

137-001-0011

### Permanent Rulemaking Notice

(1) The agency will give notice of proposed permanent rulemaking **to those listed in the rule adopted under ORS 183.341(4) and to legislators specified by ORS 183.335(15)** by mailing, electronic mailing, or personally delivering a copy of the rule or rules as proposed and a copy of the notice required under ORS 183.335(2). In lieu of providing a copy of the rule or rules as proposed, the agency may ~~provide a summary~~ **describe the subject matter** of the rule or rules and state how and where a copy may be obtained on paper, via electronic mail, or from a specified web site. If the agency posts the rule or rules on a web site, the agency must provide a web address or link sufficient to enable a person to find the rules easily. Failure to provide a web address or link shall not affect the validity of any rule.

(2) Persons who have asked the agency to send notices of proposed rulemaking to them pursuant to ORS 183.335(8) may choose to receive **copies of the proposed rule or rules and notice required under ORS 183.335(2)** by mail, ~~and not electronically.~~

**(3) If the agency offers it, persons who have asked the agency to send notices of proposed rulemaking to them pursuant to ORS 183.335(8) may choose to receive:**

**(a) An abbreviated form of mailed notice containing the caption, summary, and information about how to comment, required by ORS 183.335(2)(a), accompanied by a reference to a web site where copies of the proposed rule or rules and other information required by ORS 183.335(2) are posted or**

**(b) Notice by electronic mail that either contains the proposed rule or rules and the notice required under ORS 183.335(2) as attachments or provides a reference to a web site where the notice and the rule(s) are posted.**

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.355(2); **HB 2121 (2007)**

Hist.: JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97; DOJ 10-2005, f. 10-31-05, cert. ef. 1-1-06

137-001-0018

### Limitation of Economic Effect on Small Businesses

(1) Before the adoption of a permanent rule, the agency will determine whether the economic effect upon small business is significantly adverse, based upon:

(a) The economic effect analysis under ORS 183.335(2)(b)(E);

(b) The statement of cost of compliance effect on small businesses described in ~~Oregon Laws 2005, chapter 807, section 2~~ (ORS 183.336);

(c) Recommendations from any advisory committee appointed under ORS 183.333(1) or from any fiscal impact advisory committee, if any, appointed under ORS 183.333(5); and

(d) Comments made in response to its rulemaking notice.

(2) If the agency determines there is a significant adverse effect on a small business or small businesses, it shall modify the rule to reduce the rule's adverse economic impact on those businesses to the extent consistent with the public health and safety purposes of the rule, **as provided in ORS 183.540.**

~~(3) Modification to reduce the rule's adverse economic impact on small business shall be as provided in ORS 183.540.~~

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.341(1) & 183.540

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; DOJ 10-2005, f. 10-31-05, cert. ef. 1-1-06

**137-001-0030**

### **Conduct of Rulemaking Hearings**

(1) The hearing to consider a rule shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) At the beginning of the hearing, any person wishing to be heard shall provide their name, address, and affiliation to the presiding officer. The presiding officer may also require that the person complete a form showing any other information the presiding officer deems appropriate. Additional persons may be heard at the discretion of the presiding officer.

(3) At the beginning of the hearing, the presiding officer must summarize, **to the extent requested by any participant,** the content of the notice given under ORS 183.335.

(4) Subject to the discretion of the presiding officer, the order of the presentation shall be:

(a) Statements of proponents;

(b) Statements of opponents; and

(c) Statements of other witnesses present and wishing to be heard.

(5) The presiding officer or any member of the agency may question any witness making a statement at the hearing. The presiding officer may permit other persons to question witnesses.

(6) There shall be no additional statement given by any witness unless requested or permitted by the presiding officer.

(7) The hearing may be continued with recesses as determined by the presiding officer until all listed witnesses have had an opportunity to testify.

(8) The presiding officer shall, when practicable, receive all physical and documentary evidence presented by witnesses. Exhibits shall be marked and shall identify the witness offering the exhibit. Any written exhibits shall be preserved by the agency pursuant to any applicable retention schedule for public records under ORS 192.001 et seq.

