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## PERMANENT ADMINISTRATIVE ORDER

**BLI 8-2019**  
CHAPTER 839  
BUREAU OF LABOR AND INDUSTRIES

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### RULES:

839-050-0000, 839-050-0010, 839-050-0020, 839-050-0030, 839-050-0040, 839-050-0050, 839-050-0060, 839-050-0070, 839-050-0080, 839-050-0090, 839-050-0100, 839-050-0110, 839-050-0120, 839-050-0130, 839-050-0140, 839-050-0150, 839-050-0160, 839-050-0170, 839-050-0180, 839-050-0190, 839-050-0200, 839-050-0210, 839-050-0220, 839-050-0230, 839-050-0240, 839-050-0250, 839-050-0255, 839-050-0260, 839-050-0270, 839-050-0280, 839-050-0290, 839-050-0300, 839-050-0310, 839-050-0320, 839-050-0330, 839-050-0340, 839-050-0350, 839-050-0360, 839-050-0370, 839-050-0380, 839-050-0400, 839-050-0410, 839-050-0420, 839-050-0430, 839-050-0445

AMEND: 839-050-0000

RULE TITLE: Statement of Purpose

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amend statutory authority.

### RULE TEXT:

(1) The purpose of OAR 839-050-0000 to 839-050-0440 is to ensure that the contested case procedures of the Bureau of Labor and Industries comply with ORS 183.413 to 183.470, to provide clear guidelines and an understanding of what is expected of participants, and to provide for thorough and timely hearings.

(2) In an effort to provide timely hearings, OAR 839-050-0000 to 839-050-0440 establish time limits that will be strictly followed. Waiver or extension of set time limits will be granted only under the limited circumstances set forth in these rules.

STATUTORY/OTHER AUTHORITY: ORS chapter 183; ORS 279C.815, 279C.817; 651.060(4), 658.407(3), 658.820, 659A.805

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 659A.845, 659A.850

AMEND: 839-050-0010

RULE TITLE: Model Rules of Procedure

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to add link to Attorney General's Model Rules of Procedure.

RULE TEXT:

The Attorney General's Model Rules of Procedure for contested cases adopted pursuant to OAR 839-002-0005 govern contested case proceedings of the Bureau of Labor and Industries except to the extent they conflict with or are modified by rules in this division or any other division of chapter 839 of the Oregon Administrative Rules. The rules for contested case proceedings are set forth in OAR chapter 839, division 50. The Attorney General's Model Rules for Agency Declaratory Rulings govern Declaratory Rulings.

NOTE: The full text of the Attorney General's Model Rules of Procedure is found online at <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=283>

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0020

RULE TITLE: Definitions

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends definitions.

RULE TEXT:

Unless the context requires otherwise, the following definitions apply to OAR 839-050-0000 through 839-050-0445:

(1) "Administrative Law Judge" means the commissioner or an individual or a special tribunal designated by the commissioner to preside over any or all aspects of a contested case proceeding including motions, oral or written hearings, preparation of the Proposed Order and assistance in preparation of the Final Order. The Administrative Law Judge may or may not be an employee of the Agency, except that when a case involves a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, the Administrative Law Judge or anyone appointed as a hearings officer or member of a special tribunal to hear the matter must be an employee of the Agency.

(2) "Administrative Prosecution Unit" means the section of the Bureau of Labor and Industries handling the administrative prosecution of contested case proceedings.

(3) "Administrative Prosecutor" means the Agency staff person assigned to prosecute contested case proceedings for the Agency and to handle all related matters, but does not include counsel for the Agency.

(4) "Agency" means the Bureau of Labor and Industries and any employee thereof, and includes the bureau when acting as the agent of another governmental entity, but for the purposes of these rules does not refer to the Administrative Law Judge, Contested Case Coordinator, or the commissioner.

(5) "Aggrieved person"

(a) For the purpose of proceedings involving a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, includes, but is not limited to, a person who believes that the person either:

(A) Has been injured by an unlawful practice or discriminatory housing practice; or

(B) Will be injured by an unlawful practice or discriminatory housing practice that is about to occur.

(b) For the purpose of a complaint filed by the commissioner or the Attorney General, is a person on whose behalf the complaint is filed.

(c) A person who is, or was at any time, eligible to file a complaint under ORS 659A.820 or who is otherwise similarly situated.

(d) A person who files a complaint personally or through an attorney under ORS 659A.825.

(e) For the purpose of prevailing wage rate determinations, is a person as defined at OAR 839-050-0445.

(6) "Authorized Representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, including fiduciaries, mutual companies, trusts and unincorporated organizations, or an authorized officer or employee of a governmental agency who has been authorized by the partnership, corporation, association, organized group, or governmental agency to represent that entity during the contested case proceeding.

(7) "Charging document" means any document issued by the Bureau of Labor and Industries stating that any person, entity, or government agency has violated the laws within this Agency's jurisdiction and includes, but is not limited to:

(a) Formal Charges;

(b) Order of Determination;

(c) Notice of Intent to Revoke License;

(d) Notice of Intent to Deny License;

(e) Notice of Intent to Refuse to Renew a License;

(f) Notice of Intent to Place Name on List of Ineligibles;

(g) Notice of Intent to Assess Civil Penalties;

(h) Notice of Intent to Suspend or Revoke License or to Assess Civil Penalty in Lieu Thereof.

(8) "Chief Prosecutor" is the Administrative Prosecutor responsible for managing the Administrative Prosecution Unit. The Chief Prosecutor may also administratively prosecute cases on behalf of the Agency.

(9) "Claimant" means any individual who has filed a wage claim pursuant to ORS chapter 652 or 653 and who has assigned that claim to the commissioner.

(10) "Commissioner" means the Commissioner of the Bureau of Labor and Industries.

(11) "Complainant" means an individual who has, or whose attorney has, filed a complaint pursuant to ORS chapter 658 or 659A, chapters 652 and 653, chapter 279C, and any other laws or regulations or ordinances, enforced by the bureau as the agent of another governmental entity.

(12) "Contested Case Coordinator" means the Bureau of Labor and Industries staff person who receives and maintains all records filed with the Forum in contested cases, issues official contested case documents, and provides administrative support to the Forum and the Administrative Prosecution Unit.

(13) "Counsel" means an attorney who is in good standing with the Oregon State Bar or the Bar of another state who is granted permission by the Administrative Law Judge to appear in the matter pursuant to ORS 9.241 and Oregon Uniform Trial Court Rule 3.170. Oregon counsel who request permission for the appearance of an out-of-state attorney must participate meaningfully in the case in which the out-of-state attorney appears.

(14) "Counsel for the Agency" means the Oregon Attorney General, the Oregon Attorney General's designee, or separate counsel as authorized by the Oregon Attorney General pursuant to ORS 180.235(1).

(15) "Forum" means the Administrative Law Judge assigned to preside over the contested case proceeding and the Commissioner or Deputy Commissioner who signs the final order. The address for filing all documents with the Forum is: Contested Case Coordinator, Bureau of Labor and Industries, 1045 State Office Building, 800 N.E. Oregon Street, Portland, OR 97232.

(16) "Good cause" means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.

(17) "Issuance" means the act of sending out a document from the Forum. For purposes of these rules, the date of issuance is the date, as noted on the document, that the document was sent out from the Forum.

(18) "Mail" means the act of sending, or an item sent, by a method or manner that results in a postmark on the item or proof of service of registered or certified mail.

(19) "Participant" means any party, including any person, aggrieved person intervening in a proceeding involving a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, or entity granted party status under OAR 137-003-0005, or the Agency.

(20) "Party" means:

(a) Any person, government agency, or entity upon whom a charging document has been served;

(b) Any person, government agency, or entity that has been granted party or limited party status under OAR 137-003-0005;

(c) Any aggrieved person intervening in a proceeding involving a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law.

(21) "Postmark" means, for purposes of these rules:

(a) An imprint in black ink on the address side of the mail piece that shows the location of the United States Postal Service office that accepted custody of the mail, along with the state, zip code, and date of mailing, or

(b) A stamp indicating when postage was paid, when accompanied by a fully executed certificate of service indicating the document was mailed on the date postage was paid.

