

## **CHAPTER 98-02-03 HEARING PROCEDURE**

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### **98-02-03-01. Evidentiary purpose.**

An evidentiary hearing need be conducted only in cases where genuine issues of material fact must be resolved. When it appears from pleadings, admissions, stipulations, affidavits, or other documents that there are no matters of material fact in dispute, the hearing officer, upon motion of a party or upon the hearing officer's own motion, may conclude that the hearing can proceed without conducting an evidentiary hearing and enter an order so finding, vacating the hearing date if one has been set. Before entering an order, the hearing officer may fix a time for filing briefs or taking oral argument.

**History:** Effective January 1, 1992; amended effective August 1, 2004.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-35, 54-57-04

### **98-02-03-02. Authority of hearing officer.**

The hearing officer has the duty to conduct a hearing, and related proceedings, to take all necessary action to maintain order and avoid delay, and has all powers necessary to these ends, including, but not limited to, the authority to:

1. Arrange and issue notice of, the date, time, and place of the hearing, and related proceedings, or upon due notice to the parties, to change any date, time, or place previously set.
2. Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.
3. Require parties to state their position with respect to the various issues in the proceeding.
4. Administer oaths and affirmations.
5. Issue subpoenas and discovery orders.
6. Rule on motions or other procedural matters where the ruling does not result in a final determination of the proceeding.
7. Regulate the course of the hearing and conduct of the parties.
8. Examine witnesses, direct witnesses to testify, and, as may be warranted, exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.
9. Receive, rule on, exclude, or limit evidence.

10. Fix the time for filing motions, petitions, briefs, or other items.
11. Require the parties to submit briefs, memoranda, and proposed findings of fact and conclusions of law.

These powers apply to procedural hearing officers as well as hearing officers making recommended findings and conclusions, except as they may be lawfully limited by the agency at the time of the agency's request for, or designation of, a procedural hearing officer.

**History:** Effective January 1, 1992.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-21, 28-32-22, 28-32-24, 28-32-29, 28-32-33, 28-32-34, 28-32-35, 54-57-04

### **98-02-03-03. Hearing procedure.**

The hearing is directed to receiving factual evidence and expert opinion testimony related to issues in dispute. Argument will not be received in evidence; rather, it must be presented in statements, memoranda, or briefs, as determined by the hearing officer. Brief opening statements, limited to stating the party's position and what it intends to prove, may be allowed, in the hearing officer's discretion. Unless the hearing officer determines otherwise, the hearing must proceed and be conducted in substantially the following manner:

1. Testimony must be preserved by electronic recording unless the agency elects to use a court reporter or stenographer. If a request is made prior to the hearing, the agency may allow a party to preserve testimony by court reporter. The requesting party shall agree to pay for the court reporter and the cost of transcript preparation. The requesting party shall make all the necessary arrangements for the court reporter. The requesting party may not delay the proceeding by use of the court reporter or in the preparation of the transcript.
2. The hearing must be conducted in the English language. The proponent of any testimony to be offered by a witness who does not speak the English language proficiently shall provide an interpreter, approved by the hearing officer, proficient in the English language and the language in which the witness shall testify. The cost of such interpreter must be paid by the party providing the interpreter, unless the proponent of such testimony identifies a prevailing requirement that the agency provide an interpreter.
3. When the agency is a party, the hearing officer may require that the agency proceed first, by making an opening statement explaining the action taken, describing the evidence upon which that action was based, and identifying the applicable statutes, rules or regulations, or policy interpretations upon which the action was based.
4. All parties may present evidence and argument with respect to the issues, and cross-examine witnesses. Cross-examination of witnesses will ordinarily follow direct examination, but the sequence may be regulated by the hearing officer.
5. The party with the burden of proof shall begin the presentation of the evidence, followed by the other parties in a sequence determined by the hearing officer. In all cases the burden of presenting evidence to support a fact or position rests with the proponent of the fact or position.
6. When all parties and witnesses have been heard, opportunity must be offered to present final argument, in a sequence determined by the hearing officer. Final argument may be allowed in the form of memoranda or briefs, or oral argument, in the discretion of the hearing officer.
7. The record of the hearing must be closed upon receipt of the final memoranda or briefs, transcript, if any, or late-filed exhibits requested by the hearing officer, subject to the authority

for an administrative agency to consider additional information or evidence not presented at the hearing, as provided by North Dakota Century Code section 28-32-25.

