

Proposed Rules BOLI Division 50 2009

839-050-0080

Notice of Hearing

(1) When a party makes a timely written request for a contested case hearing, that hearing will be scheduled in accordance with OAR 839-050-0070 and the party will receive a notice of hearing. The Hearings Unit will issue a notice of hearing to the participants.

(2) *[In cases when]* **When** Formal Charges are *[filed]* **issued**, the notice of hearing will accompany the Formal Charges. **Unless a complainant or respondent named in a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law elects to have the matter heard in circuit court under ORS 659A.885 (see ORS 659A.870(4)(b)), a contested case hearing must commence no later than 120 days after Formal Charges are issued. If it is not practicable to commence the hearing within 120 days after Formal Charges are issued, the Administrative Law Judge will include on the notice of hearing or in a separately issued document the general reasons for the delay and will schedule the hearing as soon as practicable.**

(3) *[The]* **A** notice of hearing will *[contain]* **include**:

- (a) A statement of the time and place of the hearing, including the statement that the hearing will reconvene on successive business days thereafter until concluded;
- (b) A statement of the authority and jurisdiction under which the hearing is to be held;
- (c) A reference to the particular sections of the statutes and rules involved;
- (d) A short and plain statement of the matters asserted or charged;
- (e) The name of the administrative law judge designated by the commissioner to preside at the hearing and whether the administrative law judge is an employee of the Agency; and
- (f) A statement indicating whether the case for the Agency will be presented by the Department of Justice or by an Agency case presenter.

(4) Sections (3)(c) and (d) above are satisfied if the notice of hearing attaches and incorporates a charging document that includes the matters referred to in those paragraphs.

(5) The notice of hearing may contain a statement that:

- (a) When a party fails to timely request a hearing, or having made a timely request subsequently withdraws it, the Agency file will be the evidentiary record of the proceeding;
- (b) When, following an answer and request for hearing (when required), the party subsequently notifies the Agency that the party will not appear at the hearing, or, without such notice, the party fails to appear at the hearing, the Agency file may become part of the contested case record; and
- (c) When a party fails to answer a charging document, the Agency file will become part of the contested case record upon default for the purpose of proving a prima facie case.

Stat. Auth.: ORS **chapter** 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, [&] 659A.850, 659A.870

839-050-0130

Responsive Pleadings

(1) A party filing a written request for a hearing or a party served with Formal Charges must file a written response, referred to as an "answer," to the allegations in the charging document. *[Except as may be otherwise provided in ORS 652.332(1), the party must file the answer within 20 days after service of the charging document, except that the party must file the answer within 60 days after service of the charging document if that document proposes to deny a license. The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. An answer not including the information required by this rule may be disregarded and a notice of default may be issued in accordance with OAR 839-050-0330, as if no answer had been filed.]*

(2) The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. An answer not including the information required by this rule may be disregarded and a notice of default may be issued in accordance with OAR 839-050-0330, as if no answer had been filed

[2](3) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party. The failure of the party to raise an affirmative defense in the answer is a waiver of such defense. Any new facts or defenses alleged in the answer will be deemed denied by the Agency. Evidence will not be taken at the contested case hearing on any factual or legal issue not raised in the charging document or the answer as originally filed or as amended pursuant to OAR 839-050-0140.

(4) Except as may be otherwise provided in subsections (5), (6) and (7) of this rule, a party must file an answer within 20 days after service of the charging document.

(5) ORS 652.332 provides administrative procedures for wage claim collection.

(6) A party must file an answer within 60 days after service of the charging document if that document proposes to deny a license.

(7) A respondent or complainant named in a complaint filed under ORS 659A.145 or 659A.421 or discrimination under federal housing law must file any election to have the matter heard in circuit court under ORS 659A.885, within 20 days after service of formal charges.

Stat. Auth.: ORS **chapter** 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, [&] 659A.850, **659A.870**

839-050-0150

Motions

Except as otherwise stated in OAR 839-050-0050, all pre-hearing and post-hearing motions will be submitted in writing to the administrative law judge through the Hearings Unit. If the nonmoving participant chooses to respond, the nonmoving participant must file a written response to a written motion within seven days after service of the motion,

unless the administrative law judge orders otherwise. Motions include but are not limited to the following:

- (1) Motion to dismiss: This motion must be based upon:
 - (a) Lack of jurisdiction over the subject matter or person;
 - (b) Insufficiency of process or service of process; or
 - (c) Failure to state a claim upon which relief can be granted.
- (2) Motion to change the place of hearing.
- (3) Motion to exclude witnesses:
 - (a) The motion may be made by any participant at any time prior to or during the hearing.
 - (b) The administrative law judge may, without a motion being made by a participant, exclude witnesses from the hearing except for a party, counsel, the Agency case presenter, an authorized representative, claimants, complainants and any persons authorized by statute to attend. Notwithstanding this rule, an administrative law judge may expel any person from the hearing if that person engages in conduct that disrupts the hearing.
- (4) Motion for summary judgment:
 - (a) A motion for summary judgment may be made by a participant or by decision of the administrative law judge for an accelerated decision in favor of any participant as to all or part of the issues raised in the pleadings. The motion may be based on any of the following conditions:
 - (A) Issue or claim preclusion;
 - (B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings; or
 - (C) Such other reasons as are just.
 - (b) When the administrative law judge grants the motion, the decision will be set forth in the Proposed Order.
- (5) Motion for a postponement:
 - (a) Any participant making a request for a postponement of any part of the contested case proceeding must state in detail the reason for the request. The administrative law judge may grant the request for good cause shown. In making this determination, the administrative law judge will consider:
 - (A) Whether previous postponements have been granted;
 - (B) The timeliness of the request;
 - (C) Whether a participant has previously indicated it was prepared to proceed;
 - (D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and
 - (E) The date the hearing was originally scheduled to commence.
 - (b) The administrative law judge will issue a written ruling either granting or denying the motion and will set forth the reasons therefore;
 - (c) If all participants agree to a postponement, in order for the postponement to be effective, the administrative law judge will approve of this agreement. Whether the administrative law judge grants or denies such a motion for postponement, the administrative law judge will issue a written ruling setting forth the reasons therefore.
- (6) Motion for consolidation of hearings: This motion must allege facts sufficient to meet the criteria of OAR 839-050-0190.

