

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-020 Adoption of rules of procedure. (1) **Model rules.** The department adopts the model rules of procedure as set forth in WAC 10-08-035 through 10-08-230, as amended. If there is a conflict between the model rules and this chapter, the rules in this chapter (~~shall~~) govern. Wherever the term "agency" appears in the model rules it means the department of financial institutions.

(2) **Brief adjudicative proceedings.** The department specifically adopts the criteria and procedures for brief adjudicative proceedings contained in RCW 34.05.482 through 34.05.494. (~~The department will use this procedure in any proceeding under chapter 293, Laws of 1996, regarding the suspension of escrow agent licenses for nonpayment of student loans.~~)

(3) **Securities division rules.** If there is a conflict between Title 460 WAC and these rules, Title 460 WAC governs.

NEW SECTION

WAC 208-08-025 Electronic service. (1) Any party may elect to be served by electronic transmission (fax or email) upon waiver of service by other lawful means.

(2) As used in this chapter, "fax" means electronic telefacsimile transmission.

(3) The waiver must be in writing, filed with all parties and the presiding officer, and provide the fax number or email address to be used for service. The waiver does not preclude any party from effecting service by other lawful means, and can be revoked upon written notice to all parties and the presiding officer. A party agreeing to accept service by email must utilize an email program that generates a delivery receipt for proof of service.

(4) The waiver permits the other parties and the presiding officer to serve via electronic transmission as described in this section in lieu of the means of service set forth in WAC 10-08-110 (2)(b).

(5) Service by fax is complete upon production by the fax machine of confirmation of transmission. Proof of service by fax is the successful "confirmation of transmission" or similar document showing successful transmission to the fax number provided with the waiver.

(6) Service by email is complete upon transmission to the email address provided with the waiver. Proof of service by email is successful upon the sender receiving a delivery receipt or similar document showing successful transmission to the email address provided with the waiver.

(7) Should the transmitting party receive notification within twenty-four hours that a fax or email was not delivered, the waiver is void, service is not perfected, and must be made pursuant to WAC 10-08-110 (2)(b).

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-030 Appearance and practice before the department.

(1) Only the following persons may appear in a representative capacity before the department or (~~its designated~~) presiding officer:

(a) Attorneys (~~at-law~~) entitled to practice before the supreme court of the state of Washington.

(b) Attorneys (~~at-law~~) entitled to practice before the highest court of record of another state, United States territory, or the District of Columbia, if attorneys (~~at-law~~) are permitted to appear in a representative capacity before administrative agencies of that state, United States territory, or the District of Columbia, and if not otherwise prohibited by the laws of this state.

(c) A bona fide officer, partner, or full-time employee of an individual firm, association, partnership, or corporation who appears for such individual firm, association, partnership, or corporation.

(2) The presiding officer may allow other forms of representation if he or she deems the representation satisfactory.

(3) All attorneys appearing in proceedings before the department or its presiding officer, whether on their own behalf or in a representative capacity, must comply with the Washington rules of professional conduct.

(4) Department employees who are entitled to practice law in any court of record including, but not limited to, financial legal examiners and financial legal examiner supervisors, do not appear in proceedings before the department or presiding officer as legal representatives and are not "attorneys" for the purpose of this chapter. Department employees may appear as lay representatives of the department upon approval of the attorney general.

(5) The presiding officer may disqualify an attorney appearing in a representative capacity to prevent a violation of the Washington rules of professional conduct.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-040 Notice of appearance or withdrawal. (1) **Appearance.** Each attorney or other representative (~~shall~~) must file a written notice of appearance with the department and the presiding officer and (~~shall~~) must serve a notice of appearance on all attorneys and representatives then of record and on all unrepresented parties. The notice (~~shall~~) must contain the name, address and telephone number of the attorney or representative and the name, address, and telephone number of each party represented.

(2) **Withdrawal.** Any attorney or representative who withdraws from representing a party (~~shall~~) must file a written notice of withdrawal with the department and the presiding officer and (~~shall~~) must serve the notice of withdrawal on all attorneys and representatives then of record and on all unrepresented parties. The notice (~~shall~~) must contain the effective date of the withdrawal, the current name, address, and telephone number of each party who will no longer be represented, and, if known, the name of the person who will represent the

party from that time forward. Withdrawal of a party's attorney or representative after the service of a notice of hearing (~~((shall))~~) is not (~~((be))~~) grounds for the continuance of the hearing unless good cause is shown.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-050 Requests for adjudicative hearing. (1) **Where filed—Form.** All requests (~~((that the department conduct))~~) for an adjudicative hearing (~~((shall))~~) must be filed with the department on the form provided by the department or on a form that is substantially similar.

