

WSR 24-10-077
EXPEDITED RULES
OFFICE OF
ADMINISTRATIVE HEARINGS
[Filed April 30, 2024, 8:49 a.m.]

Title of Rule and Other Identifying Information: Chapter 10-08 WAC, Model rules of procedure.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose is to update current rule language with gender-inclusive pronouns. This change clarifies the language of the rules without changing its effect.

Reasons Supporting Proposal: The office of administrative hearings (OAH) received a petition for adoption, amendment, or repeal of a state administrative rule from a member of the public. OAH supports the changes requested in the petition.

Statutory Authority for Adoption: RCW 34.12.030.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: OAH, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Joshua Sundt, 2420 Bristol Court S.W., Olympia, WA 98502, 360-407-2700.

This notice meets the following criteria to use the expedited adoption process for these rules:

Corrects typographical errors, makes address or name changes, or clarifies language of a rule without changing its effect.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Joshua Sundt, OAH, P.O. Box 42488, Olympia, WA 98504-2488, phone 360-407-2700, fax 360-664-8721, email rulemaking@oah.wa.gov, AND RECEIVED BY July 1, 2024.

April 26, 2024
Edward F. Pesik, Jr.
Chief Administrative Law Judge

OTS-5387.1

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-050 Adjudicative proceedings—Assignment of administrative law judge—Motion of prejudice. (1) Whenever a state agency as defined in RCW 34.12.020(4) conducts a hearing which is not presided over by officials of the agency who are to render the final decision, the agency shall use one of the following methods for requesting assignment of an administrative law judge:

(a) Not less than (~~twenty~~) 20 days prior to the date of the hearing, notify the chief administrative law judge or (~~his or her~~) their designee of the date, time, and place of the hearing and request assignment of an administrative law judge to preside over the hearing, or

(b) File with the office of administrative hearings a copy of the hearing file, which filing shall be deemed to be a request for assignment of an administrative law judge to issue the notice of hearing and preside over the hearing, or

(c) Schedule its hearings to be held at times and places reserved and provided to the agency for that purpose by the office of administrative hearings.

(2) Motions of prejudice with supporting affidavits under RCW 34.12.050 must be filed at least three days prior to the hearing or to any earlier stage of the adjudicative proceeding at which the administrative law judge may be required to issue a discretionary ruling. If the notice of hearing does not state the name of the presiding administrative law judge, the chief administrative law judge or (~~his or her~~) their designee shall make such assignment at least five days prior to the hearing and shall disclose the assignment to any party or representative making inquiry. Subsequent motions of prejudice filed by the same party in the same proceeding shall be ruled upon by the chief administrative law judge or (~~his or her~~) their designee.

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-085 Consolidation of proceedings. If there are multiple adjudicative proceedings involving common issues or parties, upon motion of any party or upon (~~his or her~~) their own motion, the presiding officer may, in (~~his or her~~) their discretion, consolidate the proceedings.

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-090 Adjudicative proceedings—Continuances. (1) Postponements, continuances, extensions of time, and adjournments may be ordered by the presiding officer on (~~his or her~~) their own motion or may be granted on timely request of any party, with notice to all other parties, if the party shows good cause.

(2) A request for a continuance may be oral or written. The party seeking the continuance shall notify all other parties of the request. The request for a continuance shall state whether or not all other parties agree to the continuance. If all parties do not agree to the continuance, the presiding officer shall promptly schedule a prehearing conference to receive argument and to rule on the request.

AMENDATORY SECTION (Amending WSR 20-07-005, filed 3/4/20, effective 4/4/20)

WAC 10-08-110 Adjudicative proceedings—Filing and service of documents. (1) Filing.

(a) Documents to be filed with the agency shall be deemed filed when received during regular business hours at any office of the agency. Documents to be filed with the presiding officer shall be deemed filed when received during regular business hours at the office of the presiding officer. Documents received outside of regular business hours shall be deemed filed the following business day.

(b) Filing documents by fax:

(i) As used in this chapter, "fax" means electronic telefacsimile transmission.

(ii) Documents may be filed by fax with the agency. Filing by fax is perfected when a complete and legible copy of the documents is reproduced on the agency's fax machine during regular business hours. A transmission of documents after regular business hours shall be considered filed on the following business day.

(iii) Any documents filed by fax should be accompanied by a cover page or other form identifying the party making the transmission, listing the address, telephone, and fax number of the party, identifying the adjudicative proceeding to which the documents relate, and indicating the date of and the total number of pages included in the transmission.

(iv) The party attempting to file the documents by fax bears the risk that the documents will not be timely received or legibly printed, regardless of the cause. If the fax is not received in legible form, filing will not be perfected.

(c) The filing of documents with the presiding officer by electronic mail ("email") is not authorized without the express approval of the presiding officer and under such circumstances as the presiding officer allows.

(2) Service.

(a) All notices, pleadings, and other documents filed with the agency shall be served upon all representatives of record and upon unrepresented parties or upon their agents designated by them or by law.

(b) Methods of service permitted. Service shall be made personally or, unless otherwise provided by law, by first-class, registered, or certified mail; by fax; or by commercial parcel delivery company. Service by email or electronic filing is permitted if expressly assented to by the receiving party.

(c) Service by mail is completed upon deposit in the United States mail properly stamped and addressed. Service by fax is completed upon production by the fax machine of confirmation of a successful transmission. Service by commercial parcel delivery is completed upon delivery to the parcel delivery company, properly addressed with charges prepaid. Service by email is completed when the email is successfully sent. Service by electronic filing is completed upon successful uploading of the document to that party's designated system.

(3) Proof of service. Where proof of service is required by statute or rule, filing the documents with the agency, together with one of the following, shall constitute proof of service:

(a) An acknowledgment of service.

(b) A certificate that the person signing the certificate served the documents upon all parties of record in the proceeding by delivering a copy thereof in person to all parties of record.

(c) A certificate that the person signing the certificate served the documents upon all parties of record in the proceeding by:

(i) Mailing a copy thereof, properly addressed with postage pre-paid, to each party to the proceeding or (~~his or her~~) their attorney or authorized agent; or

(ii) Transmitting a copy thereof by fax to each party to the proceeding or (~~his or her~~) their attorney or authorized agent; or

(iii) Depositing a copy thereof, properly addressed with charges prepaid, with a commercial parcel delivery company; or

(iv) If agreed to by the parties, emailing or uploading to an electronic case management system a copy of the document. The certificate of service must include verification of successful sending or uploading of the document by the recipient, which may include a read receipt or confirmation of successful upload.

(4) Electronic filing with the office of administrative hearings (OAH).

(a) Documents may be filed electronically with OAH through the use of the agency's portal.

(b) Filing documents through the OAH portal:

(i) As used in this chapter, "electronically" means successfully uploading documents through the OAH portal.

(ii) Filing electronically is perfected when a complete and legible copy of the documents is successfully uploaded to OAH's portal during regular business hours. A document uploaded after regular business hours is considered filed on the following business day. Regular business hours for the purposes of electronic filing with OAH are Monday through Friday, 8:00 a.m. to 5:00 p.m. Pacific Time, excluding weekends and state holidays.

(iii) For any documents filed electronically through the OAH portal, the party attempting to file bears the risk that the documents will not be timely received or will not be legible, regardless of the cause unless the cause is due to an OAH portal malfunction. If the uploaded document is not received in legible form, filing will not be perfected.

(c) All service requirements as outlined in subsections (2) and (3) of this section apply to documents electronically filed through the OAH portal.

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-120 Adjudicative proceedings—Subpoenas. (1) Subpoenas shall be issued and enforced, and witness fees paid, as provided in RCW 34.05.446 and 5.56.010.

(2) Every subpoena shall identify the party causing issuance of the subpoena and shall state the name of the agency and the title of the proceeding and shall command the person to whom it is directed to attend and give testimony or produce designated books, documents, or things under (~~his or her~~) their control.

(a) A subpoena to a person to provide testimony at a hearing shall specify the time and place set for hearing.

(b) A subpoena duces tecum requesting a person to produce designated books, documents, or things under (~~his or her~~) their control shall specify a time and place for producing the books, documents, or things. That time and place may be the time and place set for hearing, or another reasonably convenient time and place in advance of the hearing.

(3) A subpoena may be served by any suitable person over 18 years of age, by exhibiting and reading it to the witness, or by giving (~~him or her~~) them a copy thereof, or by leaving such copy at the place of (~~his or her~~) their abode. When service is made by any other person than an officer authorized to serve process, proof of service shall be made by affidavit or declaration under penalty of perjury.

(4) The presiding officer, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (a) quash or modify the subpoena if it is unreasonable and oppressive or (b) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-130 Adjudicative proceedings—Prehearing conference.

(1) The presiding officer upon (~~his or her~~) their own motion or upon request of a party may direct the parties or their representatives to engage in a prehearing conference or conferences to consider:

- (a) Simplification of issues;
- (b) The necessity or desirability of amendments to the pleadings;
- (c) The possibility of obtaining stipulations, admissions of fact and admissions of the genuineness of documents which will avoid unnecessary proof;
- (d) Limitations on the number and consolidation of the examination of witnesses;
- (e) Procedural matters;
- (f) Distribution of written testimony and exhibits to the parties prior to the hearing;
- (g) Such other matters as may aid in the disposition or settlement of the proceeding.

(2) Prehearing conferences may be held by telephone conference call or at a time and place specified by the presiding officer.

(3) Following the prehearing conference, the presiding officer shall issue an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties concerning all of the matters considered. If no objection to such notice is filed within (~~ten~~) 10 days after the date such notice is mailed, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

(4) In any proceeding the presiding officer may, in (~~his or her~~) their discretion, conduct a conference prior to the taking of testimony, or may recess the hearing for such conference, for the purpose of carrying out the purpose of this rule. The presiding officer shall state on the record the results of such conference.

(5) Nothing in this rule shall be construed to limit the right of an agency to attempt informal settlement of an adjudicative proceeding at any time.

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-140 Adjudicative proceedings—Evidence. (1) All rulings upon objections to the admissibility of evidence shall be made in accordance with the provisions of RCW 34.05.452.

(2) Where practicable, the presiding officer may order:

(a) That all documentary evidence which is to be offered during the hearing or portions of the hearing be submitted to the presiding officer and to the other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence;

(b) That documentary evidence not submitted in advance as required in (a) of this subsection be not received in evidence in the absence of a clear showing that the offering party had good cause for (~~his or her~~) their failure to produce the evidence sooner, unless it is submitted for impeachment purposes;

(c) That the authenticity of all documents submitted in advance in a proceeding in which such submission is required be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

(3) When portions only of a document are to be relied upon, the offering party shall identify the pertinent excerpts and state the purpose for which such materials will be offered. Only the excerpts, in the form of copies, shall be received in the record. However, the whole of the original documents, except any portions containing confidential material protected by law, shall be made available for examination and for use by all parties.

(4) No former employee of the agency shall appear, except with the permission of the agency, as an expert witness on behalf of other parties in a proceeding in which (~~he or she~~) they previously took an active part in the investigation as a representative of the agency.

(5) The refusal of a witness to answer any question which has been ruled to be proper shall, in the discretion of the presiding officer, be ground for striking all testimony previously given by such witness on related matter.

(6) Any party bound by a stipulation or admission of record may, at any time prior to closure of the hearing, be permitted to withdraw the same in whole or in part by showing to the satisfaction of the presiding officer that such stipulation or admission was made inadvertently or under a bona fide mistake of fact contrary to the true fact and that its withdrawal at the time proposed will not unjustly prejudice the rights of other parties to the proceeding.

AMENDATORY SECTION (Amending WSR 16-19-083, filed 9/20/16, effective 10/21/16)

WAC 10-08-150 Adjudicative proceedings—Interpreters. (1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in an adjudicative proceeding, the appointing authority shall appoint an interpreter to assist the party or witness throughout the proceeding. Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW.

