

CHAPTER 5
RULES OF PRACTICE FOR VARIANCES, LIMITATIONS, VARIATIONS,
TOLERANCES AND EXEMPTIONS

[Prior to 9/24/86, Labor, Bureau of [530]]

[Prior to 10/7/98, see 374—Ch 5]

875—5.1(88) Purpose and scope. This chapter contains rules of practice for administrative proceedings to grant variances and other relief under Iowa Code sections 88.5(3), 88.5(6), and 88.5(7). These rules shall be construed to secure a prompt and just conclusion of proceedings subject thereto.

875—5.2(88) Definitions. The definitions and interpretations contained in Iowa Code section 88.3 shall be applicable to the terms when used in this chapter. As used in this chapter unless the context clearly requires otherwise:

“*Act*” means the Iowa Occupational Safety and Health Act, Iowa Code chapter 88.

“*Affected employee*” means an employee who would be affected by the grant or denial of a variance, or any one of the employee’s authorized representatives, such as the collective bargaining agent.

“*Commissioner*” means the labor commissioner of the department of workforce development, division of labor services.

“*Hearing examiner*” means the labor commissioner or the commissioner’s designee.

“*Party*” means a person admitted to participate in a hearing conducted in accordance with rules 5.14(88) to 5.21(88). An applicant for relief and any affected employee shall be entitled to be named parties. For the purpose of special variance hearing procedures under Iowa Code section 88.5(7), the conflicting federal regulatory agency shall also be a party. The department of workforce development, division of labor services, shall be deemed to be a party without the necessity of being named.

“*Person*” means an individual, partnership, association, corporation, business trust, legal representative, an organized group of individuals, or an agency, authority or instrumentality of the state of Iowa.

“*Variance*” means variances, limitations, variations, tolerances and exemptions for temporary variances (Iowa Code section 88.5(3)), permanent variances (section 88.5(6)), and special variances (section 88.5(7)), unless otherwise specified.

875—5.3 Reserved.

875—5.4(88) Effect of variances. All variances granted pursuant to this chapter shall have only future effect. The commissioner may discretionarily decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employer involved, and a proceeding on the citation or a related issue concerning a proposed penalty or period of abatement is pending before the employment appeal board until the completion of such proceedings.

875—5.5(88) Notice of a granted variance. Notice of every final action granting a variance under this chapter shall be published in one or more newspapers in the state having a statewide circulation. Every such final action shall specify the alternative to the standard involved which the particular variance permits.

875—5.6(88) Form of documents; subscription; copies.

5.6(1) No particular form is prescribed for applications and other papers which may be filed in proceedings under this chapter. However, any application and other papers shall be clearly legible. An original and two copies of any application or other papers shall be filed. The original shall be typewritten. Clear carbon copies or printed or processed copies are acceptable copies.

5.6(2) Each application or other paper which is filed in proceedings under this chapter shall be subscribed by the person filing the same or by the person’s attorney or other authorized representative.

875—5.7(88) Temporary variance.

5.7(1) *Application for variance.* Any employer or class of employers desiring a variance from a standard, or portion thereof, authorized by Iowa Code section 88.5(3) may file a written application containing the information specified in subrule 5.7(2) with the labor commissioner.

5.7(2) *Contents.* An application filed pursuant to 5.7(1) shall include:

- a. The name and address of the applicant;
- b. The address of the place or places of employment involved;
- c. Any request for a hearing, as provided in this chapter; and
- d. The statements and certifications required by Iowa Code section 88.5(3).

5.7(3) *Interim order.*

a. *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The labor commissioner may rule *ex parte* upon the application.

b. *Notice of denial of application.* If an application filed pursuant to 5.7(3)“a” is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

c. *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties and notice of the terms of the order shall be made in accordance with the notice requirements of rule 5.5(88). It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance (see 5.8(2)“e”(2)).

This rule is intended to implement Iowa Code section 88.3.

875—5.8(88) Permanent variance.

