Time on Recording	Rule & Section	Page Number	Brief Description of Interest	Requestor
December 17, 2013				
35:00	7.06.C. – Hearings – General Rules – Open proceedings – Presenting Evidence	**23**	**Commissioner Rubinett:** (With regard to "by a majority vote") it should say, "of those Commissioner's present." Spell it out. **Law Department (West):** Can do that. It is a parliamentary issue regarding how Commission is conducting its business. It is not taking action when it regards this section.	**Commissioner Rubinett**
36:11	7.06.A. – Hearings- General Rules – Number of Commissioners	**23**	**Commissioner Rubinett:** Burden of Proof Issue: Need to spell out Burden of Proof and implications as to the number of votes in different kinds of cases.	**Commissioner Rubinett**
40:05	7.06.D. – Hearings – General Rules – Consideration of Evidence	**24**	**Commissioner Rubinett:** (With regard to "by a majority vote") it should say, "of those present. Should be specified.	**Commissioner Rubinett**
40:55	"Majority Vote" Issue	**ALL**	**Commissioner Kovach**: Look at every section in Rules where it talks about majority vote and look at question of whether it is a majority of those present. Be explicit.	**Commissioner Kovach**
42:18	7.06.E. - Hearings – General Rules – Use of Sworn Statements or Electronic Testimony	**24**	**Commissioner Perez-Wiseley:** Does not like the kind of testimony where she cannot ask questions of someone who is supposed to be testifying. Likes talking back and forth	**Commissioners Perez-Wiseley, Kovach**

			with witness. **Commissioner Kovach:** Commissioners can consider the weight of the evidence with different types of testimony.	
44:34	7.06.D. – Hearings – General Rules – Consideration of Evidence (Second Sentence)	**24**	**Commissioner Rubinett:** Spell it out. Include statement that we have ability to exclude evidence that has indicia of unreliability such that a reasonable person would not normally rely on that to make a decision. So that there is some kind of standard for people to understand that we are looking for reasonable and reliable evidence. **Commissioner Kovach:** Spelling it out in detail may be helpful but not sure we want to be so detailed that there is not flexibility in this standard. It is hard when talking about credibility and reliability of witness to have objective standard, as people will differ on their impressions. **Commissioner Rubinett:** Highlight for person preparing case that something Commission will look at is whether it is reasonable kind of information that Commission would rely on to make decision. **Commissioner Kovach**: Inclined to look at this and put in simpler lay terms.	**Commissioners Rubinett, Kovach**

50:29	7.06.H.4 – Hearings – General Rules – Order of Conducting Hearings – "The other party shall present its witnesses and other evidence."	**25**	**Commissioner Rubinett:** Relates to Burden of Proof Issue. This might be a place to put in if in fact we make decision that the order of presentation would be determined by which party has burden of proof. In discipline and discharge cases, City has burden of proof and goes first and other cases employee has burden of proof and should go first.	**Commissioner Rubinett**
51:12	"Burden of Proof" Issue	**ALL**	**Commissioner Kovach:** Burden of Proof Issue should be clarified throughout Rules. Important for Commission and for appellants.	**Commissioner Kovach**
55:55	7.07. – Final Ruling	**26**	**Commissioner Rubinett:** It should say final and binding for purposes of City process. Intent is not to cut off whatever rights someone may have outside of City with regard to decision made. Should be reflected in Rule. It is final in terms of administrative process. Employee should not read this and believe that they have no other options when in fact they do.	**Commissioner Rubinett:**
58:29	7.08.C. – Special Rules for Disciplinary Appeals	**26**	**Commissioner Rubinett:** Confusing. Believes that department should have burden of proof to show that cause exists with regard to disciplinary appeals and should	**Commissioner Rubinett**

			clarify that. **Law Department (West):** Written that way because if there was cause, then do not need to list what you do. If you do not find cause, then this lists what you can do. That is the reason it is written the opposite way. "D" below takes care of issue with that if you do not have the 3 Commissioner votes then action stands.	
1:02:45	7.08.D. - Special Rules for Disciplinary Appeals	**26**	**Commissioner Russell**: Can take 7.08 all together because "C" talks about if Cause was not proved then the decision goes to the employee. "D" talks about unless 3 Commissioners determine that there was not cause then decision remains. This is where problematic. Throughout Rules right now says that in order for Commission to take action 3 commissioners have to agree. As "D" stands, it does not say that 3 Commissioners have to agree. As "D" stands. It says that if "C" is not established, then the default is that the decision stands and that is an action. However, no agreement yet. Need to figure out this scenario. **Commissioner Rubinett:** Agrees. Commissioners need to decide how they think it should work and let staff come	**Commissioners Russell, Rubinett**