(2) An adjudicative proceeding under chapter 34.05 RCW includes a legal proceeding which occurs on the record, and also includes oral and written communications of a party to an agency proceeding, and the filing, issuance and entry of notices, motions, orders, decisions, petitions, and other documents. When a party or witness appears in a legal proceeding on the record, the appointing authority is the presiding officer, and otherwise the appointing authority is the agency head or designee.

(3) (a) The agency head or designee may make a predetermination that an interpreter is qualified to provide parties with a:

(i) Visual translation or sight translation of forms, notices, proposed exhibits, briefs and orders, either before or following the hearing; or

(ii) Visual or spoken-language interpretation of oral communication with the agency that is not on the record.

(b) The agency head or designee may maintain a list of interpreters who have been determined to be qualified to interpret before the agency.

(4) Relatives of any participant in a proceeding and employees of the agency involved in a proceeding shall not be appointed as interpreters in the proceeding. This subsection shall not prohibit the office of administrative hearings from hiring an employee whose function is to interpret at adjudicative proceedings on the record and as otherwise needed by impaired and non-English-speaking persons.

(5) The appointing authority shall appoint a qualified spoken language interpreter who is on the list of certified interpreters maintained by the administrative office of the courts (AOC), except as provided in this subsection. The appointing authority may find there is good cause to appoint a qualified spoken language interpreter who is not on the list of certified interpreters maintained by the AOC. "Good cause" includes, but is not limited to, consideration of the totality of circumstances and a determination by the appointing authority that:

(a) The current list of certified interpreters maintained by the AOC does not include an interpreter certified in the language spoken by the non-English-speaking person;

(b) The parties agree to the issue or motion;

(c) The motion or hearing is expedited or emergent;

(d) The matter involves general or procedural information;

(e) The matter involves sight translation of case-related documents including forms, notices, proposed exhibits, briefs, and orders, either before or following the hearing;

(f) The rescheduling of a hearing to appoint a certified interpreter would cause prejudicial delay;

(g) The certified interpreter qualified by the appointing authority becomes unavailable unexpectedly before completion of the adjudicative proceeding; or

(h) An interpreter who is certified to interpret in the courts of another state or the federal courts is available.

(6) The appointing authority shall make a preliminary determination that an interpreter is able in the particular proceeding to interpret accurately all communication to and from the impaired or non-English-speaking person. This determination shall be based upon the testimony or stated needs of the impaired or non-English-speaking person, the interpreter's education, certifications, and experience in interpreting for contested cases or adjudicative proceedings, the interpreter's understanding of the basic vocabulary and procedure involved in the proceeding, and the interpreter's impartiality. The parties or their representatives may question the interpreter as to (~~his or her~~) their qualifications and impartiality.

(7) If in the opinion of the impaired or non-English-speaking person, the appointing authority or a qualified observer, the interpreter does not provide accurate and effective communication with the impaired or non-English-speaking person, the appointing authority shall appoint another interpreter.

(8) Mode of interpretation.

(a) The AOC recognizes three spoken language interpreting modes: Consecutive, simultaneous, and sight translation. Sight translation means the act of reading a written text out loud.

(b) Interpreters for non-English-speaking persons shall use the simultaneous mode of interpretation where the presiding officer and interpreter agree that simultaneous interpretation will advance fairness and efficiency; otherwise, the consecutive mode of foreign language interpretation shall be used.

(c) Interpreters for hearing impaired persons shall use the simultaneous mode of interpretation unless an intermediary interpreter is needed. If an intermediary interpreter is needed, interpreters shall use the mode that the interpreter considers to provide the most accurate and effective communication with the hearing impaired person.

(d) When an impaired or non-English-speaking person is a party to a proceeding, the interpreter shall interpret all statements made by other hearing participants. The presiding officer shall ensure that sufficient extra time is provided to permit interpretation and the presiding officer shall ensure that the interpreter interprets the entire proceeding to the party to the extent that the party has the same opportunity to understand all statements made during the proceeding as a nonimpaired or English-speaking party listening to uninterpreted statements would have.

