

ADMINISTRATIVE SERVICES DEPARTMENT[11]

Adopted and Filed

Rule making related to waivers

The Administrative Services Department hereby amends Chapter 9, “Waivers,” Chapter 100, “Capitol Complex Operations,” Chapter 117, “Procurement of Goods and Services of General Use,” and Chapter 118, “Purchasing Standards for Service Contracts,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is adopted under the authority provided in Iowa Code sections 8A.104, 17A.3 and 17A.4.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code section 17A.9A and 2020 Iowa Acts, House File 2389.

Purpose and Summary

The proposed amendments update four chapters in the Department’s rules in the Iowa Administrative Code in accordance with changes included in 2020 Iowa Acts, House File 2389, section 10. The changes call for deletions of the word “variance” when the word is used in relation to “waiver.” Amendments are also proposed for the submission of information regarding waivers on the Legislative Services Agency’s Internet site.

Public Comment and Changes to Rule Making

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on November 4, 2020, as **ARC 5243C**. A public hearing was held on November 24, 2020, at 10 a.m., via Google Meet. No one attended the public hearing. No public comments were received. No changes from the Notice have been made.

Adoption of Rule Making

This rule making was adopted by the Department on December 11, 2020.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

The Department will not grant waivers under the provisions of these rules, other than as may be allowed under Chapter 9 of the Department’s rules concerning waivers.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee’s

meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rule making will become effective on February 17, 2021.

The following rule-making actions are adopted:

ITEM 1. Amend rule ~~11—9.1(17A,8A)~~, definition of “Waiver or variance,” as follows:

“Waiver ~~or variance~~” means any action by the department that suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person. ~~For simplicity, the term “waiver” shall include both a “waiver” and a “variance.”~~

ITEM 2. Amend rule 11—9.4(17A,8A) as follows:

11—9.4(17A,8A) Granting a waiver. In response to a petition completed pursuant to rule 11—9.6(17A,8A), the director may, in the director’s sole discretion, issue an order waiving in whole or in part the requirements of a rule.

9.4(1) Criteria for waiver ~~or variance~~. A waiver may be granted if the director finds based on clear and convincing evidence each of the following:

- a. The application of the rule would pose an undue hardship on the person for whom the waiver is requested;
- b. The waiver from the requirements of the rule in the specific case would not prejudice the substantial legal rights of any person;
- c. The provisions of the rule subject to the petition for a waiver are not specifically mandated by statute or another provision of law; and
- d. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver is requested.

In determining whether a waiver should be granted, the director shall consider the public interest, policies and legislative intent of the statute on which the rule is based. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the director shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all affected persons.

9.4(2) Special waiver ~~or variance~~ of rules not precluded. These rules shall not preclude the director from granting waivers ~~or variances~~ in other contexts or on the basis of other standards if a statute or other department rule authorizes the director to do so; the director deems it appropriate to do so; and the director is not prohibited by state or federal statute, federal regulations, this rule, or any other rule adopted under Iowa Code chapter 17A from issuing such waivers.

9.4(3) Procurement-related waiver ~~or variance~~. The director may waive a rule ~~or grant a variance~~ due to noncompliance with a stated requirement in a procurement, sale, or auction if the request meets all of the following criteria:

- a. The request is made prior to the issuance of a notice of intent to award a contract or the finalization of a sale.
- b. The waiver ~~or variance~~ will tend to promote competition rather than inhibit or reduce competition.
- c. The waiver ~~or variance~~ will not materially alter the substantive contents of the offer, a response to an invitation to bid or a response to a request for proposal.
- d. The noncompliance with the stated requirement is correctable (if correction is necessary) without materially or substantially altering the substantive contents of the offer, a response to an invitation to bid or a response to a request for proposal.
- e. No other person who submits an offer, a response to an invitation to bid or a response to a request for proposals is materially or substantially harmed by the waiver ~~or variance~~. A person shall not be deemed to have been harmed if the waiver ~~or variance~~ merely increases competition.

- f. Fundamental notions of good faith and fair dealing favor the issuance of a waiver ~~or variance~~.
- g. The waiver ~~or variance~~ will not result in unreasonable delay in the procurement, sale or auction and will not interfere with certainty or finality in the procurement, sale or auction.