5.8(1) *Application for variance.* Any employer or class of employers desiring a variance authorized by Iowa Code section 88.5(6) may file a written application containing the information specified in subrule 5.8(2) with the labor commissioner.

5.8(2) *Contents.* An application filed pursuant to 5.8(1) shall include:

- a. The name and address of the applicant;
- b. The address of the place or places of employment involved;
- c. A description of the conditions, practices, means, methods, operations or processes used or proposed to be used by the applicant;
- d. A statement showing how the conditions, practices, means, methods, operations or processes used or proposed to be used would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought;
- e. A certification that the applicant has informed affected employees of the application by (1) giving a copy thereof to their authorized representative; (2) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and (3) by other appropriate means when necessary;
- f. Any request for a hearing, as provided in this chapter; and
- g. A description of how employees have been informed of the application and of their right to petition the labor commissioner for a hearing.

5.8(3) *Interim order.* Procedures for applications and for notifications of a denial or grant of interim orders shall be in the same manner as provided for in subrule 5.7(3).

This rule is intended to implement Iowa Code section 88.6.

875—5.9(88) Special variance.

5.9(1) *Application for variance.* Any employer, or class of employers, desiring a special variance authorized by Iowa Code section 88.5(7) may file a written application containing the information specified in 5.9(2) with the labor commissioner.

5.9(2) Contents. An application filed pursuant to 5.9(1) shall include:

- a. The name and address of the applicant;
- b. The address of the place or places of employment involved;
- c. The name of the federal agency and a designation of the standard, rule, or regulation allegedly in conflict with a standard, rule or regulation of the division of labor services;
- d. A designation of the standard, rule or regulation of the division of labor services allegedly in conflict;
- e. A description of the conditions, means, methods, operations, and procedures used and a specific detailed statement as to how and where the conflict exists between federal agency or agencies and the division of labor services;
- f. A description of the conditions, practices, means, methods, operations or processes used or proposed to be used by the applicant;
- g. A statement showing how the conditions, practices, means, methods, operations or processes used or proposed to be used would take into consideration the safety and health of the employees involved;
- h. A certification that the applicant has informed employees affected of the application by (1) giving a copy thereof to their authorized representative; (2) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and (3) by other appropriate means where necessary;
- i. Any request for a hearing, as provided in this chapter; and
- j. A description of how employees have been informed of the application and of their right to petition the labor commissioner for a hearing.

5.9(3) Interim order. Procedures for applications and for notifications of a denial or grant of interim orders shall be in the same manner as provided for in 5.7(3).

This rule is intended to implement Iowa Code section 88.7.

875—5.10(88) Modification and revocation of rules or orders.

5.10(1) An affected employer or an affected employee may apply in writing to the labor commissioner for a modification or revocation of a rule or order issued under Iowa Code section 88.5(3), 88.5(6), or 88.5(7). The application shall contain:

- a. The name and address of the applicant;
- b. A description of the relief which is sought;
- c. A statement setting forth with particularity the grounds for relief;
- d. If the applicant is an employer, a certification that the applicant has informed affected employees of the application by: (1) giving a copy thereof to their authorized representative; (2) posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and (3) other appropriate means when necessary;
- e. If the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer; and
- f. Any request for a hearing, as provided in this chapter.

5.10(2) The commissioner may move to modify or revoke a rule or order issued under Iowa Code section 88.5(3), 88.5(6), or 88.5(7). In such event, the commissioner shall cause a notice of intention to be published in accordance with the notice requirements of rule 5.5(88), affording interested persons an opportunity to submit written data, views or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and shall take such other action as may be appropriate to notify the affected employer and employees. Any request for a hearing shall include a short and plain statement of:

- a. How the proposed modification or revocation would affect the requesting party; and
- b. What the requesting party would seek to show on the subjects or issues involved.

875—5.11(88) Action on applications.

