

DEPARTMENT OF NATURAL RESOURCES

4-3

NR 2.10 Witnesses and subpoenas. The hearing examiner may issue subpoenas to compel the attendance of witnesses at hearings or discovery proceedings pursuant to section NR 2.11. A subpoena duces tecum may be issued if the person requesting such subpoena specifies the documents to be presented by the subpoenaed witness. The provision of the statutes shall govern the payment of witness fees and expenses.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

NR 2.11 Preservation of testimony and discovery of evidence. The department or any party in any contested case may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the department's hearing examiner may allow a shorter or longer time for discovery or preserving testimony than is allowed by ch. 804, Stats.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73; am. Register, April, 1976, No. 244, eff. 5-1-76; am. Register, March 1978, No. 267, eff. 4-1-78.

NR 2.12 Informal conferences. (1) **CALL AND PURPOSE.** The department or the hearing examiner may call an informal conference at any time prior to or during the course of a hearing. The purposes of such conferences shall, insofar as applicable, be to consider:

- (a) Simplification of issues;
- (b) Amendments to the pleadings;
- (c) Admissibility of evidence; and
- (d) Such other matters as may aid in the disposition of the matter.

(2) **RECORDING STIPULATIONS.** The hearing examiner may record any stipulations made at such informal conferences, which shall bind the parties thereto in the proceedings.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

NR 2.13 Conduct of hearings. (1) **PROCEDURE.** The hearing examiner will open the hearing and make a concise statement of its scope and purposes. Appearances then will be entered on the record. If the matter is contested, the examiner then will state the issues in the proceedings. Thereafter, 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 PROCEEDING.** Applicants, petitioners and complainants shall proceed first with their evidence.

(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 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.

(6) **CONTEMPT.** Contemptuous conduct at a hearing shall be grounds for exclusion from the hearing.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

NR 2.14 Rules of evidence in contested cases. (1) **RULES.** Rules of evidence in contested cases are governed by s. 227.10, Stats.

(2) **ADMISSIBILITY.** Evidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications. If variances of this nature occur, then the pleadings, petitions or applications shall be considered amended by the record. The hearing examiner may, in his discretion, 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, it may be presented in exhibit form and supplemented and explained by oral testimony.

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

(5) **EXHIBITS, ETC.** 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 hearings 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 thereof are present and available for cross-examination.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

NR 2.15 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 shall not be filed within such time, the department may proceed to its determination of the case. Extension of time to file briefs may be granted by the hearing examiner upon good cause shown.

(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 department 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 as originally prescribed for filing such additional evidence.

History: Cr. Register, March, 1973, No. 207, eff. 4-1-73.

2.155 Decisions in contested cases. (1) **EXAMINER DECISION.** The hearing examiner shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. Said decision shall be the final decision of the department, but may be reviewed in the manner described in NR 2.20.

Register, July, 1978, No. 271

(2) **SECRETARY DECISION.** (a) Notwithstanding (1) the secretary prior to hearing, may direct that the record be certified to the secretary for decision in accordance with the provisions of s. 227.09 (3) (b), Stats., without an intervening decision by the hearing examiner.

(b) Notwithstanding (1) the secretary prior to hearing may direct that the decision be made in accordance with the provisions of s. 227.09 (2) or (4), Stats.

History: Cr. Register, December, 1976, No. 252, eff. 1-1-77.

NR 2.16 Reopening hearings. When a hearing in a contested case is closed, no further evidence shall be received, except by order of the department reopening a closed contested case for the taking of future evidence upon application of a party showing to the department's satisfaction that the evidence is newly discovered or 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, March, 1973, No. 207, eff. 4-1-73.

NR 2.17 Transcripts. (1) **METHOD AND COPIES.** Hearings in contested cases will be transcribed either stenographically or mechanically. A typed transcript will be made when deemed necessary by the department. If a transcript is made by the department, copies will be furnished to all persons upon request at a reasonable cost. If no transcript is deemed necessary by the department and a party requests that one be prepared, that party shall be responsible for all costs of transcript preparation. In lieu of a transcript the department will provide any person a copy of the tape recording of a public hearing upon request and at a reasonable cost. All requests pursuant to the above provision shall be made in writing and presented to the hearing examiner at the hearing.

