

Order of the Division of Hearings and Appeals Amending Rules

To repeal and recreate HA 1 relating to the procedure and practice of conducting administrative hearings before the Division.

Analysis Prepared by the Division of Hearings and Appeals

These rules describe the requirements and process for the conduct before the Division of all contested case proceedings under Wis. Stat. ch. 227, except as provided otherwise.

Prior to government reorganization, the Office of Administrative Hearings in the Department of Health and Family Services conducted contested case proceedings under ch. 227 for the department. In the course of reorganization, the Office of Administrative Hearings merged with the Division of Hearings and Appeals. That office also conducts contested case proceedings for several departments and agencies as provided in Wis. Admin. Code ch. HA 1. With the addition of the new types of cases brought about by the merger, the rule requires changes and additions to HA 1 to encompass all of the various types of proceedings conducted in the Division. In addition, HA 1 was generally outdated.

The Division's authority to repeal and create these rules is found in Wis. Stat. §§ 15.03, 227.11(2)(a) and 227.43.

Section 1. HA 1 is repealed and recreated to read:

Chapter HA 1

Procedure and Practice for Contested Cases

HA 1.01 Application of this chapter.	HA 1.10 Preservation of testimony, discovery and summary judgment.
HA 1.02 Definitions.	HA 1.11 Conferences.
HA 1.03 Service of documents.	HA 1.12 Conduct of hearings.
HA 1.04 Appeals.	HA 1.13 Rules of evidence.
HA 1.05 Notice of hearing	HA 1.14 Close of hearing.
HA 1.06 Place of hearing.	HA 1.15 Transcripts.
HA 1.07 Changes in time or place of hearing; adjournments; failures to appear.	HA 1.16 Briefs.
HA 1.08 Participation.	HA 1.17 Decision.
HA 1.09 Witnesses and subpoenas.	HA 1.18 Review.

HA 1.01 Application of this chapter. (1) ADOPTION. This chapter is adopted pursuant to ss. 15.03, 227.11(2)(a) and 227.43, Stats.

(2) **APPLICATION.** This chapter shall apply in all contested cases proceedings and hearings before the division of hearings and appeals under ch. 227, Stats., except as specifically provided otherwise. In addition, these rules shall apply if authorized under the terms of any contract the division enters into under s. 227.43(1m), Stats. Agencies for which the division conducts proceedings, including, but not limited to the departments of natural resources, health and family services, employee trust funds and justice, may have specific administrative code provisions or administrative decisions that govern the conduct of those proceedings. In the event of a conflict between this chapter and an agency administrative code provision or administrative decision, the agency administrative code provision or administrative decision is controlling.

(3) **EXCLUSIONS.** This chapter does not apply to corrections hearings conducted pursuant to ch. HA 2, fair hearings conducted pursuant to ch. HA 3, or hearings conducted pursuant to s. 115.80, Stats.

HA 1.02 Definitions. For purposes of this chapter: (1) “Administrative law judge” means an administrative hearing examiner employed by the division of hearings and appeals.

(2) “Administrator” means the administrator of the division of hearings and appeals.

(3) “Agency” means the Wisconsin land council or a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer.

(4) “Appeal” means a pleading, petition or application made by an appellant.

(5) “Appellant” means an applicant, complainant or petitioner.

(6) “Division” means the division of hearings and appeals.

(7) “Official of the agency” means the head of an agency.

(8) “Party” means a person or agency named or admitted as a party in a contested case.

(9) “Preponderance of the evidence” means the greater weight of the credible evidence.

HA 1.03 Service of documents. (1) **BY THE DIVISION.** The division may serve decisions, orders, notices and other documents by first class, certified, registered or inter-departmental mail or by facsimile transmission.

(2) **BY A PARTY.** Materials filed by a party with the division may be served personally or by first class, certified or registered mail, inter-departmental mail or by facsimile transmission. All correspondence, papers or other materials filed by a party shall be served on the same date by that party on all other parties to the proceeding. Service is complete upon mailing. No affidavit of mailing, certification, or admission of service need be filed with the division.

(3) FILING DATE. (a) Materials mailed to the division shall be considered filed with the division on the date of the postmark. Materials submitted by personal service or by inter-departmental mail shall be considered filed on the date they are received by the division.

(b) For materials transmitted to the division by facsimile, the date and time imprinted by the division's facsimile machine on the transaction report that accompanies the document shall determine the date and time of filing or of service on the division or the administrative law judge. Documents received after midnight local time shall be deemed filed on the first following business day.

Note: The mailing address of the division is:

5005 University Avenue
Suite 201
Madison, Wisconsin 53705-5400

The facsimile transmission number of the division is:

(608) 264-9885

HA 1.04 Appeals. (1) FORM. Appeals shall be in writing and shall conform to the applicable statute as to form, content, number of signatories and verification.

