

Chapter 170-03 WAC

DEL HEARING RULES

WAC

I. GENERAL PROVISIONS

- 170-03-0010 Purpose and scope.
- 170-03-0020 Definitions.
- 170-03-0030 Computing time for meeting deadlines in the hearing process.

II. HEARING RIGHTS AND REQUESTS

- 170-03-0040 The right to a hearing.
- 170-03-0050 Requesting a hearing.
- 170-03-0060 Filing the request for hearing.
- 170-03-0070 Location of office of administrative hearings.
- 170-03-0080 Service of notice and documents.
- 170-03-0090 Proof of service.
- 170-03-0100 Representation during the hearing process.

III. INTERPRETER SERVICES

- 170-03-0110 The right to an interpreter in the hearing process.
- 170-03-0120 Definitions.
- 170-03-0130 Interpreter qualifications.
- 170-03-0140 Waiver of interpreter services.
- 170-03-0150 Requirements that apply to the use of interpreters.
- 170-03-0160 Requirements that apply to decisions involving limited-English-speaking parties.

IV. PREHEARING PROCEDURES

- 170-03-0170 Notice of hearing.
- 170-03-0180 Prehearing conferences.
- 170-03-0190 Purposes of prehearing conference.
- 170-03-0200 Prehearing order.
- 170-03-0210 Assignment and challenge of assignment of administrative law judge.

V. LAWS APPLIED IN ADMINISTRATIVE HEARINGS

- 170-03-0220 Rules an ALJ or review judge must apply when making a decision.
- 170-03-0230 Challenges to validity of DEL rules.
- 170-03-0240 Amendment to DEL notice or party's request for hearing.
- 170-03-0250 Changes of address.
- 170-03-0260 Continuances.
- 170-03-0270 Order of dismissal.
- 170-03-0280 Vacating an order of default or order of dismissal.
- 170-03-0290 Stay of DEL action.
- 170-03-0300 Stay of summary suspension of child care license.

VI. HEARINGS

- 170-03-0340 Conduct of hearings.
- 170-03-0350 Authority of the administrative law judge.
- 170-03-0360 Order of the hearing.
- 170-03-0390 Evidence.
- 170-03-0400 Introduction of evidence into the record.
- 170-03-0410 Objections to evidence.
- 170-03-0420 Stipulations.
- 170-03-0430 Exhibits.
- 170-03-0440 Judicial notice.
- 170-03-0450 Witnesses.
- 170-03-0460 Requiring witnesses to testify or provide documents.
- 170-03-0470 Serving a subpoena.
- 170-03-0480 Testimony.
- 170-03-0490 Burden of proof.
- 170-03-0500 Equitable estoppel.
- 170-03-0510 Closing the record.

VII. INITIAL ORDERS

- 170-03-0520 Timing of the ALJ's decision.
- 170-03-0530 Contents of the initial order.
- 170-03-0540 Finality of initial order.
- 170-03-0550 Challenges to the initial order.
- 170-03-0560 Correcting clerical errors in ALJ's decisions.

VIII. REVIEW OF INITIAL ORDERS

- 170-03-0570 Appeal of the initial order.
- 170-03-0580 Time for requesting review.
- 170-03-0590 Petition for review.
- 170-03-0600 Response to petition for review.
- 170-03-0610 Decision process.
- 170-03-0620 Authority of the review judge.

IX. REVIEW OF THE FINAL ORDER

- 170-03-0630 Request for reconsideration.
- 170-03-0640 Response to a request for reconsideration.
- 170-03-0650 Ruling on request for reconsideration.
- 170-03-0660 Judicial review.

I. GENERAL PROVISIONS

WAC 170-03-0010 Purpose and scope. (1) **Application.** This chapter contains the procedural rules that apply to adjudicative proceedings involving the department of early learning (DEL) and:

(a) Individuals or entities who are applicants for child care licenses or who are licensees of DEL and are aggrieved by a DEL denial of an application or a revocation, suspension, or modification of a license;

(b) Applicants for employment, staff, volunteers and contracted providers who participate in DEL programs, including child care, who are required to meet background check standards and who are disqualified by DEL;

(c) Individuals receiving child care subsidies under a child care program who dispute a program decision or licensed/certified providers who dispute an overpayment under a child care program.

(2) **Relation to statutes and rules.** The rules of this chapter are intended to supplement RCW 43.215.305, the statute governing hearing rights for applicants and licensees; the Administrative Procedure Act (APA), chapter 34.05 RCW; and the model rules, chapter 10-08 WAC, adopted by the office of administrative hearings (OAH). If a provision of this chapter conflicts with a provision in any chapter containing a procedural or substantive rule, the provision in the chapter containing the procedural or substantive rule governs.

(3) **Relation to actions and rules of other agencies.** Actions of DEL sometimes rely in part on actions taken by other agencies, most notably the department of social and health services (DSHS), or are taken in conjunction with the actions of other agencies. For example, DSHS's division of licensed resources/child protective services (DLR/CPS) has statutory responsibility for investigating allegations of child abuse or neglect in licensed child care agencies. If DLR/CPS finds child abuse or neglect occurred in a child care facility, the person who is the subject of the finding will have a right to a hearing to challenge that finding under DSHS rules. If the subject is a licensed provider, the child care license may be denied, revoked, suspended, or modified as a result of the circumstances and finding and the provider also would have a

right to a hearing under DEL hearing rules. To the extent the child abuse or neglect case and the licensing case can be consolidated or combined in one hearing, they should be combined.

(4) **Application and amendments.** This chapter and any amendments to this chapter apply to cases pending at the time of the adoption of the rule or amendment, unless the amendment or rule-making order specifically states that it does not apply to pending cases. An amendment to this chapter does not require that anything already done be redone in order to comply with the amendment, unless the amendment expressly says so.

(5) **Effective date.** This chapter is initially effective July 3, 2006. In addition to cases arising on or after the effective date, this chapter, and not its DSHS predecessor, applies to all pending DEL cases that have not gone to a full hearing before an ALJ by July 3, 2006, and to cases in which an initial decision is subject to review, but in which a petition for review has not been filed by July 3, 2006. This chapter does not apply to cases in which the hearing was held or begun prior to July 3, 2006, and/or which are awaiting initial decisions; Provided, Parts VIII and IX of this chapter, governing review of initial and final orders, will apply to review of any initial orders mailed after the effective date of this chapter.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0010, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0010, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0020 Definitions. The following definitions apply to this chapter:

(1) **"Adjudicative proceeding"** means a hearing before an administrative law judge concerning an appeal of department action pursuant to RCW 43.215.305.