(9) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(10) The presiding officer shall make a record of the proceeding, by audio or video tape recording, stenographic reporting or minutes

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.335(3) & 183.341(1)

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; DOJ 10-2005, f. 10-31-05, cert. ef. 1-1-06

**137-001-0080**

### **Temporary Rulemaking Requirements**

(1) If no notice has been provided before adoption of a temporary rule, the agency shall give notice of its temporary rulemaking to persons, entities, and media specified under ORS 183.335(1) by mailing, electronic mailing, or personally delivering to each of them a copy of the rule or rules as adopted and a copy of the statements required under ORS 183.335(5). ~~If a temporary rule or rules are over ten pages in length, the~~ **The** agency may provide a summary **of the rule or rules** and state how and where a copy of the rule or rules may be obtained on paper, via electronic mail or from a specified web site ~~where the rule or rules are posted~~. If the agency posts the rule or rules on a web site, the agency must provide a web address or link sufficient to enable a person to find the rules easily. Failure to give this notice shall not affect the validity of any rule.

(2) Persons who have asked the agency to mail notices of proposed rulemaking to them pursuant to ORS 183.335(8) may choose to receive notice by mail, and not electronically.

(3) The agency shall file with the Secretary of State a certified copy of the temporary rule and a copy of the statement required by ORS 183.335(5).

(4) A temporary rule is effective for 180 days, unless a shorter period is specified in the temporary rule or the certificate of filing for the temporary rule.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.335(5), 183.341(1), 183.355 & OL 1993, 729 16

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 7-1995, f. 8-25-95, cert. ef. 1-1-96; DOJ 10-2005, f. 10-31-05, cert. ef. 1-1-06

### **137-001-0100**

#### **Review of New Rules**

(1) When conducting a review of a new rule as required by Oregon Laws 2005, chapter 807, section 3, the agency may appoint an advisory committee to assist with the review, invite public comment upon the rule, or both.

(2) Notwithstanding ~~Oregon Laws 2005, chapter 807, section 3(4) and (5)~~ (ORS 183.405(4) & (5)), the agency may review any amended rule under the criteria set forth in ~~Oregon Laws 2005, chapter 807, section 3(1)~~ (ORS 183.405(1)).

(3) As part of the review under ~~Oregon Laws 2005, chapter 807, section 3(1)~~ (ORS 183.405(1)), the agency may invite public comment upon the rules and give notice of the review to those parties identified in ORS 183.335(1)(a), (c), and (d). The notice will:

(a) Identify the rule or rules under review, describe the subject matter of the rule or rules under review, and invite comments on any or all of the factors identified in ~~Oregon Laws 2005, chapter 807, section 3(1)~~ (ORS 183.405(1));

(b) State the date by which written comments must be received by the agency and the mailing address or electronic mail address to which the comments should be sent; and

(c) Include the time and place of the hearing, if the agency provides a public hearing to receive oral comments.

Stat. Auth.: ORS 183.341, 183.502

Stats. Implemented: ORS 183.333, 183.341, 183.502, OL 2005, Ch. 17, Ch. 18, Ch. 807

Hist.: DOJ 10-2005, f. 10-31-05, cert. ef. 1-1-06

### **137-003-0001**

## Contested Case Notice

- (1) The agency's contested case notice issued pursuant to ORS 183.415 shall include:
- (a) A caption with the name of the agency and the name of the person or agency to whom the notice is issued;
  - (b) A short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;
  - (c) A statement of the party's right to be represented by counsel **and that legal aid organizations may be able to assist a party with limited financial resources;**
  - (d) A statement of the party's right to a hearing;
  - (e) A statement of the agency's authority and jurisdiction to hold a hearing on the matters asserted or charged; and
  - (f) Either:
    - (A) A statement of the ~~specific~~ **procedure and time to within which a person may** request a hearing, the agency address to which a hearing request should be sent, and a statement that if a request for hearing is not received by the agency within the time stated in the notice the person will have waived the right to a hearing; or
    - (B) A statement of the time and place of the hearing.
  - (g) A statement indicating whether and under what circumstances an order by default may be entered.**
- (2) A contested case notice may include either or both of the following:
- (a) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case **and all materials submitted by the party,** automatically becomes part of the contested case record upon default for the purpose of proving a prima facie case;
  - (b) A statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