			up with language. It all fits together and wording is confusing.	
1:04	7.08.B. – Special Rules for Disciplinary Appeals – "The Department shall present its evidence first in the hearing, and may make the final closing statement to the Commission."	**26**	**Law Department (West):** Most logical place to include burden of proof**.** Could say, "the department shall have the burden of proof and shall present its evidence first." **Commissioner Russell:** Add that to interest list.	**Commissioner Russell**
1:05	7.08 – Special Rules for Disciplinary Appeals	**26**	**Commissioner Russell:** If we say that the department has the burden of proof (and that means department has to show cause) and we do not have 3 commissioners agreeing that there is cause, then wouldn't the default be to the employee that whatever happened to the employee should not happen because the department didn't meet its burden of proof? It is not his position but would that not be the logical outcome if the department has the burden of proof and fails to meet it? **Law Department (West):** Requires legal Opinion. West thinks that the Burden Of Proof means that you have to put on evidence first (that employee does not have to defend themselves before they know what allegations are). That is what some cases say. Does not mean that you file an appeal and win if there are not enough	**Commissioners Russell, Kovach, Rubinett, Perez-Wiseley**

			commissioners. Now, you would have hearing officer. In Rules, you have 5 people that make decision by preponderance of evidence that department has proved it had cause. **Commissioner Kovach:** What is troubling at this point is that the City goes forward and may not meet burden of proof (i.e., 3 may not decide that there was cause) but in 2-2 or 2-1 the employee still loses by default and City still wins. City wins even though it has the burden of proof and did not meet burden. **Commissioner Russell:** Either way (default to employee or default to City), it is a problem. **Law Department (West):** Majority of Commission has to pass a rule and decide this. **Commissioner Rubinett:** The burden of proof has to do with the number of people persuaded by the weight of the evidence. Commissioners decided that they are going to go with the recommendation of counsel that [vote for action] has to be a majority of quorum as opposed to a majority of those present. In that case, it should have the same implications for both sides. When employer has burden of	

			proof then has same impact on them as it does on employee when employee has burden of proof so that implications of 3 unanimous votes has same implication for both parties depending on who has burden of proof. Rules do not propose to do that right now (it only goes one way). It should be equal. **Commissioner Perez-Wiseley:** Agrees	
1:10:40	7.08.C.2 – Special Rules for Disciplinary Appeals – "In that case the disciplinary action shall be rescinded, and the Commission may order the following actions: restoration of all or part of any pay or other benefits lost by the Employee as a result of the disciplinary action"	**26**	**Commissioner Perez-Wiseley:** Prefers language to read, "to be made whole" because if there is anything that might have been left out this would include it (job assignment, title, work they were doing, department). Seems like all they get back is pay and benefits. If no just cause for action, should be able to return to 1 second before it happened. **Commissioner Kovach:** "other benefits" would include more. Maybe say "other benefits, including but not limited to." **Commissioner Perez-Wiseley:** more comfortable with "made whole" because it is still a way of disciplining them if they cannot have back their job title or job where they were if that is what they are asking for.	**Commissioners Perez-Wiseley. Kovach**

1:16:50	7.06.I.4. – Hearings – General Rules - Other Hearing Rules – "In order to vote and sign the Notice of Decision, a Commissioner must be present for the entire hearing of the Appeal.		**Commissioner Russell: (With regard to default going in favor of City, don't want default to be flipped and go to employee so options may be resolved by the following discussion …)(With regard to section "I")** Is this a requirement that is coming from the charter or is this how everyone else does it? What if they end up with 2-1 or 2-2? What if Commissioner who was not there listens/watches transcript, reads materials, and makes a decision based on that information? Possibly another option if it is legal with regard to the voting/burden of proof issue. **Law Department (West):** Not illegal. **Law Department (Cronig):** Concern is that Commissioner cannot ask questions, see demeanor, etc. From employer standpoint, want someone who was there for entire hearing, saw everything, and did not miss an important witness. It is a matter of fairness more than anything; not illegal. **Commissioner Kovach:** Other option is to have another hearing; but understanding limitations, Russell's proposal immediately above seems like the lesser of two evils. Thus,	**Commissioners Russell, Kovach, Rubinett, Lancaster**

			commissioner who did not attend being able to review recording and materials and vote would solve issue. **HR Staff:** Benchmarking Data - looking at 143 and other Texas cities that have civil service as it relates to decisions, the vote had to be a majority vote to overturn the status quo (i.e., majority vote to overturn the decision). San Francisco (interesting rule) in 2-2 situation would postpone. **Commissioner Rubinett:** Serious concerns rehearing any case where not able to get 3 votes (logistics, resources, employee standpoint) ; problematic solution" **Commissioner Kovach:** Options: (1) another hearing, (2) absent commissioners hear recording, or (3) postpone midway if it looks like it is going to go 2-2. **Commissioner Russell:** Discussion on getting rid of 7.06.I.4. **Commissioner Lancaster:** Administratively problematic to stop a hearing or invite someone else in and have 5th person [(i.e., commissioner)] who does not engage in deliberations. If you have 3 votes, then you win. If you	