(2) **"Administrative law judge" or "ALJ"** means an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs.

(3) **"Business days"** means all days except Saturdays, Sundays and legal holidays.

(4) **"Calendar days"** means all days including Saturdays, Sundays and legal holidays.

(5) **"Case"** means the entire proceeding following the filing of a request for hearing with OAH.

(6) **"Continuance"** means a change in the date or time of a prehearing conference, hearing or deadline for other action.

(7) **"DEL" or "department"** means the department of early learning.

(8) **"Documents"** means papers, letters, writings, or other printed or written items.

(9) **"Ex parte contact"** means a written or oral communication with an ALJ or review judge about something related to the hearing when the other parties are not present. Procedural questions are not considered an ex parte contact. Examples of procedural questions include clarifying the hearing date, time, or location or asking for directions to the hearing location.

(10) **"Final order"** means an order that is the final DEL decision. An ALJ's initial order becomes a final order if the ALJ's initial order is not appealed to a review judge. If an

ALJ's initial order is appealed to a review judge, the review judge's order is DEL's final decision.

(11) **"Good cause"** means a substantial reason or legal justification for an action or for failing to appear, act, or respond to an action required under these rules.

(12) **"Hearing"** means a proceeding before OAH that gives an aggrieved party an opportunity to be heard in disputes resulting from actions taken against the party by DEL. For purposes of this chapter, hearings include administrative hearings, adjudicative proceedings, and any other similar term referenced under chapter 34.05 RCW, the Administrative Procedure Act, Title 170 of the Washington Administrative Code, chapter 10-08 WAC, or other law.

(13) **"Initial order"** is a decision made by an ALJ that may be reviewed by a review judge.

(14) **"OAH"** means the office of administrative hearings. This is a separate agency and not part of DEL.

(15) **"Party"** means a person or entity to whom a DEL adverse action is directed and who has a right to be involved in the hearing process. DEL also is a party.

(16) **"Representative"** means the person selected by a party to represent that party in an administrative hearing. **"Lay representative"** means a person or advocate who is assisting a party in presenting that party's case in administrative hearings. **"DEL representative"** means an employee of DEL, a DEL contractor, or an employee of the office of the attorney general authorized to represent DEL in an administrative hearing.

(17) **"Record"** means the official documentation of the hearing process. The record includes tape recordings or transcripts, admitted exhibits, decisions, briefs, notices, orders, and other filed documents.

(18) **"Review"** means the act of reviewing initial orders and issuing the DEL final order as provided by RCW 34.05.464.

(19) **"Review judge"** means an attorney employed by or designated by DEL to act as the reviewing officer and who is authorized to review initial orders and to prepare and enter the final agency order.

(20) **"Rule"** means a state regulation, including a licensing standard. Rules are found in the Washington Administrative Code (WAC).

(21) **"Stay"** means an order temporarily halting the DEL decision or action.

(22) Words of command such as **"will," "shall,"** and **"must"** are words that impose a mandatory obligation on a participant in the hearing process. The word **"may"** is used when referring to a discretionary act to be taken by a participant in the hearing process.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0020, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0020, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0030 Computing time for meeting deadlines in the hearing process. (1) When counting days to find out when the time allowed or prescribed for an action under these rules or to meet a hearing deadline:

(a) Do not include the day of the action, notice, or order. For example, if an initial order is mailed on Tuesday and a party has twenty-one days from the date of mailing to request

a review, count Wednesday as the first day. Similarly, if a DEL notice of denial, revocation, suspension, or modification of a license is received on a Wednesday and an individual has twenty-eight days from the date of receipt to file a request for an adjudicative proceeding, count Thursday as the first day.

(b) Count the last day of the period, unless the last day is a Saturday, Sunday or legal holiday, in which case the deadline is the next business day.

(2) For periods of seven days or less, count only business days. For example, if you have seven days to respond to a review request that was mailed to you on Friday, May 10, the response period ends on Tuesday, May 21.

(3) For periods over seven days, count every day, including Saturdays, Sundays, and legal holidays.

(4) The deadline ends at 5:00 p.m. on the last day.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0030, filed 3/5/08, effective 4/5/08.]

II. HEARING RIGHTS AND REQUESTS

WAC 170-03-0040 The right to a hearing. (1) A person or entity has a right to a hearing only if a law or DEL rule expressly gives that right and a hearing is timely requested.

(2) A party has only a limited time to request a hearing. The deadline for the request is set by statute or DEL rule. In most cases, DEL will send a notice of adverse action that gives specific information about how, where and when to request a hearing.

(3) A challenge to a DEL adverse action is heard in an administrative hearing by an administrative law judge (ALJ) employed by the office of administrative hearings (OAH). Not all actions of DEL may be challenged through the hearing.

(4) If a party requests a hearing, one will be scheduled.

(5) If DEL or the ALJ questions a party's right to a hearing, the ALJ decides whether the party has that right. The ALJ will decide either:

(a) There is no right to a hearing and dismiss the case; or

(b) There is a right to a hearing and proceed with the hearing.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0040, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0050 Requesting a hearing. (1) A request for hearing must be made in writing. DEL will provide forms that requesting parties may use to request a hearing. The request for hearing can be made by the party requesting the hearing or by the party's representative.

(2) The hearing request shall include:

(a) The requesting party's name, address, and telephone number;

(b) A brief explanation of why the requesting party disagrees with the DEL adverse action;

(c) Any assistance, such as a foreign or sign language interpreter or accommodation for a disability, needed by the requesting party;

(d) A copy of the notice from DEL stating the adverse action.

(11/25/15)

(3) Within twenty-eight days of receipt of notice of DEL's adverse action, the request shall be filed with OAH and served on DEL.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0050, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0060 Filing the request for hearing. (1) Filing is the act of delivering documents to OAH at the location listed in WAC 170-03-0070.

(2) The date of filing is the date documents are actually received by OAH during office hours.

(3) A party may file documents with OAH by:

(a) Personal service (hand delivery);

(b) First class, registered, or certified mail;

(c) Fax transmission, if the party also mails a copy of the document the same day;

(d) Commercial delivery service; or

(e) Legal messenger service.

(4) A party cannot file documents by email.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0060, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0070 Location of office of administrative hearings. (1) The office of administrative hearings (OAH) is open from 8:00 a.m. to 5:00 p.m. Monday through Friday, except legal holidays.