(22) "Service" means, for purposes of these rules, the method of sending documents and includes personal service, hand delivery, or registered, certified mail, or regular mail sent through the United States Postal Service.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845 & 659A.850, 659A.885

AMEND: 839-050-0030

RULE TITLE: Service of Documents

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Clarifies rule regarding service of documents.

RULE TEXT:

(1) Except as otherwise provided in ORS 652.332(1) the charging document will be served on the party or the party's representative by personal service or by United States Postal Service registered or certified mail. Service of a charging document is complete upon the earlier of:

(a) Receipt by the party or the party's representative; or

(b) Mailing when sent by United States Postal Service registered or certified mail to the correct address of the party or the party's representative.

(2) All other documents may be served on the party or the party's representative by personal service or by United States Postal Service mail to the last known address in the Agency's file for the subject case. Service of a document other than the charging document is complete upon personal service or official United States Postal Service postmark date, whichever occurs earlier.

(3) Any participant to a contested case proceeding filing a document with the Forum will serve a copy of such document upon all other participants or their representatives.

(4) A participant whose mailing address changes must notify the Contested Case Coordinator in writing within 10 days of such change with a copy to all other participants; otherwise, the Contested Case Coordinator, the Forum, and the Agency will presume the address on file to be correct.

(5) For the purpose of this rule, the term "participant" or "party" does not include an aggrieved person intervening in a proceeding involving a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, or an aggrieved person named in a commissioner's complaint.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850, 659A.885

AMEND: 839-050-0040

RULE TITLE: Filing of Documents with the Contested Case Coordinator; Calculation of Time and Filing Dates

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends filing requirements.

RULE TEXT:

- (1) Documents must be filed with the Contested Case Coordinator to be considered filed with the Forum.
- (2) Except as modified by statute or enlarged by these rules, by order of the commissioner, or by decision of the Administrative Law Judge, a document is filed with the Contested Case Coordinator on the date the Contested Case Coordinator receives the document, or on the date postmarked on the properly addressed document, whichever is earlier.
- (3) Documents are not to be filed with the Contested Case Coordinator by email or by facsimile transmission except with the prior approval of the Administrative Law Judge. The Administrative Law Judge may require the participant filing a document by email or by facsimile transmission to also send the Contested Case Coordinator a copy of the document by United States Postal Service mail or personal delivery, and may require the participant to serve the other participants with the document by email or by facsimile transmission in addition to a paper copy by United States Postal Service mail or personal delivery.
- (4) The computation of any period of time will not include the day from which the designated period begins to run. The computation will include the last day of this period unless it is a Saturday, Sunday, or holiday officially recognized by the State of Oregon or the federal government. If the last day of the time period is a Saturday, Sunday, or holiday, the period will run until 5 p.m. of the next day that is not a Saturday, Sunday, or holiday.
- (5) All time periods described in these rules are measured in calendar days.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0050

RULE TITLE: Timeliness

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends filing timeliness requirements.

RULE TEXT:

(1) The Administrative Law Judge may disregard any document that is filed with the Contested Case Coordinator beyond the established number of days for filing.

(2) When a participant requires additional time to submit any document, a written request for such extension must be filed with and received by the Contested Case Coordinator no later than the date set for filing of the document in question, except that the Administrative Law Judge has discretion to permit a participant to make an oral motion for an extension of time. When the Administrative Law Judge allows a participant to make an oral motion for extension of time, the Administrative Law Judge will promptly notify the other participants of the motion and give them an opportunity to respond, either orally or in writing. When a participant files a written motion for extension of time, the other participants will have seven days after service of the motion in which to file a written response, unless that time is altered by order of the Administrative Law Judge.

(3) The administrative law judge may grant such an extension of time only in situations when the requesting participant shows good cause for the need for more time or when no other participant opposes the request. The administrative law judge will promptly notify the participant requesting the extension whether it will be allowed.

(4) When an extension of time is allowed to a participant, the administrative law judge will advise all participants of the new due date, and will state whether the same extension of time applies to the other participants.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: 658.820, 659A.845, 659A.850, ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3)

AMEND: 839-050-0060

RULE TITLE: Charging Documents

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify that charging documents contain alleged violations.

RULE TEXT:

(1) A charging document will contain:

(a) A reference to the particular statutes or administrative rules involved in the alleged violation;

(b) A short and concise statement of the matters that constitute the alleged violation; and

(c) A statement of the remedies sought, the statutes or rules involved and, when appropriate, the penalty sought.

(2) A charging document may contain statements 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 a party files an answer and a request for hearing (when required), and subsequently notifies the Agency that it will not appear at the hearing, or, without such notice, the party fails to appear at the hearing, the Agency's file may become part of the contested case record; and

(c) A statement that when a party fails to answer a charging document, the Agency file will automatically become the contested case record, or part thereof, upon default for the purpose of proving a prima facie case.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0070

RULE TITLE: Request for a Contested Case Hearing

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Clarifies requirements pertaining to requests for a contested case hearing.

RULE TEXT:

Except when Formal Charges are issued, any party upon whom a charging document is served and who wishes to contest the charging document must request a contested case hearing. This request must be in writing and filed with the Agency to the address and within the time limit established in the charging document. A party that fails to file a request for a hearing within the time limit established in the charging document, or that requests a hearing and subsequently withdraws the request, will be in default as to the charges alleged in the charging document.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0080

RULE TITLE: Notice of Hearing

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Clarifies information contained within a Notice of Hearing.

RULE TEXT:

(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 Contested Case Coordinator will issue a Notice of Hearing from the Forum to the participants.

(2) When Formal Charges are issued, the notice of hearing will accompany the Formal Charges.

(3) In civil rights housing cases only, unless an aggrieved person 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 659A.885 (see 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.

(4) A Notice of Hearing will 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 over the contested case 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 Oregon Department of Justice or by an Agency Administrative Prosecutor.

(5) 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.

(6) 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 will become the contested case record, or a part thereof; and

(c) When a party fails to answer a charging document, the Agency file will become the contested case record, or part thereof, upon default for the purpose of proving a prima facie case.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER 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

AMEND: 839-050-0090

RULE TITLE: Location of Contested Case Hearings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amend to add that location of hearing will be included in Notice of Hearing.

RULE TEXT:

Contested case hearings will generally be held in a State of Oregon office building when available, or another appropriate facility, near the location where the action arose. The location of a hearing will be included in the Notice of Hearing.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0100

RULE TITLE: Information for Contested Case Hearings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify information for Contested Case Hearings.

RULE TEXT:

The Forum will provide with a Notice of Hearing, a statement of information for all parties involved in a contested case hearing that includes:

- (1) Instructions that all filings, correspondence, and documents must be filed with the Contested Case Coordinator at this address: Contested Case Coordinator, Bureau of Labor and Industries, 1045 State Office Building, 800 N.E. Oregon Street, Portland, OR 97232;
- (2) The information required under ORS 183.413(2) concerning the rights of the parties to the hearing;
- (3) A statement that an order may be issued upon default if a party requesting a hearing fails to appear at the hearing and there is a prima facie case of unlawful practices or other violations; and
- (4) A statement that the party's address as it appears in the Contested Case Coordinator's and the Agency's files, and to which the Notice of Hearing has been sent, will be the address used throughout the proceeding. A party whose address changes must immediately notify the Contested Case Coordinator, with copies to all other participants; otherwise, the Contested Case Coordinator, the Forum, and the Agency will presume the address on file to be correct.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0110

RULE TITLE: Representation of a Party in a Contested Case Proceeding

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge."

RULE TEXT:

(1) Any party may be represented by counsel, as that term is defined in OAR 839-050-0020(13). At all stages of the contested case proceeding, all government agencies, partnerships, corporations and unincorporated associations must be represented either by counsel, who may perform all functions consistent with representation of a client, or by an authorized representative, subject to the limitations of sections (2) through (6) of this rule.