5.11(1) Defective applications. If an application filed pursuant to 5.7(1), 5.8(1), 5.9(1), or 5.10(1) does not conform to the applicable rule, the labor commissioner may deny the application. Prompt notice of the denial of an application shall be given to the applicant and shall include, or be accompanied by, a brief statement of the grounds for the denial. A denial of an application pursuant to this rule shall be without prejudice to the filing of another application.

5.11(2) Adequate applications. If an application has not been denied pursuant to 5.11(1), the labor commissioner shall cause notice of the filing of the application to be made in accordance with rule 5.5(88).

A notice of the filing of an application shall include:

- a. The terms or an accurate summary, of the application;
- b. A reference to the section of the Act under which the application has been filed;
- c. An invitation to interested persons to submit within a stated period of time written data, views or arguments regarding the application; and
- d. Information to affected employers and employees of any right to request a hearing on the application.

875—5.12(88) Requests for hearings on applications.

5.12(1) Request for hearing. Within the time allowed by a notice of the filing of an application, any affected employer or employee may file with the labor commissioner a request for a hearing on the application.

5.12(2) Contents of a request for a hearing. A request for a hearing filed pursuant to 5.12(1) shall include:

- a. A concise statement of facts showing how the employer or employee would be affected by the relief applied for;
- b. A specification of any statement or representation in the application which is denied, and a concise summary of the evidence that would be adduced in support of each denial; and
- c. Any views or arguments on any issue of fact or law presented.

875—5.13(88) Consolidation of proceedings. The commissioner may move or any party may move to consolidate or contemporaneously consider two or more proceedings which involve the same or closely related issues.

875—5.14(88) Notice of hearing.

5.14(1) Service. Upon request for a hearing as provided in this chapter, or upon the commissioner's own initiative, the labor commissioner shall serve, or cause to be served, a reasonable notice of hearing.

5.14(2) Contents. A notice of hearing served under 5.14(1) shall include:

- a. The time, place, and nature of the hearing;
- b. The legal authority under which the hearing is to be held; and
- c. A specification of issues of fact and law.

875—5.15(88) Manner of service. Service of any document upon any party may be made by personal delivery of, or by mailing, a copy of the document to the last-known address of the party. The person serving the document shall certify to the manner and the date of the service.

875—5.16(88) Hearing examiner; powers and duties.

5.16(1) Powers. The labor commissioner or designee shall preside over the hearing and shall have all powers necessary or appropriate to conduct a fair, full, and impartial hearing, including the following:

- a. To administer oaths and affirmations;
- b. To rule upon offers of proof and receive relevant evidence;
- c. To provide for discovery and to determine its scope;
- d. To regulate the course of the hearing and the conduct of the parties and their counsel therein;
- e. To consider and rule upon procedural requests;

- f. To hold conferences for the settlement or simplification of the issues by consent of the parties;
- g. To make, or to cause to be made, an inspection of the employment or place of employment involved;
- h. To make decisions in accordance with the Act and this chapter; and
- i. To take any other appropriate action authorized by the Act or this chapter.

5.16(2) *Private consultation.* Except to the extent required for the disposition of ex parte matters, the hearing examiner may not consult a person or a party on any fact at issue, unless upon notice and opportunity for all parties to participate.

5.16(3) *Disqualification.* When the labor commissioner or designee deems appropriate to be disqualified to preside, or to continue to preside, over a particular hearing, the commissioner or designee shall withdraw therefrom by notice on the record, and the commissioner shall designate another.

Any party who deems the commissioner or designee for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file with the commissioner a motion for disqualification and removal, which shall be supported by affidavits setting forth the alleged ground for disqualification. The commissioner shall rule upon the motion. The decision shall be deemed final for the purposes of judicial review under rule 5.24(88).

5.16(4) *Contumacious conduct; failure or refusal to appear or obey the rulings of the hearing examiner.* Contumacious conduct at any hearing before the hearing examiner shall be ground for exclusion from the hearing.

If a witness or a party refuses to answer a question after being directed to do so, or refuses to obey an order to provide or permit discovery, the hearing examiner may make such orders with regard to the refusal as are just and appropriate, including an order denying the application of an applicant or regulating the contents of the record of the hearing.

