

CHAPTER 35
CONTESTED CASES
[Prior to 5/19/99, see 657—Ch 9]

657—35.1(17A,124,124B,126,147,155A,205,272C) Scope and applicability. This chapter applies to contested case proceedings, including licensee, registrant, or permittee discipline, conducted by the board of pharmacy.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.2(17A,272C) Definitions. Except where otherwise specifically defined by law:

“*Board*” means the Iowa board of pharmacy.

“*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 1998 Iowa Acts, chapter 1202, section 14.

“*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 members of the board of pharmacy or the administrative law judge assigned to preside over the case pursuant to rule 657—35.6(17A,272C).

“*Proposed decision*” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the board did not preside. If the contested case involves licensee or registrant discipline, “proposed decision” means the decision of the panel of the board when the hearing is held before a panel of the board rather than the full board.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.3(17A) Time requirements.

35.3(1) Computation. Time shall be computed as provided in Iowa Code subsection 4.1(34).

35.3(2) Changing time to take action. For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. 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.

657—35.4 Reserved.

657—35.5(17A,124B,126,147,155A,205,272C) Notice of hearing.

35.5(1) Delivery. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery. Delivery may be executed by:

- a. Personal delivery;
- b. Certified mail, return receipt requested, to the last address on file with the board;
- c. Certified mail to the last address on file with the board;
- d. First-class mail to the last address on file with the board;
- e. Facsimile. Facsimile transmission may be used as the sole method of delivery if the party to be served has filed a written request that board communications be sent by facsimile and has provided a facsimile telephone number for that purpose;
- f. Other electronic transmission. Other electronic transmission, such as E-mail, may be used as the sole method of delivery if the party to be served has filed a written request that board communications be sent by such other electronic transmission and has provided an address for that purpose; or
- g. Publication, as provided in the Iowa Rules of Civil Procedure.

35.5(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 board 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 board or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., members of the board, administrative law judge from the department of inspections and appeals); and
- i. Notification of the time period in which a party may request, pursuant to Iowa Code section 17A.11 and rule 35.6(17A,272C), that the presiding officer be an administrative law judge.
[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.6(17A,272C) Presiding officer for nondisciplinary hearings.

35.6(1) Request for administrative law judge. Any party may request that an administrative law judge employed by the department of inspections and appeals be assigned to render a proposed decision in a nondisciplinary hearing. The written request shall be filed with the executive director within 20 days after service of a notice of hearing identifying or describing the presiding officer as the members of the board.

35.6(2) Grounds for denial. The executive director may deny the request only upon a finding that one or more of the following apply:

- a. Neither the board nor any member of the board, under whose authority the contested case is to take place, is a named party to the proceeding or a real party in interest to that proceeding.
- b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- c. The contested case involves the discipline of a licensee or registrant and therefore must be decided by the board as required by Iowa Code section 272C.6.
- d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.
- e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.
- f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.
- g. The request was not timely filed.
- h. The request is not consistent with a specified statute.

35.6(3) Written ruling. The executive director shall issue a written ruling specifying the grounds for the decision within 20 days after a request for an administrative law judge is filed.

35.6(4) Appeals to board. Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the board. A party shall seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

35.6(5) Review of proposed decision. Unless otherwise provided by law, members of the board, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.7(17A,124B,147,155A,272C) Waiver of procedures. Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

657—35.8(17A,272C) Telephone or network proceedings. The presiding officer may resolve preliminary procedural motions by telephone conference or by a conference on the Iowa Communications Network (ICN) in which all parties have an opportunity to participate. Other telephone or network proceedings, including the hearing for the contested case proceeding, may be held when

appropriate under the circumstances. The presiding officer will determine the location of the parties and witnesses for telephone or network hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

657—35.9(17A) Disqualification.

35.9(1) *Reasons for withdrawal from participation.* A presiding officer or other person 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, director or trustee of a party;
 - (2) Is a lawyer 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.

35.9(2) *“Personally investigated” defined.* 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 board 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 35.9(3) and 35.22(9).

35.9(3) *Determination that withdrawal is not necessary.* 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 by affidavit for the record the relevant information and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

35.9(4) *Motion for disqualification.* If a party asserts disqualification on any appropriate ground, including those listed in subrule 35.9(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17. The motion shall 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 35.24(17A) and seek a stay under rule 35.28(17A,272C).

657—35.10(17A,272C) Consolidation—severance.

35.10(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.

35.10(2) Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

657—35.11(17A,272C) Service and filing of pleadings and other papers.