			have 2-2, then you did not win. Why struggle with 2-2? If you do not have 3 votes, you do not win. **Commissioner Kovach:** Win is the status quo. If no action, then employee stays fired or demoted. Sense of fairness requires that City does not win by default. **Commissioner Rubinett:** Disagrees with Lancaster above. However, does not want to rehear cases every time one cannot get sufficient votes. Better to decide what they think the vote split means.	
1:30:44	7.09 – Special Rules for Denial of Promotion Appeals	**26-27**	**Commissioner Rubinett:** Agrees with Lancaster, if you do not have 3 votes, you do not win. Her opinion: This is linked to the burden of proof. Whoever has burden of proof has to get three votes and if someone does not get 3 votes, the decision goes in favor of the party. Understands that this is not a shared view. Discipline and discharge cases – burden of proof on City. Other cases – employee. **Commissioner Lancaster:** Has problem with Denial of Promotion because standard for determining when there had been denial of promotion did not exist because in every hiring decision there is	**Commissioners Rubinett, Lancaster**

			discretionary and subjective judgment (and properly so) especially on hiring panels. In every denial of promotion department believes it picked the right person. Cannot really say that discretionary judgment is wrongly applied. Over time based decision on whether process was properly followed because that was the most objective review that could be done. Seemed fairer. Does not like "reasonable good faith belief" standard. Standard needs to be able to be more objectively determined. Such as, "was the hiring process fully and fairly followed?" Makes it hard to overturn denials or promotion. Has only overturned maybe 1 denial of promotion in 20 years or so. Very difficult to say that someone did not make a good faith judgment. Suggests a different standard. **Law Department (West):** Should "best qualified" employee get the position? **Commissioner Lancaster:** "Best" is subjective. Not the best standard either because can't argue with someone over who is best qualified but can look at process. **Commissioner Rubinett:** If we were to look only at process	

			how does that take into account when it is very clear that there was substantive error or something was arbitrary and capricious? **Commissioner Lancaster:** Panel members required to participate in fair and open-minded fashion and can attack arbitrary and capricious. Just making observations regarding the difficulty in denials of promotions.	
1:39	7.10 – Special Rules for Reduction-In-Force Appeals	**27**	**Commissioner Kovach:** Same issue as with denials of promotion—changing the standard.	**Commissioner Kovach**
1:52:33	7.08 – Special Rules for Disciplinary Appeals	**26**	**Commissioner Kovach:** (Response to AFSCME's proposed changes to 7.08) Issue- If we are 2-2 (4 Commissioners present) and AFCME proposes that means that they did not find cause and employee needs to be reinstated…the issue is that this changes the status quo. If Commission reinstates employee, they are taking action. Need 3 votes to take action. It is the same situation as before except flipped around. **Commissioner Rubinett:** Dilemma. Thinks if employee has property right in job then in order to take job away then action must be taken by City	**Commissioners Kovach, Rubinett, Lancaster**

			and must prove to 3 Commissioners that property right should be taken away. Believes that this is tied to specifically to property right in job and does not believe that City has to prove by 3 votes every action city takes. Need to figure out. **Commissioner Lancaster:** The issue may be whether it is taking action if matter fails by vote. If 2-2, then have not met 3-1. Is it defined by rules that if we do not get 3 votes then position does not hold and it is not a decision that Commissioners make but instead just written in rules? **Law Department (Cronig):** it is not taking action. It is the consequence. Commissioners decide what consequence is. What currently happens is default? **Commissioner Kovach:** 2-2 and 2-1 means cannot take action. Now Commission has to decide what consequence of not taking an action will be. **Commissioner Rubinett:** City proposes that default position is that City wins. AFSCME says default position employee is restored to pre-department decision. Rubinett thinks it depends on who has burden of proof and that party may	

			obtain 3 votes in order to sustain. This needs to be decided.	
2:11	Right to Representation (as proposed by AFSCME)		**Law Department (Cronig):** (Question with regard to AFSCME's proposed 6.04.F.5. "An employee representative have [sic] the right to: Give the employee advise[sic] on how to answer a question"): Asking for rights that not even police, fire or EMS has – before employee answers question they get to discuss answer with representative. Commission wants to hear from employee. **AFSCME (Brown):** Employees often get confused by a question, need clarification, or are not aware of what impact of answering that question could be. Not typically practiced. Typically, questions being answered by employee. Representative should be given opportunity to assist employee. **Commissioner Rubinett:** Do you think you have this right before questioning begins and during the questioning? **AFSCME (Brown):** Yes. Employee can ask for break to consult with representative at any time during investigatory process. **Law Department (Cronig):** In Civil Service, when there is an	**Commissioners Rubinett, Kovach, Perez-Wiseley, Lancaster**

