filed by the opposing party. There shall be no obligation to file a response to any motion, unless otherwise ordered by the Commissioners or the Hearing Officer or required by law.
2. Should a response to a motion be filed, the moving party may file a reply only by leave of the Hearing Officer or the Commissioners, as appropriate.

3. The Commissioners or the Hearing Officer may, when the circumstances are appropriate, modify the timeline for responding to motions.

**G. Electronic Filing and Service of Documents Preferred:**

1. The Commission shall accept into record, in lieu of the original hard copy, documents that are filed via electronic mail. The filing party shall retain the original.
2. All electronic mail submissions for Disciplinary Appeals will be accepted only at the Commission's designated e-mail address. The electronic mail shall include a cover page explaining the purpose and content of the attached document.
3. The Commission shall only accept into record submissions that are complete filings. Therefore, truncated or partial attachments shall not be accepted into record.
4. The Commission shall only accept attachments in electronic file formats that are compatible with DOC, PDF, JPG, JPEG, or GIF file extensions. Moreover, the Commission shall not convert or unzip any attachments.
5. Any document submitted via email shall maintain the standard page formats as when submitted in hard copy format.
6. The Commission shall not be responsible for any failed transmissions.
7. All email submissions shall adhere to all deadlines and requirements in Rule 12. The requirements of this Rule shall not supersede or replace any provisions of Rule 12. Electronic documents received in the Commission's office after the close of a business day or on a non-business day shall be deemed as filed on the next business day.
8. Upon receiving a submission, the Commission shall document into record the sender, date, time, and document title. The Commission will provide a confirmation for any electronic submissions only upon request.
9. The Commission and the Hearing Officer may serve copies of orders, documents, or notices upon the parties by e-mail transmission in lieu of service by mail, and retain as a record the original document and certificate of mailing/service.
10. Any documents filed via e-mail shall include a certificate of mailing/service.

**I. Facsimile Filings Not Accepted:**

*(Adopted October 13, 1995)*

Facsimile filings will not be accepted.

**Section 7. Discovery and Scope of Discovery:**

**A. Generally:**

1. Without requiring a formal request for production, the Respondent shall provide to the Petitioner reasonable access to and/or copies of the following materials:
  - a. The full and complete Department Internal Affairs investigation file(s), for the Petitioner, upon which the disciplinary action is based in whole or in part;
  - b. The Chief’s written order (command), report, and attachments, as submitted to the Executive Director of Safety in the subject disciplinary matter per the requirements of Charter § 9.4.14(A).
  - c. The full and complete record documenting the pre-disciplinary meeting(s), if any, held by the Chief or his designee, to include any notice of contemplated discipline provided to the Classified Member in advance of said meeting and any notice of the Chief’s (or designee’s) decision following the meeting.
  - d. Should the Petitioner request copies of any of the noted materials, the Respondent may charge a reasonable fee for costs associated with the reproduction of the documents or recordings. Any dispute over fees charged may be resolved by the Hearing Officer who may consider issues of financial hardship.
  - e. Either party may obtain additional discovery of documents. In order to obtain additional discovery, the party must first confer with the opposing party to determine what additional material is available and discoverable. If the parties are unable to agree on such discovery issues, the discovery will be made available to the party only upon a motion granted by the Hearing Officer following a showing of good cause that the requested discovery may be relevant to the requesting party’s case.
  - f. Should either party deny the opposing party access to and/or copies of any document(s) or other material(s), as referenced in this subsection A (1), on the basis that the document or material is privileged and therefore not discoverable, the party shall list and describe the document or material on a “privilege log”, noting the basis of the privilege, and promptly serve the opposing party with a copy of the log.
  
2. Except when a request for an expedited hearing has been timely filed, said documents and materials shall be made available for review and/or copies provided (as requested) within fourteen (14) calendar days of the date of the notice of the filing of the appeal or date of request. In the case of a request for an expedited hearing, the documents and materials shall be made available for review and/or copies provided (as requested) within seven (7) calendar days.

3. With respect to any material that may be subject to discovery under this subsection, nothing in this subsection shall prohibit any party from filing a motion for a protective order or for approval to make certain redactions. However, said motion shall be filed with the Commission and be served on all parties reasonably in advance of the respective deadline for production so that, following any ruling on the motion, the deadline for production will still be met.
4. Depositions may be permitted, but only in the event that a witness is unavailable to testify at the hearing and only upon a party's motion granted by the Hearing Officer. The party requesting the deposition shall be responsible for providing the Hearing Officer and opposing party, no later than seven (7) calendar days prior to the start of the hearing, unless ordered otherwise by the Hearing Officer, with a complete transcript of the deposition and copies of any documents or other materials used in the deposition.
5. Discovery in matters concerning issues of consistent discipline shall be limited to the three years (36 months) prior to the date on which the external or internal complaint was filed against the Member, and up to and including the date the Executive Director of Safety signed the Departmental Order of Disciplinary Action.
6. Any disciplinary case in which the final penalty imposed is the result of a documented negotiated settlement shall not be subject to discovery for the purpose of comparison in the matter of consistent discipline. Further, the Hearing Officer shall not consider any such case for the purpose of determining consistent discipline.
7. In appeals concerning disqualifications, each party to the appeal shall be required to disclose all documents, recordings or other tangible things which support either party's respective position in favor of or against the disqualification, within twenty-eight (28) days from the filing of the appeal.

**B. Resolution of Discovery Issues:**

The Hearing Officer shall have full authority to dispose of any motions related to discovery. The Hearing Officer shall resolve any discovery issues not resolved between the parties.

**C. Case Management and Pre-hearing Conferences:**

1. A case management and/or a pre-hearing conference(s) may be ordered by the assigned Hearing Officer on the request of any party or at the discretion of the Hearing Officer. Any conference may be held by telephone or in-person, giving consideration to the request of any party and the nature of the issues. [BSK3]
2. At a case management conference the Hearing Officer may set dates for discovery, pre-hearing statements, a pre-hearing conference, and for the hearing. The Hearing

Officer may also resolve any other matters related to the timely disposition of the appeal, including any matters relating to discovery.

3. At a pre-hearing conference the Hearing Officer may rule upon the admissibility of and the limitations on prospective evidence and witnesses; attempt to obtain a definition of or simplification of the issues; obtain stipulations as to the facts or documents in order to avoid unnecessary proof; sign and issue subpoenas; and address or rule on such other matters as may be properly before the Hearing Officer.
4. The Hearing Officer shall also encourage the parties to explore settlement of the dispute. Further, the Hearing Officer may, at their discretion, order the parties to participate in settlement procedures as outlined in Rule 12 § 5, which may include an order to participate in a mandatory settlement conference.

**D. Pre-hearing Order:**

1. Unless otherwise ordered by the Hearing Officer, the parties shall jointly file and serve a pre-hearing order no later than fourteen (14) calendar days before the scheduled start of the hearing. Pre-hearing orders may be amended, as necessary, up to seven (7) calendar days before the date of the hearing, if not ordered otherwise by the Hearing Officer.
2. When a request for an expedited hearing has been made, and unless ordered otherwise by the Hearing Officer, the parties shall jointly file and serve a pre-hearing order no later than ten (10) days before the scheduled start of the hearing. The parties may amend the pre-hearing order up to five (5) calendar days before the date of the hearing, or as otherwise ordered by the Hearing Officer.
3. The pre-hearing order shall contain a statement of the case from both parties.
  - a. The Respondent’s statement of the case shall include the following:
    1. A summary of the key asserted facts upon which any Rule violation(s) and imposed penalty(s) are based, to include, for each sustained rule violation, a description of the specific conduct of the Classified Member that formed the basis for the sustained violation; and
    2. The methodology and rationale utilized to determine the level of penalty(s) imposed with respect to the:
      - i. Allocation of a penalty(s) to an individual Rule violation(s);
      - ii. Allocation of a penalty(s) to combined Rule violations;
      - iii. Consideration of facts in mitigation;
      - iv. Consideration of facts in aggravation;
      - v. Application of any departmental disciplinary matrix; and

- vi. Imposition of discipline outside of any disciplinary matrix.
  - b. The Petitioner's statement of the case shall include any and all defenses which the Petitioner intends to raise at the hearing and shall also include a summary of the key asserted facts upon which those defenses may rest.
4. The pre-hearing order shall also contain:
  - a. A list of all stipulated facts and issues of law;
  - b. A list of all the witnesses, by name, title or rank, address, and phone number which the party intends to call to testify at hearing; with a summary of the expected testimony of the witness; and with the expected length of time required for the testimony of each witness for both direct and cross examinations;
  - c. A list of all the exhibits which may be presented by the party at the hearing; and
  - d. An estimate of the number of days to be required for the hearing.
5. At any time after the filing of the joint pre-hearing order, the Hearing Officer may, upon request of either party or at their own discretion, convene a pre-hearing conference as contemplated in § 7 (C) (3) above.