(2) For purposes of OAR chapter 839, division 50, "authorized representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental agency.

(3) Before appearing in the case, an authorized representative must provide written authorization for the named representative to appear on behalf of the party or limited party. This written authorization must be provided no later than the time that an answer and request for hearing is filed.

(4) An authorized representative may not present legal argument during the contested case proceeding except to the extent authorized by section 5 of this rule. "Legal argument" includes arguments on:

(a) The jurisdiction of the agency to hear the contested case;

(b) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(c) The application of court precedent to the facts of the particular contested case proceeding.

(5) The Administrative Law Judge may allow the authorized representative to present evidence, examine and cross-examine witnesses, and make arguments relating to the:

(a) Application of statutes and rules to the facts in the contested case;

(b) Actions taken by the Agency in the past in similar situations;

(c) Literal meaning of the statutes or rules at issue in the contested case;

(d) Admissibility of evidence; and

(e) Proper procedures to be used in the contested case hearing.

(6) When a party is represented by an authorized representative in a hearing, the Administrative Law Judge will advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. When such objections may involve legal argument as defined in section 4 of this rule, the Administrative Law Judge will provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

(7) A party that intends to be represented by counsel during the contested case proceeding, and that is not a government agency, partnership, corporation or unincorporated association, will notify the Forum of its intent to be represented by counsel as soon as practicable. Once the contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0120

RULE TITLE: Representation of a Claimant, Complainant, or Aggrieved Person in a Contested Case Proceeding

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to correct statutory authority.

RULE TEXT:

The claimant, complainant or aggrieved person may have counsel present at the contested case hearing; however, counsel's participation is limited to rendering advice to counsel's client. Such counsel may not file motions, make objections, examine or cross-examine witnesses or make legal argument, except that such counsel may assert privilege for counsel's client at any point in a contested case proceeding and may participate fully in any deposition of counsel's client.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0130

RULE TITLE: Responsive Pleadings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify when and how to file responsive pleadings.

RULE TEXT:

- (1) A party filing a written request for a hearing must file a written response, referred to as an "answer," to the allegations in the charging document. The answer must be sent to the address indicated on the charging document. A party served with a Notice of Hearing and Formal Charges must file with the Contested Case Coordinator, at the address indicated on the Notice of Hearing, an answer to the allegations in the Formal Charges.
- (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.
- (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, except as provided in OAR 839-050-0140(3). 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 aggrieved person 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.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER 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

AMEND: 839-050-0140

RULE TITLE: Amendments

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify that amendments must be filed with the Contested Case Coordinator.

RULE TEXT:

(1) The Agency may amend its charging document:

(a) At any time before the hearing commences; or

(b) During the hearing, but before the evidentiary record closes, as allowed in (4) and (5) of this rule.

(2) If the Agency files an amended charging document with the Contested Case Coordinator before the hearing commences, any party may file an answer to it as it would in responding to an original charging document under OAR 839-050-0130(2)–(3), except:

(a) The answer to an amended charging document must be filed with the Contested Case Coordinator no later than seven days after the amended charging document is served on the party, subject to the Administrative Law Judge's discretion to alter the deadline; and

(b) The answer to an amended charging document may differ from the answer to the previous charging document only as needed to respond to new or amended information, unless good cause is shown. If a party does not file an answer to an amended charging document with the Contested Case Coordinator, the party's answer to the previous charging document will be deemed its answer to the amended charging document.

(3) For good cause shown to the Administrative Law Judge, a party may amend its answer at any time before the hearing commences. Any new facts or defenses alleged in the amended answer will be deemed denied by the Agency.

(4) Once the hearing commences, issues not raised in the charging document or answer may be raised and evidence presented on such issues, provided there is express or implied consent of the participants, except that affirmative defenses not raised in the answer may only be raised in response to an agency motion to amend that is made and allowed under this section or section (5) of this rule. Consent will be implied when there is no objection to the introduction of such issues and evidence or when the participants address the issues. Any participant raising new issues must move the Administrative Law Judge, before the close of the evidentiary portion of the hearing, to amend its charging document or answer to conform to the evidence and to reflect issues presented. The Administrative Law Judge may address and rule upon such issues in the Proposed Order.

(5) If evidence offered at hearing is objected to on the grounds that it is not within the issues raised by the charging document or answer, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge will allow the amendment when the participant seeking the amendment shows good cause for not having included the new matter in its charging document or answer prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence. A party may amend its answer to raise an affirmative defense and introduce evidence in support of that defense only when the amendment responds to new matter raised in a charging document amended under this section or section (4) of this rule.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279.361, 279.370, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0150

RULE TITLE: Motions

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to add additional circumstances under which a motion to dismiss will be considered.

RULE TEXT:

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 Contested Case Coordinator. If the nonmoving participant chooses to respond, the nonmoving participant must file a written response to a written motion with the Contested Case Coordinator 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; or

(d) The commissioner's discretion to dismiss a complaint pursuant to ORS 659A.830(2)(a); or

(e) The requirement pursuant to ORS 659A.830(2)(a) that the commissioner dismiss a complaint filed under ORS 659A.820 upon the written request of the person who filed the complaint.

(f) Subsection (e) of this section does not apply to a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law.

(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 Administrative Prosecutor, one agency officer or employee, an authorized representative, claimant, complainant and any person 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.

(c) A motion for summary judgment shall be denied if, at the time of its filing, the contested case hearing is scheduled to commence in fewer than 21 days.

(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 a protective order.

(9) Motion for default when a respondent has failed to timely file an answer within the time specified in the charging document.

(10) Motion to amend.

(11) Motion to make more definite and certain.

(12) 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.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0160

RULE TITLE: Disqualification of Administrative Law Judge

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize Administrative Law Judge.

RULE TEXT:

(1) An Administrative Law Judge may withdraw from a proceeding whenever the Administrative Law Judge determines disqualification to be necessary. Any party to any contested case may claim that the person designated as Administrative Law Judge is prejudiced against any party or counsel or the interest of any party or counsel appearing in such case. Such prejudice must be established by a motion supported by an affidavit establishing that the designated Administrative Law Judge is prejudiced against the party or counsel, or against the interest of the party or counsel, such that the party or counsel cannot, or believes that the party or counsel cannot, have a fair and impartial hearing before the Administrative Law Judge, and that it is made in good faith and not for the purpose of delay. Grounds upon which a motion may be made, or upon which the Administrative Law Judge may determine that disqualification is necessary, include but are not limited to a family relationship with the complainant or claimant or with any party or counsel, or a financial interest in the property or business of any of those individuals. The fact that the Administrative Law Judge is an employee of the Oregon Bureau of Labor and Industries is not a ground for disqualification of the Administrative Law Judge.

(2) The motion and affidavit must be filed together with the Contested Case Coordinator within 14 days after service of the notice of hearing with a copy to all other participants. No motion to disqualify an Administrative Law Judge may be made after the Administrative Law Judge has ruled upon any motion, other than a motion to extend time in the case, or after the hearing has commenced, whichever is earlier.

(3) The Administrative Law Judge will issue a written ruling on the motion for withdrawal or disqualification, setting forth the grounds therefore, within ten days of the receipt of the motion. The ruling will be sent to the commissioner, the Agency, and all parties.

(4) When an Administrative Law Judge has been disqualified, the commissioner will designate another Administrative Law Judge to preside over the contested case proceeding. The Forum will notify the participants of this designation.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0170

RULE TITLE: Joinder of Parties, Claimants, Complainants, or Aggrieved Persons

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify joinder of aggrieved persons.

RULE TEXT:

(1) Aggrieved persons, complainants, or claimants: Any number of persons may be joined in one proceeding as aggrieved persons, complainants, or claimants if they assert a right to relief arising out of the same or similar transaction(s) or occurrence(s) and if questions of law or fact common to all these persons will arise in the proceeding.

(2) Parties: Any number of persons may be joined in one proceeding as parties if there is asserted against them any right to relief arising out of the same transaction(s) or occurrence(s) or if questions of law or fact common to all these persons will arise in the proceeding.

