

CHAPTER 26  
APPEALS AND CONTESTED CASES—PROCEEDINGS

[Prior to 1/7/04, see 581—21.9]

**495—26.1(17A,97B) Scope and applicability.** These rules are applicable to appeals and contested case proceedings conducted by the Iowa Public Employees' Retirement System.

**495—26.2(17A,97B) Definitions.** Except where otherwise specifically defined by law:

*"Appeal"* means a dispute, other than a disability claim under Iowa Code section 97B.52A, of an agency decision or action. An appeal shall be conducted as a contested case if IPERS has issued its final agency decision and if the aggrieved party wishes to continue in the appeal process.

*"Contested case"* means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under Iowa Code section 17A.10A.

*"Issuance"* means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

*"Party"* means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

*"Presiding officer"* means an administrative law judge provided by the department of inspections and appeals.

**495—26.3(17A,97B) Appeals.**

**26.3(1)** A party who wishes to appeal a decision by IPERS, other than a disability claim pursuant to Iowa Code section 97B.50A, shall, within 30 days after notification was mailed to the party's last-known address, file with IPERS a notice of appeal in writing setting forth:

- a. The name, address, and social security number of the applicant;
- b. A reference to the decision from which the appeal is being made;
- c. The fact that an appeal from the decision is being made;
- d. The grounds upon which the appeal is based; and
- e. Any evidence necessary to support the appeal.

Upon receipt of the appeal, IPERS shall conduct an internal review of the facts and circumstances involved, in accordance with its appeal review procedure. IPERS shall issue a final agency decision which becomes final unless within 30 days of issuance the member files a request for a contested case proceeding. In determining the date that an appeal or request for a contested case proceeding is filed with IPERS, the following shall apply: An appeal or request for a contested case proceeding delivered by mail shall be deemed to be filed on the postmark date; an appeal or any other document delivered by any other means shall be deemed to be filed on the date of receipt. Upon receipt of a request for contested case proceeding, IPERS shall inform the department of inspections and appeals of the filing and of relevant information pertaining to the case in question. The department of inspections and appeals shall, after issuing proper notice, hold a hearing on the case under the contested cases procedure as described in 26.4(17A,97B) and shall affirm, modify, or reverse IPERS' decision.

**26.3(2)** Appeals of disability claims under Iowa Code section 97B.50A shall be filed and processed as provided under rule 495—13.2(97B) and, upon exhaustion of that appeal process, shall revert to the procedures set forth in 26.4(17A,97B).

**495—26.4(17A,97B) Contested case procedures.** Appeals of final agency decisions by IPERS shall be conducted pursuant to the following subrules.

**26.4(1)** Time requirements. Time shall be computed as provided in Iowa Code section 4.1(34).

**26.4(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule that specifies a jurisdictional filing deadline. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**495—26.5(17A,97B) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

The request for a contested case proceeding shall:

1. State the name and address of the requester;
2. Identify the specific agency action which is disputed;
3. Where the requester is represented by an attorney, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved; and
4. Include a short and plain statement of the issues of material fact in dispute.

**495—26.6(17A,97B) Notice of hearing.**

**26.6(1) Delivery.** Delivery of the notice of hearing by the department of inspections and appeals constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**26.6(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal 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. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the agency or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer; and
- h. Notification of the time period in which a party may request, pursuant to Iowa Code section 17A.11(1) and rule 26.7(17A,97B), that the presiding officer be an administrative law judge.

**495—26.7(17A,97B) Presiding officer.** The presiding officer for contested cases shall be an administrative law judge employed by the department of inspections and appeals.

**495—26.8(17A,97B) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the agency in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**495—26.9(17A,97B) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**495—26.10(17A,97B) Disqualification.**

**26.10(1)** A presiding officer shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted, or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that:

(1) Is a party to the case, or an officer, CEO or designee or trustee of a party;

(2) Is an attorney or legal representative in the case;

(3) Is known to have an interest that could be substantially affected by the outcome of the case; or

(4) Is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**26.10(2)** The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 26.10(3) and 26.24(9).

**26.10(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**26.10(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 26.10(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17. The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 26.26(17A,97B) and seek a stay under rule 26.30(17A,97B).