**E. Subpoenas:**

Subpoenas of witnesses and subpoenas to produce documents (subpoenas duces tecum) may be issued by the Hearing Officer or the Executive Director. Service shall be in the same manner as for a subpoena issued pursuant to Rule 45 of the Colorado Rules of Civil Procedure. Enforcement of subpoenas may be pursued with the Denver District Court. (Amended March 26, 1987, and December 11, 1987)

**F. Issuance of a Subpoena:**

1. A subpoena of any witness to attend and testify at hearing before a Hearing Officer or the Commissioners; or to produce documentary evidence (subpoena duces tecum) including books, records, papers, documents, or other tangible items at hearing; or for deposition with or without production of documentary evidence; shall be issued without discrimination between public and private parties. This subsection shall not be used to expand the limits of discovery previously set forth in this rule.
2. In a disciplinary or disqualification appeal hearing before a Hearing Officer, a subpoena may be issued by the Hearing Officer or the Executive Director upon request of any party or an attorney representative of any party. However, a subpoena for deposition may only be issued upon the granting of a motion to do so.

3. In any investigatory hearing before the Commissioners, a subpoena may be issued by the Executive Director upon order of the Commissioners, or upon request of any party to the hearing, or by an attorney representing any party to the hearing. However, a subpoena for deposition may only be issued upon the granting of a motion to do so. *(Amended March 26, 1987 and December 11, 1987)*

**G. Service of a Subpoena:**

1. The requesting party shall be responsible for proper service of any subpoena. Service shall be in the same manner as for a subpoena issued pursuant to Colorado Rules of Civil Procedure Rule 45. However, a witness fee need not be advanced or provided, and mileage expense need not be advanced to an individual who is an officer or employee of the City and County of Denver.
2. The party issuing or requesting the issuance of any subpoena shall also serve a copy of the subpoena (including a complete list of any documents and tangible items requested to be provided) upon all parties of record, including pro se parties, in the manner prescribed by Rule 5.b of the Colorado Rules of Civil Procedure. Service on all parties shall be made promptly after service on the individual named in the subpoena.

**H. Filing of a Subpoena:**

The original subpoena and return/affidavit of service need not be filed with the Commission. However, the original subpoena with completed return/affidavit of service shall be maintained in the office of any attorney representing a party, and if the party has no attorney, then by the party. The documents shall be promptly filed with the Commission upon request of the Hearing Officer or the Commission.

**I. Objections to Subpoena:**

When a motion is filed by the individual named in the subpoena, and within the time specified in the subpoena for compliance, the Hearing Officer/Commissioners may quash or modify the subpoena, if appropriate. A denial of a motion to quash may be conditioned upon advancement of the reasonable cost of producing any documentary evidence required by the subpoena by the person in whose behalf the subpoena was issued.

**J. Enforcement of a Subpoena:**

Enforcement of any subpoena may be pursued with the Denver District Court.

1. Contempt. Any person subpoenaed, who fails or refuses to appear, produce requested items, or provide testimony at a hearing or deposition may be cited and required to show cause why said person should not be held in contempt of court by the Denver District Court.

2. Contempt Procedure. The party issuing the subpoena may petition the Denver District Court to enforce said subpoena for failure to comply, if the Commission/Hearing Officer determines that such petition is appropriate.
  - a. In such instance, the party issuing the subpoena shall file a motion requesting that the Hearing Officer file with the Commission a Determination and Notice for Enforcement of Subpoena; a Determination and Notice for Enforcement of Subpoena shall include the Hearing Officer's determination that subpoena enforcement is necessary to resolve issues of fact before the Hearing Officer, a presentation of the facts, and copies of supporting documents necessary to file the petition with the District Court.
  - b. The petition to the District Court shall indicate that due notice has been given of the time and place of attendance of the witness and the service of the subpoena.
  - c. The District Court, after hearing evidence in support of or contrary to the petition, may enter an order as in other civil actions compelling the witness to appear or testify or produce requested items under penalty of punishment for contempt in case of willful failure to comply with the District Court order.

## **Section 8. Hearing before the Hearing Officer:**

### **A. Public Hearing:**

1. A disciplinary or disqualification appeal hearing conducted by a Hearing Officer shall be open to the public unless ordered closed by the Hearing Officer. At the request of either party or upon the Hearing Officer's own motion, and only after a showing of good cause, the Hearing Officer may close a hearing, in part or in whole.
2. Witnesses shall be sequestered at the request of either party or when the Hearing Officer deems sequestration is appropriate.
3. Any audio or video recording of a hearing, in whole or in part, is strictly prohibited except for the sole private use by Hearing Officers in carrying out their duties and responsibilities, or for the sole private use of the Court Reporters in carrying out their duties and responsibilities, or for official Commission purposes.
4. All documents and all other exhibits filed with the Commission for a disciplinary appeal may remain closed from public inspection or duplication until the Hearing Officer's Decision and Order has been filed with the Commission.
5. Unless sealed by the Hearing Officer, or subject to a protective order, or State or Federal Law restrictions, any document or exhibit filed as evidence can only be inspected through a Colorado Open Records Request made to the Commission.