(3) Intervention by aggrieved persons: An aggrieved person may intervene and be joined as a party in a proceeding in which the Agency has issued Formal Charges alleging violations of ORS 659A.145, 659A.421, or federal housing law. The procedures set out in OAR 137-003-0005 of the Attorney General's Model Rules apply.

(4) The Final Order may find for or against the Agency according to the respective rights of one or more of the aggrieved persons, complainants, or claimants, and for or against one or more of the parties according to their respective liabilities.

(5) Misjoinder of aggrieved persons, complainants, claimants, or parties is not a ground for dismissal of a proceeding. Parties may be added or deleted by order of the Administrative Law Judge upon the motion of any participant, upon the Administrative Law Judge's own motion, or upon the application of any person or entity seeking party or limited party status, at any stage of the contested case proceeding. When necessary to complete disposition of the case, the Administrative Law Judge may postpone the hearing to allow a newly added aggrieved person, complainant, claimant, or party to prepare for the hearing.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850, 659A.885

REPEAL: 839-050-0180

RULE TITLE: Dual Hearings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Repeal rule on Dual Hearings.

RULE TEXT:

(1) The commissioner may hold a hearing to resolve the allegations set forth in two or more charging documents when:

(a) The same evidence will be presented in both cases; and

(b) There will not be substantial prejudice to any party.

(2) The issues in both cases need not be the same, nor must the same enforcement means or damages be sought.

(3) Conduct of the hearing includes establishing the procedure for the hearing, questioning of witnesses, and ruling on motions and objections to evidence.

(4) The administrative law judge will issue a Proposed Order to the commissioner in the case. All other rules governing the issuance of any charging document or the hearings process apply to dual hearings.

STATUTORY/OTHER AUTHORITY: ORS 183, 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0190

RULE TITLE: Consolidation of Contested Case Proceedings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify consolidation of contested case proceedings.

RULE TEXT:

The Administrative Law Judge, on their own motion, or upon motion of a party, may order a joint contested case proceeding for two or more contested cases over which they are presiding when the Administrative Law Judge determines that the cases involve common questions of law or fact. The Administrative Law Judge, in conducting the proceeding, may establish procedures necessary to avoid additional costs or delay.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0200

RULE TITLE: Discovery

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule for clarity, particularly related to interrogatories and depositions.

RULE TEXT:

(1) The Administrative Law Judge has the sole discretion to order discovery by a participant in appropriate cases. This rule does not require the Administrative Law Judge to authorize any discovery. If the Administrative Law Judge does authorize discovery, the Administrative Law Judge will control the methods, timing, and extent of discovery, but nothing in this rule prevents informal exchanges of information. When the Administrative Law Judge orders discovery, the Administrative Law Judge will notify the participants of the possible sanction, pursuant to section (11) of this rule, for failure to provide the discovery ordered.

(2) Discovery may include but is not limited to one or more of the following:

(a) Disclosure of names and addresses of witnesses expected to testify at the hearing;

(b) Production of documents;

(c) Production of objects for inspection or permission to enter upon land to inspect land or other property;

(d) Written interrogatories to be served on a participant; and

(e) Requests for admission.

(3) Depositions are strongly disfavored. A factor that the Administrative Law Judge may consider in determining whether to grant a request for a deposition is whether the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.

(4) Except as provided in sections (6) and (9) of this rule, before requesting a discovery order, a participant must seek the discovery through an informal exchange of information.

(5) Except as provided in sections (6) and (9) of this rule, a request for a discovery order must be filed with the Contested Case Coordinator, be in writing, and must include a description of the attempts to obtain the requested discovery informally. The Administrative Law Judge will consider any objections by the participant from whom discovery is sought.

(6) A participant seeking information from another participant by means of written interrogatories may serve that participant with up to 25 interrogatories to be answered by the participant served, or, in the case of a corporation, unincorporated association, or government agency, by its officer or agent. Each discrete subpart of an interrogatory will be counted as a separate interrogatory. If a clause, phrase, or adjective is logically and factually related to the overall interrogatory then it is not "discrete" and does not count as a separate interrogatory. A participant wishing to serve another participant with more than 25 interrogatories must file a motion identifying the participant to be served, setting forth a general description of the nature of the information to be sought and its relevance, and explaining why the additional interrogatories are necessary. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party must state the reasons for objection and must answer to the extent the interrogatory is not objectionable. The answers are to be signed by the person making them. The participant served with interrogatories must serve its answers and objections, if any, within 14 days after service of the interrogatories. The Administrative Law Judge may alter the deadline for answers to interrogatories upon motion by either participant.

(7) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the Administrative Law Judge may require the participant requesting discovery to explain how the request is likely to produce relevant information. If the request appears unduly burdensome, the Administrative Law Judge may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(8) The Administrative Law Judge will issue an order granting or denying a discovery request in whole or in part.

Participants must comply with such orders and have a continuing obligation, through the close of the hearing, to provide the other participants with any newly discovered material that is within the scope of the discovery order.

(9) Unless limited by the Administrative Law Judge, the participants may issue subpoenas in support of discovery. Counsel representing a party may issue subpoenas in the same manner as subpoenas are issued in civil actions, as set forth in the Oregon Rules of Civil Procedure. The Administrative Law Judge may issue subpoenas in support of discovery for any party not represented by counsel. The Bureau of Labor and Industries may apply to the Oregon Circuit Court to compel obedience to a subpoena.

(10) A party requesting that the Administrative Law Judge issue a subpoena on its behalf must file a motion with the Contested Case Coordinator as soon as practicable after the party is served with the Notice of Hearing, but in no event less than seven days prior to the date of the hearing. The motion must include a showing of general relevance and reasonable scope of the evidence sought. If the motion is granted, the Forum will deliver the subpoena to the party that requested it. The party will then be responsible for serving the subpoena and for paying any applicable witness fees.

(11) The Administrative Law Judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8). If the Administrative Law Judge admits evidence that was not disclosed as ordered or subpoenaed, the Administrative Law Judge may grant a continuance to allow an opportunity for the other participant(s) to respond.

(12) The authority to order and control discovery rests solely with the Administrative Law Judge.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0210

RULE TITLE: Case Summary

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends case summary rule to capitalize "Administrative Law Judge."

RULE TEXT:

(1) Prior to any contested case hearing, the Administrative Law Judge may issue a discovery order directing the participants to prepare a case summary due no later than 14 calendar days before the hearing date, containing any or all of the following:

(a) A list of all persons to be called as witnesses, including expert witnesses, at the hearing, except that impeachment or rebuttal witnesses need not be included on the witness list;

(b) The qualifications of any expert witnesses and the substance of the facts and opinions to which the experts are expected to testify;

(c) Identification and description of any document or other physical evidence to be offered into evidence at the hearing, together with two copies of any such document, except that evidence offered solely for impeachment or rebuttal need not be identified or furnished;

(d) Statement of any defenses to the claim;

(e) Statement of any agreed or stipulated facts;

(f) Statement, when appropriate, of any applicable agency policies together with, in the discretion of the Agency, any supporting documents or information on which such policies are based.

(2) When a party is unrepresented by counsel, the Administrative Law Judge may order the party to produce a summary of the case containing only the information and documents described in subsections (1)(a), (b), and (c) of this rule.

(3) Each participant must serve a copy of its case summary, including all documents or other physical evidence to be offered into evidence at the hearing as described in (1)(c) of this rule, on the other participants. Following production of the case summary and before the start of the hearing, a participant must, as soon as practicable, file and serve the other participants with an addendum to its case summary if the participant intends to offer as evidence at the hearing any additional documents, physical exhibits, or testimony that was not identified in the original case summary. The addendum must meet the requirements of paragraphs (1)(a), (1)(b), and (1)(c) of this rule, as applicable. As with the original case summary, evidence to be offered solely for impeachment or rebuttal need not be identified or furnished.

(4) When the Administrative Law Judge orders a case summary, the Administrative Law Judge will notify the participants of the possible sanction, pursuant to OAR 839-050-0210(5), for failure to provide the case summary.