(2) The address for the office of administrative hearings (OAH) is:

Office of Administrative Hearings
2420 Bristol Court S.W., 1st Floor
P.O. Box 42488
Olympia, WA 98504-2488
360-664-8717
360-664-8721 (fax)

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0070, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0080 Service of notice and documents. (1) Service is the act of delivering a copy of documents to the opposing party. Service gives the opposing party notice of the request for hearing or other action. When a document is given to a party, that party is considered served with official notice of the contents of the document.

(2) A party may serve another party by:

(a) Personal service (hand delivery);

(b) First class, registered, or certified mail;

(c) Fax, if the party also mails a copy of the document the same day;

(d) Commercial delivery service; or

(e) Legal messenger service.

(3) A party cannot serve documents by email.

(4) A party must serve all other parties or a party's representative, if the party is represented, whenever the party files a pleading (request for hearing), brief or other document with OAH or the review judge or when required by law.

(5) Service is complete when:

(a) Personal service is made;

[Ch. 170-03 WAC p. 3]

(b) Mail is properly stamped, addressed and deposited in the United States mail;

(c) Fax produces proof of transmission;

(d) A parcel is delivered to a commercial delivery service with charges prepaid; or

(e) A parcel is delivered to a legal messenger service with charges prepaid.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0080, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0090 Proof of service. A party may prove that an opposing party was served with documents by providing any of the following:

(1) A sworn statement by the person who served the document;

(2) The certified mail receipt signed by the recipient;

(3) An affidavit or certificate of mailing;

(4) A signed receipt from the person who accepted the commercial delivery service or legal messenger service package;

(5) Proof of fax transmission; or

(6) Acknowledgment by the party being served.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0090, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0100 Representation during the hearing process. (1) The party requesting the hearing may represent himself or herself or may have another person, except a DEL employee, act as the representative.

(2) The representative may be a friend, relative, community advocate, attorney, paralegal, or lay representative.

(3) The representative shall provide OAH and the other parties with the representative's name, address, and telephone number. If the representative is an attorney or lay representative, the representative must file a written notice of appearance in the action. If the representative is not an attorney, the party must provide a written statement to DEL authorizing the release of information about the party to the representative.

(4) DEL may be represented by an employee of DEL, a DEL contractor, or an assistant attorney general.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0100, filed 3/5/08, effective 4/5/08.]

III. INTERPRETER SERVICES

WAC 170-03-0110 The right to an interpreter in the hearing process. (1) If a party or witness has limited English proficiency (LEP), OAH will provide an interpreter during the hearing at no cost.

(2) If OAH is notified that a party is a limited English-speaking person (LES), all notices concerning hearings must:

(a) Be written in the party's primary language; or

(b) Include a statement, in the primary language, explaining the importance of the notice and informing the party how to get help in understanding the notice and responding to it.

[Ch. 170-03 WAC p. 4]

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0110, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0120 Definitions. The following definitions apply to rules relating to interpreter services.

(1) "**Limited English proficient person**" includes limited English-speaking persons or other persons unable to readily communicate in spoken English.

(2) "**Limited English-speaking person**" means a person who, because of non-English-speaking cultural background or disability (including a hearing impairment), cannot readily speak or understand the English language.

(3) "**Hearing impaired person**" means a person who, because of a hearing or speech impairment, cannot readily speak, understand or communicate in spoken language.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0120, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0130 Interpreter qualifications. (1) OAH must provide a qualified interpreter to assist any person who:

(a) Has limited English proficiency; or

(b) Is limited English speaking or hearing impaired; and

(c) Is a party or witness in a hearing.

(2) OAH may hire or contract with persons to interpret at hearings.

(3) Relatives of any party and DEL employees may not be used as interpreters.

(4) The ALJ must determine, at the beginning of the hearing, if an interpreter can accurately interpret all communication for the person requesting the service.

(5) The parties or their representatives may question the interpreter's qualifications and ability to be impartial.

(6) If at any time before or during the hearing the ALJ finds that the interpreter does not provide accurate and effective communication, OAH must provide another interpreter.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0130, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0140 Waiver of interpreter services. (1) An eligible party may waive interpreter services.

(2) A request for waiver must be made in writing or through a qualified interpreter on the record.

(3) The ALJ must determine that the waiver has been knowingly and voluntarily made.

(4) A waiver of interpreter services may be withdrawn at any time before or during the hearing.

(5) A waiver of interpreter services at the hearing constitutes a waiver of a right to challenge any aspect of the hearing based on a lack of understanding resulting from an inability to understand or a lack of proficiency in the English language.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0140, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0150 Requirements that apply to the use of interpreters. (1) Interpreters must:

(a) Use the interpretive mode that the parties, the limited English proficient, limited English speaking, or hearing impaired person, the interpreter, and the ALJ consider the most accurate and effective;

(b) Interpret statements made by the parties, witnesses, and the ALJ;

(c) Not disclose information about the hearing without the written consent of the parties unless required by law; and

(d) Not comment on the hearing or give legal advice.

(2) The ALJ must allow enough time for all interpretations to be made and understood.

(3) The ALJ may videotape a hearing and use it as the official transcript for hearings involving a hearing impaired person.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0150, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0160 Requirements that apply to decisions involving limited-English-speaking parties. (1) When an interpreter is used at a hearing, the administrative law judge (ALJ) must explain that decisions are written in English and that the office of administrative hearings (OAH) will provide an interpreter for an oral translation of the decision at no cost to that party.

(2) OAH must provide the party needing interpretation services information about how to obtain those services. Information about how to access interpretation services must be attached to the decision or order. The individual who provides the interpretation service does not need to be the same individual who provided the interpreter services at the hearing.

(3) OAH or the review judge must send a copy of a decision or order to an interpreter for use in oral interpretation.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0160, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0160, filed 3/5/08, effective 4/5/08.]

IV. PREHEARING PROCEDURES

WAC 170-03-0170 Notice of hearing. (1) When a hearing is requested, OAH sends the parties a written notice of the hearing or prehearing conference.

(2) The notice of hearing or prehearing conference will include:

(a) The names, mailing addresses, and telephone numbers of all parties and of their representatives;

(b) The name, mailing address, and telephone number of the ALJ;

(c) The date, time, place, and nature of the hearing or prehearing conference;

(d) The legal authority and jurisdiction for the hearing or prehearing conference; and

(e) The date of the hearing request.

(3) OAH also will send information with the notice of hearing or prehearing conference stating:

(a) If a party and the party's representative fail to attend or participate in a prehearing conference or a hearing, that party may lose the right to a hearing and the ALJ may enter an order of default or an order dismissing the case.

(11/25/15)

(b) If a party or witness needs a qualified interpreter because the party or witness is entitled to an interpreter under WAC 170-03-0110 and 170-03-0130, OAH will provide an interpreter at no cost.

(c) Whether the hearing or prehearing conference is to be held by telephone or in person, and how to request a change in the way it is held.

(d) How to indicate any special needs for a party or witness.

(e) How to contact OAH if a party or witness has a safety concern.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0170, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0180 Prehearing conferences. (1) A prehearing conference is a formal meeting that may be conducted by an ALJ before a full hearing. A prehearing conference may not be conducted in some cases. In others, more than one prehearing conference may be necessary.

(2) Either the ALJ or a party may request a prehearing conference, but the ALJ decides whether to hold a prehearing conference. OAH sends notice of the time and date of the prehearing conference to all parties.

(3) An ALJ may conduct the prehearing conference in person, by telephone conference call, by electronic means, or in any other manner acceptable to the parties.

(4) Attendance of the parties and their representatives is mandatory. A party may lose the right to participate during the hearing if that party and their representative does not attend the prehearing conference. Your appeal may be dismissed if you and your representative do not attend.

(5) Additional prehearing conferences may be requested by the parties and/or set by the ALJ to address the procedural or other issues specific to the case.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0180, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0190 Purposes of prehearing conference. (1) The purposes of the prehearing conference are to clarify issues, set deadlines for the parties to exchange information regarding witnesses and evidence, and set the time for the hearing.

(2) During a prehearing conference the parties and the ALJ may:

(a) Simplify or clarify the issues to be decided during the hearing;

(b) Agree to the date, time and place of the hearing;

(c) Identify accommodation and safety issues;

(d) Agree to postpone the hearing;

(e) Allow the parties to make changes in their own documents, including the DEL notice of adverse action or the appealing party's hearing request;

(f) Agree to facts and documents to be entered during the hearing;

(g) Set a deadline for each party to file and serve the names and phone numbers of witnesses, and copies of all documents or other exhibits that will be presented at the hearing;

[Ch. 170-03 WAC p. 5]

- (h) Schedule additional prehearing conferences;
- (i) Resolve the dispute;
- (j) Consider granting a stay if authorized by law or DEL rule;
- (k) Consider a motion for summary judgment or other motion; or
- (l) Determine any other procedural issues raised by the parties.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0190, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0200 Prehearing order. (1) After the prehearing conference ends, the ALJ will send a prehearing order describing:

- (a) The decisions made or actions taken during the conference;
 - (b) Any changes to DEL's or other party's initial documents; and
 - (c) Any agreements reached.
- (2) A party may object to the prehearing order by notifying the ALJ in writing within ten days after the mailing date of the order. The ALJ must issue a ruling on the objection.

(3) If no objection is made to the prehearing order, the order determines how the hearing is conducted, including whether the hearing will be in person or held by telephone conference or other means, unless the ALJ changes the order for good cause.

(4) Prehearing orders are not final appealable orders of the department.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0200, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0210 Assignment and challenge of assignment of administrative law judge. (1) OAH assigns an ALJ at least five business days before the hearing and discloses that assignment in writing to the parties. A party may ask which ALJ is assigned to the hearing by calling or writing the OAH field office listed on the notice of hearing.

(2) A party may file a motion of prejudice against an ALJ under RCW 34.12.050 by:

(a) Sending a written motion of prejudice at least three business days before the hearing, and before the ALJ rules on a discretionary issue in the case.

(b) The motion of prejudice must include an affidavit that a party does not believe that the ALJ can hear the case fairly.

(c) The party must send the request to the chief administrative law judge in care of the OAH field office where the ALJ works and send a copy of the request to all other parties or, if other parties are represented, to the representatives.

(3) The first timely request for a different ALJ is automatically granted. Any later request may be granted or denied by the chief ALJ or a designee.

(4) A party may also request that an ALJ or review judge be disqualified under RCW 34.05.425, for bias, prejudice, conflict of interest, or any other good cause or if one of the parties or a party's representative has an ex parte contact with the ALJ or review judge by:

(a) Sending a written petition for disqualification. A petition for disqualification is a written explanation to request assignment of a different ALJ or review judge. A party must promptly make the petition upon discovery of facts establishing grounds for disqualification.

(b) A party must send or deliver the petition to the ALJ or review judge assigned to the case and send a copy of the petition to all other parties or, if other parties are represented, to the representatives. The ALJ or review judge must decide whether to grant or deny the petition and must state the facts and reasons for the decision.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0210, filed 3/5/08, effective 4/5/08.]

V. LAWS APPLIED IN ADMINISTRATIVE HEARINGS

WAC 170-03-0220 Rules an ALJ or review judge must apply when making a decision. (1) ALJs and review judges must first apply the DEL rules adopted in the Washington Administrative Code.

(2) If no DEL rule applies, the ALJ or review judge must decide the issues according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, rules, and published appellate court decisions.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0220, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0230 Challenges to validity of DEL rules. (1) Neither an ALJ nor a review judge may decide that a DEL rule is invalid or unenforceable. Only a court may decide this issue.

(2) If the validity of a DEL rule is raised during the hearing, the ALJ or review judge may allow argument for later court review.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0230, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0240 Amendment to DEL notice or party's request for hearing. (1) The ALJ must allow DEL to amend (change) the notice of a DEL adverse action before or during the hearing to match the evidence and facts.

(2) If DEL amends its notice, it must put the change in writing and give a copy to the ALJ and the other parties.

(3) The ALJ may allow an appealing party to amend a hearing request before or during the hearing to conform with an amended DEL notice.

(4) If there is an amendment to either the DEL notice or the appealing party's request for hearing, the ALJ must offer to continue or postpone the hearing to give the parties more time to prepare or present evidence or argument if there is a significant change from the earlier DEL notice or from the appealing party's request for hearing.

(5) If the ALJ grants a continuance, OAH must send a new hearing notice at least seven business days before the new hearing date.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0240, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0250 Changes of address. (1) Parties and representatives must tell DEL and OAH, as soon as possible, when the party's or the representative's name, mailing address or telephone number changes.

(2) If OAH and DEL are not notified of a change in a party's or a representative's mailing address and either DEL or OAH continues to send documents to the address stated in the file, the ALJ and DEL may assume that the documents were received.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0250, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0260 Continuances. (1) Any party may request a continuance either orally or in writing.