**B. Petitioner Representation at Hearing:**

The Classified Member may represent him or herself at the hearing, or be represented by an attorney. If a Classified Member is acting *pro se*, he or she must attend the appeal hearing in person. If the Classified Member or representative fails to appear, without good cause, the Hearing Officer shall dismiss the appeal.

**C. Oaths and Affirmations:**

In the course of any hearing conducted under the provisions of these Rules, the Hearing Officer shall have the power to administer an oath or affirmation.

**D. Conduct of Hearings:**

1. All hearings shall follow the provisions of Section 24-4-105(7), (8), and (9) (a) of the Colorado Administrative Procedure Act, except as otherwise provided by these Rules, to include the special provisions regarding formal rules of evidence.
2. The Department of Safety shall proceed first and, acting through the City Attorney as counsel, *shall offer evidence in justification of the departmental action*, that is, the Department of Safety shall present sufficient evidence to create a reasonable inference of the correctness of the sustained Rule violation(s) and the imposed penalty(s) as contained in the Departmental Order of Disciplinary Action. The evidence offered initially by the Executive Director of Safety shall be limited to evidence, including materials, considered as the basis of the Order (generally, the Internal Affairs investigation).
3. The Classified Member in person, or by counsel, *may offer evidence in support of his or her written objections* to the Departmental Order. The Petitioner shall be considered the proponent of an order seeking reversal or modification of the discipline imposed.
4. Each party to the proceeding shall be entitled to present oral (testimony of witnesses) or documentary evidence, to cross examine witnesses, and to submit any other evidence as may be required for a full disclosure of the facts.
5. The Hearing Officer shall rule upon the admissibility of offered evidence.
  - a. The Colorado Rules of Evidence shall not be strictly applied. The Hearing Officer shall admit evidence that possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.
  - b. Further, any relevant document or other relevant material in the Internal Affairs file shall be presumptively admissible and admitted into evidence upon proffer or motion by either party, subject to the limitations on admission of recommendations for appropriate discipline as provided in subparagraph (c)

below. The Hearing Officer shall not consider any objection to the admissibility of any Internal Affairs file document or other material on any basis other than relevancy.

- c. Any recommendations for appropriate rule violations and penalties shall not be admissible except for notices to the Classified Member and the Chief's Written Command.
  - d. If discipline has been imposed pursuant to a disciplinary matrix, the matrix in effect at the time the discipline was imposed, and any writings adopted by the Department in explanation of the matrix, shall automatically be admitted into evidence and made part of the record of the appeal. In addition, the Executive Director of Safety's interpretation of the matrix as defined and explained in the Departmental Order of Disciplinary Action shall be admitted into evidence and accepted as correct unless proven to be clearly erroneous.
6. Evidence and testimony shall end at the conclusion of the Classified Member's presentation, or at the conclusion of any rebuttal or sur-rebuttal, as may be permitted by the Hearing Officer.
  7. The proceedings shall be recorded by a Reporter or by an electronic recording device. Upon timely request and prepayment of estimated cost to the retained Court Reporter, a party shall be entitled to a transcript, or any portion thereof, of the proceedings. Any balance due shall be paid before the final transcript is provided. Likewise, any witness shall be entitled to a transcript of their testimony.

**E. The Record of a Hearing:**

The record shall include the Notice of Appeal, all exhibits admitted and all exhibits offered but not admitted, pre-hearing statements, briefs and motions before the Hearing Officer; all written orders and rulings of the Hearing Officer, and the full decision and order of the Hearing Officer, to include the findings of fact, conclusions of law, and the disposition of issues. Upon appeal, this record may be supplemented with a transcript of the full hearing or the designated portions thereof.

**F. Hearing Exhibits:**

1. Every exhibit offered shall be assigned a designation by number or letter. Numbers shall identify exhibits offered by the Respondent. Letters shall identify exhibits offered by the Petitioner. The individual documents, recordings or other materials contained in any large exhibit (e.g. investigatory file) shall be appropriately indexed, tabbed and labeled. In addition, all exhibits shall be provided to the Commission in electronic format whether by e-mail, thumb drives, or DVD. Exhibits entered into evidence at hearing shall be considered to be in the custody of the Commission.

2. Where possible, both parties must stipulate exhibits. Identical exhibits may not be offered by both Petitioner and Respondent.
3. At least five (5) days prior to the scheduled start of the hearing the parties shall exchange both a copy of their hearing exhibits that have been appropriately tabbed and labeled, and an index to their exhibits that is in the format prescribed by the Commission.
4. At the time of the hearing, each party must submit to the Hearing Officer two (2) copies of both their tabbed and labeled exhibits and an index to their exhibits that is in a format prescribed by the Commission; one to serve as the original to be handled by the Reporter and one for the Hearing Officer.
5. Upon the close of a hearing, the parties shall immediately and jointly purge, from the original and the Hearing Officer's copy of the exhibits, any and all exhibits that were not offered, leaving those exhibits that were offered but not admitted and those admitted.
6. The Commission shall return all hearing exhibits to the respective party(s) following the close of the hearing, or at the exhaustion of any further legal action arising out of the appeal in question. If a party is unavailable, the Commission shall retain the exhibits in conformance with any applicable records retention schedule.