(5) The Administrative Law Judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8). If the Administrative Law Judge admits evidence not provided in response to a case summary order, the Administrative Law Judge may grant a continuance to allow an opportunity for the other participants to respond.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0220

RULE TITLE: Informal Disposition of Contested Case

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to clarify informal disposition of a case and that FOIDs are to be issued solely by Administrative Law Judges and not by the Administrator of the Wage and Hour Division.

RULE TEXT:

- (1) After the Agency issues a charging document, a case may be resolved informally by stipulation, agreed settlement, consent order, settlement agreement, or default.
- (2) When a charging document involves a license revocation proceeding, informal settlement may be made by written agreement of the parties and the Agency consenting to a suspension, civil penalty, or other intermediate sanction.
- (3) Any informal disposition of a contested case, other than by default, must be in writing and signed by the party or parties to the case and the Agency.
- (4) A party interested in resolving a case before the contested case hearing should contact the assigned Administrative Prosecutor. Settlement negotiations are not a basis for postponing the hearing and participants should continue to prepare for hearing until they reach an agreement to settle. An agreement to settle is reached when the participants have agreed to resolve all issues of the contested case and have agreed, orally or in writing, to all terms and conditions of the agreement.
- (5) When an agreement to settle is reached before the hearing date, the participants will submit a joint written notice to the Forum that includes a detailed synopsis of the substantive terms and conditions of the agreement. The Administrative Law Judge will waive the case summary requirement and cancel the hearing only upon receipt of the written notice of agreement to settle and detailed synopsis of the substantive terms and conditions of the agreement signed by the Administrative Prosecutor and respondent or respondent's authorized representative or counsel, if represented. The participants will file fully executed settlement documents with the Contested Case Coordinator, with a copy to the Administrative Law Judge, within 10 days after submitting written notice of the agreement to settle. If fully executed settlement documents are not filed within that period and no extension of time to submit those documents has been granted, the Administrative Law Judge will set a new hearing date that is at least 14 days after the original hearing date unless the Administrative Law Judge and participants agree to an earlier date. No further cancellations or postponements will be allowed based on a purported settlement and the case summary requirement will not be waived for the rescheduled hearing.
- (6) Fully executed settlement documents submitted to the Forum will not contain terms the Agency lacks the authority to enforce or to which the Agency is not a party, such as an agreement by an aggrieved person, claimant, or complainant not to pursue legal action against a respondent other than the claim or complaint being settled.
- (7) Fully executed settlement documents submitted to the Forum will not contain provisions requiring the settlement terms to be confidential or requiring an aggrieved person, claimant, complainant, or the Agency to keep the settlement terms confidential.
- (8) Participants waive their right to a contested case hearing by their signatures on fully executed settlement documents.
- (9) When a contested case is resolved by informal disposition other than default (see OAR 839-050-0330), the Administrative Law Judge will incorporate the settlement terms into a Final Order Incorporating Informal Disposition ("FOID"). When an Order of Determination or Notice of Intent has been issued, but a Notice of Hearing has not been issued, the fully executed settlement document may be incorporated into a FOID by an Administrative Law Judge.
  - (a) The Forum will deliver or mail a copy of a FOID issued by an Administrative Law Judge to each participant and participant's attorney of record.
  - (b) A FOID is not subject to ORS 183.470.
  - (c) A FOID is not subject to judicial review.
  - (d) Within 60 days after a FOID is issued, a participant may petition the Bureau of Labor and Industries to set aside the

order on the ground that the informal disposition was obtained by fraud or duress.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 183.417(3), 279.361, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.850

AMEND: 839-050-0230

RULE TITLE: Authority of the Administrative Prosecutor

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to capitalize Administrative Prosecutor and Administrative Law Judge.

RULE TEXT:

(1) The Administrative Prosecutor is authorized by ORS chapter 183 to appear on behalf of and represent the Agency. The Administrative Prosecutor may perform any function not prohibited by this rule.

(2) The Administrative Prosecutor may not present legal argument during the contested case proceeding except to the extent authorized by section 3 of this rule. "Legal argument" includes arguments on:

(a) The jurisdiction of the agency to hear the contested case;

(b) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;

(c) The application of court precedent to the facts of the particular contested case proceeding.

(3) The Administrative Law Judge may allow the Administrative Prosecutor to present evidence; examine and cross-examine witnesses; and make arguments relating to the:

(a) Application of statutes and rules to the facts in the contested case;

(b) Actions taken by the Agency in the past in similar situations;

(c) Literal meaning of the statutes or rules at issue in the contested case;

(d) Admissibility of evidence; and

(e) Proper procedures to be used in the contested case hearing.

(4) When an Administrative Prosecutor is representing the Agency in a hearing, the Administrative Law Judge will advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. When such objections may involve legal argument as defined in section 2 of this rule, the Administrative Law Judge will provide reasonable opportunity for the Administrative Prosecutor to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after the conclusion of the hearing.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0240

RULE TITLE: Responsibilities of the Administrative Law Judge

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to clarify authority of Administrative Law Judge.

RULE TEXT:

(1) The commissioner delegates Proposed Order Authority to Administrative Law Judges 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:

(a) Rule on all motions filed prior to the hearing.

(b) Issue subpoenas and otherwise oversee the discovery process in a manner consistent with rules relating to these powers.

(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.

(d) Regulate the course of the hearing, including scheduling, reconvening, and adjourning.

(e) Maintain order during the course of the hearing, including the authority to expel persons whose conduct is disruptive.

(f) Make rulings on motions or evidence, with or without objection, during the hearing.

(g) Question witnesses at the hearing and set time limitations for argument or presentation.

(h) Limit or extend filing periods.

(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.

(j) Prepare a Proposed Order at the conclusion of the contested case hearing and cause it to be served by the Contested Case Coordinator on 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.

(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 an Administrative Law Judge appointed to hear the matter.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0250

RULE TITLE: Conduct of Hearings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amend to capitalize "Administrative Law Judge."

RULE TEXT:

The hearing will be conducted by and under the control of the Administrative Law Judge.

(1) The Administrative Law Judge will open the hearing with a brief introduction of the Agency, the parties and issues, including all information required by ORS 183.413(2) and 183.415(7).

(2) Each participant may be given an opportunity to make an opening statement describing the evidence and issues to be presented at the hearing.

(3) The Administrative Prosecutor will present evidence in support of the charging document.

(4) Any person, government agency, or entity granted party status may present additional evidence in support of the charging document.

(5) Each party opposing the charging document must present evidence in support of the party's position.

(6) Participants will have the right to conduct cross-examination of adverse witnesses.

(7) Participants may present rebuttal evidence.

(8) Participants may be given the opportunity to make a closing statement at the conclusion of the testimony.

(9) The Administrative Law Judge has the right to question any witness. The Administrative Law Judge may request any participant to provide additional evidence, and may recess the hearing when necessary to allow the participant the opportunity to gather and present the requested evidence.

(10) In any proceeding the Administrative Law Judge may call the participants together for a pre-hearing conference in order to ascertain what is disputed, hear argument on motions, order discovery, or resolve procedural matters. At any time during the hearing, the Administrative Law Judge may recess the hearing in order to conduct such a conference. The results of any conference will be summarized on the record, except that argument on motions will be recorded verbatim.

(11) When the testimony of a witness not present at the hearing is necessary to the complete and fair adjudication of the case, the Administrative Law Judge may admit testimony of the witness by telephone or other two-way communication device. In such cases:

(a) The testimony of the witness will be broadcast simultaneously to all participants and to the Administrative Law Judge;

(b) All rules governing the questioning of witnesses present at the hearing apply to witnesses whose testimony is taken by telephone; and

(c) The participant presenting the witness by telephone will provide the witness's telephone number and the approximate time that the witness will be available.

(12) The Agency has the right to submit a statement of policy concerning any issue that may arise in the course of the hearing.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0255

RULE TITLE: Telephone Hearings

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify that documentary evidence must be filed with the Contested Case Coordinator, with copies served on other participants. Corrects statutory citation for full and fair inquiry.