**History:** Effective January 1, 1992; amended effective August 1, 2004.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-25, 28-32-34, 28-32-35, 54-57-04

#### **98-02-03-04. Disruption of hearing.**

Disrespectful, disorderly, or contemptuous conduct, contumacious language, refusal to comply with directions, or continued use of dilatory tactics by any person constitutes grounds for immediate exclusion of such person from the hearing by the hearing officer.

**History:** Effective January 1, 1992.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-35, 54-57-04

#### **98-02-03-05. Evidence - Official notice.**

[Reserved] See North Dakota Century Code section 28-32-24 for statutory requirements.

#### **98-02-03-06. Exhibits.**

Evidence other than witness testimony must be submitted in the form of exhibits. All documentary exhibits must be on paper of good quality, plainly legible, and durable, and may not exceed eight and one-half by eleven inches [21.59 by 28.21 centimeters]. If approval of the hearing officer is obtained, documentary exhibits need not be on paper, if they are plainly legible and durable, and may exceed the size limit. If a documentary exhibit exceeds the size limit, it is acceptable if it can be folded to conform to the size requirement. Whenever possible, copies of exhibits must be furnished to all parties. In any event, all parties must be afforded an opportunity to examine the exhibit. The hearing officer may require that the parties mark exhibits in advance of the hearing. When the evidence offered through the exhibit is embodied in a book, document, or other material of such volume as to needlessly encumber the record, an authenticated copy of the relevant excerpt may be entered, or the excerpt may be read into the record, in the discretion of the hearing officer.

**History:** Effective January 1, 1992; amended effective April 1, 1998.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-24, 28-32-35

#### **98-02-03-07. Continuances.**

A party seeking a continuance shall first contact the other parties for the purpose of obtaining a stipulated agreement. If the party seeking the continuance is unable to secure a stipulated agreement then that party shall submit a written request for continuance to the hearing officer, with copies served upon the parties of record. These requirements may be waived by the hearing officer if circumstances arise to make compliance unreasonable. The hearing officer may not approve a continuance except for good cause shown. The hearing officer may order a continuance upon the hearing officer's own motion.

**History:** Effective January 1, 1992.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-35, 54-57-04

#### **98-02-03-08. Ex parte communications.**

[Reserved] See North Dakota Century Code section 28-32-37 for statutory requirements.

**98-02-03-09. The record.**

Requests by a party, or any other person allowed to participate in the proceeding, for the furnishing of a copy of the record, or a part thereof, under either North Dakota Century Code section 28-32-36 or 28-32-44, shall be made to the administrative agency. If the record is in the possession of the hearing officer, the hearing officer may temporarily return it to the administrative agency for preparation of the transcript, or a part thereof, to furnish to the requesting party or person, or the hearing officer may retain all or a part of the record until the issuance of the hearing officer's order.

**History:** Effective January 1, 1994; amended effective August 1, 2004.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-36, 28-32-44

**98-02-03-10. Hearings conducted by electronic means.**

A hearing officer conducting a hearing for an agency under North Dakota Century Code chapter 28-32 may conduct a hearing in total or in part by making use of electronic means. If the agency has a statute or rule about conducting the hearing by electronic means, the hearing officer will conduct the hearing in compliance with the statute or rule. If the agency has no statute or rule about conducting a hearing by electronic means, the hearing officer may select the electronic means necessary to conduct the hearing and determine the method and manner in which the hearing is to be electronically conducted. If the agency statute or rule with regard to conducting the hearing by electronic means is incomplete, the hearing officer may select the electronic means necessary to conduct the hearing and determine the manner or means necessary to conduct the hearing electronically, if the selection or determination is not inconsistent with the statute or rule.

**History:** Effective August 1, 2004.

**General Authority:** NDCC 54-57-05

**Law Implemented:** NDCC 28-32-35