

CHAPTER 33-22-04 HEARINGS

Section

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33-22-04-01. Hearing officers.

1. **Appointment.** All hearing officers shall be appointed by the department. The department shall appoint a hearing officer within five days of service of a complaint or petition. Notification of the appointment shall be made to all parties in such manner as the department may direct.
2. **Qualifications.**
 - a. All appointments of hearing officers shall be consistent with the purpose of obtaining objectivity and impartiality in making decisions.
 - b. The hearing officer may be an employee or a member of the department. The department may appoint as hearing officer a person who is not an employee or member of the department. In such event, the hearing officer shall be an attorney at law licensed to practice in North Dakota, unless some other person is agreed upon by all parties; provided, that such hearing officer shall be considered an employee of the department for the sole purpose of compensation, if any, and authorization to conduct the hearing and recommend findings of fact and decision to the department. In all other respects, the hearing officer shall be independent of the department.
 - c. In all cases, the department retains discretion to conduct the hearing itself, in which case an employee of the department shall be the hearing officer.
3. **Authority.** The appointment of the hearing officer shall, to the extent permitted by law, authorize and direct the hearing officer to conduct the hearing and recommend a decision to the department. When evidence is to be taken in a proceeding, one or more of examiners, when duly designated for that purpose, shall preside at the hearing. An officer duly designated by the department to preside at a hearing shall have the authority to take any of the following actions in the name of the department.
 - a. To regulate the course of hearing.
 - b. To administer oath.
 - c. To issue subpoenas.
 - d. To take depositions or cause depositions to be taken.
 - e. To rule upon offers of proof and to receive evidence.
 - f. To hold appropriate conferences before or during hearings.
 - g. To dispose of procedural matters but not to dispose of motions made during hearings to dismiss proceedings or other motion which involves a final determination of proceedings.

- h. To exclude evidence which is cumulative or repetitious.
 - i. To authorize any party to furnish and serve designated late-filed exhibits within a specified time after the close of the hearing.
 - j. To order discovery.
 - k. Within the hearing officer's discretion, or upon direction of the department, to certify any question to the department for its consideration and disposition.
 - l. To take any other action necessary or appropriate to discharge the duties vested in the hearing officer, consistent with statutory or other authorities under which the department functions and with the rules, regulations, and policies of the department.
4. **Limitations.** Hearing officers shall perform no duties inconsistent with their responsibilities as such. No officer shall in any proceeding for an adjudication required by statute to be determined on the record after opportunity for hearing consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate.
5. **Disqualification.**
- a. Any party may file a petition with the department to disqualify any hearing officer. The department shall determine the petition in accordance with this subsection and enter its decision on the record.
 - b. The department may, for good cause, revoke the appointment of any hearing officer upon the filing of a petition of a party or upon the department's own motion. Any such revocation shall be effective upon notice to the officer.
 - c. A hearing officer shall withdraw from participation in a hearing at any time prior to the final determination if the officer deems oneself disqualified for any reason.
 - d. Whenever a hearing officer withdraws or is disqualified, the department shall appoint another in the officer's place, without the need for such newly-appointed officer hearing evidence already presented in the case.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-02. Discovery.

1. Agency discovery.

- a. Information. Upon request of the department or the hearing officer, any party to the matter shall furnish to the department or the hearing officer any information which the party may have which is relevant to the matter under consideration.
- b. Examination of records. Upon request of the department or the hearing officer, any party shall allow the department or any member, employee, or agent of the department, when authorized by it or the hearing officer, of the officer personally, to examine and copy any books, papers, records, or memoranda pertaining to the matter under consideration.
- c. Inspection of premises. Upon request of the department or the hearing officer, any party shall allow the department, or any member, employee, or agent of the department when authorized by it or the hearing officer, or the hearing officer personally, to enter upon any of the party's property for the purpose of obtaining information, examining any physical facility, or examining records or conducting surveys or investigations.

2. **Discovery by parties.**

- a. Parties other than the department may obtain discovery by examination of those public records which are in possession of the hearing officer or the department. Any party to a case may request the department or the hearing officer to exercise its powers in subdivision a of subsection 1 to obtain to public information or to issue a subpoena as provided in section 33-22-05-03. The department or the hearing officer may grant or deny such requests. A party may request voluntary disclosure of information by any other party.
- b. The deposition of any witness or party required in any proceeding before the department may be taken in the same manner and on the same notice as in an action pending in the district courts of this state. Any person whose deposition is taken shall receive the same fees and mileage as a witness in a civil case in the district courts and such costs shall be paid by the party at whose insistence the deposition is taken.
- c. Interrogatories may be issued, in any proceeding before the department, in the same manner as in an action pending in the district courts of this state.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-03. Appearance.

