# **12 DEPARTMENT OF LABOR**

**179 BOARD OF OCCUPATIONAL SAFETY AND HEALTH**

**Chapter 1: PROCEDURAL RULES**

**Summary**: This chapter describes the Occupational Safety & Health Board Procedural Rules for notices, hearings, records, subpoena powers, decisions, officers and rulings.

**1.01 NOTICE**

 A. Notice of Hearings to be held by the Board shall be given as follows:

 1. By registered mail to the person or persons whose legal rights, duties or privileges are at issue, sufficiently in advance of the hearing date to afford an adequate opportunity to prepare and submit evidence and argument.

 2. By publication to the public sufficiently in advance of the hearing date to afford interested persons an adequate opportunity to prepare and submit evidence and argument and to petition to intervene in any proceedings deemed by the Board to involve the determination of issues of substantial public interest.

 3. Notice by publication shall be given in a newspaper of general circulation at least twice, in the area of the State affected and in any other trade, industry, professional or interest group publication which the Board deems effective in reaching persons who would be entitled to intervene.

 B. All Notices of Hearings shall contain the following:

 1. A statement of the legal authority and jurisdiction under which the proceeding is being conducted;

 2. A reference to the particular substantive statutory and rule provisions involved;

 3. A short and plain statement of the nature and purpose of the proceeding and of the matters asserted;

 4. A statement of the time and place of the hearing,

 5. A statement of the manner and time within which evidence and argument may be submitted to the agency for consideration,

 6. A statement of the manner and time within which applications for intervention may be filed.

**1.02 DISPOSITION WITHOUT FULL HEARING**

 A. The Board may make informal disposition of any adjudicatory proceeding by default when any party fails to appear at the scheduled hearing, provided that notice of the consequences of such failure to appear has been given to said party. Any such default may be set aside by the Board for good cause shown.

 B. The Board may limit the issues to be heard or vary any procedure prescribed by Board rule or the Administrative Procedure Act if the parties and Board agree to such limitation or variation, or if no prejudice to any party will result.

**1.03 PUBLIC PARTICIPATION**

 A. **Intervention**. On timely application made pursuant to Board rules, the Board shall allow any person showing that he is or may be, or is a member of a class which is or may be substantially and directly affected by the proceeding, or any other agency of federal, state or local government to intervene as a party to the proceeding.

 B. **Intervention; interested person**. The Board may, by order, allow any other interested person to intervene and participate as a full or limited party to the proceeding. This shall not be construed to limit public participation in the proceeding in any other capacity.

 C. **Participation limited or denied**. When participation of any person is limited or denied, the Board shall include in the record an entry to that effect and the reasons-therefore.

 D. **Consolidation of presentation**. Where appropriate, the Board may require consolidation of presentations of evidence and argument by members of a class entitled to intervene or by persons allowed to intervene.

 E. **Participation**. The Board shall allow any of its staff to appear and participate in any adjudicatory proceeding.

 F. **Attendance by conference communications**. Unless otherwise restricted by law, members of the Board, or members of any committee designated by the Board, may participate in a meeting of the Board by means of video conference, interactive television, computer technology or similar communications equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this section shall constitute presence in person at such meeting.

**1.04 EX PARTE COMMUNICATIONS: SEPARATION OF FUNCTIONS**

 A. In any adjudicatory proceeding, no Board members authorized to take final action or presiding officers designated by the Board to make findings of fact and conclusions of law shall communicate directly or indirectly, in connection with any issue of fact, law or procedure, with any person, except upon notice and opportunity for all parties to participate.

 B. This section shall not prohibit any Board member or other presiding officer described above from:

 1. Communicating in any respect with other members of the Board or other presiding officer; or

 2. Having the aid or advice of those members of his own Board staff, counsel or consultants retained by the Board who have not participated and will not participate in the Board proceeding in an advocate capacity.

**1.05 OPPORTUNITY TO BE HEARD**

 A. The opportunity for hearing shall be afforded without undue delay.

 B. Unless limited by stipulation under Rule 1.02(B) or by Board order pursuant to Rule 1.03(b or D) or unless otherwise limited by the Board to prevent repetition or unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, and at any bearing to call, and examine witnesses and to make oral cross-examination of any person present and testifying.

**1.06 EVIDENCE**

 A. The Board need not observe the rules of evidence observed by the courts, but shall observe the rules of privilege recognized by law.

 B. Evidence shall be submitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The Board may exclude irrelevant or unduly repetitious evidence.

 C. All witnesses shall be sworn.

 D. Subject to these requirements, the Board may, for the purposes of expediting adjudicatory proceedings, require the prefiling of all or part of the testimony of any witness in written form. Every such witness shall be subject to oral cross-examination.