5.16(5) *Referral to Iowa rules of civil procedure.* On any procedural question not regulated by the Act or this chapter, the hearing examiner shall be guided to the extent practicable by any pertinent provisions of the Iowa rules of civil procedure.

875—5.17(88) Prehearing conferences.

5.17(1) *Convening conference.* Upon the commissioner's own motion or the motion of a party, the labor commissioner or designee may direct the parties or their counsel to meet with the commissioner for a conference to consider:

- a. Simplification of the issues;
- b. Necessity or desirability of amendments to documents for purpose of clarification, simplification, or limitation;
- c. Stipulations, admissions of fact and of contents and authenticity of documents;
- d. Limitation of the number of parties and of expert witnesses; and
- e. Such other matters as may tend to expedite the disposition of the proceeding, and to ensure a just conclusion thereof.

5.17(2) *Record of conference.* The labor commissioner or designee shall make an order which recites the action taken at the conference, the amendments allowed to any documents which have been filed, and the agreements made between the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order when entered controls the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

875—5.18(88) Consent findings and rules or orders.

5.18(1) *Negotiation by parties.* At any time before the reception of evidence in any hearing, or during any hearing a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be in the discretion of the hearing examiner, after consideration of the nature of the proceeding, the requirements of the public

interest, the representations of the parties and the probability of an agreement which will result in a just disposition of the issues involved.

5.18(2) Contents. Any agreement containing consent findings and rule or order disposing of a proceeding shall also provide:

- a. That the rule or order shall have the same force and effect as if made after a full hearing;
- b. That the entire record on which any rule or order may be based shall consist solely of the application and the agreement;
- c. A waiver of any further procedural steps before the labor commissioner or designee; and
- d. A waiver of any right to challenge or contest the validity of the findings and of the rule or order made in accordance with the agreement.

5.18(3) Submission. On or before the expiration of the time granted for negotiations, the parties or their counsel may:

- a. Submit the proposed agreement to the hearing examiner for consideration; or
- b. Inform the hearing examiner that agreement cannot be reached.

5.18(4) Disposition. In the event an agreement containing consent findings and rule or order is submitted within the time allowed therefor, the hearing examiner may accept such agreement by issuing a decision based upon the agreed findings.

875—5.19(88) Discovery.

5.19(1) Perpetuating testimony. Iowa Rules of Civil Procedure 159-166 are applicable for the taking of depositions for a variance hearing before the hearing examiner.

5.19(2) Other discovery. Whenever appropriate to a just disposition of any issue in a hearing, the hearing examiner may allow discovery by other appropriate procedures, such as by written interrogatories upon a party, production of documents by a party, or by entry for inspection of the employment or place of employment involved. Iowa Rules of Civil Procedure 121-134 and 140-158 shall be applicable to such authorized discovery procedures.

875—5.20(88) Hearings.

5.20(1) Order of proceeding. Except as may be ordered otherwise by the hearing examiner, the party applicant for relief shall proceed first at a hearing.

5.20(2) Burden of proof. The party applicant shall have the burden of proof.

5.20(3) Evidence.

a. *Admissibility.* A party shall be entitled to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any oral or documentary evidence may be received, but a hearing examiner shall exclude evidence which is irrelevant, immaterial or unduly repetitious.

b. *Testimony of witnesses.* The testimony of a witness shall be upon an oath or affirmation administered.

c. *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, or to the failure to limit such scope, the party shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the hearing examiner may be relied upon subsequently in a proceeding.

d. *Proof for a special variance.* Before a special variance may be granted, there must be proof that an actual conflict does exist. The proof required to establish such conflict is information in writing or oral testimony from a representative of the involved federal regulatory agency or agencies, substantiated by evidence, that there is a conflict between the standards, rules or regulations of the federal agency and those of the division of labor services. Also, the applicant must prove that compliance with the standard, rule or regulation of the division of labor services would subject the applicant to probable citation, penalty, or prosecution for violating such federal agency standard, rule or regulation.

