



Recommendation 70-3

Summary Decision in Agency Adjudication

(Adopted June 2-3, 1970)

Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists. Each agency having a substantial caseload of formal adjudications should adopt procedures providing for summary judgment or decision, patterned after the following model rule in suitable cases and with appropriate modifications to meet the needs of its own hearings:

Recommendation

§ 1. Any party to an adjudicatory or rulemaking proceeding required by statute to be determined on the record after opportunity for agency hearing may, after commencement of the proceeding and at least _____ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceeding. Any other party may, within _____ days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for argument and call for the submission of briefs.

§ 2. The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

§ 3. Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

§ 4. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding



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officer may deny the motion for summary decision or may order a discontinuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

§ 5. The denial of all or any part of a motion for summary decision by the presiding officer shall not be subject to interlocutory appeal to the (*review authority*) unless (a) the presiding officer certifies in writing (i) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion and (ii) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (b) if the presiding officer declines so to certify, a designee of the (*review authority*) so certifies upon appropriate application. The allowance of such an interlocutory appeal shall not stay the proceeding before the presiding officer unless the (*review authority*) shall so order.

Citations:

38 FR 19785 (July 23, 1973)

__ FR ____ (2012)

1 ACUS 36

Note: Recommendation No. 71-1 supersedes section 5 of Recommendation No. 70-3 and paragraphs 2 (6) and 7 (b) of Recommendation No. 70-4, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals.