

STATE OF SOUTH DAKOTA



OFFICE OF HEARING EXAMINERS

GENERAL GUIDE TO ADMINISTRATIVE HEARINGS

This brochure is issued for informational purposes only. Nothing contained herein shall be inferred to bind the presiding Hearing Examiner, Administrative Law Judge, or the Bureau of Administration as to any practice described herein.

Updated January 2020

The purpose of the Office of Hearing Examiners is to provide for fair, prompt, and objective hearings for persons affected by actions of state agencies. The Office of Hearing Examiners conducts all hearings for the Department of Revenue, the Division of Insurance, the Department of Public Safety, as well as other agencies wishing to use the Office. All hearing examiners are licensed attorneys in South Dakota.

This pamphlet is not a substitute for having an attorney. An individual may represent himself or herself. Individuals may also choose to be represented by an attorney. **Note: Corporations must be represented by an attorney.** Information about obtaining low-cost legal representation can be obtained by calling the South Dakota Bar Association / Access to Justice at 1-855-287-3510.

The Office of Hearing Examiners (OHE) is providing this pamphlet to help you prepare for your administrative hearing. The procedures outlined below are designed to accommodate both the short, simple case and the complex case. However, not all cases are the same, and yours may be different. Many of the procedures are optional with each Examiner. All cases do not proceed along exactly the same path.

We cannot tell you about **all** possible situations that might arise. But we hope this pamphlet will help you better understand the process and prepare for your hearing.

Remember: It is very important for you to read carefully the documents sent to you by the OHE and the agency. Those documents tell you the issues involved, or the charges brought against you by the agency, what deadlines you must meet, and your rights.

HOW WILL I KNOW IF MY CASE HAS BEEN SENT TO THE OHE?

When a case is sent to the OHE for a hearing, the case will be assigned to an Examiner. You will then

be notified of the name of the Examiner and the OHE docket number for your case. This number will appear in all documents you receive from the OHE. You must use this number on all correspondence or filings.

WILL I HAVE A PRE-HEARING CONFERENCE?

In some cases, the Examiner or one of the parties will want to have a pre-hearing conference to discuss the issues in the case and answer any questions before the hearing. This can be done by telephone. If you want a pre-hearing conference, you may contact the OHE to schedule one.

WHO WILL DECIDE MY CASE?

In some hearings, the Examiner alone will hear your case. In these cases, the Examiner's decision will not be made until sometime after the hearing.

In most cases, the Examiner's decision will be a written Proposed Decision which will be mailed to both parties. The Agency will issue a Final Decision after receipt of the Proposed. The Agency may affirm, reject or modify the Proposed Decision. That Final Decision will be sent to you as well.

In some hearings, your case will be heard by a Board or Commission that is sitting with the Examiner. In these hearings, the Board, and not the Examiner, will make the decision on your case. The Board's decision, which is called the Final Order, will be made at the close of the hearing.

CAN I CALL THE EXAMINER AND TALK ABOUT MY CASE?

You may call OHE and ask general questions about how the hearing will be conducted, but if you wish to discuss specific issues in the case, it will be necessary to include the agency attorney in the conversation. The Examiner and the OHE may not give legal advice to parties.

WHAT WILL MY HEARING BE LIKE?

Your hearing will be very similar to a court trial, with witnesses, exhibits, and rules of evidence. An Examiner or Administrative Law Judge will preside. The Examiner is employed by the OHE, not by the agency involved in this action. Normally, an attorney represents the agency involved. You may be represented by an attorney or you may appear on your own behalf.

When the hearing begins, each party may present an opening statement. This tells the Examiner what that party intends to prove. Each party can then offer relevant evidence to prove its case. Evidence can be sworn testimony taken under oath at the hearing or it can be certain kinds of documents, such as business records. You must prove the accuracy of documents you submit. It may be helpful to get the other side to agree to the admissibility of your documents.

The Examiner will determine which side presents their case first. This is based upon which party has the burden of proof. **Each side** will have the opportunity to call their witness(es) and ask questions (direct examination). The opposing party will have the opportunity to cross-examine the witness. There will also be an opportunity for redirect and recross examinations.

Remember: Before the hearing closes, you must submit all the evidence you want the Examiner to consider.

After all testimony has been heard, each party can make a closing argument.

Closing arguments can address only those facts brought out in testimony of witnesses or in documents received into evidence. In some cases, the Examiner may want the parties to submit written argument after the hearing is over.

WHAT IS THE BURDEN OF PROOF? WHO HAS IT?

The **burden of proof** is the duty of a party to present evidence to demonstrate that an allegation or fact is true. Some cases require the burden to be only a preponderance of the evidence, which means the greater weight of the evidence, or the more probable conclusion based on the evidence. While other cases will have a higher burden of proof, clear and convincing evidence. Which means that the threshold of proof is more than a preponderance but less than beyond a reasonable doubt.

The **burden of proof** is generally assigned to the party who seeks to change the present state of affairs regarding any issue. Generally, if the agency is seeking to take disciplinary or enforcement action against you or your license, the agency will have the burden of proof.