Interested parties shall enter their appearances at the beginning of the hearing by giving their name and address and briefly stating whether they appear in support of the complaint or in opposition thereto, or otherwise. All such appearances shall be noted on the record with a notation in whose behalf each appearance is made. Included in such appearances shall be the names of the members of the department's staff participating in the hearing of investigation and the names of any other persons appearing for the department.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-04. Continuance.

Before or after any hearing, continuances may be granted by the department for good and sufficient cause. A motion for such a continuance shall be made in writing, filed with the department, and served on opposing counsel or parties. Such motions shall be presented as far in advance of date fixed for hearing as possible to ensure favorable action. The department may effect a continuance before or after any hearing upon its own motion. The hearing officer may grant oral or written requests for continuances during any hearing.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-05. Order of procedure.

In hearings on formal complaints and petitions, the complainant or petitioner, as the case may be, shall open and close. In hearings on an order to show cause, the respondent shall open and close. When proceedings have been consolidated for hearing, the officer shall designate who shall open and close.

Intervenors shall follow the parties in whose behalf the intervention is made. Where the intervention is not in support of an original party, the presiding officer shall designate at which stage such intervenor shall be heard. In proceedings where the evidence is materially within the knowledge or control of another party or participant, the foregoing order or presentation may be varied by the officer.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-06. Appeal to department from ruling of hearing officer - Offer of proof.

An appeal may be taken to the department from a ruling of an officer during the course of a hearing only where extraordinary circumstances necessitate a prompt decision by the department to prevent detriment to the public interest.

Any offer of proof made in connection with an objection taken to any ruling of the hearing officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-07. Oral argument.

1. **Before officer.** When, in the opinion of the hearing officer, time permits and the nature of the proceedings, the complexity or the importance of the issues of fact or law involved, and the public interest warrant, such officer may, either on the officer's own motion, or at the request of any party at or before the close of the taking of testimony, allow and fix a time for the presentation of oral argument imposing such limits of time on the argument as deemed appropriate. Such arguments shall be transcribed and bound with the transcript of testimony, if a transcript is prepared.
2. **Before department.** Request for authority to present oral argument before the department may be made at the time of any appeal taken during the hearing, at the conclusion of the taking of evidence, or on brief, at such time as the department may allow. The department will fix the time for oral argument, if allowed, and notify the parties.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-02

33-22-04-08. Briefs and proposed findings of fact and conclusions of law.

1. Each party to any proceeding may file proposed findings of fact and conclusions of law, briefs, or memoranda of law; provided, however, that the department or hearing officer may direct any party to file proposed findings of fact and conclusions of law, briefs, or memoranda of law.
2. The department or hearing officer shall fix the time for the filing and service of proposed findings of fact and conclusions of law, briefs, or memoranda of law, giving due regard to the nature of the proceeding, the magnitude of the record, and the complexity or importance of the issues involved, and shall fix the order in which such documents shall be filed.
3. Should a party find that it is unable to meet the date for filing and serving proposed findings of facts and conclusions of law, briefs, or memoranda of law, such party shall so notify the department or hearing officer and the other parties in writing, therein setting forth the reasons for such inability together with a request for an extension of time to a date certain for filing and service.
4. When it is ordered that proposed findings of fact and conclusions of law, briefs, or memoranda of law be filed and served by the party initiating the proceeding, and where such party fails to file and serve by the date specified without complying with subsection 3, the department on its own motion or the motion of any party may, in its discretion, dismiss the proceeding. Such

failure in the case of an intervenor, protestant, or respondent may be deemed a waiver of the right to participate further in the proceeding, and the department on its own motion or the motion of any party may so order.

5. Exhibits should not be reproduced in a brief, but may, if desired, be reproduced in an appendix to the brief. Every brief of more than twenty pages shall contain a subject index, with page references, and the pages where the citations appear. All briefs shall be as concise as possible.
6. All briefs shall be accompanied by certificate showing service upon all parties or their attorneys who appeared at the hearing. One copy of each brief shall be furnished for the use of the department unless otherwise directed by the department or hearing officer.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-13