Stat. Auth.: ORS 183.341 & 183.502

Stats. Implemented: ORS 183.341(1), 183.413, 183.415(7) & 183.502; **HB 2423 (2007).**

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-

79; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91; JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97; DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

137-003-0002

### **Rights of Parties in Contested Cases**

(1) In addition to the information required to be given in writing under ORS 183.413(2) ~~and (3)~~ and ~~183.415(2)~~183.415(7), before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise. This information may be given in writing or orally.

~~(2) Except as otherwise required by ORS 183.415(7), the information referred to in section (1) of this rule may be given in writing or orally before the commencement of the hearing.~~

~~(3)~~ (2) Unless otherwise precluded by law, the agency and the parties may agree to use alternative methods of dispute resolution in contested case matters. Such alternative methods of resolution may include arbitration or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include arbitration that is binding on the agency.

(4) (3) Final disposition of contested cases may be by a final order following hearing or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing and to judicial review. The agency shall incorporate the disposition into a final order.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 9.320, ORS 183.341(1), 183.413, 183.415 & 183.502; **HB 2423 (2007)**

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95; JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97; DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00

137-003-0070

### **Final Orders in Contested Cases**

(1) Final orders in contested cases shall be in writing.

(2) Except as provided in section (3) of this rule, final orders in contested cases shall include the following:

(a) Rulings on admissibility of offered evidence when the rulings are not set forth in the record;

(b) Findings of fact -- those matters that are either agreed as fact or that, when disputed, are determined by the factfinder, on substantial evidence, to be facts over contentions to the contrary. A finding must be made on each fact necessary to reach the conclusions of law on which the order is based;

(c) Conclusion(s) of law -- applications of the controlling law to the facts found and the legal results arising therefrom;

(d) Order -- the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom; and

(e) A citation of the statutes under which the order may be appealed.

(3) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0002(4), **(3)**, the final order need not comply with section (2) of this rule. However, the order must state the agency action and:

(a) Incorporate by reference the stipulation or agreed settlement signed by the party or parties agreeing to that action; or

(b) Be signed by the party or parties; **and**

**(c) A copy must be delivered or mailed to each party and the attorney of record for each party that is represented.**

(4) The date of service of the order on the parties shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

**(5) Unless service of the final order is not required by statute, the final order shall be served on each party and, if the party is represented, on the party's attorney.**

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), ORS 183.415 & ORS 183.470; **HB 2423 (2007)**

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0075

### Final Orders by Default

(1) The agency may issue a final order by default:

(a) When the agency gave a party an opportunity to request a hearing and the party failed to request a hearing within the time allowed to make a request;

(b) When the party that requested a hearing withdraws the request;

(c) Except as provided in section (2) of this rule, when the agency notified the party of the time and place of the hearing and the party fails to appear at the hearing; or

(d) When the agency notified the party of the time and place of the hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency that the party will not appear at the hearing, unless the agency agreed to reschedule the hearing.

(2) If the party failed to appear at the hearing and, before issuing a final order by default, the agency finds that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, the agency may not issue a final order by default under section (1)(c) of this rule but shall schedule a new hearing.

(3) The agency may issue a final order that is adverse to a party by default only after making a prima facie case on the record. The agency must find that the record, **including all materials submitted by the party**, contains evidence that persuades the agency of the existence of facts necessary to support the order. **If the record on default consists solely of an application and other materials submitted by the party, the order shall so note.** The record shall be made at a scheduled hearing on the matter or, if the hearing is canceled or not held, at an agency meeting or at the time the final order by default is issued, unless the agency designates the agency file as the record at the time the contested case notice is issued in accordance with OAR 137-003-0001(1). **The record includes all materials submitted by the party.**

(4) The record may consist of transcribed, recorded or reported oral testimony or written evidence or both oral testimony and written evidence.