RULE TEXT:

- (1) A "telephone hearing" is one in which at least one participant is not physically present at the hearing but participates by telephone or other two-way communication device.
- (2) The Administrative Law Judge has the discretion to hold a hearing or portion of a hearing by telephone. Nothing in this rule precludes the Administrative Law Judge from allowing some parties or witnesses to attend by telephone while others attend in person.
- (3) The Administrative Law Judge may direct that a hearing be held by telephone upon request or on the Administrative Law Judge's own motion.
- (4) Fourteen days before the telephone hearing is scheduled to occur each participant must file with the Contested Case Coordinator and serve each other participant copies of documentary evidence that it will seek to introduce into the record and a list of all persons to be called as witnesses.
- (5) The Administrative Law Judge may refuse to admit evidence not filed and served as required by section (4) of this rule, unless the participant that failed to provide the documentary evidence and the list of witnesses offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8). If the Administrative Law Judge admits evidence that was not filed and served as required, the Administrative Law Judge may grant a continuance to allow an opportunity for the other participant(s) to respond.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0260

RULE TITLE: Evidence

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to capitalize "Administrative Law Judge."

RULE TEXT:

- (1) All evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs, including hearsay if reliable, will be admissible.
- (2) Irrelevant, immaterial, or unduly repetitious evidence may be excluded.
- (3) The burden of presenting evidence to support a fact or proposition rests on the proponent of that fact or proposition.
- (4) The burden of presenting evidence to establish a prima facie case rests with the Agency.
- (5) When appropriate, the burden of proving failure to mitigate damages rests with the party opposing damages.
- (6) Any witness, including Agency staff, may submit evidence to the Administrative Law Judge.
- (7) All offered evidence to which there is no objection may be received by the Administrative Law Judge subject to the Administrative Law Judge's power to exclude irrelevant, immaterial, or unduly repetitious evidence.
- (8) Evidence on which an objection is made may be taken by the Administrative Law Judge. Rulings on the admissibility or exclusion of this evidence will be made at the hearing or at the time the Proposed Order in the case is issued.
- (9) Any declaration, affidavit, certificate, or document included with a case summary or that a participant serves on the other participants at least ten days before hearing may be offered and received into evidence unless cross-examination is requested of the declarant, affiant, certificate preparer, or other document preparer or custodian no later than five days prior to hearing or, for good cause shown, by such other date as the Administrative Law Judge may set. A declaration, affidavit, or certificate may be offered and received with the same effect as oral testimony.
- (10) If cross-examination is requested of the declarant, affiant, certificate preparer, or other document preparer or custodian as provided in section (9) of this rule and the preparer is not made available for cross-examination, but the declaration, affidavit, certificate or other document is offered in evidence, the same may be received in evidence, provided the Administrative Law Judge determines that:
  - (a) The contents of the document are otherwise admissible; and
  - (b) The participant requesting cross-examination would not be substantially prejudiced by the lack of cross-examination.
- (11) The Administrative Law Judge will accept an offer of proof made for excluded evidence. The Administrative Law Judge has the discretion to decide when and in what form the offer of proof will be made and may place reasonable time or page limits on the offer of proof.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0270

RULE TITLE: Exhibits

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge" and "Respondent."

RULE TEXT:

(1) Hearing participants must premark their exhibits. Agency exhibits will be marked with "A" (for example, A-1, A-2, etc.), and Respondent exhibits will be marked with "R" (for example, R-1, R-2, etc.). The Administrative Law Judge will preserve the exhibits received as part of the record of the proceedings.

(2) All paper exhibits must be no larger than 8-1/2 by 11 inches in size and the participant presenting this exhibit must bring two copies of the exhibit to the hearing in addition to the copies already provided with the case summary.

Participants must bring four copies of rebuttal or impeachment exhibits to the hearing unless those exhibits were previously submitted with the case summary, in which case only two additional copies are required at the hearing.

(3) Larger exhibits are allowed; however, in order to be included in the record, the information contained in the exhibit must be reduced to paper 8 1/2 by 11 inches in size.

(4) Variation from the exhibit size requirements will be allowed only when there is no reasonable alternative.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0280

RULE TITLE: Stipulation

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge" and "Notice of Hearing."

RULE TEXT:

(1) Prior to the hearing, participants to a contested case may agree to all or some of the facts involved in the controversy. This may be done through a written and signed stipulation or an oral stipulation made on the record during a prehearing conference. Such a stipulation of facts is binding upon those who agree to it and will be regarded and used as evidence at the hearing. During the hearing, participants may stipulate to facts involved in the controversy. The Administrative Law Judge is bound by the facts set forth in a stipulation, but not by any conclusion drawn from those facts.

(2) Any party interested in stipulating to all or any part of the facts involved in the case should contact the Administrative Prosecutor identified in the Notice of Hearing. The Agency may also contact any party requesting that a stipulation be entered on all or any part of the facts.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0290

RULE TITLE: Witnesses

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to correct statutory authority.

RULE TEXT:

All testimony to be taken at the hearing, except matters officially noticed or entered by stipulation, will be sworn or affirmed. This may include testimony given on deposition, by declaration, or in answers to interrogatories.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0300

RULE TITLE: Interpreters and Assistive Communication Devices

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to clarify that no fee will be charged for interpreter or assistive communication device services.

RULE TEXT:

(1) When a person unable to speak or understand the English language, or having a physical hearing or speaking impairment, is involved in a contested case hearing, such person is entitled to a qualified interpreter or appropriate assistive communication device. All interpreters will be appointed by the Administrative Law Judge. A participant wishing to obtain the services of an interpreter or to obtain an assistive communication device must notify the Administrative Law Judge no later than 20 days before the hearing. Such notification must include:

(a) The name of the person needing a qualified interpreter or assistive communication device;

(b) The person's status as a party or a witness in the proceeding; and

(c) If the request is on behalf of:

(A) A person with a physical hearing or speaking impairment, the nature and extent of the person's impairment, and the type of aural interpreter, or assistive communication device needed or preferred; or

(B) A person unable to speak or understand the English language, the language spoken by the person unable to speak or understand the English language.

(2) If a person with a physical hearing or speaking impairment is a party or a witness in a hearing:

(a) The Administrative Law Judge will appoint a qualified interpreter and make available appropriate assistive communication devices whenever it is necessary to interpret the proceedings to, or to interpret the testimony of, the person with a physical hearing or speaking impairment.

(b) No fee will be charged to the person with a physical hearing or speaking impairment for the appointment of an interpreter or use of an assistive communication device. No fee will be charged to any person for the appointment of an interpreter or the use of an assistive communication device if appointment or use is made to determine whether the person has a physical hearing or speaking impairment.

(3) If a person unable to speak or understand the English language is a party or a witness in a hearing:

(a) The Administrative Law Judge will appoint a qualified interpreter whenever it is necessary to interpret the proceedings to a party unable to speak or understand the English language, to interpret the testimony of a party or a witness unable to speak or understand the English language, or to assist the Administrative Law Judge in performing the duties of the Administrative Law Judge.

(b) No fee will be charged to any person for the appointment of an interpreter to interpret the testimony of a non-English speaking party or witness or to interpret the proceedings to a non-English speaking party.

(4) When a participant requests the services of an interpreter, the Administrative Law Judge will appoint a qualified interpreter who has been certified under ORS 45.291. If no certified interpreter is available, able, or willing to serve, the Administrative Law Judge will appoint a qualified interpreter. For the purposes of these rules, a "qualified interpreter" means:

(a) For a person with a physical hearing or speaking impairment, a person readily able to communicate with the person with the impairment, interpret the proceedings, and accurately repeat and interpret the statements of the person with the impairment to the Administrative Law Judge.

(b) For a person unable to speak or understand the English language, a person readily able to communicate with the person unable to speak or understand the English language and who can orally transfer the meaning of statements to and from English and the language spoken by the person unable to speak or understand the English language. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style, and register of the original statement, without additions or omissions. "Qualified interpreter" does not include a person who is unable to interpret the dialect, slang, or specialized vocabulary used by the party or witness.