5.20(4) Official notice. Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the division of labor services by reason of its functions is presumed to be expert provided that the parties shall be

given adequate notice, at the hearing or by reference in the hearing examiner's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

5.20(5) *Transcript.* Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

875—5.21(88) Decisions of hearing examiner.

5.21(1) *Proposed findings of fact, conclusions and rules or orders.* Within ten days after receipt of notice that the transcript of the testimony has been filed or such additional time as the hearing examiner may allow, each party may file with the hearing examiner proposed findings of fact, conclusions of law, and rule or order, together with supporting briefs shall be served on all other parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

5.21(2) *Decision.* Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and rule or order, the hearing examiner shall issue a decision which shall be reviewed and countersigned by the commissioner. The commissioner shall serve the decision upon each party, and the decision shall become final upon the twentieth day after service thereof. The decision shall include: (1) a statement of findings and conclusions, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record, and (2) the appropriate rule, order, relief or denial thereof. The decision shall be based upon a consideration of the whole record and shall state all facts officially noticed and relied upon. The decision shall be made on the basis of a preponderance of reliable and probative evidence.

5.21(3) *Grant of a special variance.* The grant of a special variance shall be renewable upon review by the labor commissioner at six-month intervals beginning on the date the decision becomes final under 5.21(2). If at the time of the review the labor commissioner finds that there has been a change in the standard, rule, or regulation or a change in the interpretation of such standard, rule or regulation of the federal agency or the division of labor services affecting or resolving the conflict on which the special variance was granted, the labor commissioner shall set the case for an evidentiary hearing in accordance with 5.14(88) to 5.21(88). Enforcement shall be stayed during review and hearing procedures under this rule.

Affected employees shall be notified by their employer of a renewal or a refusal to renew by: (1) giving a copy of the labor commissioner's notice to the authorized employee representative; (2) posting a copy of the commissioner's notice at the place or places where notices to employees are normally posted; and (3) other appropriate means.

875—5.22(88) Motion for summary decision.

5.22(1) Any party may, at least 20 days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision in favor of the moving party on all or any part of the proceeding. Any other party may, within 10 days after service of the motion, serve opposing affidavits or countermove for summary decision. The hearing examiner may discretionarily set the matter for argument and call for the submission of briefs.

5.22(2) The filing of any documents under 5.22(1) shall be with the labor commissioner, and copies of any such documents shall be served in accordance with 5.15(88).

5.22(3) The hearing examiner may grant the motion if the pleadings, affidavits, material obtained by discovery or otherwise obtained, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The hearing examiner may deny such motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

5.22(4) Affidavits shall set forth such facts as would be admissible in evidence in the hearing and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of its own pleading. The response of the party opposing the motion must set forth specific facts showing that there is a genuine issue of fact for the hearing.

5.22(5) Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify the opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

875—5.23(88) Summary decision.

5.23(1) *No genuine issue of material fact.*

a. Where no genuine issue of a material fact is found to have been raised, the hearing examiner may issue a decision to become final 20 days after service thereof.

b. A decision made under 5.23(1) shall include a statement of: (1) findings and conclusions, and the reasons or bases therefor, on all issues presented; and (2) the terms and conditions of the rule or order made.

c. A copy of the decision under this rule shall be served on each party.

5.23(2) *Hearings on issues of fact.* Where a genuine material question of fact is raised, the hearing examiner shall, and in any other case may, set the case for an evidentiary hearing in accordance with rules 5.14(88) to 5.21(88).

875—5.24(88) Finality for purposes of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

These rules are intended to implement Iowa Code sections 84A.1, 84A.2, 88.2, 88.3, 88.5, 88.6, and 88.7.

[Filed 10/11/72]

[Filed emergency 2/15/80—published 3/5/80, effective 2/15/80]

[Filed emergency 9/5/86—published 9/24/86, effective 9/24/86]

[Filed 4/17/87, Notice 9/24/86—published 5/6/87, effective 6/10/87]