If the stated terms of the procurement, sale or auction permit or authorize waiver ~~or variance~~ from the stated terms, the director may waive ~~or vary~~ the stated terms without regard to subrule 9.4(1).

9.4(4) *Special waiver ~~or variance~~ not permitted.* The compensation rates for publication in a newspaper for any notice, order or citation or other publication required or allowed by law as determined by the state printing administrator pursuant to Iowa Code section 618.11 shall not be waived ~~or varied~~. The procedure established in this chapter does not apply to waiver ~~or variance~~ of contractual terms or conditions; contracts shall be waived ~~or varied~~ only upon their own terms. These rules do not apply to the Terrace Hill commission established in Iowa Code section 8A.326 or rules adopted by the commission unless these rules are adopted by the Terrace Hill commission.

ITEM 3. Amend rule 11—9.6(17A,8A) as follows:

11—9.6(17A,8A) Content of petition. A petition for waiver ~~or variance~~ shall include the following information where applicable and known to the requester:

1. to 9. No change.

10. Signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver ~~or variance~~.

ITEM 4. Amend rule 11—9.9(17A,8A) as follows:

11—9.9(17A,8A) Hearing procedures. The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (1) to any petition for a waiver ~~or variance~~ of rule filed within a contested case; (2) when the director so provides by rule or order; or (3) when a statute so requires. Prior to issuing an order granting or denying a proposed waiver, the department shall determine whether or not the facts alleged in the proposed waiver are accurate and complete.

ITEM 5. Amend rule 11—9.10(17A,8A) as follows:

11—9.10(17A,8A) Ruling. An order granting or denying a waiver ~~or variance~~ shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope (including any conditions) and duration of the waiver if one is issued.

9.10(1) to 9.10(3) No change.

9.10(4) *Administrative deadlines.* When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the director shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all affected persons.

9.10(5) and 9.10(6) No change.

9.10(7) *Time for ruling.* The director shall grant or deny a petition for a waiver ~~or variance~~ as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date or the department, specifying good cause, extends this time period with respect to a particular petition for an additional 30 days. However, if a petition is filed in an appeal, the director shall grant or deny the petition no later than the time at which the final decision in that appeal is issued.

9.10(8) and 9.10(9) No change.

ITEM 6. Amend rule 11—9.13(17A,8A) as follows:

11—9.13(17A,8A) ~~Summary reports~~ Submission of waiver information. Semiannually Within 60 days of granting or denying a waiver, the director shall prepare a summary report identifying make a submission on the Internet site established pursuant to Iowa Code section 17A.9A for the submission of waiver information. The submission shall identify the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory

provisions implemented by these rules, and a general summary of the reasons justifying the director's actions on waiver requests. If practicable, the report submission shall detail the extent to which the granting of a waiver has established a precedent for additional waivers and the extent to which the granting of a waiver has affected the general applicability of the rule itself. ~~Copies of this report shall be available for public inspection and shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.~~

ITEM 7. Amend rule **11—100.1(8A)**, definition of “Waiver,” as follows:

“*Waiver*” means a waiver ~~or variance~~ as defined in 11—Chapter 9, Iowa Administrative Code.

ITEM 8. Amend subrule 117.21(1) as follows:

117.21(1) Definition. For the purpose of this chapter, a “waiver ~~or variance~~” means an action by the director that suspends, in whole or in part, the requirements or provisions of a rule in this chapter as applied to a state agency when the state agency establishes good cause for a waiver ~~or variance~~ of the rule. ~~For simplicity, the term “waiver” shall include both a “waiver” and a “variance.”~~

ITEM 9. Amend subrule 118.16(1) as follows:

118.16(1) For the purpose of this chapter, a “waiver ~~or variance~~” means an action by the director of the department that suspends, in whole or in part, the requirements or provisions of a rule in this chapter as applied to a state agency when the state agency establishes good cause for a waiver ~~or variance~~ of the rule. ~~For simplicity, the term “waiver” shall include both a “waiver” and a “variance.”~~

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EDITOR’S NOTE: For replacement pages for IAC, see IAC Supplement 1/13/21.