35.11(1) Service—when 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 board, 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.

35.11(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.

35.11(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 Iowa Board of Pharmacy, 400 S.W. Eighth Street, Suite E, Des Moines, Iowa 50309-4688. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board.

35.11(4) Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to the board office, or mailed by first-class mail or state interoffice mail to the board office, so long as there is proof of mailing.

35.11(5) Proof of mailing. Proof of mailing includes one of the following:

- a. A legible United States Postal Service postmark on the envelope;
- b. A certificate of service;
- c. A notarized affidavit; or
- d. 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 Iowa Board of Pharmacy, 400 S.W. Eighth Street, Suite E, Des Moines, Iowa 50309-4688, 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

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.12(17A,272C) Discovery.

35.12(1) Procedures. 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.

35.12(2) Motions. 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. The presiding officer shall rule on motions in regard to discovery. 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

35.12(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

35.12(3) Admissibility of evidence. Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

657—35.13(17A,272C) Subpoenas.

35.13(1) Issuance of investigatory subpoenas.

a. The board's executive director or designee may, upon the written request of a board investigator or on the executive director's own initiative, subpoena books, papers, records, and other real evidence which the executive director determines are necessary for the board to decide whether to institute a contested case proceeding. In the case of a subpoena for mental health records, each of the following conditions shall be satisfied prior to the issuance of the subpoena:

- (1) The nature of the complaint reasonably justifies the issuance of a subpoena;
- (2) Adequate safeguards have been established to prevent unauthorized disclosure;
- (3) An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and
- (4) The patient was notified and an attempt was made to secure an authorization from the patient for release of the records at issue.

b. A written request for a subpoena or the executive director's written memorandum in support of the issuance of a subpoena shall contain the following:

- (1) The name and address of the person to whom the subpoena will be directed;
- (2) A specific description of the books, papers, records or other real evidence requested;
- (3) An explanation of why the documents sought to be subpoenaed are necessary for the board to determine whether it should institute a contested case proceeding; and
- (4) In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 35.13(1), paragraph "a," have been satisfied.

c. Each subpoena shall contain:

- (1) The name and address of the person to whom the subpoena is directed;
- (2) A description of the books, papers, records or other real evidence requested;
- (3) The date, time, and location for production or inspection and copying;
- (4) The time within which a motion to quash or modify the subpoena must be filed;
- (5) The signature, address and telephone number of the executive director or designee;
- (6) The date of issuance;
- (7) A return of service.

d. Any person who is aggrieved or adversely affected by compliance with the subpoena who desires to challenge the subpoena shall, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified and may be accompanied by legal briefs or factual affidavits.

e. Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold an argument and issue a decision, or the board may hold the argument and issue a decision. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

f. A person aggrieved by a ruling of an administrative law judge who desires to challenge the ruling shall appeal the ruling to the board in accordance with the procedure applicable to intra-agency appeals of proposed decisions set forth in rule 35.26(17A,124B,126,147,155A,205, 272C), provided that all of the time frames are reduced by one-half.

g. If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until either the person is notified the investigation has been concluded with no formal action or there is a final decision in the contested case.

35.13(2) Issuance of subpoenas in a contested case.

a. Subpoenas issued in a contested case may compel the attendance of witnesses at depositions or hearing and may compel the production of books, papers, records, and other real evidence. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing or may be issued separately. Upon written request, the executive director or designee shall issue subpoenas. A request for a subpoena of patient records must confirm the conditions described in subrule 35.13(1), paragraph “*a*,” prior to the issuance of the subpoena.

b. A request for a subpoena shall include the following information, as applicable, unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:

- (1) The name, address, and telephone number of the person requesting the subpoena;
- (2) The name and address of the person to whom the subpoena shall be directed;
- (3) The date, time, and location at which the person shall be commanded to attend and give testimony;
- (4) Whether the testimony is requested in connection with a deposition or hearing;
- (5) A description of the books, papers, records, or other real evidence requested;
- (6) The date, time, and location for production or inspection and copying; and
- (7) In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 35.13(1), paragraph “*a*,” have been satisfied.

c. Each subpoena shall contain, as applicable:

- (1) The caption of the case;
- (2) The name, address, and telephone number of the person who requested the subpoena;
- (3) The name and address of the person to whom the subpoena is directed;
- (4) The date, time, and location at which the person is commanded to appear;
- (5) Whether the testimony is commanded in connection with a deposition or hearing;
- (6) A description of the books, papers, records or other real evidence the person is commanded to produce;
- (7) The date, time, and location for production or inspection and copying;
- (8) The time within which a motion to quash or modify the subpoena must be filed;
- (9) The signature, address, and telephone number of the executive director or designee;
- (10) The date of issuance;
- (11) A return of service.

d. Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the executive director or designee shall mail copies of all subpoenas to the parties to the contested case. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

e. Any person who is aggrieved or adversely affected by compliance with the subpoena, or any party to the contested case who desires to challenge the subpoena, shall, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

f. Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold an argument and issue a decision, or the board may hold the argument and issue a decision. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

g. A person aggrieved by a ruling of an administrative law judge who desires to challenge the ruling shall appeal the ruling to the board in accordance with the procedure applicable to intra-agency appeals of proposed decisions set forth in rule 35.26(17A,124B,126,147,155A,205,272C), provided that all of the time frames are reduced by one-half.

h. If the person contesting the subpoena is not the person under investigation, the board’s decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board’s decision is not final for purposes of judicial review until there is a final decision in the contested case.

35.13(3) Refusal to obey subpoena. In the event of a refusal to obey a subpoena, the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.14(17A,272C) Motions.

35.14(1) Form. No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

35.14(2) Timely response. 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 board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

35.14(3) Oral argument. The presiding officer may schedule oral argument on any motion.

35.14(4) Timely filing. Motions pertaining to the hearing, except motions for summary judgment, shall be filed and served at least ten days 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 board or an order of the presiding officer.

657—35.15(17A,272C) Prehearing conference.

35.15(1) Request or order for conference. 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 executive director to all parties. For good cause the presiding officer may permit variances from this rule.

35.15(2) Witness and exhibit lists. Each party shall bring to the prehearing conference:

a. A final list of the witnesses who 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 that 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.

35.15(3) Effect of conference. In addition to the requirements of subrule 35.15(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 that the parties intend to request be officially noticed;

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

e. Consider any additional matters that will expedite the hearing.

35.15(4) Conducted by telephone. Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a prehearing conference.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.16(17A,272C) Continuances. Unless otherwise provided, applications for continuances shall be made to the presiding officer or, in the case of a licensee or registrant disciplinary hearing, to the executive director.

35.16(1) Requirements of application. 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, or in a disciplinary hearing the executive director, 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 or, in a disciplinary hearing, by the executive director. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

35.16(2) Consideration of application. In determining whether to grant a continuance, the presiding officer, or in a disciplinary hearing the executive director, 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, or in a disciplinary hearing the executive director, may require documentation of any grounds for continuance.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.17(17A) Withdrawals. A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

657—35.18 Reserved.

657—35.19(17A,124B,126,147,155A,205,272C) Hearing procedures in contested cases.

35.19(1) Presiding officer. 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.

35.19(2) Objections. All objections shall be timely made and stated on the record.

35.19(3) Right of participation or representation. 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. An attorney or another person authorized by law may represent any party.

35.19(4) Rights of all parties. 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.

35.19(5) Disorderly conduct. The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

35.19(6) Sequestering witnesses. Witnesses may be sequestered during the hearing.

35.19(7) Conduct of hearing. 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.

35.19(8) *Administrative law judge.* A license disciplinary hearing shall be conducted by a qualified administrative law judge and either a quorum of the board or a panel of not less than three pharmacist members of the board. The administrative law judge's duties shall include:

- a.* Opening the record and receiving appearances.
- b.* Administering oaths.
- c.* Entering notice of the hearing into the record.
- d.* Receiving testimony and exhibits presented by the parties.
- e.* At the administrative law judge's discretion, interrogating witnesses.
- f.* Making initial rulings on objections and motions.
- g.* Closing the hearing.
- h.* Participating in board or panel deliberations and preparing an order containing findings of fact and conclusions of law in accordance with the board's or panel's decisions.

35.19(9) *Written decision.* In a license disciplinary hearing, the administrative law judge shall prepare in writing the proposed decision of the panel or the final decision of the board, as applicable. Such decisions shall:

- a.* Be in writing and signed by the board chairperson or the chairperson's designee.
- b.* Set forth the issues, a brief history of the case, findings of fact, the reasons for the decision, and the actual decision.
- c.* Be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs.
- d.* Be delivered to the licensee, permittee, or registrant by one of the methods provided for in subrule 35.5(1).

35.19(10) *Hearings open to the public.* License, permit, or registration disciplinary hearings shall be open to the public except as provided in Iowa Code section 272C.6 and Iowa Code chapter 21.