#### **495—26.11(17A,97B) Consolidation—severance.**

**26.11(1)** *Consolidation.* The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**26.11(2)** *Severance.* The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**495—26.12(17A,97B) Pleadings.**

**26.12(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**26.12(2)** Petition.

*a.* Any petition required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

*b.* A petition shall state in separately numbered paragraphs the following:

- (1) The persons or entities on whose behalf the petition is filed;
- (2) The particular provisions of statutes and rules involved;
- (3) The relief demanded and the facts and law relied upon for such relief; and
- (4) The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**26.12(3)** Answer. An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**26.12(4)** Amendment. Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**495—26.13(17A,97B) Service and filing of pleadings and other papers.**

**26.13(1)** *When service required.* Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the agency, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**26.13(2)** *Service—how made.* Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**26.13(3)** *Filing—when required.* After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the CEO, or designee, IPERS, 7401 Register Drive, P.O. Box 9117, Des Moines, Iowa 50306-9117. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the agency.

**26.13(4)** *Filing—when made.* Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the CEO, or designee, IPERS, 7401 Register Drive, P.O. Box 9117, Des Moines, Iowa 50306-9117, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**26.13(5)** *Proof of mailing.* Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

\_\_\_\_\_ (Date) \_\_\_\_\_ (Signature)

**495—26.14(17A,97B) Discovery.**

**26.14(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**26.14(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 26.14(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**26.14(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**495—26.15(17A,97B) Subpoenas.**

**26.15(1) Issuance.**

*a.* An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least five days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

*b.* Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**26.15(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**495—26.16(17A,97B) Motions.**

**26.16(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**26.16(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**26.16(3)** The presiding officer may schedule oral argument on any motion.

**26.16(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days, or other time period designated by the agency or presiding officer, prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

**26.16(5)** Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 1.981 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases. Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or normal submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered

on all issues in a contested case is subject to rehearing pursuant to 26.29(17A,97B) and appeal pursuant to 26.28(17A,97B).

**495—26.17(17A,97B) Prehearing conference.**

**26.17(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

**26.17(2)** Each party shall bring to the prehearing conference:

*a.* A final list of the witnesses the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

*b.* A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

*c.* Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**26.17(3)** In addition to the requirements of subrule 26.17(2), the parties at a prehearing conference may:

*a.* Enter into stipulations of law or fact;

*b.* Enter into stipulations on the admissibility of exhibits;

*c.* Identify matters which the parties intended to be officially noticed;

*d.* Enter into stipulations for waiver of any provision of law; and

*e.* Consider any additional matters which will expedite the hearing.

**26.17(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**495—26.18(17A,97B) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**26.18(1)** A written application for a continuance shall:

*a.* Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;

*b.* State the specific reasons for the request; and

*c.* Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The agency or presiding officer may waive notice of such requests for a particular case or an entire class of cases.

**26.18(2)** In determining whether to grant a continuance, the presiding officer may consider:

*a.* Prior continuances;

*b.* The interests of all parties;

*c.* The likelihood of informal settlement;

*d.* The existence of an emergency;

*e.* Any objection;

*f.* Any applicable time requirements;

*g.* The existence of a conflict in the schedules of counsel, parties, or witnesses;

*h.* The timeliness of the request; and

*i.* Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**495—26.19(17A,97B) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with agency rules. A party requesting withdrawal of an appeal shall do so in writing and submit the request to the CEO or presiding officer, whichever is applicable. Unless otherwise provided, a withdrawal shall be with prejudice.

**495—26.20(17A,97B) Intervention.**

**26.20(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**26.20(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. The presiding officer may deny the motion for leave to intervene if not filed timely. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**26.20(3) Grounds for intervention.** The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**26.20(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceeding. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**495—26.21(17A,97B) Hearing procedures.**

**26.21(1)** The presiding officer presides at the hearing and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**26.21(2)** All objections shall be timely made and stated on the record.

**26.21(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law. The cost of representation is the responsibility of the party.

**26.21(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**26.21(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**26.21(6)** Witnesses may be sequestered during the hearing.

**26.21(7)** The presiding officer shall conduct the hearing in the following manner:

*a.* The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

*b.* The parties shall be given an opportunity to present opening statements;

*c.* Parties shall present their cases in the sequence determined by the presiding officer;

*d.* Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

*e.* When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**495—26.22(17A,97B) Evidence.**

**26.22(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**26.22(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**26.22(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**26.22(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**26.22(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**26.22(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**495—26.23(17A,97B) Default.**

**26.23(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**26.23(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**26.23(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 26.27(17A,97B). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**26.23(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**26.23(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to



the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**26.23(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rules of Civil Procedure 1.977.

**26.23(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 26.26(17A,97B).

**26.23(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**26.23(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

**26.23(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 26.30(17A,97B).

#### **495—26.24(17A,97B) Ex parte communication.**

**26.24(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 26.10(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**26.24(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**26.24(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**26.24(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 26.13(17A,97B) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through a conference telephone call including all parties or their representatives.