(5) When the hearing begins, the Administrative Law Judge will require the person serving as an interpreter to state the person's name on the record and whether the person is certified under ORS 45.291. If the interpreter is certified, the interpreter will not be required to make the oath or affirmation required by ORS 40.325 or to submit the interpreter's qualifications on the record. If an interpreter is not certified under ORS 45.291, the Administrative Law Judge will require the interpreter to state or submit the interpreter's qualifications on the record and make an oath or affirmation to make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter's best skills and judgment in accordance with the standards and ethics of the interpreter profession.

(6) The Administrative Law Judge will not appoint any person under these rules if:

(a) The person has a conflict of interest with any of the participants or witnesses;

(b) The person is unable to understand the Administrative Law Judge, participants or witnesses or cannot be understood by the Administrative Law Judge, participants or witnesses; or

(c) The person is unable to cooperate with Administrative Law Judge, the person in need of an interpreter, or the counsel for that person.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0310

RULE TITLE: Ex Parte Communications

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge" and clarify what is not an ex parte communication.

RULE TEXT:

(1) An ex parte communication is an oral or written communication to an agency decision maker or the presiding officer not made in the presence of all parties to the contested case proceeding, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts already in the record.

(2) The Administrative Law Judge will place on the record a statement of the substance of any ex parte communication on a fact in issue made to the Administrative Law Judge while the proceeding is pending. Participants will be given notice of such ex parte communication and of their right to rebut the substance of the ex parte communication on the record.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0320

RULE TITLE: Official Notice

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to include decision makers delegated by the commissioner.

RULE TEXT:

The Administrative Law Judge, commissioner, or decision maker delegated by the commissioner may take notice of judicially cognizable facts and of general, technical, or scientific facts within the specialized knowledge of the Administrative Law Judge, commissioner, or decision maker delegated by the commissioner. Participants will be notified at any time during the proceeding of material officially noticed, and they will be afforded the opportunity to contest the fact so noticed. The notice required by this section may be given to the participants during the hearing, prior to the issuance of the Proposed Order, or in the Proposed Order in the matter.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0330

RULE TITLE: Default

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify circumstances under which a default may occur.

RULE TEXT:

(1) Default may occur when:

(a) A party fails to file a required response, including a request for hearing or an answer, within the time specified in the charging document;

(b) A party withdraws a request for hearing;

(c) The Forum has scheduled a hearing and a party notifies the Agency or the Administrative Law Judge that the party will not appear at the specified time and place; or

(d) Notice regarding the time and place of the hearing was sent to the party and the party fails to appear at the scheduled hearing.

(2) When the Agency has designated the Agency file, including all the materials submitted by a party, as the record in its charging document:

(a) If a circumstance described in (1)(b) or (c) of this rule occurs, the Administrative Law Judge will issue an order dismissing the party's request for hearing.

(b) If the circumstance described in (1)(d) of this rule occurs, the Administrative Law Judge will wait no longer than 30 minutes from the time set for the contested case proceeding before orally dismissing the party's request for hearing. The Administrative Law Judge will subsequently issue a written order dismissing the party's request for hearing.

(c) When section (2)(a) or (b) of this rule applies, the Administrative Law Judge will refer the case to the Administrator of the Wage and Hour Division for issuance of a Final Order by Default. The Administrative Law Judge will prepare the Record of Proceeding of the contested case, including all materials filed with the Forum by the Agency or the party up to the time set for hearing and submit it to the Contested Case Coordinator for delivery to the Wage and Hour Administrator.

(d) If the circumstances described in (1)(d) of this rule occur, and before issuing a final order dismissing the party's request for hearing, the Administrative Law Judge finds that the party had good cause for not appearing, the Administrative Law Judge may not dismiss the party's request for hearing and will schedule a new hearing date. If the reasons for the party's failure to appear are in dispute, the Administrative Law Judge will schedule a hearing on the reasons for the party's failure to appear.

(3) When the Agency has not designated the Agency file as the record in its charging document, and a circumstance described in (1)(b)-(d) of this rule occurs and the Administrative Law Judge has not granted relief from default, the Administrative Law Judge will take evidence of a prima facie case from the Agency at hearing. The Administrative Law Judge will not permit the defaulted party to participate in any manner in the hearing, including, but not limited to, presentation of witnesses or evidence on the party's own behalf, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, or filing exceptions to the Proposed Order.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0340

RULE TITLE: Relief from Default

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify relief from default process.

RULE TEXT:

(1) A party seeking relief from default must file a written request for relief from default within 10 days after any of the following:

(a) A Final Order by default has been issued by the Administrator of the Wage and Hour Division;

(b) A notice of default has been issued; or

(c) A party has failed to appear at a hearing and the Administrator of the Wage and Hour Division has issued a Final Order by default.

(2) Relief from default may be granted when the party's written request for relief from default shows good cause for the party's action or inaction that caused the default. The party's request should state any facts supporting the party's claim of good cause and include any documents that support the party's claim.

(3) The computation of the 10-day deadline for filing begins on the day after one of the events listed in (1)(a), (b), or (c) of this rule occurs. If the 10th day is a Saturday, Sunday, or holiday officially recognized by the State of Oregon or the federal government, the 10-day deadline will expire at 5 p.m. of the next day that is not a Saturday, Sunday, or holiday. A request for relief from default is considered filed on the date that it is postmarked by the United States Postal Service, or on the date reported on a certificate of service signed by counsel, or on the date it is received, whichever is earlier.

(4) A request for relief from default made after a Final Order by default has been issued by the Administrator of the Wage and Hour Division must be addressed to the Administrator of the Wage and Hour Division. The Administrator of the Wage and Hour Division may serve a response on the requesting party. The Administrator of the Wage and Hour Division will then file the request for relief from default, any response the Wage and Hour Division served on the requesting party, a copy of the Final Order on Default, and the division's case file with the Contested Case Coordinator for assignment to an Administrative Law Judge to rule on and issue an order denying or granting the request for relief from default.

(5) A request for relief from default made after a notice of default has been issued or after the party has failed to appear at a hearing and the Administrator of the Wage and Hour Division has issued a Final Order on default must be filed with the Contested Case Coordinator for assignment to an Administrative Law Judge to rule on and issue an order denying or granting the request for relief from default. If the Administrative Law Judge grants the party's request for relief from default, the Administrative Law Judge will schedule a new hearing.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0350

RULE TITLE: Record of Proceeding

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge."

RULE TEXT:

(1) A verbatim, written and/or mechanical record of the proceeding will be made that includes:

(a) All pleadings, motions, legal memoranda, correspondence, and rulings made by the Administrative Law Judge;

(b) The case summary submitted by any participant;

(c) Evidence received or considered;

(d) Stipulations approved by the Administrative Law Judge;

(e) A statement of matters officially noticed;

(f) Questions asked, offers of proof and objections and rulings made during the hearing;

(g) A statement of any ex parte communications on a fact at issue made to the Administrative Law Judge;

(h) The Proposed Order by the Administrative Law Judge;

(i) Exceptions filed by any participant;

(j) Nonconfidential advice from counsel to the Agency;

(k) Policy statements submitted by the Agency; and

(l) The commissioner's Final Order.

(2) The record in the case does not close until the Forum has received all documents, statements, and advice requested.

The Administrative Law Judge will determine the date upon which the record closed.

(3) The written or mechanical record ordinarily will not be transcribed unless requested for purposes of court review.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0360

RULE TITLE: Post-Hearing Briefs

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge."

RULE TEXT:

(1) The Administrative Law Judge may request a post-hearing brief from a participant. The Administrative Law Judge will state the specific issues to be briefed and the deadline for filing the brief.

(2) If a party's brief contains legal argument as defined in OAR 839-050-0110(4), the party must file its brief through counsel, except if the party is an individual who is not required under 839-050-0110(1) to be represented by counsel and personally files the brief. The Agency may respond to the Administrative Law Judge's request by filing a legal brief from the Attorney General or an Agency statement of policy.