**Section 9. Hearing Officers' Decision and Order:**

**A. Within thirty (30) calendar days** of the conclusion of the hearing, the Hearing Officer shall issue a written decision which includes findings of fact and conclusions of law affirming, reversing, or modifying the disciplinary action in whole or in part. The decision shall address each violation of departmental rules and regulations, and each respective penalty imposed, as may be a subject of the appeal. Any issue not addressed in the Hearing Officer's Decision and Order is subject to be remanded by the Commissioners.

**B. In reviewing the disciplinary action:**

1. The Hearing Officer *shall give due weight to the necessity of the maintaining by the Executive Director of Safety of administrative control of the respective Department.*
  - a. Hearing Officers shall not substitute their judgment for that of the Executive Director of Safety concerning any policy considerations underlying the discipline, to include the interpretation of Departmental Rules and Regulations, and may only reverse or modify the Manager's decision concerning policy considerations when it is shown to be clearly erroneous. Hearing Officers shall not substitute their judgment for that of the Executive Director of Safety in determining the appropriate level of penalty to be imposed for a sustained

violation, and may only modify the disciplinary penalty imposed when it is shown to be clearly erroneous.

- b. A Hearing Officer may reverse or modify the Executive Director of Safety's Departmental Order of Disciplinary Action on the basis of issues raised by the Petitioner concerning policy considerations, a sustained Rule violation or an imposed penalty, only when it is shown to be clearly erroneous.
  - c. A Departmental Order of Disciplinary Action shall be deemed to be "clearly erroneous", in whole or in part, in the following circumstances:
    - i. The decision, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole;
    - ii. If the Manager fails to follow the applicable Departmental guidelines, rules or regulations, an applicable matrix or its associated guidelines, and absent such failure the discipline imposed would not have resulted; or
    - iii. If the Manager otherwise exceeds his authority.
2. The Hearing Officer shall not consider any other case offered for purposes of assessing consistency of discipline if the final penalty imposed in that case was based on a documented negotiated settlement between the parties.

- C. In rendering a decision, the Hearing Officer should consider the following:** The interests of the individual Classified Member and the safety, health, welfare, and liability interests of the Department, other employees, and the citizens of the City and County of Denver.
- D. The Hearing Officer's findings of evidentiary fact** contained in the decision shall be binding upon the Commissioners.
- E. The Hearing Officer's decision, or any final closing order** issued prior to any hearing and/or decision, shall include a Notice of Appeal Rights as prescribed by the Commission, advising the parties of the right of appeal to the Commissioners or to District Court. Appeal Rights need not be included in any final closing order issued upon a Motion from the Member requesting a withdrawal or dismissal of their appeal with prejudice.
- F. The Hearing Officer's Decision and Order, or any Final Closing Order,** shall be filed with the Commission. Upon its receipt, the Commission shall promptly serve the decision or order on the Executive Director of Safety and the classified Member by certified or registered mail, with return receipt. If represented by an attorney, service shall be upon the attorney. Service by certified or registered mail need not occur for any final closing order issued upon a Motion from the Member requesting a withdrawal or dismissal of their appeal with prejudice.

**Section 10. Stay of Decision:**

**A. Request and Requirements for a Stay:**

1. A request for a stay of a Hearing Officer decision overturning a dismissal from the Classified Service shall be automatically granted upon the filing of a request by the Executive Director of Safety, having been served on the Commission and the Petitioner within seven (7) calendar days of the date of service of the Hearing Officer’s decision.
2. For all other cases, before making any decision with regard to a request to stay the Decision and Order of a Hearing Officer, the Commissioners shall balance the interests of the individual with the safety, health, liability, and welfare of the Department and the citizens of the City and County of Denver. The Civil Service Commissioners may stay a Decision and Order of the Hearing Officer when:
  - a. An appeal of the Hearing Officer’s Decision and Order has been timely filed with the Commission by the party requesting a stay; and
  - b. A sworn and notarized written request for a stay is filed with the Civil Service Commission and served on the parties to the appeal at the time the appeal is filed, or prior to the deadline for the filing of such appeal; and
  - c. The request for a stay states, with particularity, the irreparable harm, injury or loss which would occur if the request is not granted; and
  - d. Upon a review of the documents submitted, the Commissioners may find that irreparable harm, injury, or loss is likely to result if the request for the stay is not granted. The fact that any payment of back wages and/or benefits has been ordered by the Hearing Officer shall not in itself constitute irreparable harm, injury, or loss should there be adequate remedy available by law to recover such payments.