(2) Before contacting the ALJ to request a continuance, a party shall contact the other parties, if possible, to find out if they will agree to a continuance.

(3) The party making the request for a continuance must let the ALJ know whether the other parties agree to the continuance.

(a) If the parties agree to a continuance, the ALJ will grant the request, unless the ALJ finds that good cause for a continuance does not exist.

(b) If the parties do not agree to a continuance, the ALJ will set a hearing to decide whether there is good cause to grant or deny the request for continuance.

(4) If a request for continuance is granted, OAH will send written notice of the changed time and date of the hearing.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0260, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0270 Order of dismissal. (1) An order of dismissal is an order sent by the ALJ to end the hearing. The order is made by agreement of the parties, or because the party who requested the hearing withdrew the request, failed to appear, or refused to participate.

(2) If a hearing is dismissed because the appealing party withdrew the request, did not appear, or refused to participate, the DEL decision stands.

(3) If the hearing is dismissed due to a written agreement between the parties, the parties must follow the agreement.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0270, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0280 Vacating an order of default or order of dismissal. (1) A party may ask the ALJ to vacate (set aside) an order of default or dismissal.

(a) A request to vacate an order must be filed with OAH within twenty-one calendar days after the date the order of default or dismissal was mailed. If no request is received within that deadline, the order becomes a final order.

(b) The request to vacate an order of default or dismissal must specify why the party believes there is good cause for the order to be vacated.

(11/25/15)

(2) OAH will schedule a hearing on the request to vacate the order.

(3) At the hearing, the ALJ will receive evidence and argument from the parties on whether there is good cause for an order of default to be vacated.

(4) The ALJ will vacate an order of dismissal and reinstate the hearing if the defaulted party shows good cause or if the DEL representative agrees to waive the deadline.

(5) An agreed order of dismissal may be vacated only upon proof that a party has violated a condition of the agreed order of dismissal.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0280, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0290 Stay of DEL action. Only as set forth in WAC 170-03-0300, at any point in the proceeding before OAH or the review judge, the appealing party may request that an ALJ or review judge stay (stop) a DEL action until there is a decision entered by the ALJ or review judge.

[Statutory Authority: RCW 43.215.060, 43.215.070, and chapter 43.215 RCW. WSR 13-21-111, § 170-03-0290, filed 10/22/13, effective 11/22/13. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0290, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0300 Stay of summary suspension of child care license. (1) The department may immediately and summarily suspend a license when:

(a) It finds that conditions in the licensed facility constitute an imminent danger to a child or children in care; or

(b) The public health, safety, or welfare requires emergency action.

(2) Pursuant to WAC 170-03-0040 and 170-03-0050 a licensee may request a hearing to challenge the decision to summarily suspend a license. A licensee who contests a summary suspension of a license may obtain a stay of the effective date of the suspension only as set forth in this section.

(3) It shall be the licensee's burden to establish that the stay is in the public interest and is made for good cause.

(4) The licensee's request for a stay of the summary suspension must be made by filing a motion for stay of summary suspension. The motion for stay of summary suspension must be filed with the initial request for hearing, or by subsequent motion. The motion for stay, and documents and pleadings described in subsection (5) of this section, shall be served on the office of administrative hearings, and attorney general's office, by noon on the seventh day before the hearing, unless a shorter time is ordered. Reply affidavits or declarations shall be served on the licensee's attorney, or representative, by noon on the day prior to the hearing. If unrepresented, the reply affidavits or declarations shall be served on the licensee.

(5) The motion for stay must be accompanied by a statement of grounds justifying the stay and a description of evidence setting forth the factual basis upon which the request is based. The decision to grant or deny the request for a stay shall be based on:

(a) Legal authority; and

(b) Affidavits or declarations signed under penalty of perjury.

[Ch. 170-03 WAC p. 7]

(6) The hearing officer shall not allow the presentation of oral testimony at a stay hearing except under the following circumstances:

(a) The party seeking the opportunity to offer oral testimony must file a motion for permission to offer oral testimony. The decision to grant or deny the motion must be based on affidavits filed in support of or opposition to the motion to offer oral testimony.

(b) Oral testimony shall only be permitted if substantial evidence has been presented establishing that the failure to allow oral testimony will deny the moving party the opportunity for a fair stay hearing.

(7) Upon receipt of a motion for a stay, the ALJ shall schedule a hearing on the motion, not less than seven days from the date the request is received by the office of administrative hearings.

(8) The ALJ shall not grant the motion for stay unless the ALJ makes specific findings that the stay is in the public interest and is made for good cause. In finding good cause, the ALJ must determine:

(a) The licensee is likely to prevail in the hearing on the merits of the licensing action;

(b) The licensee will suffer irreparable injury if the stay is not granted;

(c) The threat to the public health, safety, or welfare inherent in the licensee's operation of a child care facility is not sufficiently serious to justify the suspension of the license; and

(d) Economic hardship of itself shall be an insufficient reason for a finding of irreparable injury under (b) of this subsection.

(9) Unless otherwise stipulated by the parties, the ALJ, after granting or denying a motion for stay, will expedite the hearing and decision on the merits.

(10) The decision on the motion for stay is subject to review by the review judge at the request of either DEL or the licensee. The request for review must be filed not later than seven days following the date the decision on the motion for stay is mailed by OAH to the parties.

(11) A request for review by the review judge shall be promptly determined. The decision on the request for review by the review judge shall not be subject to judicial review.

[Statutory Authority: RCW 43.215.060, 43.215.070, and chapter 43.215 RCW. WSR 13-21-111, § 170-03-0300, filed 10/22/13, effective 11/22/13. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0300, filed 3/5/08, effective 4/5/08.]

VI. HEARINGS

WAC 170-03-0340 Conduct of hearings. (1) Hearings may be held in person or by telephone conference or other electronic means.

(2) All parties, their representatives and witnesses may attend the hearing in person or by telephone conference or other electronic means at the discretion of the ALJ.

(3) Whether a hearing is held in person or by telephone conference, the parties have the right to see all documents, hear all testimony and question all witnesses.

(4) When a hearing is held by telephone or other electronic means, all documentary evidence must be filed and served in advance of the hearing.