35.19(11) *Decisions available for public inspection.* Copies of all decisions of the board shall be kept on file for public inspection at the office of the board pursuant to 657—Chapter 14.

35.19(12) *Proceedings recorded.* Oral proceedings in connection with a hearing in a contested case shall be recorded either by mechanized means or by certified shorthand reporters. These records shall be kept in the board office for a period of five years following the date of the hearing.

35.19(13) *Board chairperson.* The chairperson of the board shall have the right to vote in all administrative hearings.

35.19(14) *Final decision.* When a quorum of the board presides over the reception of the evidence at the hearing, its decision is a final decision.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.20(17A,272C) Evidence.

35.20(1) *Ruling on admissibility.* 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.

35.20(2) *Stipulation.* Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

35.20(3) *Issues limited.* 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.

35.20(4) Admissible evidence. Irrelevant, immaterial, and unduly repetitious evidence should be excluded. A finding will be based upon the kind of evidence upon which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

35.20(5) Exhibits. 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.

35.20(6) Objection. Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. A brief statement of the grounds upon which it is based shall accompany the objection. 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.

35.20(7) Offer of proof. 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.

35.20(8) and 35.20(9) Rescinded IAB 11/13/02, effective 12/18/02.

657—35.21(17A,272C) Default.

35.21(1) Failure to appear. 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.

35.21(2) Motion for default. 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.

35.21(3) Motion to vacate. A default decision or a decision rendered on the merits after a party has failed to appear or participate in a contested case proceeding shall become final board 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 unless an appeal of a decision on the merits is timely initiated within the time provided by rule 35.26(17A,124B,126,147,155A,205,272C). 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.

35.21(4) Appeal. 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.

35.21(5) Proof of good cause. 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.

35.21(6) "Good cause" defined. "Good cause," for purposes of this rule, shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 1.977.

35.21(7) Appeal of decision on motion to vacate. 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 35.24(17A,272C).

35.21(8) Notice of hearing. 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.

35.21(9) *Default decision.* 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.

35.21(10) *Default decision effective.* 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 35.28(17A,272C).

657—35.22(17A,272C) Ex parte communication.

35.22(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 board 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 35.9(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.

35.22(2) *Duration of prohibition.* 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.

35.22(3) *“Ex parte” defined.* Written, oral, or other forms of communication are “ex parte” if made without notice and opportunity for all parties to participate.

35.22(4) *Authorized communications.* 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 35.11(17A,272C) and may be supplemented by telephone, facsimile, electronic mail, or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

35.22(5) *Communications between presiding officers.* Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

35.22(6) *Others authorized to communicate with presiding officer.* The executive director 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 35.22(1).

35.22(7) *Communications not prohibited.* 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 35.16(17A,272C).

35.22(8) *Disclosure of prohibited communications received during pendency of case.* A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified.

a. 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 under seal by protective order.

b. 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.

c. 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.

35.22(9) Disclosure of prohibited communications received prior to assignment as presiding officer. 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.

35.22(10) Sanctions for violation. 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 board. Violation of ex parte communication prohibitions by board personnel shall be reported to the executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.23(17A,272C) Recording costs. Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The requesting party shall pay the cost of preparing a copy of the record or of transcribing the hearing record. Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

657—35.24(17A,272C) Interlocutory appeals. If the board is not serving as the presiding officer, upon written request of a party or on its own motion, the board may review an interlocutory order of the presiding officer. In determining whether to do so, the board shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the board 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 14 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.

657—35.25(17A) Final decision.

35.25(1) Presiding officer—board. When a quorum of the board presides over the reception of evidence at the hearing, the board's decision is a final decision.

35.25(2) Presiding officer—not the board. When the board does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the board without further proceedings unless there is an appeal to, or review on motion of, the board within the time provided in rule 35.26(17A,124B,126,147,155A,205,272C).

657—35.26(17A,124B,126,147,155A,205,272C) Appeals and review.

35.26(1) Appeal by party. Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision.

35.26(2) Review. The board may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

35.26(3) Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the board. The appealing party or a representative of that party shall sign the notice of appeal and shall include 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.

35.26(4) 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 non-appealing party, within 14 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

35.26(5) Scheduling. The board shall issue a schedule for consideration of the appeal.

35.26(6) 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 20 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 board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.27(17A,124B,126,147,155A,205,272C) Applications for rehearing.