(5) The agency shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order. If the contested case notice contained an order that was to become effective unless a party requested a hearing, and designated the agency file as the record **for purposes of default**, that order becomes a final order by default if no hearing is requested, and no further order need be served upon any party.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), 183.415(6) & 183.470; **HB 2423 (2007)**

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

### 137-003-0501

#### Rules for Office of Administrative Hearings

(1) OAR 137-003-0501 to 137-003-0700 apply to the conduct of all contested case hearings conducted for an agency by an administrative law judge assigned from the Office of Administrative Hearings unless:

(a) The case is not subject to the procedural requirements for contested cases; or

(b) The Attorney General, by order, has exempted the agency or a category of the agency's cases from the application of these rules in whole or in part.

(2) Any procedural rules adopted by the agency related to the conduct of hearings shall not apply to contested case hearings conducted for the agency by an administrative law judge assigned from the Office of Administrative Hearings unless required by state or federal law or specifically authorized by these rules or by order of the Attorney General. An agency may have rules specifying the time for requesting a contested case hearing, the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing and timelines for issuance of a proposed or final order. **Agencies with authority to assess the costs of an action or proceeding against a party may have rules specifying procedures related to assessment of costs.** The agency's substantive rules, including those allocating the burden of proof, shall apply to all of its hearings.

(3) If permitted by law, the agency may delegate to an administrative law judge any of the agency's functions under these rules, including the authority to issue a final order. This delegation must be in writing and may be for a category of cases or on a case-by-case basis.

**(4) For purposes OAR 137-003-0501 to 137-003-0700, "good cause" exists when the failure to meet a deadline arises from mistake, inadvertence, surprise, or excusable neglect or from fraud, misrepresentation, or other misconduct of a party or agency participating in the proceeding.**

Stat. Auth.: ORS 183.341

Stats. Implemented: OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### 137-003-0505

## Contested Case Notice

(1) When the agency is required to issue a contested case notice pursuant to ORS 183.415, the notice shall include:

(a) A caption with the name of the agency and the name of the person or agency to whom the notice is issued;

(b) A short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;

(c) A statement of the party's right to be represented by counsel **and that legal aid organizations may be able to assist a party with limited financial resources;**

(d) A statement of the party's right to a hearing;

(e) A statement of the authority and jurisdiction under which a hearing is to be held on the matters asserted or charged;

(f) Either:

**(A)** ~~(i) a~~ **A** statement of the ~~specific procedure and time within which a person may to~~ request a hearing, the agency address to which a hearing request should be sent, and a statement that if a request for hearing is not received by the agency within the time stated in the notice the person will have waived the right to a contested case hearing; ~~;~~ or

**(B)** ~~(ii) a~~ **A** statement of the time and place of the hearing; ~~and~~

**(g) A statement indicating whether and under what circumstances an order by default may be entered; and**

~~(g)~~ **(h)** Any other information required by law.

(2) A contested case notice may include either or both of the following:

(a) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case **and all materials submitted by a party,** automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

(b) A statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.413, 183.415 & OL 1999, Ch. 849; **HB 2423 (2007)**

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00

137-003-0510

### **Rights of Parties in Contested Cases**

(1) In addition to the information required to be given **in writing** under ORS 183.413(2) **and (3) and 183.415(2)**, before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise. **The agency may provide this information in writing or orally.**

(2) The agency may request the administrative law judge to provide **to each party written notice of** any or all of the information required to be given under ORS 183.413(2) or section (1) of this rule ~~to each party in writing or orally~~ before the commencement of the hearing. **The administrative law judge shall provide any such written notice personally or by mail to each party or, if a party is represented by an attorney, to the party's attorney.**

(3) Unless otherwise precluded by law, the party(ies) and the agency, if participating in the contested case hearing, may agree to use alternative methods of dispute resolution in contested case matters. Such alternative methods of resolution may include arbitration or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include arbitration that is binding on the agency.

