

## Proposed OAH rules

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To: Bryan Nickels <bryan.nickels@oah.idaho.gov>

Good afternoon, Bryan,

I'm assisting Director Jeppesen in transitioning IDHW from fair hearings with the AG's to fair hearings with OAH. The Director shared OAH's proposed rules with me. As you probably know, IDHW currently opts out of using the AG's contested case rules at IDAPA 04.11.01, using its own instead at IDAPA 16.05.03 due to complexities in applicable federal law and rules.

The AG's rules provide:

Every state agency that conducts rulemaking or hears contested cases must adopt individual rules of procedure as required by this chapter. Further every state agency will be considered to have adopted the procedural rules of this chapter [unless the state agency by rule affirmatively declines to adopt this chapter, in whole or in part.](#) 04.11.01.001.02.

The OAH's rules provide:

Every state agency that conducts "contested cases" as defined by Section 67-5240, Idaho Code, must use these rules unless otherwise required by governing federal law. 62.01.01.001.02.

Rule 800 addresses agency-specific rules that may apply to contested cases before certain agencies. Those agency-specific rules of limited application are hereby incorporated by reference. 62.01.01.002.

800. OTHER AGENCY-SPECIFIC CONTESTED CASE RULES (RULE 800).

01. Mandatory application. Some agencies have promulgated their own contested case rules to comply with applicable federal law or specific requirements of Idaho law applicable to the agency or programs it administers. **Upon request of the agency at any point in the proceedings**, the presiding officer shall adopt and apply any such agency-specific rules. ( )

02. Optional application. Agency-specific contested case procedures may also be reflected in agency policies, procedure, or other non-rule guidance. **Upon request of the agency no later than the initial scheduling conference**, the presiding officer may adopt and apply such agency-specific policies, procedures, or other non-rule guidance, provided that such policies, procedure, or other non-rule guidance are publicly-available pursuant to Section 67-5250, Idaho Code; however, any such policies, procedures, or non-rule guidance which are required to comply with applicable federal law shall be adopted and applied at any time during the proceedings **upon request by the agency.**

The language (bolded above) used in the OAH rules would seem to require the Department to tell the hearing officer in each hearing that the Department uses its own rules. The language in the AG rules (in blue above) seems more efficient -- recognizing that an agency may affirmatively decline to adopt the chapter, and once declined, the OAH will recognize and use the agency's contested case rules. Would OAH consider similar language? Of course, there may be other perspectives I'm not considering. I'm happy to discuss. Thanks for your thoughts.

Daphne

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