(3) Nothing in this rule limits the Administrative Law Judge's authority to request a statement of policy from the Agency.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.850

AMEND: 839-050-0370

RULE TITLE: Proposed Orders

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge."

RULE TEXT:

(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.

(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.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0380

RULE TITLE: Exceptions to Proposed Order

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends rule to clarify exceptions to Proposed Order filing requirements.

RULE TEXT:

(1) Any participant may file exceptions to the Proposed Order. Exceptions must be specific and must be in writing. No oral argument is allowed on exceptions unless requested by the Administrative Law Judge. Any new facts presented or issues raised in exceptions will not be considered by the commissioner in the Final Order.

(2) Exceptions filed by the Agency may include factual summaries, statements of policy, corrections, and prior Agency decisions, but may not include legal argument as defined in OAR 839-050-0110(4) unless the Agency is represented by counsel.

(3) Exceptions filed by a party's authorized representative may include factual summaries, statements of policy, corrections, and prior Agency decisions, but may not include legal argument as defined in OAR 839-050-0110(4). A party that is a government agency, corporation, or unincorporated association, including a limited liability company, may include legal argument in its exceptions only if those exceptions are filed by counsel.

(4) Participants must file any exceptions within ten days of the date of issuance of the Proposed Order. Exceptions must be filed with the Contested Case Coordinator at the address indicated in the Proposed Order. Participants may request an extension of time to file exceptions as provided in OAR 839-050-0050.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850, ORS 279C.860, 279C.865

AMEND: 839-050-0400

RULE TITLE: Agency Policy

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge."

RULE TEXT:

The Administrative Law Judge may, at any time during a contested case proceeding and before the issuance of a Final Order, request that the Agency submit a written statement indicating the Agency's policy with regard to any statute or administrative rule at issue in the case. The Administrative Law Judge will provide a copy of such request and Agency statement to the commissioner and all parties in the case and will include the statement in the record of the proceeding.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0410

RULE TITLE: Reopening the Contested Case Record

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to capitalize "Administrative Law Judge."

RULE TEXT:

On the Administrative Law Judge's own motion or on the motion of a participant, the Administrative Law Judge will reopen the record when the Administrative Law Judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0420

RULE TITLE: Final Order

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to include authority of commissioner to delegate authority to issue orders.

RULE TEXT:

(1) Except as provided in OAR 839-050-0220, 839-050-0430, or 839-050-0440, on the basis of the record considered as a whole, the commissioner will issue a Final Order in writing that includes findings of fact, conclusions of law, and an opinion and order. The Final Order will also contain a notice that the Final Order may be appealed to the Oregon Court of Appeals.

(2) The Final Order may include different findings, conclusions, or interpretations of law than the Proposed Order.

(3) The Final Order may provide for a different determination of liability, alternative means of enforcement, damages, or penalties, than the Proposed Order.

(4) A copy of the Final Order will be served on participants to a contested case in accordance with OAR 839-050-0030.

(5) Unless otherwise provided by law, a final order remains in effect during appeal, reconsideration or rehearing until stayed or changed.

(6) The commissioner may authorize and delegate the commissioner's authority to exercise and fulfill the duties of the commissioner, including issuance of Final Orders, to an officer or employee of the Agency, pursuant to ORS 651.060. A delegation of authority under this section must be made in writing before the issuance of any order pursuant to the delegation and must be retained in the Agency's records.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850, 651.060(3)

AMEND: 839-050-0430

RULE TITLE: Final Order by Default

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to align with OAR 839-050-0330 default rule.

RULE TEXT:

(1) The Administrator of the Wage and Hour Division may issue a Final Order by default when:

(a) A party is given an opportunity to request a hearing and file an answer within the time specified in the charging document and fails to do so; or

(b) A party withdraws the party's request for hearing.

(2) A Final Order by default may be issued only after a prima facie case in support of the charging document is made on the record. A prima facie case may be made from the Agency's file, if designated as the record in the charging document, provided that the charging document contained a statement advising the party that a failure to request a hearing would result in a Final Order.

(3) The participants will be served with a copy of the Final Order by default in accordance with OAR 839-050-0030.

(4) When a party has requested a hearing but either fails to attend the hearing or notifies the Agency that it will not attend, the Administrative Law Judge will proceed according to OAR 839-050-0330.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS 279C.860, 279C.865, 652.332(3), 653.065(1), 658.115, 658.407(3), 658.820, 659A.845, 659A.850

AMEND: 839-050-0445

RULE TITLE: Proceedings on Prevailing Wage Rate Determinations

NOTICE FILED DATE: 03/27/2019

RULE SUMMARY: Amends to clarify rule on Prevailing Wage Determination proceedings.

RULE TEXT:

(1) This rule sets forth the procedures used in contested case proceedings requested pursuant to ORS 279C.817(4) and OAR 839-025-0005(7).

(2) Proceedings on prevailing wage rate determinations are governed by the procedures set forth in OAR 839-050-0000 to 839-050-0430, except to the extent those procedures are modified by this rule.

(3) The following definitions apply to this rule:

(a) "Aggrieved person" means a person adversely affected or aggrieved by a commissioner's determination under ORS 279C.817.

(b) "Determination" means a determination issued by the commissioner under the provisions of ORS 279C.817 and OAR 839-025-0005.

(c) "Party" means a requester or aggrieved person who has requested a hearing after the commissioner issues a determination.

(d) "Requester" means a public agency or other interested person who requests a determination under ORS 279C.817 about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.

(4) When the commissioner has issued a determination and the requester or aggrieved person requests a hearing, an Administrative Law Judge will be assigned to hear the case and the Contested Case Coordinator will issue a Notice of Hearing on behalf of the Forum to the party that meets the requirements of OAR 839-050-0080(1). Information on contested case proceedings will be provided as required by OAR 839-050-0100.

(5) Within ten days after the Notice of Hearing is issued, the Administrative Law Judge will issue an order requiring:

(a) The party to file a written statement identifying all of the party's reasons for contesting the determination; and

(b) The Agency to file copies of all materials provided by the requester under OAR 839-025-0005(1)–(4), a copy of the Agency's determination, and a copy of any other materials the Agency relied on to reach its determination. The Agency will mark these materials and the Agency's determination for identification in the manner set forth in 839-050-0270.

(6) The statement, materials, and Agency determination filed pursuant to section (5) of this rule will be received into the record as exhibits.

(7) No later than 14 calendar days before the hearing date, the party and the Agency each will file written statements containing the names of all persons they propose to call as witnesses at the hearing, along with a statement of how each person's testimony will help the Administrative Law Judge understand the materials provided by the requester under OAR 839-025-0005(1)–(4) or the reasons for the Agency's determination.

(8) After reviewing the materials and statements filed pursuant to sections (5) and (7) of this rule, the Administrative Law Judge may issue an interim order finding that the testimony of any proposed witness is irrelevant to the issues at hearing and disallowing the proposed testimony. The Administrative Law Judge may also request that the party or Agency bring additional witnesses to the hearing.

(9) Evidence presented at hearing is limited to the materials provided to and considered by the Agency in making its determination and witness testimony explaining the materials and their significance.

(10) At hearing, the Agency, as proponent of its determination, will first present evidence in support of its determination. The party will then have an opportunity to explain the reasons that the party contests the determination and to rebut the Agency's evidence. The Agency may then present evidence to rebut evidence presented by the party.

(11) If the party withdraws its request for hearing or does not appear at the scheduled hearing, the Administrative Law Judge will issue an order canceling the hearing. When a hearing is canceled based on a party's failure to appear at the scheduled hearing, the hearing may be rescheduled if the party establishes good cause for its failure to appear within 10

days after the party fails to appear at hearing. The party's request to reschedule the hearing must be in writing and be accompanied by a written statement, together with appropriate documentation, setting forth facts supporting the claim of good cause and must be filed with the Contested Case Coordinator.

STATUTORY/OTHER AUTHORITY: ORS chapter 183, ORS 651.060(4), 279C.817

STATUTES/OTHER IMPLEMENTED: ORS 279C.817