(4) Final disposition of contested cases may be by a final order following hearing or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default.

**(5) A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing and to judicial review. The agency or administrative law judge shall incorporate the disposition into a final order. A copy of any final order incorporating an agreement must be delivered or mailed to each party and, if a party is represented by an attorney, to the party's attorney.**

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.413, 183.415 & OL 1999, Ch. 849; **HB 2423 (2007)**

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

137-003-0520

### Filing and Service of Pleadings and Other Documents in Contested Case

(1) Notwithstanding any other provision of these rules, a hearing request is considered filed when actually received by the agency.

(2) Unless otherwise provided by these rules, any documents, correspondence, motions including motions for a discovery order, pleadings, rulings and orders filed for the record in the contested case shall be filed:

(a) With the agency before the case is referred by the agency to the Office of Administrative Hearings;

(b) With the Office of Administrative Hearings or assigned administrative law judge after the agency has referred the case to the Office of Administrative Hearings and before the assigned administrative law judge issues a proposed order;

(c) With the agency after the assigned administrative law judge issues a proposed order, or with the administrative law judge if the administrative law judge has authority to issue the final order.

(3) The agency shall refer to the Office of Administrative Hearings or the assigned administrative law judge any motion or other matter filed with the agency that ~~is not within the agency's jurisdiction.~~ **should have been filed with the Office of Administrative Hearings or the assigned administrative law judge under section (2) of this rule.**

(4) The Chief Administrative Law Judge or assigned administrative law judge shall refer to the agency any motion or other matter filed with the Office of Administrative Hearings or assigned administrative law judge that ~~is not within the jurisdiction of the Office of Administrative Hearings.~~ **should have been filed with the agency under section (2) of this rule.**

(5) **Except for orders issued under HB 2423, § 4(3)(b) (2007), the** The person or agency filing any pleading, motion, correspondence or other document with the agency, the Office of Administrative Hearings or administrative law judge assigned to the case shall simultaneously provide copies of the documents to the agency and the parties, or their counsel if the agency or parties are represented. **The agency or administrative law judge must serve orders issued under HB 2423, § 4(3)(b) (2007) on any party and the attorney for the party, if the party is represented. The agency or administrative law judge may elect to serve any document on both a represented party and the party's attorney.**

(a) Copies shall be provided to the agency and the parties, or their counsel if the agency or parties are represented, by hand delivery, by facsimile, by mail or as otherwise permitted by the agency by rule or in writing, or as otherwise directed by the administrative law judge with the agreement of the agency and the parties.

(b) The agency may by rule or in writing waive the right to receive copies of documents filed under this rule if the administrative law judge is authorized to issue the final order or if the agency is not a participant in the contested case hearing.

(6) Each party shall notify all other parties, the agency and the administrative law judge of any change in the party's address or withdrawal or change of the party's representatives, including legal counsel. If an attorney withdraws from representing a party, the attorney shall provide written notice of the withdrawal to the administrative law judge, all other parties and the agency, unless the agency has waived the right to receive notice.

(7) The agency shall notify all parties and the administrative law judge of any change in the agency's address or withdrawal or change of the agency's representatives, including legal counsel.

(8) Motions, pleadings and other documents sent through the U.S. Postal Service to the agency, Office of Administrative Hearings or assigned administrative law judge shall be considered filed on the date postmarked. Documents sent by facsimile or hand-delivered are considered filed when received by the agency, Office of Administrative Hearings or assigned administrative law judge. If the agency permits or the administrative law judge directs alternative means of filing, the agency or the administrative law judge should determine when filing is effective for each alternative method permitted or directed.

(9) Documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary.

(10) In computing any period of time prescribed or allowed by these rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the time period shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the time period runs until the end of the next day that is not a Saturday or a legal holiday. Legal holidays are those identified in ORS 187.010 and 187.020.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

**137-003-0525**

**Scheduling Hearings**

(1) Subject to the approval of the agency, the Office of Administrative Hearings or assigned administrative law judge shall:

- (a) Set the date and time of the hearing, including a postponed or continued hearing;
- (b) Determine the location of the hearing; and
- (c) Determine whether cases shall be consolidated or bifurcated.