(5) All hearings must be recorded.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0340, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0350 Authority of the administrative law judge. (1) The ALJ must hear and decide the issues de novo (anew) based on what is presented during the hearing, provided that the ALJ's authority shall be limited to determining whether the sanction imposed or action taken by the department was warranted and/or justified under the evidence presented during the hearing. The ALJ shall not have authority to substitute or impose an alternative sanction, remedy or action.

(2) As needed, the ALJ may:

(a) Administer oaths and affirmations;

(b) Determine the order for presenting evidence;

(c) Issue subpoenas and protective orders as provided in the Administrative Procedure Act;

(d) Rule on objections, motions, and other procedural matters;

(e) Rule on motions for summary judgment;

(f) Rule on offers of proof and receive relevant evidence;

(g) Pursuant to RCW 34.05.449(5), close parts of a hearing to public observation or order the exclusion of witnesses upon a showing of good cause;

(h) Question witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the matter;

(i) Request additional exhibits and/or testimony following a finding that the additional evidence is necessary to complete the record provided all parties are given a full opportunity for cross-examination and/or rebuttal;

(j) Take official notice of facts pursuant to RCW 34.05.452(5);

(k) Regulate the course of the hearing and take any appropriate action necessary to maintain order during the hearing;

(l) Permit or require oral argument or briefs and determine the time limits for submission thereof;

(m) Issue an order of default pursuant to RCW 34.05.440;

(n) Hold prehearing conferences;

(o) Allow a party to waive rights given by chapter 34.05 RCW or these rules unless another law prevents it;

(p) Decide whether a party has a right to a hearing;

(q) Permit and regulate the taking of discovery;

(r) Consider granting a stay if authorized by law or DEL rule; and

(s) Take any other action necessary and authorized by any applicable statute or rule.

(3) The ALJ may, upon his or her own motion or the motion of any party, order that multiple administrative proceedings be consolidated for hearing if they involve common issues or parties.

(4) The ALJ may waive any of the department's procedural rules, other than a rule relating to jurisdiction, for any

party not represented by legal counsel or a lay representative upon specific findings that:

- (a) The waiver is necessary to avoid manifest injustice to the unrepresented party; and
- (b) That the waiver would not prejudice any other party.
- (5) The ALJ shall make findings of fact based on the preponderance of the evidence unless otherwise required by law.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0350, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0360 Order of the hearing. (1) At the hearing, the ALJ:

- (a) Explains the rights of the parties;
- (b) Marks and admits or rejects exhibits;
- (c) Ensures that a record is made;
- (d) Explains that a decision is mailed after the hearing;

and

- (e) Notifies the parties of appeal rights.
- (2) The parties may:
 - (a) Make opening statements to explain the issues;
 - (b) Offer evidence to prove their positions, including oral or written statements of witnesses;
 - (c) Question the witnesses presented by the other parties; and
 - (d) Give closing arguments about what the evidence shows and what laws apply.

(3) At the end of the hearing if the ALJ does not allow more time to send in evidence, the record is closed.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0360, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0390 Evidence. (1) Evidence includes documents, objects, and testimony of witnesses that parties give during the hearing to help prove their positions.

(2) Evidence may be all or parts of original documents or copies of the originals.

(3) Parties may offer statements signed by a witness under oath or affirmation as evidence, if the witness cannot appear.

(4) Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ.

(5) The ALJ may only consider admitted evidence to decide a case.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0390, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0400 Introduction of evidence into the record. (1) The ALJ may set a deadline before the hearing for the parties to provide proposed exhibits and names of witnesses to the ALJ and to all other parties. If the parties miss the deadline, the ALJ may refuse to admit the evidence unless the parties show:

- (a) They have good cause for missing the deadline; or
- (b) The other parties agree to waive the deadline.
- (2) The ALJ may admit and consider hearsay evidence. Hearsay is a statement made outside of the hearing used to prove the truth of what is in the statement. The ALJ may only

base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it.

- (3) The ALJ may reject evidence, if it:
 - (a) Is not relevant;
 - (b) Repeats evidence already admitted;
 - (c) Is from a privileged communication protected by law;
- or
- (d) Is otherwise legally improper.

(4) Except in cases where the department's notice of adverse action alleges the person lacks the character to provide for the needs of any child in care or to have unsupervised access to any child in care, evidence regarding character or reputation shall not be admissible. In cases where such evidence is admissible, the ALJ shall exercise reasonable control over the number of character witnesses so as to avoid duplication of testimony and evidence and needless consumption of time.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0400, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0410 Objections to evidence. (1) Although a party may offer any documents and testimony at the hearing to support the party's position, other parties may object to the evidence and may question the witnesses. For example, a party may object to the authenticity or admissibility of any exhibit, or offer argument about how much weight the ALJ should give the exhibit.

(2) The ALJ determines whether to admit the evidence and what weight (importance) to give it.

(3) If the ALJ does not admit the evidence, the party may make an offer of proof to show why the ALJ should admit it. The offer of proof preserves the issue for appeal. To make an offer of proof, a party presents evidence and argument on the record to show why the ALJ should consider the evidence.

(4) If a witness refuses to answer any question ruled proper by the ALJ, the ALJ has discretion to strike all testimony previously given by that witness on the proceeding.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0410, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0420 Stipulations. (1) A stipulation is an agreement among two or more parties that certain facts or evidence is correct or authentic.

(2) If an ALJ accepts a stipulation, the ALJ must enter it into the record.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0420, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0430 Exhibits. (1) Proposed exhibits are documents or other objects that a party wants the ALJ to consider when reaching a decision. After the document or object is accepted by the ALJ, it is admitted and becomes an exhibit.

(2) The ALJ may require the parties to mark and number their proposed exhibits before the hearing and to provide copies to the other parties as far ahead of the hearing as possible.

(3) The ALJ admits proposed exhibits into the record by marking, listing, identifying, and admitting the proposed exhibits.

(4) The ALJ may also exclude proposed exhibits from the record.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0430, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0440 Judicial notice. (1) Judicial notice is evidence that includes facts or standards that are generally recognized and accepted by judges, government agencies, or national associations, such as a calendar, building code or standard of practice.

(2) An ALJ may consider and admit evidence by taking judicial notice.

(3) If a party requests judicial notice, or if the ALJ intends to take judicial notice, the ALJ may ask the party to provide a copy of the document that contains the information.

(4) The ALJ must give the parties time to object to judicial notice evidence.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0440, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0450 Witnesses. (1) A witness is any person who makes statements or gives testimony that becomes evidence in a hearing.

(2) One type of witness is an expert witness. An expert witness is qualified by knowledge, experience, and education to give opinions or evidence in a specialized area.

