

**OFFICE OF ADMINISTRATIVE HEARINGS**

STATE OF NORTH DAKOTA

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Bismarck, North Dakota 58501-1882

Allen C. Hoberg
DIRECTOR

November 16, 2007

701-328-3260
Fax 701-328-3254
oah@state.nd.us
www.nd.gov/oahSenator Tom Fischer, Chairman
Administrative Rules Committee
North Dakota Legislative Council
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Dear Senator Fischer:

Enclosed is a proposed amendment to North Dakota Administrative Code section 98-02-02-06 of the Uniform Rules of Administrative Procedure for Adjudicative Proceedings (Article 98-02). The Office of Administrative Hearings asks for approval of this amendment by the Administrative Rules Committee outside of the formal agency rulemaking process. North Dakota Century Code section 28-32-18.1(2)(c) allows agencies and the Administrative Rules Committee to change a rule when it is no longer in compliance with statute. This amendment is required to comply with a 2007 amendment to North Dakota Century Code section 28-32-33 made by Senate Bill No. 2265. *See* N.D. Session Laws chapter 388.

Senate Bill No. 2265 amended section 28-32-33 by removing subsection 2, the requirement that in an adjudicative proceeding a party must first show good cause by written petition and get the written approval of the hearing officer before obtaining discovery from an administrative agency. OAH's proposed amendment removes that corresponding requirement in section 98-02-02-06 of the uniform rules.

Upon committee approval, please inform the Legislative Council to publish this change in the uniform rules.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Allen C. Hoberg".

Allen C. Hoberg
Director

ACH/eap

cc: Mr. John M. Walstad
Legislative Council

PROPOSED AMENDMENT TO TITLE 98

PROPOSED AMENDMENT TO CHAPTER 98-02-02 PREHEARING PROCEDURE

98-02-02-06. Discovery.

1. **General.** Parties may obtain discovery in accordance with the North Dakota Rules of Civil Procedure. ~~A party seeking to undertake discovery from an administrative agency shall first submit a written petition for approval to conduct discovery to the hearing officer. The petition must identify the type of discovery sought, must name the person to be examined, or identify with particularity the documents or property to be inspected, as the case may be, and must explain how the information sought is relevant to the issues. If the hearing officer finds that the requesting party has demonstrated that the information sought is relevant to the issues in dispute, is reasonable in scope, is needed for the proper presentation of the party's case, and is not for the purposes of delay, the request must be approved.~~ The hearing officer shall recognize all privileged information or communications which are recognized by law.
2. **Identification of witnesses.** The hearing officer may require a party to disclose the names and addresses of all witnesses that the party intends to call at the hearing. All witnesses unknown at the time of that disclosure must be disclosed as soon as they become known. Any party failing to make disclosure required by this section without good cause may, at the discretion of the hearing officer, be foreclosed from presenting evidence at the hearing through witnesses not disclosed.
3. **Failure to comply with discovery.** The provisions of rule 37 of the North Dakota Rules of Civil Procedure regarding failure to make or cooperate in discovery, and sanctions do not apply in adjudicative proceedings except as provided in this section. Upon failure of a party to reasonably comply with a discovery request or order, the hearing officer may take one of the following actions:
 - a. Make a further order concluding that the subject matter of the order approving discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order;
 - b. Make an order which recognizes the failure of the party to comply and refuse to allow that party to support or oppose designated claims or defenses, or prohibit the party from introducing designated matters into evidence;
 - c. Make an order striking out pleadings, or parts thereof, or staying further proceedings until the order is obeyed;
 - d. When the hearing officer is the final decisionmaker, make an order dismissing the action or proceeding, or any part thereof, or make a recommended default order against the party.

4. **Protective orders.** Protective orders may be obtained from the hearing officer in accordance with the North Dakota Rules of Civil Procedure, but a hearing officer may not award expenses in regard to a motion for a protective order.

History. Effective January 1, 1992; amended effective April 1, 1998; _____, 2007.

General Authority. NDCC 54-57-05

Law Implemented: NDCC 28-32-33