			interview and attorney or union representative with them they are observer, cannot interrupt, and cannot advise employee on how to answer question. Asking for more here than what has been negotiated in civil service contracts. Investigator wants to hear from employee on what happened. **AFSCME (Brown):** Civil Service gets many benefits that civilian employees do not get. That is not necessarily a fair comparison to say that the two should be treated the same. This is not totally new to what has been done at City. Allowed to do that at the City Auditor's office (—allows AFSCME to stop and confer between union member and representative during questioning). In typical investigation, employees do not need assistance but there are some instances when they should be afforded right. **Commissioner Kovach:** Regarding general language proposed by AFSCME regarding rights to representation. How broad is that? Can it be a neighbor, person walking off the street? Creates difficulties. **AFSCME (Brown):** Intent is not to define who can be representative. **Commissioner Rubinett:** Makes	

			sense to address questions of scope of representation. **Commissioner Perez-Wiseley:** Historically "representative" could be anyone. Responds to Mr. Cronig regarding F.2. and F.5. as proposed by AFSCME – role as representative is to read paper given to employee by employer to ensure employee understands what is being done to them because often it was difficult for employee to understand so that is why representative would go in with employee. In addition, went in with employees as witnesses because some supervisors were abusive to employees when they were brought in by themselves and so that was the reason for having a witness with them. As to giving them advice on how to answer questions, this usually ran along the lines of "tell the truth, don't add anything more than you need to, and let's get past this meeting so that we can discuss what happened." Sometimes employees do not understand questions, are nervous, or testify as to extraneous matters that are irrelevant to the facts. Was more innocent than how it is being framed. Does not see this part of AFSCME's language as scary language and would	

			like to see it noted as interest. **Law Department (Cronig):** Slows down investigative process. Not trying to infringe on rights. **Commissioner Lancaster:** Has seen that City practice in assessing disciplinary action is to almost always have an extra employee in there and to read letter to anyone thought to not be able to understand and to have questions answered.	
2:22:14	6.03.C. - Administration of Employee Discipline – Review Prior to Disciplinary Action	**16**	**Commissioner Lancaster:** (With regard to AFSCME's comment on Administration of Employee Discipline under 6.03 that "employees should be afforded the opportunity to review any and all relevant materials used to determine the potential action") – A lot of employees say that they don't get to see investigation and what those results were. It is the Michael Morton Rule of Discovery for City of Austin Employees. While thinks it is good that employees get to know ahead of time before responding what allegations are, City also has concerns as to employees who might not otherwise step forward or tell truth because they are all still working together and might see each other at work. Need to figure out how to share more	**Commissioners Lancaster**

			information with employee but address concerns about confidentiality. **AFSCME (Brown):** City practice provides some level of protection with regard to confidentiality by listing witnesses and indicating what number of employees confirmed the allegation but will not disclose names in report.	
2:24	Rules 6 & 7		**Commissioner Rubinett:** Would like to see each of the items on AFSCME's cover sheet as to Rules 6 & 7 to be placed on interest log to have opportunity to hear what City has to say in future as to these items to determine whether Commission wants to make any proposed changes that AFSCME is recommending.	**Commissioner Rubinett**
2:26	ADR (Generally)		**Commissioner Kovach:** Does AFSCME have any thoughts with regard to ADR provision? At last meeting Kovach had confidentiality concerns and Lancaster raised question of whether it needs to be in Rules. **AFSCME (Brown):** Overall AFSCME typically has not had much success with ADR process. Do not see need to eliminate option for employees. Oftentimes if department is not willing to do something, Ombuds does not	**Commissioners Kovach, Rubinett**

			have much teeth to make them. When ADR is successful it is when department is amenable to doing negotiations (typically when apparent AFSCME had a good case and won at grievance hearing). However, if department not willing to entertain negotiation it is moot point. No need to deprive employee of opportunity to use ADR. Have not typically engaged in ADR. Usually go straight to grievance officer. **Commissioner Rubinett:** Does the fact that when you go through ADR that it stays the timeline have any impact for AFSCME? If it went along simultaneously, would you be more inclined to consider ADR? **AFSCME (Brown):** Yes would be more inclined. Timeline is concern. Some cases drag on for a few months. Especially if you have termination, suspension, or demotions (loss in pay) do not want to delay process. May change position in utilizing ADR if simultaneous and there is clear timeline for when Ombuds would finish ADR process.	