(3) Witnesses may include:

- (a) The appealing party or a DEL representative;
- (b) Anyone a party or the ALJ asks to be a witness.
- (c) The ALJ decides who may testify as a witness.

(5) Unless DEL agrees, a current or former DEL employee may not be an expert witness against DEL if that employee was actively involved in the case while working for DEL.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0450, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0460 Requiring witnesses to testify or provide documents. (1) A party may require witnesses to testify or provide documents by issuing a subpoena. A subpoena is an order to appear at a certain time and place to give testimony, or to provide books, documents, or other items.

(2) ALJs, DEL, and attorneys for the parties may prepare subpoenas.

(3) If a party is not represented by an attorney, the party may ask the ALJ to prepare a subpoena on that party's behalf.

(a) The ALJ may schedule a hearing to decide whether to issue a subpoena.

(b) There is no cost to prepare a subpoena, but a party may have to pay for:

- (i) Serving a subpoena;
- (ii) Complying with a subpoena; and
- (iii) Witness fees according to RCW 34.05.446(7).

(4) A party may request that an ALJ quash (set aside) or change the subpoena at any time before the deadline given in the subpoena.

(5) An ALJ may set aside or change a subpoena if it is unreasonable.

[Ch. 170-03 WAC p. 10]

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0460, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0470 Serving a subpoena. (1) Any person who is at least eighteen years old and not a party to the hearing may serve a subpoena.

(2) Service of a subpoena is complete when the server:

- (a) Gives the witness a copy of the subpoena; or
- (b) Leaves a copy at the residence of the witness with a person over the age of eighteen.

(3) To prove that a subpoena was served on a witness, the person serving the subpoena must sign a written, dated statement including:

- (a) Who was served with the subpoena;
- (b) When the subpoena was served;
- (c) Where the subpoena was served; and
- (d) The name, age, and address of the person who served the subpoena.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0470, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0480 Testimony. (1) Direct examination. All witnesses may be asked questions by the party that calls the witness to testify. Each witness:

(a) Must affirm or take an oath to testify truthfully during the hearing;

(b) May testify in person or by telephone;

(c) May request interpreters from OAH at no cost to the parties;

(d) May be subpoenaed and ordered to appear according to WAC 170-03-0460.

(2) Cross-examination. The parties have the right to cross-examine (question) each witness called by any other party.

(3) If a party has a representative, only the representative, and not the party, may question the witness.

(4) The ALJ may also question witnesses.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0480, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0490 Burden of proof. (1) The party who has the burden of proof is the party who has the responsibility to provide evidence to persuade the ALJ that a position is correct under the standard of proof required.

(2) Standard of proof refers to the amount of evidence needed to prove a party's position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.

(3) The ALJ decides if a party has met the burden of proof.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0490, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0500 Equitable estoppel. (1) Equitable estoppel is a legal doctrine defined in case law that may prevent DEL from taking some action against a party in a proceeding to challenge an overpayment notice issued by DEL.

(2) There are five elements of equitable estoppel that must be proved by clear and convincing evidence. All of the following elements must be proved:

(a) DEL made a statement or took action or failed to take action, which is inconsistent with its later claim or position regarding an overpayment.

(b) The appealing party relied on DEL's original statement, action or failure to act.

(c) The appealing party will be injured if DEL is allowed to contradict the original statement, action or failure to act.

(d) Equitable estoppel is needed to prevent a manifest injustice.

(e) The exercise of government functions is not impaired.

(3) If the ALJ concludes that all of the elements of equitable estoppel in subsection (2) of this section have been proved with clear and convincing evidence, DEL is stopped or prevented from taking action or enforcing its claim for repayment of the overpayment.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0500, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0510 Closing the record. When the record is closed, no more evidence may be taken, without a showing of good cause. The record is closed:

(1) At the end of the hearing if the ALJ does not allow more time to send in evidence or argument; or

(2) After the deadline for sending in evidence or argument is over.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0510, filed 3/5/08, effective 4/5/08.]

VII. INITIAL ORDERS

WAC 170-03-0520 Timing of the ALJ's decision. (1) After the record is closed, the ALJ must write an initial order and send copies to the parties.

(2) The maximum time an ALJ has to send an initial order is ninety calendar days after the record is closed.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0520, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0530 Contents of the initial order. The ALJ initial order must:

(1) Identify the hearing decision as a DEL case;

(2) List the name and docket number of the case and the names of all parties and representatives;

(3) Find the specific facts determined to exist by the ALJ, based on the hearing record, and relied on by the ALJ in resolving the dispute;

(4) Explain why evidence is credible when the facts or conduct of a witness is in question;

(5) State the law that applies to the dispute;

(6) Apply the law to the facts of the case in the conclusions of law;

(7) Discuss the reasons for the decision based on the facts and the law;

(8) State the result;

(11/25/15)

(9) Explain how to request changes in the decision and the deadlines for requesting them;

(10) State the date the decision becomes final; and

(11) Include any other information required by law or DEL program rules.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0530, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0540 Finality of initial order. If no one requests review of the initial order or if a review request is dismissed, the initial order becomes the DEL final decision twenty-one calendar days after the date it is mailed to the parties by OAH.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0540, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0550 Challenges to the initial order. (1) If a party disagrees with an ALJ's initial order because of a clerical error, the party may ask for a corrected decision from the ALJ as provided in WAC 170-03-0560.

(2) If a party disagrees with the reasoning and result of an initial order and wants it changed, the party must request review by the review judge as provided in WAC 170-03-0570 through 170-03-0620.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0550, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0560 Correcting clerical errors in ALJ's decisions. (1) A clerical error is a mistake that does not change the result or intent of the decision. Some examples of clerical error are:

(a) Missing or incorrect words or numbers;

(b) Dates inconsistent with the decision or evidence in the record such as using May 3, 1989, instead of May 3, 1998; or

(c) Math errors when adding the total of an overpayment.

(2) A party may ask for a corrected ALJ decision by making the request in writing and sending it to the OAH office that held the hearing. A copy of the request must be sent to the other parties or their representatives.

(3) A request to correct a clerical error must be made within ten days of the date the decision was mailed to the parties by OAH.

(4) When asking for a corrected decision, a party must clearly identify the clerical error.

(5) When a party requests a corrected initial or final order, the ALJ must either:

(a) Send all parties a corrected order; or

(b) Deny the request within three business days of receiving it.

(6) If the ALJ corrects an initial order and a party does not request review, the corrected initial order becomes final twenty-one calendar days after the original initial order was mailed.