35.27(1) By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

35.27(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 board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 35.26(4), the applicant requests an opportunity to submit additional evidence.

35.27(3) Time of filing. The application shall be filed with the board within 20 days after issuance of the final decision.

35.27(4) Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board shall serve copies on all parties.

35.27(5) Disposition. Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.28(17A,272C) Stays of board actions.

35.28(1) When available.

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

b. Any party to a contested case proceeding may petition the board 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.

35.28(2) When granted. In determining whether to grant a stay, the presiding officer or board shall consider the following factors:

- a. The extent to which the applicant is likely to prevail when the court finally disposes of the matter;
- b. The extent to which the applicant will suffer irreparable injury if relief is not granted;
- c. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings;
- d. The extent to which the public interest relied on by the board is sufficient to justify the board's action in the circumstances.

35.28(3) Vacation. The issuing authority may vacate a stay upon application of the board or any other party.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

657—35.29(17A,272C) 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.

657—35.30(17A,124B,126,147,155A,205,272C) Emergency adjudicative proceedings.

35.30(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 board may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license, registration, or permit in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order, the board shall consider factors including, but not limited to, the following:

- a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;
- b. Whether the specific circumstances that 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 board is necessary to avoid the immediate danger.

35.30(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 board;
- (3) Certified mail to the last address on file with the board;
- (4) First-class mail to the last address on file with the board;
- (5) Facsimile. Facsimile transmission may be used as the sole method of delivery if the person required to comply with the order has filed a written request that board orders be sent by facsimile and has provided a facsimile telephone number for that purpose; or
- (6) Other electronic transmission. Other electronic transmission, such as E-mail, may be used as the sole method of delivery if the party to be served has filed a written request that board communications be sent by such other electronic transmission and has provided an address for that purpose.

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

35.30(3) Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

35.30(4) Completion of proceedings. After the issuance of an emergency adjudicative order, the board 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 board proceedings are scheduled for hearing. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing.

[ARC 9412B, IAB 3/9/11, effective 4/13/11]

These rules are intended to implement Iowa Code sections 17A.10 to 17A.23, 124.304, 124B.12, 126.17, 147.96, 155A.6, 155A.12, 155A.13A, 155A.15 to 155A.18, 155A.26, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

[Filed 5/11/79, Notice 4/4/79—published 5/30/79, effective 7/4/79]

[Filed 2/12/81, Notice 12/24/80—published 3/4/81, effective 4/8/81]

[Filed emergency 7/28/81—published 8/19/81, effective 8/1/81]

[Filed emergency 9/14/81—published 9/30/81, effective 9/30/81]

[Filed 12/21/81, Notice 11/11/81—published 1/6/82, effective 2/10/82]

[Filed 7/28/82, Notice 3/17/82—published 8/18/82, effective 9/22/82]

[Filed emergency 1/21/88—published 2/10/88, effective 1/22/88]

[Filed 1/21/88, Notice 11/18/87—published 2/10/88, effective 3/16/88]

[Filed 8/5/88, Notice 5/18/88—published 8/24/88, effective 9/28/88]

[Filed emergency 5/16/89—published 6/14/89, effective 5/17/89]

[Filed emergency 5/10/91—published 5/29/91, effective 5/10/91]

[Filed 1/21/92, Notice 10/16/91—published 2/19/92, effective 3/25/92]

[Filed 10/22/92, Notice 9/2/92—published 11/11/92, effective 1/1/93]

[Filed 2/5/93, Notice 11/11/92—published 3/3/93, effective 4/8/93]

[Filed 9/23/93, Notice 5/26/93—published 10/13/93, effective 11/17/93]

[Filed 6/24/94, Notice 4/13/94—published 7/20/94, effective 8/24/94]

[Filed 5/1/96, Notice 1/3/96—published 5/22/96, effective 6/26/96]

[Filed 8/2/96, Notice 5/22/96—published 8/28/96, effective 10/2/96]

[Filed 2/27/97, Notice 1/1/97—published 3/26/97, effective 4/30/97]

[Filed 7/31/98, Notice 5/20/98—published 8/26/98, effective 10/15/98]

[Filed 4/22/99, Notice 3/10/99—published 5/19/99, effective 6/23/99]

[Filed emergency 10/6/99—published 11/3/99, effective 10/11/99]

[Filed 10/24/02, Notice 7/24/02—published 11/13/02, effective 12/18/02]

[Filed ARC 9412B (Notice ARC 9191B, IAB 11/3/10), IAB 3/9/11, effective 4/13/11]