 E. No sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown.

**1.07 OFFICIAL NOTICE**

 A. The Board may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and nonconfidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

 B. Facts officially noticed shall be included and indicated as such in the record.

 C. Notwithstanding the foregoing, the Board may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

**1.08 RECORD**

 A. In all adjudicatory proceedings the Board shall make a record consisting of the following:

 1. All applications, pleadings, motions, preliminary and interlocutory rulings and orders;

 2. Evidence received or considered;

 3. A statement of facts officially noticed;

 4. Offers of proof, objections and rulings thereon;

 5. Proposed findings and exceptions, if any;

 6. The recommended decision, opinion or report, if any, by the presiding officer;

 7. The decision of the Board; and

 8. All staff memoranda submitted to the members of the Board or other presiding officers by Board staff in connection with their consideration of the case, except memoranda of counsel to the Board.

 B. The Board shall record all hearings in a form susceptible to transcription. Portions of the record as required and specified in subsection A of this rule may be included in the recording. The Board shall transcribe the recording when necessary for the prosecution of an appeal.

 C. The Board shall make a copy of the record, including recordings made pursuant to subsection B of this rule, available at the offices of the Bureau of Labor, for inspection by any person during normal business hours; and make copies of the record, copies of recordings or transcriptions or recordings available to any person at actual cost. Notwithstanding the provisions of this subsection, the Board shall withhold, obliterate or otherwise prevent the dissemination of any portions of the record which are made confidential by State or federal statute, but shall do so in the least restrictive manner feasible.

 D. All material, including record, reports and documents in possession of the Board, of which it desires to avail itself as evidence in making a decision, shall be offered and made part of the record and no other factual information or evidence shall be considered in rendering a decision.

 E. Documentary evidence may be incorporated in the record by reference when materials so incorporated are made available for examination by the parties before being received in evidence.

**1.09 SUBPOENAS**

 A. Pursuant to Title 5 MRSA §9060, the Board may issue a subpoena if it first obtains the approval of the Attorney General or of any deputy attorney general. Any party to the proceeding may request that a subpoena be issued.

 B. Authorized subpoenas shall be issued in accordance with the following:

 1. The form of the subpoena shall adhere, insofar as practicable, to the form used in civil cases before the courts. Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law.

 2. The subpoena shall show on its face the name and address of the party at whose request it was issued.

 3. Any witness subpoenaed may petition the Board to vacate or modify a subpoena in its name. The Board shall give prompt notice to the party who requested issuance of the subpoena. After such investigation as the agency considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested.

 4. Pursuant to Title 5 MRSA §9060 (1) (D) failure to comply with a subpoena lawfully issued and not revoked or modified shall be punishable by a fine of not less than $500.00 and not more than $5,000, or by imprisonment not to exceed 30 days, or both.

**1.10 DECISIONS**

 A. Every Board decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's rights to review or appeal of the decision within the Board or review of the decision by the courts, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right of review or appeal, shall be given to each party with the decision.

 B. The Board shall maintain a record of the vote of each member of the Board with respect to the Board decision.

**1.11 PRESIDING OFFICERS**

 A. The Board may authorize any Board member to act as presiding officer in any hearing.

 B. Whenever a presiding officer is disqualified or it becomes impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the hearing; provided that, if it is shown substantial prejudice to any party will thereby result, the substitute officer shall commence the hearing anew.

 C. It shall be the duty of the presiding officer to:

 1. Administer oaths and affirmations;

 2. Rule on the admissibility of evidence;

 3. Regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of evidence, briefs and other written submissions; and

 4. Take other action authorized by statute or Board rule.

 D. In the event that the presiding officer prepares any report or proposed findings for the Board, the report of findings shall be in writing. A copy of the report or findings shall be provided to each party and an opportunity shall be provided for response or exceptions to be filed by each party.

 E. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or Board member in the proceeding requesting that the person disqualify himself, that person shall determine the matter as a part of the record.

**1.12 ADVISORY RULINGS**

 A. Advisory rulings may be made with respect to the applicability of any statute or rule administered by the Board to an interested person or his property or actual state of facts.

 B. An interested person means any person over whom the Board has authority to inspect and enforce its safety standards.

 C. All requests for advisory rulings shall be made in writing and submitted to the Director of the Bureau of Labor, State Office Building, Augusta, Maine. Such requests shall state the facts and statutes or rules on which the ruling is requested.

 D. The Director of the Bureau of Labor may request from any person seeking an advisory ruling any additional information that is necessary. Failure to supply such additional information shall be cause for the Board to decline to issue an advisory ruling.

 E. The Board may decline to issue an advisory ruling if a citation or penalty has been issued against the person requesting the ruling on the same factual grounds. The Board may also decline to issue an advisory ruling if such a ruling may harm the Board's interest in any litigation in which it is or may be a party.

 F. All advisory rulings shall be issued, in writing no later than 30 days from the date all information necessary to make a ruling has been received by the Director of the Bureau of Labor.

 G. No advisory ruling shall be binding upon the Board provided that in any subsequent enforcement action initiated by the Board, any person's reliance on such a ruling shall be considered in mitigation of any penalty sought to be assessed.

STATUTORY AUTHORITY: 26 MRSA Chapter 6 §565

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