

621—1.9(17A,20) Waiver or variance of rules.**1.9(1) Definitions.**

a. “*Waiver or variance*” as used in this rule means action by the board which suspends, in whole or in part, the requirements or provisions of a rule as applied to an identified individual or entity on the basis of the particular circumstances of that individual or entity. The term “waiver” as used herein shall include both a waiver and a variance.

b. “*Provision of law*” as used in this rule means a provision of law as defined by Iowa Code section 17A.2(10).

1.9(2) Purpose and scope. This rule creates a generally applicable process and specifies applicable criteria for granting individual waivers from rules adopted by the board in situations in which no other specifically applicable provision of law provides for waiver. To the extent another more specific provision of law governs the issuance of a waiver from a particular rule, the more specific waiver provision shall supersede this rule with respect to any waiver of that rule.

1.9(3) When waiver unavailable. No waiver may be granted pursuant to this rule unless the board has jurisdiction over the rule to which the waiver request applies and the requested waiver is consistent with any applicable statute, constitutional provision or other provision of law. The board may not waive requirements created or duties imposed by statute.

1.9(4) Criteria for waiver. In response to a petition filed in accordance with this rule the board may, in its sole discretion, issue an order waiving the requirements of a rule or rules if the board finds, based on clear and convincing evidence, all of the following:

a. The application of the rule would pose an undue hardship on the entity or individual for whom the waiver is requested;

b. The waiver of the rule in the particular case would not prejudice the substantial legal rights of any individual or entity;

c. The provisions of the rule or rules to which the waiver request applies are not specifically mandated by statute or other provision of law; and

d. Substantially equal protection of public health, safety and welfare will be afforded by a means other than that prescribed in the particular rule or rules to which the waiver request applies.

1.9(5) Filing of petition. All petitions requesting a waiver must be filed with the agency pursuant to 621—Chapter 16. If the petition relates to a pending contested case proceeding or a proceeding pending before the agency which could culminate in a contested case proceeding, the petition shall be filed in the case docketed in the agency’s electronic document management system (EDMS) and bear the caption of that proceeding.

1.9(6) Content of petition. A petition requesting a waiver shall be in writing and shall include the following information where applicable and known to the petitioner:

a. The name, address and telephone number of the individual or entity requesting the waiver and of the individual’s or entity’s authorized representative, if any.

b. A citation of the specific rules, rule or part thereof from which a waiver is requested.

c. A description of the precise scope and duration of the waiver requested.

d. A statement of the relevant facts the petitioner believes would justify a waiver under each of the criteria specified in subrule 1.9(4), together with an affirmation signed by the petitioner attesting to the accuracy of the facts asserted in the petition.

e. A history of any prior contacts within the last five years by or between the board or its representatives and the petitioner concerning the matter which would be affected by the requested waiver, including references to all past or pending agency proceedings relating to the matter.

f. Any information known to the petitioner regarding the board’s treatment of waiver requests by similarly situated individuals or entities under similar circumstances.

g. The name, address and telephone number of any other governmental agency or entity which also regulates the activity in question or which might be affected by the granting of the requested waiver.

h. The name, address and telephone number of each individual or entity, public or private, which might be adversely affected by the granting of the requested waiver.

i. The name, address and telephone number of each individual with knowledge of the relevant facts relating to the requested waiver.

j. Signed releases of information authorizing individuals with knowledge of relevant facts relating to the requested waiver to furnish the board with such information.

1.9(7) *Timing and effect of petition.* If the petition seeks waiver of a time requirement specified by a rule, it must be filed as soon as possible but, in every case, before the expiration of the time period sought to be waived. The filing of a petition does not itself stay the operation of any agency rule, including the rule which is the subject of the petition.

1.9(8) *Service of petition.* The petitioner shall, within ten days of the filing of the petition, serve a copy thereof, in accordance with the provisions of rule 621—2.15(20), upon all entities or individuals named in or potentially affected by the petition or to whom notice is required by any provision of law and shall file proof of such service with the board. The board may also give notice of the petition to other individuals or entities.

1.9(9) *Additional information.* Prior to issuing an order granting or denying a waiver, the board may request additional information from the petitioner or other individuals or entities relating to the petition and the surrounding circumstances. Unless the petition is filed in a pending contested case proceeding, the board may, on its own motion or at the request of the petitioner or other interested individual or entity, schedule and conduct a telephonic or in-person meeting with the petitioner to discuss the request and surrounding circumstances and may include other interested individuals or entities.

1.9(10) *Procedure in contested cases.* The provisions of Iowa Code sections 17A.10 through 17A.18A regarding contested case hearings shall apply to petitions for a waiver which are filed in a pending contested case proceeding, but shall otherwise apply to proceedings on such petitions only when required by statute or when the board so provides by rule or order.