(2) CONTENT. Appeals shall contain the following information: (a) The name and address of the appellant;

(b) a description of the action that is being contested, the effective date of the action and, if possible, a copy of the document that prompted the action;

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

(d) what type of relief the appellant is seeking;

(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. All appeals 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. Appeals shall be filed and served in accordance with s. HA 1.03.

(4) ADDITIONAL INFORMATION. The division may request additional information concerning an appeal filed under this section and may deny any such petition, complaint or request where the information required or requested is not timely provided.

HA 1.05 Notice of hearing. (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) the class of the contested case in accordance with s. 227.01(3), Stats.;

(e) other information as the division or the administrative law judge deems appropriate.

HA 1.06 Place of hearings. Unless otherwise specifically provided by law, all hearings shall be held at the offices of the division or at the location designated by the administrative law judge. Hearings may be conducted outside the offices of the division at the discretion of the administrative law judge. Within the discretion of the administrative law judge, prehearing and other conferences may be conducted by telephone and witness testimony at hearing may be allowed to be by telephone, if necessary and desirable.

HA 1.07 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 administrative law judge deems such change appropriate under the circumstances presented.

(2) ADJOURNMENT. The administrative law judge 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 appellant fails to appear at a hearing following due notice, the administrative law judge may dismiss the appeal unless the appellant shows good cause for the failure to appear. If an appellant fails to submit proof of publication and notice as required by statute, the administrative law judge may dismiss the appeal and cancel the hearing.

(b) If a respondent fails to appear, the administrative law judge may take testimony and issue, modify or rescind an order or take the allegations in an appeal as true as may be appropriate, unless good cause is shown for the failure to appear.

(c) For a telephone or video hearing or prehearing, the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for hearing or prehearing conference: (1) The failure to provide a telephone number to the division after it had been requested; (2) the failure to answer the telephone or videoconference line; (3) the failure to free the line for the proceeding; (4) the failure to be ready to proceed with the hearing or prehearing conference as scheduled.

HA 1.08 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 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.

HA 1.09 Witnesses and subpoenas. An attorney may issue a subpoena to compel the attendance of witnesses under the procedure provided by s. 805.07, Stats. The division or the administrative law judge may also issue subpoenas to compel the attendance of witnesses at hearings or discovery proceedings under this section. An attorney may issue a subpoena requiring the production of material if he or she specifies the material to be presented by the subpoenaed witness. Sections 814.67, 885.06 and 885.07, Stats., shall govern the payment of witness fees and expenses.

HA 1.10 Preservation of testimony, discovery and summary judgment. (1) **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. 227 and ch. 804, Stats. For good cause, the administrative law judge may allow a shorter or longer time for discovery or preserving testimony than is allowed by ch. 804, Stats. For good cause, the administrative law judge may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden, as provided in s. 804.01(3), Stats., or to compel discovery and for sanctions as provided in s. 804.12, Stats.

(2) **SUMMARY JUDGMENT.** The summary judgment procedure as provided in s. 802.08, Stats., shall be available to the parties upon approval by the division or the administrative law judge.

HA 1.11 Conferences. (1) **CALL AND PURPOSE.** The administrative law judge 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 parties to the proceeding. At the discretion of the administrative law judge, a conference may be conducted by telephone. The purposes of such conferences shall be to consider the following matters:

- (a) The clarification of issues;
- (b) any amendments to the pleadings;
- (c) the admissibility of evidence;
- (d) the possibility of obtaining admissions or stipulations of fact and of documents that will avoid unnecessary proof;
- (e) the limitation of the number of witnesses;
- (f) the identification of all parties to the proceeding;
- (g) other matters as may aid in the disposition of the matter.

(2) **RECORDING STIPULATIONS.** The administrative law judge may record any stipulations or other agreements made at a conference. Stipulation 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 pleadings, the administrative law judge may cancel the hearing and may decide the matter on the basis of briefs or stipulations submitted by the parties.

HA 1.12 Conduct of hearings. (1) **PROCEDURE.** The administrative law judge shall open the hearing and may 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) clear and concise summary 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 an 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 bear the burden of proof.

(b) In any proceeding other than a proceeding under par. (a), the administrative law judge 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 administrative law judge permits. If a discussion off the record is deemed pertinent by the administrative law judge, he or she may summarize it on the record.

(5) **OBJECTIONS TO EVIDENCE.** Any argument before the administrative law judge on objections to receipt of evidence or on motions to strike will be recorded. The parties will be afforded the opportunity to make an offer of proof, which shall be in the form directed by the administrative law judge.