**B. Statements in Support or Opposition:**

Any interested party given notice of the request may submit a sworn and notarized document in support or opposition to the request for a stay. Any such documents shall be filed with the Commission within ten (10) days of the filing of the request for a stay.

**C. Notice and Expiration:**

Written notice of the Commissioners’ decision regarding any request for a stay of a Hearing Officer’s decision shall be sent to all parties to the appeal. Any stay granted shall expire at the time the Commission issues a final decision in the matter appealed.

## **SECTION 11. Appeal from Hearing Officer's Decision:**

### **A. To Whom the Hearing Officer's Decision May Be Appealed:**

1. In reference to Charter § 9.4.15(E), any final decision or final closing order of a Hearing Officer may be appealed to either the Commissioners or directly to the District Court in accordance with the Colorado Rules of Civil Procedure then in effect. If one party appeals to the Commissioners and the other party appeals to the District Court, the court shall dismiss the appeal without prejudice until the Commission rules on any appeal before it. Judicial review of a Hearing Officer's decision shall be in the same manner as provided for judicial review of a Commissioners' decision.
2. Filing an Appeal or Cross-Appeal to the Commissioners:
  - a. Appeal: An appeal to the Commissioners shall be initiated by filing an original and one copy of a Notice of Appeal with the Commission within fifteen (15) calendar days of the date noted on the certificate of mailing/service of the Hearing Officer's decision by the Commission. The party filing an appeal shall promptly serve the notice on the opposing party or, if represented by an attorney, on the opposing party's attorney. Attached to the original and each copy filed and served shall be a certificate of service/ mailing.
  - b. Cross-Appeal: A Notice of Appeal having been timely filed by one party, the opposing party may file a Notice of Cross Appeal. A cross-appeal shall be initiated by filing an original and one copy of the Notice with the Commission within fifteen (15) calendar days of the date of the filing of the Notice of Appeal.
  - c. An Appeal or Cross-Appeal of a Hearing Officer's Order may only be filed if based on one or more of the limited grounds for the Commissioners' review as listed in Charter § 9.4.15(F) and Rule 12 § 11(D).
3. Upon the filing of an appeal or cross-appeal from a Hearing Officer's decision, the Commission shall promptly notify the parties and their attorney in writing providing the new appeal case number and caption, instructions for ordering any transcript, and any orders regarding case management issues.
4. Where both parties file a Notice of Appeal with the Commission, the second of the two appeals filed will be designated as a cross-appeal and no additional cross-appeal may be filed by either party.

**B. Contents of a Notice of Appeal:**

1. Every Notice of Appeal or Cross-Appeal shall contain the following:
  - a. The case number and the caption of the original appeal before the Hearing Officer;
  - b. The names and contact information of all parties to the case, to include each party’s attorney(s), if any;
  - c. A listing or identification of each and every asserted basis for the appeal;
  - d. A plain statement of the relief or remedy sought; and
  - e. A designation of the record in the appeal including those portions of the hearing transcript to be prepared for the record, at the party’s own expense.
2. Where an appeal is based on new and material evidence, the notice shall include an Affidavit Regarding New and Material Evidence from the party and the party’s attorney, if any, in support of the appeal on that basis. The affidavit shall state the specific nature of the new evidence, provide an explanation of how the evidence is material to a determination of the issues of the initial appeal, and provide the reason(s) for its unavailability at the time of hearing.

**C. Rejection of an Appeal:**

Any appeal which does not state as a basis for appeal one or more of the limited grounds for the Commissioners’ review, as listed in Charter § 9.4.15(F) and Rule 12 § 11(D), may be rejected by the Commissioners.

**D. Bases for Appeal and Grounds for Commissioners’ Review:**

The Commissioners’ review of a Hearing Officer’s decision shall be limited to the following grounds, which shall define the scope of the Commissioners’ review. (Charter § 9.4.15(F)) these also constitute the limited basis for an appeal to the Commissioners from a decision of the Hearing Officer.