- (7) Motion for hearing by telephone: Any participant may file a motion to conduct the hearing by telephone. The motion must contain:
- (a) A statement setting forth the reason(s) for the request;
 - (b) A statement explaining why no participant will be substantially prejudiced by having a hearing in this manner;
 - (c) A statement of the location of the majority of witnesses expected to be called;
 - (d) A statement estimating the number and/or volume of documents to be introduced into the record;
 - (e) A statement indicating whether the participant intends to call any expert witness; and
 - (f) A statement indicating whether an interpreter or an assistive communication device under OAR 839-050-0300 will be required for any witness.
- (8) Motion for an earlier hearing date: After issuance of a notice of hearing, a participant may request an earlier hearing date upon a showing that the purposes of the law or the interests of justice would otherwise be frustrated.
- (9) Motion for a protective order.
- (10) Motion for default when a respondent has failed to timely file an answer within the time specified in the charging document.
- (11) Motion to amend.
- (12) Motion to make more definite and certain.

(13) Motion for prevailing party costs and reasonable attorney fees for an aggrieved person who intervenes in a proceeding alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, [&] 659A.850

839-050-0240

Responsibilities of the Administrative Law Judge

(1) The commissioner designates as administrative law judges those employees who are employed by the Agency as hearings officers and those persons who are appointed to preside at particular hearings. The commissioner delegates to such designee the authority to:

- [(1)] **(a)** Rule on all motions filed prior to the hearing.
- [(2)] **(b)** Issue subpoenas and otherwise oversee the discovery process in a manner consistent with rules relating to these powers.
- [(3)] **(c)** Hold appropriate conferences, if necessary, before or during the course of the hearing to discuss the conduct of the proceedings or the issues to be presented.
- [(4)] **(d)** Regulate the course of the hearing, including scheduling, reconvening, and adjourning.
- [(5)] **(e)** Maintain order during the course of the hearing, including the authority to expel persons whose conduct is disruptive.
- [(6)] **(f)** Make rulings on motions or evidence, with or without objection, during the hearing.
- [(7)] **(g)** Question witnesses at the hearing and set time limitations for argument or presentation.
- [(8)] **(h)** Limit or extend filing periods.

[(9)] **(i)** Decide procedural matters, but not grant motions for summary judgment or other motions by a party that involve final determination of the proceeding, but to issue a Proposed Order as provided for in these rules. Nothing in this section may be construed to prohibit the administrative law judge from making a routine disposition of a hearing proceeding based on a settlement, on the Agency's withdrawal of the charging document, or on other reasons not requiring a Final Order by the commissioner.

[(10)] **(j)** Prepare a Proposed Order at the conclusion of the contested case hearing and send it to the Agency, the commissioner, and all parties to the case; and at the request of the commissioner, assist in responding to any exceptions and the preparation of the Final Order.

[(11)] **(k)** Take any other action consistent with the duties of an administrative law judge.

(2) In a contested case proceeding alleging an unlawful practice under ORS 659A.145 or 659A.421, or discrimination under federal housing law, only an employee of the bureau may be a member of a special tribunal or administrative law judge appointed to hear the matter.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, [&] 659A.850

839-050-0370

Proposed Orders

(1) The administrative law judge will prepare and serve upon the commissioner and all participants a Proposed Order including the following:

(a) Rulings, motions, or objections, including those rulings previously reserved;
(b) Findings of fact, including those matters at issue that are either agreed to as fact at the hearing or by stipulation, or that, when disputed, are determined by the administrative law judge to be a fact over contentions to the contrary, and will include:

(A) A concise statement of facts supporting the findings as to each contested issue of fact;

(B) Ultimate facts required to support the Agency's order; and

(C) Credibility findings when credibility is of importance in the decision of the case, including the evidence relied on to reach this finding and the relevance of that evidence.

(c) Conclusions of law;

(d) An opinion explaining the rationale for the findings of fact and conclusions of law; and

(e) An order setting forth the administrative law judge's suggested determination, when the proposed decision is adverse to the party, of the amount owed by the party and any other relief within the authority of the commissioner.

(2) Proposed Orders will include a statement that written exceptions, if any, must be filed by participants within ten days of the date of issuance of the Proposed Order. [*Stat. Auth.: ORS 183, ORS 651.060(4)*]

(3) Unless it is not practicable to do so, a proposed order in a case involving alleged violations of ORS 659A.145 or 659A.421, or federal housing law, will be issued within 60 days of the date of the closure of the hearing record. If the issuance of the proposed order will be delayed, written notice will be given to the participants by the Administrative Law Judge as to the general reasons for the delay.

Stat. Auth.: ORS 183 & 651.060(4)

Stats. Implemented: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115,
658.407(3), 658.820, 659A.845, [&] 659A.850