If you are applying for a license, permit, or other benefit, you have the burden of proving that you meet the qualifications for that license, permit, or benefit.

CAN I SEE THE AGENCY'S EVIDENCE AGAINST ME BEFORE THE HEARING?

You have the **right** to obtain information, including a witness list, from the agency (discovery). Call or write the agency attorney and ask to see or copy the file and any other documents or relevant evidence the agency has regarding your case. If you have any difficulty obtaining information, you may contact the assigned Examiner for possible assistance.

You are also **required** to send a copy of your evidence to the agency before the hearing. If you bring evidence to the hearing that has not been sent to the agency prior to the hearing, the Examiner may not consider the evidence. The Examiner will give you the deadline for exchanging evidence.

WHAT KIND OF EVIDENCE WILL I NEED FOR THE HEARING?

Depending on your case, you may want to bring witnesses who know about the issues involved. If there are documents, such as contracts, business records, or checks that help prove your side, try to bring the original and two copies. You may bring photographs or other items that are relevant to your defense. Items you want to be considered as exhibits must be left with the Examiner. Any document you want to be considered by the Examiner must be admissible under the South Dakota Rules of Evidence.

HOW DO I GET A WITNESS TO COME TO THE HEARING? TO BRING RECORDS?

A **witness can come** voluntarily to the hearing. However, a subpoena protects your right to have the person present. **Remember:** The hearing is your chance to tell the Examiner your side. It is important to have witnesses present at the hearing to testify.

You also have the **right** to subpoena individuals to bring relevant records to the hearing. You may have to pay a fee for copying the records you are seeking. **Contact the OHE** well ahead of the hearing to obtain subpoenas to compel the attendance of a person whose testimony and/or records are relevant to your case.

IS IT OK TO BRING LETTERS INSTEAD OF WITNESSES?

Ordinarily, evidence is presented through the testimony of witnesses. Some letters may be admitted into evidence for limited purposes, but generally it is better to bring witnesses who can help present your side of the case and answer any questions raised.

IF I FORGOT SOMETHING, CAN I SEND IT TO THE EXAMINER LATER?

Your chance to present evidence is at the hearing. Only in rare cases will the Examiner allow you to send evidence later.

WHAT IF I CAN'T BE THERE ON THE DAY SET FOR HEARING?

You **must show good cause** to change a hearing date. Most hearings will be in-person and held in Pierre. If you cannot attend on the date and time shown, you must contact the OHE as soon as you know of the problem. To request a change of date (continuance), you may have to file a written request stating the reasons for the change. Make your request as far in advance of the hearing as possible.

WHAT IF I DON'T ATTEND?

You **will likely** lose your case if you do not attend. If an emergency arises on your hearing date and you will be late for the hearing, telephone the OHE and explain the problem.

IS THERE A WAY TO SETTLE THIS WITHOUT A HEARING?

Cases often settle without going to hearing. Contact the agency attorney to see if you can work your case out. It is appropriate for the parties to discuss settlement, and parties may agree to resolve a contested case by settlement at any time.

CAN I WITHDRAW MY APPEAL?

If you **requested the hearing** and later decide not to proceed, your request may be withdrawn any time before the scheduled hearing time. Send a letter by mail, fax, or e-mail to the OHE as soon as possible so the other party can be notified.

CAN I APPEAL THE FINAL ORDER OF THE AGENCY?

You have **thirty (30) days** to appeal the agency's Final Order to the Circuit Court.

CAN I OBTAIN A TRANSCRIPT (WRITTEN RECORD) OF THE HEARING?

Yes, but you must pay the cost of preparing the transcript. There are exceptions for certain cases.

IS THE HEARING LOCATION ACCESSIBLE TO PEOPLE WITH DISABILITIES?

The Americans with Disabilities Act (ADA) prohibits discrimination against any qualified individual with a disability. The OHE does not permit discrimination against any individual on the basis of physical or mental disability in accessing its programs. In accordance with the ADA, if necessary, the OHE will provide reasonable modifications in order to access all of its programs, services, and activities to qualified individuals with disabilities.

This notice is provided as required by Title II of the Americans with Disabilities Act of 1990. If you need assistance, have questions, or need additional information, please contact OHE at (605) 773-6811.

GENERAL INFORMATION

The **hearings** conducted by the OHE are governed by the Uniform Administrative Procedures Act, see South Dakota Codified Law Title 1, Chapter 26, as well as Title 1, Chapter 26D. Other rules and law specific to certain Departments or Agencies may be found in Code pertaining to that Office. Copies of laws and rules may be found <https://sdlegislature.gov>.

The **Office of Hearing Examiners is located at the following address:**

523 East Capitol Avenue
3rd Floor, Foss Building
Pierre, South Dakota 57501
Email: SDOHE@state.sd.us
Phone: (605) 773-6811 Fax: (605) 773-6818

If you are appearing without an attorney, you must keep the OHE informed of your current mailing address and telephone number.