**26.24(5)** Persons who jointly act as presiding officer or are a committee assigned to conduct a contested case may communicate with each other without notice or opportunity for parties to participate.

**26.24(6)** The CEO, or designee, or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 26.24(1).

**26.24(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 26.18(17A,97B).

**26.24(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication while a contested case is pending must initially determine if the effect of the

communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record and disclosed to all parties having an interest in the contested case. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**26.24(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**26.24(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the CEO or agency general counsel for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**495—26.25(17A,97B) Recording costs.** Upon request, the agency shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**495—26.26(17A,97B) Interlocutory appeals.** Upon written request of a party or on its own motion, the CEO, or designee, may review an interlocutory order of the presiding officer. In determining whether to do so, the CEO shall weigh the extent to which the granting of the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within ten days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**495—26.27(17A,97B) Hearing decision.** Following the conclusion of a hearing of an appeal, the administrative law judge within the department of inspections and appeals shall announce the findings of fact and conclusion of law and issue a written decision. The decision shall be signed by the administrative law judge, and filed with IPERS, with a copy mailed to the appellant. This decision shall be deemed final unless, within 30 days after the issuance date of such decision, further appeal is initiated. The issuance date is the date that the decision is signed by the administrative law judge.

**495—26.28(17A,97B) Appeal of the hearing decision.**

**26.28(1) Notice of appeal.** An appeal of a written decision of an administrative law judge is initiated by filing a timely notice of appeal with the employment appeal board of the Iowa department of inspections and appeals. In determining the date that a notice of appeal or any other document is filed with the employment appeal board, and subject to applicable exceptions adopted by the employment appeal board, the following shall apply: an appeal or any other document delivered by mail shall be deemed to be filed as of the postmark date; an appeal or any other document delivered by any other means shall be deemed to be filed as of the date that it is received. The notice of appeal must be signed

by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**26.28(2) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The CEO, or a designee, may preside at the taking of additional evidence.

**26.28(3) Scheduling.** The employment appeal board shall issue a schedule for consideration of the appeal.

**26.28(4) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 14 days thereafter any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The employment appeal board may resolve the appeal on the briefs or provide an opportunity for oral argument.

**26.28(5) Judicial review.** The employment appeal board's decision shall be final and without further review 30 days after the decision is mailed to all interested parties of record unless within 20 days a petition for rehearing is filed with the employment appeal board or within 30 days a petition for judicial review is filed in the appropriate district court. The agency, in its discretion, may also petition the district court for judicial review of questions of law involving any of its decisions. Action brought by the agency for judicial review of its decisions shall be brought in the district court of Polk County, Iowa.

#### **495—26.29(17A,97B) Applications for rehearing.**

**26.29(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**26.29(2) Content of application.** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 26.28(2), the applicant requests an opportunity to submit additional evidence.

**26.29(3) Time of filing.** The application shall be filed with the Iowa department of inspections and appeals within 20 days after issuance of the written decision.

**26.29(4) Notice to other parties.** A copy of the application shall be timely served by the applicant to all parties of record not joining therein.

**26.29(5) Disposition.** Any application for a rehearing shall be deemed denied unless the appeal board grants the application within 20 days after its filing.

#### **495—26.30(17A,97B) Stays of agency actions.**

**26.30(1) When available.**

a. Any party to a contested case proceeding may petition the agency for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The CEO, or designee, may rule on the stay or authorize the presiding officer to do so.

*b.* Any party to a contested case proceeding may petition the agency for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**26.30(2) *When granted.*** In determining whether to grant a stay, the CEO, or designee, or presiding officer shall consider the factors listed in Iowa Code section 17A.19(4).

**26.30(3) *When vacated.*** A stay may be vacated by the issuing authority upon application of the agency's representative or any other party.

**495—26.31(17A,97B) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**495—26.32(17A,97B) Emergency adjudicative proceedings.**

**26.32(1) *Necessary emergency action.*** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the agency may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

*a.* Whether there has been a sufficient factual investigation to ensure that the agency is proceeding on the basis of reliable information;

*b.* Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

*c.* Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

*d.* Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

*e.* Whether the specific action contemplated by the agency is necessary to avoid the immediate danger.

**26.32(2) *Issuance of order.***

*a.* An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the agency's decision to take immediate action.

*b.* The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency;

(3) Certified mail to the last address on file with the agency;

(4) First-class mail to the last address on file with the agency; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

*c.* To the degree practicable, the agency shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**26.32(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the agency shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**26.32(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which agency proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapters 17A and 97B.

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