Chapter HA 1

PROCEDURE AND PRACTICE

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Note: This chapter replaces the rules promulgated by the Nursing Home Forfeiture Appeals Board which were repealed effective September 1, 1985.

HA 1.01 Application of rules. These rules shall apply in all proceedings and hearings before the division of hearings and appeals except as specifically provided otherwise. Agencies for which the division conducts proceedings, such as the departments of natural resources and justice, may have specific regulations which govern the conduct of those proceedings.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.02 Definitions. For purposes of this chapter:

(1) "Administrator" means the administrator of the division of hearings and appeals.

(2) "Division" means the division of hearings and appeals.

(3) "Nursing home" has the meaning set forth in s. 50.01, Stats.

(4) "Nursing home action" is a proceeding conducted pursuant to s. 50.04 (4) (e) and (5) (e), Stats.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.03 Service on the division. Unless otherwise provided by law, all orders, notices and other papers may be served personally or by first class, certified or registered mail. All papers filed by a party with the division shall be served on the same date by that party on all parties to a proceeding. No affidavit of mailing, certification, or admission of service need be filed with the division.

Note: The mailing address of the division is:

6300 University Avenue
Suite 200
Middleton, Wisconsin 53562

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85; correction made under s. 13.93 (2m) (b) 6, Stats., Register, June, 1989, No. 402.

HA 1.04 Appeals of nursing home actions. (1) FORM. Appeals shall be in writing.

(2) CONTENT. Appeals shall contain:

(a) The name and address of the appellant;

(b) A description of the action that is being contested and the date on which notice of the action was received;

(c) A concise statement of the reasons for objecting to the action;

(d) The type of relief which is sought;

(e) The name and address of any person who may be expected to appear on behalf of the appellant;

(f) A request for hearing.

(3) FILING AND SERVICE. Appeals shall be filed with the division within 10 days after appellant receives notice of the action that is being contested. Appeals are deemed to be filed upon deposit in the U.S. mails, as evidenced by postmark, or upon personal service on the division. The appellant shall also serve a copy of the appeal on the Bureau of Quality Compliance, Division of Health, Department of Health and Social Services, Madison, Wisconsin, 53702 on the same date that the appeal is filed with the division.

(4) NOTICE OF HEARING. A notice of hearing and, where apropriate, a notice of a prehearing conference shall be served on the parties by the division pursuant to s. 227.44 (2), Stats. The notice will identify the hearing examiner designated by the administrator to be the presiding officer.

(5) CONSOLIDATION. The division may, on its own motion, consolidate several pending appeals involving the same appellant or an issue or issues arising substantially out of the same circumstances or closely related circumstances. Consolidation may be for hearing or decision or both. Nothing in this rule shall limit the right of a party to make a motion to consolidate or to object to the division's motion to consolidate.

(6) OTHER RULES. The procedural rules of general application contained in this chapter apply to nursing home proceedings in any situation not specifically dealt with in this section.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85; correction in (4) made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1989, No. 402.

HA 1.05 Forms of other petitions for review. Petitions shall conform with the applicable statute as to form, content, number of signatories and verifications. All petitions shall be filed within the time specified by statute or administrative code, or, where no time is specified, within 30 days of the date of the order or decision to be reviewed. Petitions are deemed filed upon deposit in the U.S. mails, as evidenced by postmark, or upon personal service on the division. The division may request additional information concerning any petition or request filed under this section. The division may deny any such petition or request where the information required or requested under this section is not provided.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.06 Notice of hearing and prehearing. (1) FORM. The notice of hearing shall be in writing, with a title identifying the matter to be set for hearing and the docket number.

(2) CONTENT. The notice of hearing shall contain the following information:

(a) The date, time and location of the hearing.

(b) The statutory authority for the hearing.

(c) A short summary of the matter to be considered.

(d) Such other information as the division or the hearing examiner may deem appropriate.

(3) SERVICE. Except as otherwise specifically required, service of the notice of hearing may be made by personal delivery or by mailing a copy of the notice to the last known post office address of the person to be served. The notice will be placed in a sealed envelope with first class postage prepaid and shall be deemed to have been served upon deposit in the U.S. mails. The division may require service by registered or certified mail when deemed appropriate and with the same effect.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.07 Place of hearings. Unless otherwise specifically provided by law, all hearings shall be held at the offices of the Division of Hearings and Appeals, 6300 University Avenue, Suite 200, Middleton, Wisconsin, or at the location designated by the hearing examiner in the hearing notice.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85; correction made under s. 13.93 (2m) (b) 6, Stats., Register, June, 1989, No. 402.

HA 1.08 Changes in time or place of hearing; adjournments; failures to appear. (1) CHANGES. Requests for changes in the time and place of a scheduled hearing will be granted only for good cause. A request received after any required newspaper publication or legal notice will be rescheduled only if the person requesting the change bears the cost of such change and the examiner deems such change appropriate under the circumstances presented.

(2) ADJOURNMENT. The hearing examiner may adjourn a hearing for good cause and the hearing shall be reset or reconvened at his or her discretion.