(2) Unless otherwise provided by law, the Office of Administrative Hearings or assigned administrative law judge may postpone or continue a hearing:

- (a) For good cause; or
- (b) By agreement of the parties and the agency, if the agency is participating in the hearing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 2-2000, f. & cert. ef. 3-27-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

**137-003-0595**

### **Public Attendance; Exclusion of Witnesses; Removal of Disruptive Individuals**

(1) Unless otherwise required by law, contested case hearings are open to the public unless the agency by rule or in writing determines that the hearing will be closed to non-participants in the hearing.

(2) The administrative law judge may exclude witnesses from the hearing, except for a party, a party's authorized representative, expert witnesses, the agency representative, one agency officer or employee and any persons authorized by statute to attend.

(3) An administrative law judge may expel any person from the contested case hearing if that person engages in conduct that disrupts the hearing.

(4) Any party, party's representative, agency or agency's representative, having knowledge or reasonable belief that any person participating in the hearing may present a danger or may be a threat to anyone involved in the hearing, should immediately notify **the Office of Administrative Hearings or** the assigned administrative law judge, the agency and the parties or their representatives of the potential danger.

(5) An administrative law judge, **the Office of Administrative Hearings, or the agency** may take any other measures reasonably required to ensure the safety and security of the participants in the hearing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 2-2000, f. & cert. ef. 3-27-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

137-003-0630

### Pre-hearing Motions

(1) A request for any order or other relief may be made by filing a motion in writing. The motion need not be in any particular form.

**(2) Before filing any motion, the moving party or agency must make a good faith effort to confer with any non-moving party or agency regarding the order or relief sought to seek agreement about the subject of the motion. The moving party or agency need not make an effort to confer if efforts to confer would pose a risk to any person or would be futile. Any motion must describe the effort to confer and the result of the effort, or explain why the moving party or agency made no effort to confer with the non-moving party or agency.**

~~(2)~~ **(3)** Unless otherwise provided by statute or rule, all motions shall be filed in writing at least seven **14** calendar days before the date set for the hearing and a copy provided to the parties and to the agency in the manner required by OAR 137-003-0520 except:

(a) Motions seeking to intervene or to be granted party status under OAR 137-003-0535,

(b) Motions made in a pre-hearing conference,

(c) Motions for a ruling on legal issues under OAR 137-003-0580; and

(d) Motions to continue a scheduled conference or hearing,

(e) Motions to quash a subpoena under OAR 137-003-0585 when the subpoena is served less than 14 days before the date set for the hearing.

~~(3)~~ **(4)** The agency or a party may file a response to a motion.

**(a) Responses to motions made seven filed 14 or more** calendar days before the date of the hearing shall be in writing with service to the parties and to the agency in the manner required by OAR 137-003-0520 and shall be filed **and served within seven calendar days after receipt of the motion.** ~~on the earlier of:~~

~~(a) Five calendar days after receipt of the motion, or~~

~~(b) The date and time of the hearing.~~ **Responses to motions filed fewer than 14 calendar days before the date of the hearing may be in writing or presented orally at**

**the hearing. If the response is in writing, the response must be filed and served on the parties or the agency in the manner required by OAR 137-003-0520 before the start of the hearing.**

(4) ~~(5)~~ Responses to late-filed motions may be presented orally or in writing at the contested case hearing.

~~(5)~~ (6) At the request of a party or the agency, or on the administrative law judge's own motion, the administrative law judge may establish longer or shorter periods than those under sections (2) and (3) of this rule for the filing of motions and responses. The administrative law judge may also consider motions presented orally at the contested case hearing. In exercising discretion under this subsection, the administrative law judge shall consider the duty to ensure a full and fair inquiry into the facts and the likelihood of undue delay or unfair prejudice.

~~(6)~~ (7) The mere filing or pendency of a motion, even if uncontested, does not alter or extend any time limit or deadline established by statute, rule or order.