1. New and Material Evidence: New and material evidence is available that was not available when the Hearing Officer heard the appeal. To establish such basis for appeal, the evidence must be such that it could not, with reasonable diligence, have been discovered and produced at the time of hearing. Further, the evidence must be:
  - a. Favorable to the appealing party;
  - b. Pertinent to a determination of one or more issues of the appeal; and

- c. Of such substance and importance that, by itself or in combination with other evidence, there is a reasonable probability that consideration of the evidence will result in a different outcome for the case.
2. Erroneous Interpretation of Departmental or Civil Service Rules: The decision of the Hearing Officer involves an erroneous interpretation of departmental or Civil Service Rules. To establish such basis for appeal, the specific departmental or Civil Service Rule that has allegedly been subject to erroneous interpretation must be identified and cited with specificity. The nature of the Hearing Officer's erroneous interpretation of the Rule must be explained with specificity.
4. The Discipline Affirmed or Imposed is Inconsistent: The discipline affirmed or imposed by the Hearing Officer is inconsistent with discipline received by other Members of the Department under similar circumstances:
- a. A finding of similar circumstances by the Commissioners shall be based on an assessment of the relative degree to which any other disciplinary case offered for purpose of assessing consistency in discipline contains the following factors:
    - i. Similar factual situations;
    - ii. Similar disciplinary histories;
    - iii. The same or similar facts in aggravation and/or mitigation;
    - iv. The same or similar Rule violations;
    - v. The application of the same or similar disciplinary policies, principles, disciplinary matrix, and/or guidelines; and
    - vi. Notice to Members of the Classified Service of any change in the Departmental disciplinary policies, principles, discipline matrix, and/or guidelines.
  - b. For discipline to be determined inconsistent, it must be outside of a reasonable range for discipline imposed in similar circumstances.

**E. Preparation and Filing of Transcripts:**

- 1. Any party initiating an appeal of a Hearing Officer's Decision and Order shall directly contact the Court Reporter and request, at the party's own expense, the preparation of the relevant portions of the Reporter's transcript as designated in the appeal. The party ordering the transcript shall cause to be filed with the Commission an original of the transcript within five (5) business days of the date of preparation of the transcript and no later than forty-two (42) days from the date the appeal was filed, except by leave of the Commissioners. At the discretion of the Court Reporter, advancement of the estimated cost of the transcript may be required, and full payment may be required prior to delivery.

2. Upon a motion granted by the Commissioners, a non-appealing party may designate additional portions of the transcript not so designated by the appealing party. If permitted to designate additional portions of the transcript, they shall cause those additional portions to be ordered and then filed with the Commission as provided in subparagraph 1 above. The Commissioners may, within their discretion, also order the preparation of additional portions of the transcript at the Commission’s own expense, if deemed necessary, and all parties shall be notified of same.
3. In the circumstance of the filing of a cross-appeal, should the Cross-Appellant designate additional portions of the transcript as part of the record (not so designated by the Appellant), the Cross-Appellant shall cause those additional portions of the Reporter's transcript to be prepared at their own expense, and to be filed consistent with the provisions of subparagraph 1 above.
4. Upon the filing of any original transcript or portions thereof with the Commission, the filing party shall also file a certificate showing the date of filing with the Commission, including a certificate of mailing/service, and shall serve a copy of the certificate on all parties.

**F. The Filing, Timing, Nature, Length, and Format of Briefs:**

1. When only one party has filed an appeal, the filing and the timing of the filing of briefs shall be as follows, except by leave of the Commissioners:
  - a. The Appellant shall file, and serve on all parties, an Opening Brief within thirty twenty-eight (28) days of the date on which the transcript was filed. If the Appellant does not request a transcript, the Appellant shall file and serve an Opening Brief on all parties within twenty-eight (28) days of the date on which the appeal was filed;
  - b. The Appellee may file and serve an Answer Brief within twenty-eight (28) days after the service of the Appellant's Opening Brief; and
  - c. The Appellant may file and serve a Reply Brief to the Appellee’s Answer Brief within fourteen (14) days after service of the Answer Brief.
2. When an appeal and a cross-appeal have been filed, the filing and the timing of the filing of briefs shall be modified as follows, except by leave of the Commissioners:
  - a. The Appellant shall file and serve Opening Brief as provided above.
  - b. The Cross-Appellant shall file and serve a Cross-Appeal Opening Brief, and may file and serve an Answer Brief, within twenty-eight (28) days after the service of the Appellant's Opening Brief. The individual briefs shall be combined in one document.