(2) **FINANCIAL NEED.** Any person who by affidavit or other appropriate means can establish to the department's satisfaction that the person is impecunious may be provided a copy of a transcript without charge.

(3) **CORRECTIONS.** Any party, within 7 days of the date of mailing of the transcript, may file with the hearing examiner a notice in writing of any claimed error therein, and shall mail a copy of such notice to each party of record. Other parties may contest any claimed error within 12 days of the date of the mailing of the transcript by so 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, March, 1973, No. 207, eff. 4-1-73; am. Register, December, 1976, No. 252, eff. 1-1-77.

NR 2.18 Briefs. (1) **TIME FOR BRIEFS.** In contested cases, parties shall indicate on the record after the close of testimony whether they desire to file briefs. The party or parties having the affirmative shall file affirmative briefs within 15 days after date of mailing of transcript. Other parties 8 days thereafter shall file answer briefs, which may be replied to within 5 days. The hearing examiner in his discretion may establish an alternate schedule for the filing of briefs.

(2) **NUMBER.** Five copies of all briefs shall be filed with the department together with a certification showing when and upon whom copies have been served. Briefs which contain a summary of evidence or facts relied upon shall include 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, March, 1973, No. 207, eff. 4-1-73.

NR 2.19 Confidential status. (1) **APPLICABILITY.** This section establishes a procedure which shall apply to requests made to the department to treat as confidential, information in possession of the department or being requested by the department.

(2) **RESPONSIBILITY FOR ESTABLISHING CONFIDENTIALITY.** The burden of establishing the need for confidential treatment of any information shall be on the person requesting such treatment of the information.

(3) **APPLICATION FOR CONFIDENTIAL STATUS.** Any person seeking confidential treatment of information shall file with the department a written application for confidential status containing in affidavit form:

- (a) The name and address of the applicant;
- (b) The position of the individual filing the application;
- (c) The specific type of information for which confidential status is sought;
- (d) The facts and supporting legal authority believed to constitute a basis for obtaining confidential treatment of the information.

(4) **ADDITIONAL INFORMATION.** Within 21 days of the receipt of a complete application, the department shall mail to the applicant a list of written interrogatories the answers to which are necessary for a determination under this section. If an extension has not been granted and if the applicant fails to answer all the interrogatories within 30 days, the department shall deny the application. The department may also deny the application if the applicant fails to provide the information requested in the interrogatories. If a determination under this section can be made solely on the basis of information appearing in the application, written interrogatories may be waived by the department. The responses to the interrogatories shall be treated as confidential if a request for such treatment from the applicant accompanies the responses.

(5) **PRELIMINARY DECISION.** (a) Within 30 days of receipt of a complete application in instances in which interrogatories have been waived, or within 30 days of receipt by the department of the information requested in the interrogatories, the department shall issue a written preliminary decision on the request for confidentiality. The preliminary decision shall include:

1. A finding which identifies the type of information sought to be assigned confidential status, and
2. A determination of whether the department has the authority to compel submittal of the information, and
3. If such authority exists, a determination of whether the department is authorized by law to assign confidential status to the type of information at issue, and
4. The decision to deny or to grant the request in whole or in part.

(b) A preliminary decision to assign confidential status must be made pursuant to one of the following:

Register, July, 1978, No. 271

1. S. 144.33, Stats., or
2. S. 147.08 (2) (c), Stats., or
3. Upon a finding consistent with the ruling in *State ex rel. Youmans v. Owens* (1965), 28 Wis.2d 672, that confidential treatment of the information is in the public interest, or
4. Other specific statutory or common law right to confidential treatment of information.

(c) A preliminary decision made pursuant to s. 147.08 (2) (c), Stats., or *Youmans* shall also include answers to the following questions:

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number to a significant degree?
2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
3. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would its competitors reap from disclosure?
4. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way?