(3) FAILURE TO APPEAR. (a) If an applicant for a permit or license fails to appear at a hearing following due notice, the hearing examiner may dismiss the application unless the applicant shows good cause for the failure to appear. If an applicant fails to submit proof of publication and notice as required by statute, the hearing examiner may dismiss the application and cancel the hearing.

(b) If a respondent in an enforcement proceeding fails to appear, the hearing examiner may take testimony and issue, modify or rescind the order as may be appropriate, unless good cause is shown for the failure to appear.

(c) If a petitioner or appellant in a proceeding fails to appear, the hearing examiner may dismiss the petition unless the petitioner or appellant shows good cause for the failure to appear.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.09 Participation. Any person desiring to participate in a proceeding before the division, whether on his or her own behalf or as an authorized agent or attorney, shall enter an appearance in person by giving his

or her name and address, the name and address of any party being represented, and the capacity in which he or she is representing such party. A person may enter his or her appearance either prior to or at the commencement of a contested case hearing unless otherwise directed in the notice of hearing.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.10 Witnesses and subpoenas. The division or the hearing examiner may issue subpoenas to compel the attendance of witnesses at hearings or discovery proceedings under this section. A subpoena requiring the production of material may be issued if the person requesting such subpoena specifies the documents to be presented by the subpoenaed witness and the request is deemed reasonable by the examiner. Sections 814.67, 885.06 and 885.07, Stats., shall govern the payment of witness fees and expenses.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.11 Preservation of testimony and discovery. The division or any party involved in a proceeding before the division may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the hearing examiner may allow a shorter or longer time for discovery or preserving testimony than is allowed by ch. 804, Stats. For good cause, the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden, as provided in s. 804.01 (3), Stats. or orders as provided in s. 804.12, Stats. to compel discovery and for sanctions.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.12 Conferences. (1) CALL AND PURPOSE. The hearing examiner may call a conference at any time prior to or during the course of a hearing, and may require the attendance of all persons who are or wish to be certified as parties to the proceeding. The purposes of such conferences shall be to consider:

(a) Clarification of issues;

(b) Amendments to the pleadings;

(c) Admissibility of evidence;

(d) The possibility of obtaining admissions or stipulations of fact and of documents which will avoid unnecessary proof;

(e) The limitation of the number of witnesses;

(f) The identification of all parties to the proceeding; and

(g) Such other matters as may aid in the disposition of the matter.

(2) RECORDING STIPULATIONS. The hearing examiner may record any stipulations made at a conference. Stipulations or other agreements made at a conference shall bind the parties in the subsequent course of the proceeding.

(3) DECISION ON BRIEFS. If a prehearing conference is held and the parties agree that there is no material dispute of fact raised by the plead-

ings, the hearing examiner may cancel the hearing and may decide the matter on the basis of briefs or stipulations submitted by the parties.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.13 Conduct of hearings. (1) PROCEDURE. The hearing examiner will open the hearing and make a concise statement of its scope and purposes. Appearances shall be entered on the record. Parties may make motions or opening statements.

(2) OPENING STATEMENTS. When opening statements are made they shall be confined to:

(a) A brief summary or outline in clear and concise form of the evidence intended to be offered; and

(b) A statement of ultimate legal points relied upon.

(3) ORDER OF PROCEEDINGS. (a) In proceedings where a state agency has issued an order or proposed order and the order recipient requests a hearing on the matter, the agency shall proceed first with the presentation of evidence and shall have the burden of proof.

(b) In any other proceeding, the examiner will apply normal rules of procedure used in the courts in determining the appropriate order of presentation of a case and on whom the burden of proof should fall.

(4) OFF RECORD. Proceedings may be conducted off the record only when the hearing examiner permits. If a discussion off the record is deemed pertinent by the hearing examiner, he or she may summarize it on the record.

(5) OBJECTIONS TO EVIDENCE. Any argument before the examiner on objections to receipt of evidence or on motions to strike will be recorded and parties will be afforded the opportunity to make an offer of proof. An offer of proof shall be in the form directed by the examiner.

(6) CONTEMPT. Contemptuous conduct at a hearing shall be grounds for exclusion from the hearing. Other actions may be taken by the division or the examiner which are authorized by statute and are appropriate under the circumstances.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.14 Rules of evidence. (1) RULES. Rules of evidence in contested cases are governed by s. 227.45, Stats.

(2) ADMISSIBILITY. Evidence submitted at the time of the hearing need not be limited to matters set forth in the pleadings, petitions or applications. If such variances occur, the pleadings petitions or applications shall be considered amended by the record. The hearing examiner may grant such continuances as may be necessary to give other parties adequate time to prepare evidence to rebut that involved in any such variances.

(3) TECHNICAL DATA. When evidence to be presented consists of technical figures so numerous as to make oral presentation difficult to follow, or if information can be more effectively presented visually it may be presented in exhibit form and supplemented and explained by oral testimony.

(4) PETITIONS. Petitions or other written communications not admissible as evidence may be filed with the hearing examiner but will not be part of the record.