(6) **CONTEMPT.** Conduct that unreasonably impedes the orderly progress of the hearing or contemptuous conduct at a hearing shall be grounds for exclusion from the hearing. The division or the administrative law judge may take other actions that are authorized by statute and are appropriate under the circumstances.

(7) **SEQUESTRATION OF WITNESSES.** At the request of a party, or on the administrative law judge's own motion, the administrative law judge may order witnesses sequestered in accordance with s. 906.15, Stats.

(8) **TELEPHONE AND AUDIOVISUAL TESTIMONY.** The administrative law judge may permit oral argument and oral testimony communicated on the record by telephone or live audiovisual means as provided in s. 807.13, Stats.

HA 1.113 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 appeal. If variances occur, the appeal shall be considered amended by the record. The administrative law judge may grant such continuances as may be necessary to give other parties adequate time to prepare evidence to rebut that involved in any variances.

(3) TECHNICAL DATA. When evidence to be presented consists of data so complex as to make oral presentation difficult to follow, or if information can be more effectively presented visually, the data 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 administrative law judge but may not be part of the record.

(5) EXHIBITS AND PREPARED TESTIMONY. (a) The administrative law judge may order parties offering documentary exhibits or prepared testimony to furnish copies to all other parties in advance of the hearing and to provide a reasonable amount of time as the administrative law judge may order to enable review of the prepared testimony and exhibits. Upon compliance with such order, prepared testimony may be admitted in evidence as though given orally, providing the authors are present and available for cross-examination.

(b) An administrative law judge at his or her discretion may exclude from the record exhibits offered into evidence that are bulky, dangerous, perishable, or otherwise not suitable for inclusion in agency records. Proponents shall make reasonable efforts to use photographs, recordings, or other mechanical or electronic means to substitute for physical evidence excluded by the administrative law judge.

HA 1.14 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 administrative law judge may proceed to the determination of the case. The administrative law judge may grant an extension of time to file briefs upon a showing of good cause.

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

HA 1.15 Transcripts. (1) METHOD AND COPIES. Hearings shall be recorded either stenographically or electronically. A transcript will be made when it is determined that one is necessary by the division or the administrative law judge. If the division makes a transcript, copies shall be furnished to all persons upon request and prepayment 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 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 or an electronic reproduction 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 administrative law judge 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 administrative law judge 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 administrative law judge and other parties of record. All parties shall be advised by the administrative law judge of any corrections to the record approved by the administrative law judge.

HA 1.16 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 administrative law judge 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 subsequently file response briefs, which may be replied to. Alternatively, the administrative law judge may direct that the briefs of all parties be filed simultaneously.

(2) **NUMBER.** One copy of each brief 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 the evidence or facts.

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

HA 1.17 Decision. (1) **FORM.** After the record is closed in each proceeding the administrative law judge shall prepare written findings of fact, conclusions of law and, except in the case of proceedings under s. 227.46(3)(b), Stats., either a proposed or a final decision. The decision shall be in accordance with the provisions of ss. 227.46 and 227.47, Stats.

(2) **BURDEN OF PROOF.** Unless the law provides for a different standard, the quantum of evidence for a hearing decision shall be by the preponderance of the evidence.

(3) **COMMENTS ON PROPOSED DECISIONS.** Where a proposed decision is prepared and circulated, comments shall be filed within 15 days of service of the decision unless the administrative law judge or the administrator specifies a different period. An interim decision may be issued as a proposed decision.

(4) **EFFECT OF DECISION.** Except as provided in s. 227.43(1)(bg), an agency may, by administrative code provision or by order in a particular case or category of cases, direct that a decision of the division is to be issued as a final decision, in which case the decision is a final

decision of the agency. If the agency does not direct that the decision in a case or category of cases is to be issued as a final decision, the administrative law judge shall issue a proposed decision to the official of the agency.

(5) **PARTIES.** The administrative law judge shall prepare a list of persons who are parties to the proceeding and include the list in the decision. For purposes of identifying parties to the proceeding under s. 227.47, Stats., and this section, the administrative law judge 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 the impact;

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

(6) **SERVICE.** Every decision shall be served, on the date of its signature, upon each party to the proceeding or upon the party's attorney of record.

(7) **ACTIVITIES AFTER DECISION.** Person identified 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. These persons shall also be served with petitions for rehearing and reopening as well as with petitions for administrative and judicial review.

HA 1.18 Review. A 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. The notice shall also provide the time allowed for filing a petition for review and shall identify the party to be named as respondent in such an action.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative register, as provided in s. 227.22(2)(intro), Stats.

WISCONSIN DIVISION OF HEARINGS AND APPEALS

By: _____

DAVID H. SCHWARZ
ADMINISTRATOR