~~(7)~~ (8) The administrative law judge shall rule on all motions on the record before issuance of a proposed order or in the proposed order or, if the administrative law judge has authority to issue a final order without first issuing a proposed order, in the final order.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

**137-003-0665**

### **Final Orders in Contested Cases**

(1) Final orders in contested cases shall be in writing.

(2) Except as provided in section (5) of this rule, all final orders in contested cases shall include the following:

(a) Each of the elements identified in OAR 137-003-0645(3)(a)-(h),

(b) An Order stating the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom; and

(c) A citation of the statutes under which the order may be appealed.

(3) If the agency modifies the proposed order issued by the administrative law judge in any substantial manner, the agency must identify the **modification** ~~modifications~~ and

~~provide an explanation to the parties as to~~ explain to the parties why the agency made the modification. For purposes of this provision, an agency modifies a proposed order in a "substantial manner" when the effect of the modification ~~modifications~~ is to change the outcome or the basis for the order or to change a finding of fact.

(4) The agency may modify a finding of historical fact made by the administrative law judge only if the agency determines that the finding made by the administrative law judge is not supported by a preponderance of the evidence in the record. For purposes of this provision, an administrative law judge makes a finding of historical fact if the administrative law judge determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.

(5) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0510(4), the final order need not comply with section (2) of this rule. However, the order must state the agency action and:

(a) Incorporate by reference a stipulation or agreed settlement signed by the party or parties agreeing to that action; or

(b) Be signed by the party or parties: **; and**

**(c) A copy must be delivered or mailed to each party and the attorney of record for each party that is represented.**

(6) The final order shall be served on each party **and, if the party is represented, on the party's attorney.**

(7) The date of service of the final order on the parties **or, if a party is represented, on the party's attorney** shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(5), 183.470 & OL 1999, Ch. 849, **HB 2423 (2007)**

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

137-003-0670

**Default in Cases Involving a Notice of Proposed Action that Does Not Become Final Without a Hearing or Default**

(1) This rule applies when the agency issues a notice of proposed action that does not become final in the absence of a request for hearing. The agency or, if authorized, the administrative law judge may issue a final order by default:

(a) When the agency gave a party an opportunity to request a hearing and the party failed to request a hearing within the time allowed to make the request;

(b) When the party that requested a hearing withdraws the request;

(c) Except as provided in section (2) of this rule, when the agency or administrative law judge notified the party of the time and place of the hearing and the party fails to appear at the hearing; or

(d) When the agency or administrative law judge notified the party of the time and place of the hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency or administrative law judge that the party will not appear at the hearing, unless the agency or administrative law judge agreed to reschedule the hearing.

(2) If the party failed to appear at the hearing and, before issuing a final order by default, the agency or administrative law judge finds that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, the agency or administrative law judge may not issue a final order by default under section (1)(c) of this rule. In this case, the administrative law judge shall schedule a new hearing.

(3)(a) An agency or administrative law judge may issue an order adverse to a party upon default under section (1) of this rule only upon a prima facie case made on the record. The agency or administrative law judge must find that the record contains evidence that persuades the agency or administrative law judge of the existence of facts necessary to support the order.

(b) Except as provided in subsection (c) of this section, if the agency designated the agency file in a matter as the record when a contested case notice for the matter was issued in accordance with OAR 137-003-0505 and no further testimony or evidence is necessary to establish a prima facie case, the agency file, **including all materials submitted by a party**, shall constitute the record. No hearing shall be conducted. The agency or, if authorized, the administrative law judge shall issue a final order by default under section (1) of this rule in accordance with OAR 137-003-0665.

(c) If the agency determines that testimony or evidence is necessary to establish a prima facie case or if more than one party is before the agency and one party appears at the hearing, the administrative law judge shall conduct a hearing and, unless authorized to issue a final order without first issuing a proposed order, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645. The agency or, if authorized, the administrative law judge shall issue a final order by default in accordance with OAR 137-003-0665.

(4) The agency or administrative law judge shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order.