- c. The Appellant may file and serve a Cross-Appeal Answer Brief, and may file and serve a Reply Brief, within twenty-eight (28) days after service of the Cross-Appeal Opening Brief and any Answer Brief. The individual briefs shall be combined in one document. The Reply Brief shall be limited to the issues of the Appeal.
    - d. The Cross-Appellant may file and serve a Cross-Appeal Reply Brief within fourteen (14) days after service of any Cross-Appeal Answer Brief. The Cross-Appeal Reply Brief shall be limited to the issues of the Cross-Appeal.
3. All briefs shall be composed in the following manner:
  - a. Document page setting shall be double spaced, with twelve (12) point typeface on 8.5 inch by 11.0-inch paper with one and one-half inch (1.5) margins at the top, and one inch (1”) margins on the sides and bottom, excluding page numbers. All pages shall be numbered. All briefs shall be single sided.
  - b. Contain a cover page with a case number and caption, and title of the brief.
  - c. Contain a Table of Contents, Table of Authorities, and a Table of Cases, if so ordered by the Commission.
  - d. Briefs shall be filed with one original hard copy, or as may be ordered by the Commission.
4. Excluding the cover page, required tables, and any attachments or addenda, the maximum length of any brief shall be as follows, unless otherwise modified by the Commission:
  - a. An Opening Brief shall be a maximum of 20 pages;
  - b. An Answer Brief shall be a maximum of 20 pages;
  - c. A Reply Brief shall be a maximum of 10 pages;
  - d. A combined Opening/Answer brief shall be a maximum of 30 pages.
  - e. A combined Answer/Reply brief shall be a maximum of 25 pages.

**G. Contents of the Record:**

The record for the Commissioners’ review shall be composed of those portions of the file maintained by the Commission concerning the underlying disciplinary appeal, including but not limited to: the Notice of Appeal and request for hearing; all pre-hearing statements; briefs, motions, orders, rulings; and all evidence and exhibits before and received by the Hearing Officer, at the time of and prior to the close of hearing; the Hearing Officer’s Decision and Order; the Notice of Appeal; the parties’ briefs in the appeal to the Commissioners; and the designated portions of the transcript of hearing. No other documents may be filed except by leave of the Commissioners.

**H. Remand to the Hearing Officer:**

The Commissioners have the power and authority to remand the matter under appeal to the Hearing Officer and to order an entirely new hearing, limited new hearing, entry of new or additional findings, or other further action as may be deemed proper. As appropriate, in a remand to the Hearing Officer, the Commissioners may retain jurisdiction over the matter under appeal. The Commissioners may remand the case to the Hearing Officer on their own motion or upon request of any party.

**I. Oral Argument:**

Any request for oral argument shall be made in the form of a motion. Any party filing such a motion shall confer with the opposing party prior to the filing of the motion. Such motion shall be filed only after the close of the briefing period in the appeal, and no later than seven (7) days after the briefing period is closed. The Commission shall reply to a request for oral argument in a reasonable time. Oral argument shall be permitted at the discretion of the Commissioners.

**J. Standards for the Commissioners’ Review:**

The standards for the Commissioners’ review of a Hearing Officer’s Decision and Order shall include but not be limited to the following:

1. The scope of the Commissioners’ review of the Hearing Officer’s decision shall be limited to those grounds as specified in Charter § 9.4.15(F) and this Commission Rule 12.
2. The Commissioners may affirm, reverse, or modify the Hearing Officer’s Decision and Order.
3. The Commissioners shall not impose a level of discipline (penalty) more severe than that imposed by the Hearing Officer or the Executive Director of Safety.
4. In deciding the appeal, the Commissioners shall rely only upon the evidence presented to the Hearing Officer, except when the appeal is based on new and material evidence.
5. All findings of evidentiary fact by the Hearing Officer shall be binding on the Commissioners. The Commissioners may not resolve disputed issues of fact.
6. The Commissioners are not bound by the Hearing Officer’s findings of ultimate fact, mixed findings of fact and conclusions, or conclusions of law.
7. In reaching a determination on the issues of the appeal, those items of which the Commissioners may take judicial notice, on request of a party or on its own motion, shall include but not be limited to the following: Federal or State laws; Municipal

ordinances; Colorado Rules of Civil Procedure; Charter of the City and County of Denver; Rules and Regulations of the respective Fire or Police Department; Rules of the Civil Service Commission, and prior disciplinary appeal rulings of the Civil Service Commission.

**K. Decision of the Commissioners – Final Order:**

1. The Commissioners shall issue a written Decision and Final Order, that shall be binding upon all parties, affirming, reversing, or modifying the Hearing Officer's Decision and Order with respect to any charged violation and any imposed penalty that is a subject of the appeal. The Commissioners' decision shall be final and is subject to judicial review as provided in Charter § 9.4.15(G).
2. The Commissioners' deliberations regarding the review of a Hearing Officer's decision shall be conducted in executive session. In the event of a tie vote of the Commissioners, the decision of the Hearing Officer shall be affirmed. Any decision or vote of the Commissioners shall remain confidential until the Commission issues the written decision and final order.
3. The Commissioners shall issue their decision no later than eighty-four (84) days after the close of Oral Argument or, if no Oral Argument is held, after the close of the briefing period.
4. Upon issuing the Decision and Final Closing Order, the Commission shall promptly serve a copy on each party's counsel of record, or if unrepresented, on the respective party, with a certificate of service.

**END**