(9) An interpreter shall not, without the written consent of the parties to the communication, be examined as to any communication the interpreter interprets under circumstances where the communication is privileged by law. An interpreter shall not, without the written consent of the parties to the communication, be examined as to any information the interpreter obtains while interpreting pertaining to any proceeding then pending.

(10) The presiding officer shall explain to the impaired or non-English-speaking party that a written decision or order will be issued in English, and that a visual translation or sight translation of the decision is available at no cost to the party.

The presiding officer shall attach to or include in the decision or order a telephone number to request a visual translation or sight translation.

(11) If the party has a right to review of the order or decision, the presiding officer shall orally inform the party during the hearing of the right and of the time limits to request review.

(12) The agency involved in the hearing shall pay interpreter fees and expenses.

AMENDATORY SECTION (Amending WSR 99-20-115, filed 10/6/99, effective 11/6/99)

WAC 10-08-160 Adjudicative proceedings—Testimony under oath or affirmation. (1) Every person called as a witness in a hearing shall swear or affirm that the testimony (~~(he or she is)~~) they are about to give in the hearing shall be the truth according to the provisions of RCW 5.28.020 through 5.28.060. If the witness is testifying from outside the jurisdiction, the presiding officer may require the witness to agree to be bound by the laws of the state of Washington for purposes of the oath or affirmation.

(2) Every interpreter shall, before beginning to interpret, take an oath that a true interpretation will be made to the person being examined of all the proceedings in a language or in a manner which the person understands, and that the interpreter will repeat the statements of the person being examined to the agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

AMENDATORY SECTION (Amending WSR 89-13-036, filed 6/15/89)

WAC 10-08-190 Adjudicative proceedings—Cameras—Recording devices. Photographic and recording equipment shall be permitted at hearings; however, the presiding officer may impose such conditions upon their use as (~~(he or she)~~) they deem(~~(s)~~) necessary to prevent disruption of the hearing.

AMENDATORY SECTION (Amending WSR 89-13-036, filed 6/15/89)

WAC 10-08-230 Informal settlements. RCW 34.05.060 authorizes agencies to establish by rule specific procedures for attempting and executing informal settlement of matters. The following procedures are available for informal dispute resolution that may make more elaborate proceedings under the Administrative Procedure Act unnecessary.

(1) (a) All agencies and persons are strongly encouraged to explore early, informal resolution to disputes whenever possible. Any person whose interest in a matter before an agency may be resolved by settlement shall communicate (~~(his or her)~~) their request or complaint to the agency, setting forth all pertinent facts and particulars and the desired remedy. If the agency requires additional information to resolve the matter informally, it shall promptly provide to the person

who is seeking relief an opportunity to supply such information. Settlement negotiations shall be informal and without prejudice to rights of a participant in the negotiations; Provided, however, that any time limit applicable to filing an application for an adjudicative proceeding shall not be extended because settlement attempts are pending.

(b) In the event an early, informal resolution is reached, the agency is responsible for providing a written description of the resolution to the person(s) involved.

(2) (a) If settlement of an adjudicative proceeding may be accomplished by informal negotiation with the agency or other parties involved, negotiations shall be commenced at the earliest possible stage of the proceeding. Settlement shall be concluded by:

(i) Stipulation of parties or

(ii) Withdrawal by the applicant of (~~his or her~~) their application for an adjudicative proceeding or

(iii) Withdrawal by the agency of the agency action which is the subject matter of the adjudicative proceeding.

(b) A stipulation shall be in writing and signed by each party to the stipulation or (~~his or her~~) their representative or shall be recited on the record at the hearing. When an adjudicative proceeding has been settled by stipulation, the agency head, the agency head's designee, or the presiding officer shall enter an order in conformity with the terms of the stipulation.

(c) When an adjudicative proceeding has been wholly or partially settled by withdrawal, the presiding officer shall enter an order dismissing the adjudicative proceeding, or an order dismissing the affected party's interest in the proceeding if other parties have not withdrawn.