(d) The definition of "trade secret" in s. 943.205 (2), Stats., is adopted to apply to determinations made pursuant to s. 147.08 (2) (c), Stats.

(e) A preliminary decision to approve the request in whole or in part shall be published by the department as a class 1 notice in the official state newspaper, and such other notice as the department deems appropriate shall be provided. The applicant or any interested member of the public may obtain an adjudicatory hearing on the preliminary decision to grant the request in whole or in part by petitioning the department for such a hearing within 10 days of receipt of notice. If the preliminary decision is to deny the request, the applicant shall be notified in writing of the decision by the department, and shall have 10 days after receipt of the decision to petition the department for an adjudicatory hearing on the preliminary decision.

(6) HEARING ON THE PRELIMINARY DECISION. (a) If a timely request is received, the department shall provide a hearing at which the applicant, the department and any other interested party may appear and present evidence or testimony supporting its position. A class 1 notice of the hearing shall be published by the department in the official state newspaper, and such other notice as the department deems appropriate shall be provided.

(b) The hearing shall be before a hearing examiner and testimony shall be under oath and subject to cross-examination. The burden of establishing the confidential status shall be with the applicant.

(c) The hearing examiner shall exercise discretion to determine which individuals may have access to information alleged to be confidential and shall exercise the authority provided by law to impose protective measures and conditions for inspection necessary to safeguard confidentiality of the information during and after the hearing.

(7) **FINAL DECISION.** If no hearing is requested within the time provided, the preliminary decision shall become final. If a hearing is requested, the decision of the hearing examiner shall be the final decision of the department, but may be reviewed in the manner prescribed by NR 2.20. The decision of the hearing examiner shall be in writing, shall include findings of fact and conclusions of law, and shall be provided to all parties to the hearing.

(8) **INTERIM CONFIDENTIAL STATUS.** No information for which confidential status was requested shall be open to public scrutiny until 40 days after issuance of the final decision. Additional information supplied by the applicant to support the request for confidentiality shall be treated as confidential. Unless judicial review is requested, this additional information shall be returned to the applicant following the 30-day period for filing a petition for judicial review.

(9) In any contested case hearing the hearing examiner, in determining the merits of a request for trade secret protection or confidential treatment of information which arises during the course of the hearing, shall render a ruling on the request only after receiving answers to the questions appearing in NR 2.19 (5) (c) 1., 2., 3. and 4.

History: Emerg. cr. eff. 1-1-75; Cr. Register, May, 1975, No. 233, eff. 6-1-75; r, and rec. Register, July, 1978, No. 271, eff. 8-1-78.

NR 2.20 Review of contested case decision. (1) **FILING.** Any party to a contested case who is adversely affected by a final decision of the department rendered after a public hearing on the matter, may within 10 days after entry of the decision, file a written petition for review by the secretary. Said petition shall specify in detail the grounds for the review, the relief which petitioner seeks and citation to supporting authorities which petitioner feels aids petitioner's case. The secretary shall not delegate the review to anyone who has had prior involvement in either the hearing or decision-making process.

(2) **SERVICE.** Said petition for review shall be served either personally or by registered or certified mail upon the secretary and upon all other parties to the action.

(3) **DECISION.** Within 14 days of the receipt of the petition, the secretary shall decide whether or not to grant the requested review. If the secretary decides to grant the review, the secretary may order the filing of briefs, presentation of oral argument, or a rehearing of all or part of the evidence presented at the original public hearing (or any combination thereof).

(4) **APPEAL.** A petition for review pursuant to this section shall not be a prerequisite for appeal or review under ss. 227.15 to 227.16, Stats.

(5) **SUSPENSION OF ORDERS.** The filing of a petition for review shall not suspend or delay the effective date of an order, and the order shall take effect on the date fixed by the department and shall continue in effect unless provisions of the order are specifically suspended or delayed by the secretary in writing. Petition for such suspension of the effective date of an order shall be clearly specified in the petition for review.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.