(7) Requesting a corrected initial order for a case does not extend the deadline to request review of the initial order by the review judge.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0560, filed 3/5/08, effective 4/5/08.]

VIII. REVIEW OF INITIAL ORDERS

WAC 170-03-0570 Appeal of the initial order. (1)

Review of the initial order may occur when a party disagrees with or wants a change in an initial order, other than correcting a clerical error.

(2) A party must request review of an initial order from the review judge as provided in WAC 170-03-0580 through 170-03-0640.

(3) If more than one party requests review, each request must meet the deadlines in WAC 170-03-0580.

(4) The review judge considers the request, the initial order, and record, before deciding if the initial order may be changed.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0570, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0570, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0580 Time for requesting review. (1)

The review judge must receive the written petition for review on or before the twenty-first calendar day after the initial order was mailed.

(2) A review judge may extend the deadline if a party both:

- (a) Asks for more time before the deadline expires; and
- (b) Shows good cause for requesting more time.

(3) A review judge may accept a review request after the twenty-one calendar day deadline only if:

- (a) The review judge receives the review request on or before the thirtieth calendar day after the deadline; and
- (b) A party shows good cause for missing the deadline.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0580, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0590 Petition for review. (1) A party must make the review request (petition for review) in writing and clearly identify the:

- (a) Parts of the initial order with which the party disagrees; and
 - (b) Arguments supporting the party's position.
- (2) The petition for review must be filed with the review judge and a copy sent to the other parties and their representatives.

(3) The review judge can be contacted at the following address or at the address stated on the letter containing instructions for obtaining review mailed with the initial order:

Review Judge
Office of Administrative Hearings
P.O. Box 42488
2420 Bristol Court S.W.
Olympia, WA 98504-2488
Phone: 360-407-2700
Fax: 360-586-6563

(4) After receiving a party's review request, the review judge will send a copy to the other parties, their representatives and the administrative law judge who entered the initial order.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0590, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0590, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0600 Response to petition for review.

(1) A party does not have to respond to the review request. A response is optional.

(2) If a party responds, that party must send the response so that the review judge receives it on or before the seventh business day after the date a copy of the petition for review was mailed to the party by the review judge.

(3) The responding party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, the party must contact the review judge by the deadline in subsection (2) of this section and show good cause for an extension of time.

(5) A review judge may accept and consider a party's response even if it is received after the deadline.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0600, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0610 Decision process. (1) After the response deadline, the record on review is closed unless there is a good cause to reopen the record.

(2) The review judge only considers evidence given at the original hearing unless the review judge has reopened the record pursuant to subsection (1) of this section.

(3) The review judge will decide the appeal without oral argument, unless the review judge determines that oral argument is necessary for resolution of the appeal.

(4) The review judge enters a final order that affirms, changes, dismisses or reverses the initial order, or remands (returns) the case to the administrative law judge for further specified action.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0610, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0610, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0620 Authority of the review judge. (1)

The review judge has the same decision-making authority as an ALJ, but must consider the ALJ's opportunity to observe the witnesses.

(2) The review judge's order is the DEL final order in the case. If the review judge's final order upholds the department's adverse action, the appealing party must comply with the final order unless the appealing party obtains a stay of the effectiveness of the final order from the superior court after filing a petition for judicial review in accordance with WAC 170-03-0660.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0620, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0620, filed 3/5/08, effective 4/5/08.]

IX. REVIEW OF THE FINAL ORDER

WAC 170-03-0630 Request for reconsideration. (1) If a party disagrees with the final order issued by a review judge and wants it reconsidered, the party may ask the review judge to reconsider the final order because the party believes the review judge made a mistake. However, the appealing party must comply with the final order pending reconsideration. Filing a petition for reconsideration does not stay the effectiveness of the final order.

(2) If a party asks for reconsideration of the final order, the reconsideration process must be completed before judicial review is sought.

(3) A request for reconsideration must be made in writing and must clearly state the reasons why the party wants the final order reconsidered.

(4) The review judge must receive the written reconsideration request on or before the tenth calendar day after the final order was mailed by the review judge to the parties. The party requesting reconsideration must send a copy of the request to all parties or, if the parties are represented, to their representatives.

(5) If a reconsideration request is received by the review judge after the deadline, the final order will not be reconsidered. However, the review judge may extend the deadline if a party:

- (a) Asks for more time before the deadline expires; and
- (b) Demonstrates good cause for the extension.

(6) After receiving a reconsideration request, the review judge will send a copy to the other parties and representatives giving them time to respond.

(7) If a party does not request reconsideration or ask for an extension within the deadline, the final order will not be reconsidered.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0630, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0640 Response to a request for reconsideration. (1) A party does not have to respond to a request for reconsideration. A response is optional.

(2) If a party responds, that party must send a response to the review judge by or before the seventh business day after the date OAH or the review judge mailed the request to the party.

(3) A party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, OAH or the review judge may extend the deadline if the party demonstrates good cause for an extension within the deadline in subsection (2) of this section.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0640, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0650 Ruling on request for reconsideration. (1) After the review judge receives a reconsideration request, within twenty calendar days the review judge must either:

- (a) Dispose of the petition; or

(b) Send all parties a written notice setting a date by which the review judge will act on the petition.

(2) If the review judge does not dispose of the petition or send the parties written notice setting a date by which the review judge will act on the petition within twenty days of receipt of the reconsideration request, the request is denied.

(3) The review judge decision is final when the reconsideration decision is mailed or the date the reconsideration request is denied.

[Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0650, filed 3/5/08, effective 4/5/08.]

WAC 170-03-0660 Judicial review. (1) Judicial review is the process of appealing a final order to a court.

(2) Any party, except DEL, may appeal a final order by filing a written petition for judicial review that meets the requirements of RCW 34.05.546. The petition must be properly filed and served within thirty calendar days of the date the review judge mails the final order in the case.

(3) Filing an appeal of a final order does not stay the effectiveness of the final order.

(4) RCW 34.05.510 through 34.05.598 contain further details of the judicial review process.

[Statutory Authority: RCW 43.215.070 and chapter 43.215 RCW. WSR 15-24-069, § 170-03-0660, filed 11/25/15, effective 12/26/15. Statutory Authority: Chapter 43.215 RCW, RCW 34.05.220, chapter 34.05 RCW, 2006 c 265. WSR 08-06-102, § 170-03-0660, filed 3/5/08, effective 4/5/08.]