1.9(11) *Board discretion.* The final decision to grant or deny a waiver is vested in the board and shall be made wholly at its discretion following its consideration of all relevant factors, including the unique, individual circumstances set out in the petition. When the rule to which the petition relates establishes administrative deadlines, the board's consideration shall include a balancing of the individual circumstances of the petitioner with the board's policy favoring the uniform treatment of all similarly situated individuals or entities.

1.9(12) *Burden of persuasion.* The petitioner bears the burden of demonstrating, by clear and convincing evidence, that the board should exercise its discretion to grant a waiver pursuant to this rule.

1.9(13) *Ruling on petition.* The board shall issue a written ruling which includes an order granting or denying the requested waiver. The ruling shall contain a statement of the relevant facts and reasons upon which the order is based and a description of the precise scope and duration of any waiver granted.

1.9(14) *Time for ruling.* The board will issue its ruling as soon as practicable, but shall do so within 120 days of its receipt of the petition unless the petitioner agrees to a later date. However, if the petition was filed in a contested case proceeding or in a pending agency proceeding which has subsequently become a contested case proceeding, ruling on the petition may be withheld until the issuance of the final agency decision in that case.

1.9(15) *Deemed denial of petition.* Failure by the board to grant or deny a petition within the time required by subrule 1.9(14) shall be deemed a denial of the petition. However, notwithstanding such deemed denial, the board shall remain responsible for issuing a ruling pursuant to subrule 1.9(13).

1.9(16) *Scope and conditions of waiver.* Any waiver granted shall provide the narrowest exception possible to the provisions of the rule being waived. The board may include as a part of its granting of a waiver such conditions as it finds desirable to protect the public welfare or to achieve through alternative means the objectives of the particular rules, rule or part thereof being waived. A waiver shall not be permanent unless the petitioner has shown that a temporary waiver would be impracticable. Should a temporary waiver be granted, there is no automatic right to its renewal. A waiver may be renewed, in the sole discretion of the board, upon the filing and service of a petition for renewal which complies with the provisions of this rule and a finding by the board that grounds for a waiver continue to exist.

1.9(17) *Service of ruling.* Within seven days of its issuance, the board's ruling on the petition shall be served by the board by ordinary mail upon any entity or individual to whom the ruling pertains and

any other individuals or entities entitled to notice pursuant to any other provision of law if the individuals or entity representatives have not filed appearances in the case to receive service by EDMS.

1.9(18) *Indexing and public availability.* The board shall maintain a record of all rulings on petitions filed pursuant to this rule, which shall be indexed and available for public inspection at the board's offices subject to the provisions of Iowa Code section 17A.3. Because petitions and rulings may contain information which the board is authorized or required to keep confidential, the board may redact such confidential information from such petitions and rulings prior to public inspection.

1.9(19) *Effect of waiver.* Any waiver granted by the board shall constitute a defense, within the terms and the specific facts set forth therein, for the entity or individual to whom the waiver pertains in any proceeding in which the rule in question is sought to be invoked. The waiver is effective only as to the entity or individual to whom it was granted, is not assignable and does not inure to the benefit of the individual's or entity's successor(s) in interest.

1.9(20) *Cancellation of waiver.* A waiver granted pursuant to this rule may be canceled, withdrawn or modified if, after appropriate notice and hearing, the board finds:

a. An entity or individual who requested or was the subject of the waiver withheld from or knowingly misrepresented to the board material facts relevant to the propriety or desirability of the waiver; or

b. The alternative means for ensuring that the public welfare will be adequately protected and the purposes of the rule or set of rules waived will be adequately served after issuance of the waiver have been demonstrated to be insufficient, or

c. The subject of the waiver has failed to comply with all of the conditions specified in the order granting the waiver.

1.9(21) *Violations.* A violation of a condition specified in an order granting a waiver shall be treated as a violation of the particular rules, rule or portion thereof waived by the board. As a result, the recipient of a waiver under this rule who violates such a condition may be subject to the same remedies or penalties as an entity or individual who violates the rules, rule or portion thereof waived by the board.

1.9(22) *Appeals.* Any intra-agency or judicial review of rulings granting or denying waivers pursuant to this rule shall be in accordance with other applicable board rules and Iowa Code chapter 17A.

1.9(23) *Summary reports.* All orders granting or denying a waiver pursuant to this rule shall be summarized in semiannual reports which comply with and are distributed pursuant to the requirements of Iowa Code section 17A.9A.

[ARC 4457C, IAB 5/22/19, effective 6/26/19]