(5) EXHIBITS. Parties offering documentary exhibits or prepared testimony may be ordered by the hearing examiner to furnish copies to all other parties in advance of the hearing and to provide such reasonable time as the hearing examiner may order to enable review of the prepared written testimony and exhibits. Upon compliance therewith, such written testimony and exhibits may be admitted in evidence as though given orally, providing the authors are present and available for cross-examination.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85; correction in (1) made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1989, No. 402.

HA 1.15 Close of hearing. (1) CLOSING AND BRIEFS. A hearing in a contested case shall be closed upon completion of the submission of all evidence and expiration of the period fixed for filing of briefs. If the time for filing briefs has expired and the brief of one or more parties is not filed within such time, the hearing examiner may proceed to the determination of the case. Extension of time to file briefs may be granted by the hearing examiner upon a showing of good cause.

(2) ADDITIONAL EVIDENCE. If by stipulation of the parties, documentary evidence is permitted to be submitted after the close of testimony, the record will be closed when such documentary evidence is received by the division or when the specified time for furnishing it has elapsed without its being furnished. The hearing examiner may, upon the request of the stipulating parties, extend the time originally prescribed for filing such additional evidence.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.16 Transcripts. (1) METHOD AND COPIES. Hearings shall be recorded either stenographically or electronically. A typed transcript will be made when it is determined that one is necessary by the division or the hearing examiner. If a transcript is made by the division copies shall be furnished to all persons upon request and payment of a reasonable fee, as determined by the division. If no transcript is deemed necessary by the division and a party requests that one be prepared, that party shall be responsible for all costs of transcript preparation. If several parties request transcripts, the division may divide the costs of transcription equally among the parties. In lieu of a transcript the division may provide any person requesting a transcript with a copy of the tape recording of the hearing upon payment of a reasonable fee. All requests for transcription shall be made at the hearing or in writing and sent to the hearing examiner who presided at the hearing.

(2) FINANCIAL NEED. Any person who by affidavit or other appropriate means can establish to the satisfaction of the division that the person is indigent and has a legal need, may be provided with a copy of a transcript without charge.

(3) CORRECTIONS. Any party, within 14 days of the date of mailing of the transcript, may file with the hearing examiner a notice in writing of any claimed error, and shall mail a copy of such notice to each party of record. Other parties may contest any claimed error within 20 days of the date of the mailing of the transcript by notifying the hearing examiner

and other parties of record. All parties will be advised by the hearing examiner of any authorized corrections to the record.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.17 Briefs. (1) TIME SCHEDULE FOR FILING OF BRIEFS. Parties shall indicate on the record after the close of testimony at the hearing whether they desire to file briefs. The hearing examiner may establish a schedule for the filing of briefs. The party or parties having the burden of proof shall file the first brief. Other parties may then file response briefs, which may be replied to. In the alternative, the hearing examiner may direct that the briefs of all parties be filed simultaneously.

(2) NUMBER. Two copies of all briefs should be filed with the division together with a statement showing upon whom copies have been served. Briefs which contain a summary of evidence or facts relied upon should include, where possible, reference to specific pages of the record containing such evidence.

(3) EFFECT OF EARLY FILING. The filing of briefs in less time than allowed shall not change the due dates for the remaining briefs.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.18 Decision. (1) FORM. After the record is closed in each proceeding the hearing examiner shall prepare written findings of fact, conclusions of law, and either a proposed or a final decision. Said decision shall be in accordance with the provisions of ss. 227.46 and 227.47, Stats.

(2) PARTIES. The hearing examiner shall prepare a list of persons who are certified as parties and set forth such list in the decision. For purposes of certifying parties under s. 227.47, Stats., and this section, the hearing examiner shall consider the following criteria:

(a) The nature of the agency proceeding;

(b) The persons on whom the decision will have an effect and the amount of that impact; and

(c) The nature of the participation by those involved in the proceeding, including attendance at hearings, cross-examination of witnesses, and submission of briefs.

(3) SERVICE. Every decision when signed shall be served by personal delivery or mailing a copy to each party to the proceeding or to the party's attorney of record.

(4) ACTIVITIES AFTER DECISION. Persons certified as parties shall be served with post hearing motions, correspondence and other documents submitted by any party after issuance of the decision and directly relating to the case. Such persons shall also be served with petitions for rehearing and reopening as well as with petitions for administrative and judicial review.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85; correction in (1) and (2) (intro.) made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1989, No. 402.

HA 1.19 Reopening hearings. When a hearing in a proceeding has been closed, no further evidence shall be received, except by order of the division or the hearing examiner. A closed case may be reopened for the taking of further evidence upon application of a party showing to the divi-

sion's or the hearing examiner's satisfaction that the evidence is newly discovered and was not available at the time of the hearing and that the evidence is necessary for a just disposition of the case.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.

HA 1.20 Review. Each final decision shall include a notice of any right of the parties to petition for rehearing and to request administrative or judicial review of adverse decisions. Said notice shall also provide the time allowed for filing each petition for review and shall identify the party to be named as respondent in such an action.

History: Cr. Register, August, 1985, No. 356, eff. 9-1-85.