(5) If a final order by default is entered because a party did not request a hearing within the time specified by the agency, the party may make a late hearing request as provided in OAR 137-003-0528.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(6), 183.470 & OL 1999, Ch. 849, **HB 2423 (2007)**

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

**137-003-0672**

### **Default in Cases Involving an Agency Order that May Become Final Without a Request for Hearing**

(1) This rule applies when the agency has issued a contested case notice containing an order that was to become effective unless a party requested a hearing, ~~and~~ has designated the agency file, **including all materials submitted by a party**, as the record, **and the record constitutes a prima facie case.**

(2) When the agency gives a party an opportunity to request a hearing and the party fails to request a hearing within the time allowed to make the request, the agency order is final and no further order need be served upon the party. The party may make a late hearing request as provided in OAR 137-003-0528.

(3) After a party requests a hearing, the agency or the administrative law judge will dismiss the request for hearing, and the agency order is final as if the party never requested a hearing if:

(a) The party that requested a hearing withdraws the request;

(b) The agency or administrative law judge notifies the party of the time and place of the hearing and the party fails to appear at the hearing; or

(c) In a matter in which only one party is before the agency, the agency or administrative law judge notifies the party of the time and place of the hearing, and the party notifies the agency or administrative law judge that the party will not appear at the hearing, unless the agency or administrative law judge agrees to reschedule the hearing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(6) & 183.470, **HB 2423 (2007)**

Hist.: DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

## **Selection and Procurement of Dispute Resolution Providers**

### **137-005-0040**

- (1) The agency may select the collaborative DR provider or may opt to select the provider by consensus of the participants.
- (2) A collaborative DR provider who has a financial interest in the subject matter of the dispute, who is an employee of an agency in the dispute, who has a financial relationship with any participant in the collaborative DR process or who otherwise may not be impartial is considered to have a potential bias. If, before or during the dispute resolution process, a provider has or acquires a potential bias, the provider shall so inform all the participants. Any participant may disqualify a provider who has a potential bias if the participant believes in good faith that the potential bias will undermine the ability of the provider to be impartial throughout the process.
- (3) If the collaborative DR provider is a public official as defined by ORS 244.020(15), the provider shall comply with the requirements of ORS chapter 244.
- (4) If the agency procures the services of a collaborative DR provider, the agency must comply with all procurement and contracting rules provided by law. A roster of collaborative DR providers and a simplified mediator and facilitator procurement process developed by the Department of Justice may be used by the agency when selecting a collaborative DR provider ~~by consensus~~.
- (5) If the collaborative DR provider is a mediator or facilitator who is not an employee of the agency, the participants shall share the costs of the provider, unless the participants agree otherwise or the provider is retained solely by the agency or by a non-participant.
- (6) Whenever the agency compensates a provider who is not an employee of the agency, the state must execute a personal services contract with the provider. If the agency and the other participants choose to share the cost of the collaborative DR provider's services, the non-agency participants may enter into their own contract with the provider or may be a party to the contract between the agency and the provider, at the discretion of the agency. The agency's contract with a provider must state:
  - (a) The name and address of the provider and the contracting agency;
  - (b) The nature of the dispute, the issues being submitted to the collaborative DR process and the identity of the participants, as well as is known at the time the contract is signed;
  - (c) The services the provider will perform (scope of work);
  - (d) The compensation to be paid to the provider and the maximum contract amount;

(e) The beginning and ending dates of the contract and that the contract may be terminated by the agency or the provider upon mutual written consent, or at the sole discretion of the agency upon 30 calendar days notice to the provider or immediately if the agency determines that the DR process is unable to proceed for any reason.

(7) A student, intern or other person in training or assisting the provider may function as a co-provider in a dispute resolution proceeding. The co-provider shall sign and be bound by the agreement to collaborate specified in OAR 137-005-0030, if any, and, if compensated by the agency, a personal services contract as specified in section (6) of this rule.

Stat. Auth.: ORS 183.341 & 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 13-2005, f & cert. ef. 10-31-05

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