(2) **Time limits for request.** The department must receive the request for an adjudicative hearing no later than twenty calendar days after the department serves the (~~((applicant))~~) respondent with a written notice of an opportunity to request a hearing (~~((upon department))~~) on the department's action or contemplated (~~((department))~~) action. Service upon the (~~((applicant))~~) respondent is completed when made in accordance with WAC 10-08-110 (2) and (3), 208-08-025, or as provided by the statute under which the department initiated the action. If the statute under which the department initiated the action specifically provides for a different time limit, the time limit in that statute (~~((shall apply))~~) governs unless it has been superseded by the Administrative Procedure Act, chapter 34.05 RCW, but in no case (~~((shall))~~) can the time limit for requesting an adjudicative hearing be less than twenty calendar days.

(3) **Failure to request hearing.** Failure of (~~((an applicant))~~) a respondent to file an application for an adjudicative hearing within the time limit set forth in subsection (2) of this section constitutes a default and results in the loss of the (~~((applicant's))~~) respondent's right to an adjudicative hearing. When (~~((an applicant))~~) a respondent defaults, the department may proceed to resolve the case pursuant to RCW 34.05.440(1).

NEW SECTION

WAC 208-08-053 Submission of answer to department. (1) **Answer to statement of charges.** Each respondent must file an answer to the department's statement of charges. The answer must be filed with the department no later than thirty days after the respondent's request for an adjudicative hearing unless the parties agree in writing to a longer time period.

(2) **Contents of answer.** The answer must state whether each of the factual allegations in the statement of charges is admitted, denied, or not contested, and must include a summary of the party's position on each factual allegation denied.

(3) **Effect of admission or no contest.** When a factual allegation is admitted or not contested, it is deemed to be conclusive for all

further proceedings between the department and the respondent in regard to the statement of charges.

(4) **Failure to file answer.** Failure by the respondent to file an answer within the time limit constitutes a default and, upon motion by the department, results in the loss of the respondent's right to an adjudicative hearing on the statement of charges.

(5) **Curing the default.** A respondent may cure the default by filing and serving an answer prior to the hearing on the motion for default. Notice of the motion for default must be served on respondent at least seven days prior to the hearing on the motion. When a respondent defaults, the department may proceed to resolve the case as to that respondent pursuant to RCW 34.05.440(2).

NEW SECTION

WAC 208-08-055 Authority of administrative law judge. (1) In addition to the authority provided under chapter 10-08 WAC, the administrative law judge has the following authority:

- (a) To make negative inferences based upon discovery violations;
- (b) To schedule hearings on temporary orders to cease and desist within fourteen days of receipt of such request by the department;
- (c) To determine whether the applicable statutes or rules authorize the imposition of punitive or remedial sanctions by the director; and
- (d) To determine whether the applicable statutes or rules authorize the imposition of fines, costs, fees, or any combination thereof, by the director.

(2) The administrative law judge does not have the authority to:

- (a) Modify punitive or remedial sanctions intended to be ordered by the director in accordance with and authorized by statute or rule;
- (b) Modify fines, costs, fees, or any combination thereof, intended to be ordered by the director in accordance with and authorized by statute or rule; and
- (c) Schedule hearings on motions for summary judgment to be heard within thirty days of the hearing on the merits of the department's action.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-060 Discovery. (1) Application of superior court civil rules.

(a) When applicable and not in conflict with this section, civil rules 26 through 34 and rule 36 of the Washington state superior court civil rules apply.

(b) Civil rule 45 may be applied to the extent set forth in civil rules 30 and 31.

(c) Civil rules not set forth in this subsection do not apply unless they are referred to by one of the civil rules enumerated in this subsection.

(2) Presiding officer. For purposes of discovery, the presiding officer is the administrative law judge assigned by the office of administrative hearings.

(3) Motion required.

(a) Any motion for discovery served upon any party prior to the assignment of an administrative law judge is stayed until an administrative law judge is assigned and the motion for discovery can be heard at the prehearing conference set forth in WAC 208-08-110.

(b) Unless discovery is included in the prehearing order as provided in WAC 208-08-110, a party wishing to make discovery must file a motion for discovery with the presiding officer. The party must also serve the discovery motion on all other parties to the proceeding. Any party opposing or otherwise responding to the motion must file a response with the presiding officer and the response must be served on all parties within ten calendar days after service of the motion.

((+2)) (4) Limitation on discovery. In addition to limitations on discovery set forth in any other applicable law, regulation, or rule, discovery does not include:

(a) Information or documents from the personnel file of any department employee;

(b) Information or documents relating to any investigation conducted by the department against unrelated parties;

(c) Information or documents relating to any action brought by the department against unrelated parties;

(d) Information or documents relating to any examination conducted by the department of unrelated parties;

(e) Information or documents relating to any license applications or determinations made by the department of unrelated parties; or

(f) Depositions of the agency director or assistant directors.

(5) Hearing on discovery motion. Any party may request a hearing on a discovery motion. If the presiding officer determines that a hearing on the motion is warranted, he or she shall give all parties ((at least three business days)) notice of the time and place for the hearing.

((+3)) (6) Decision on motion. The presiding officer may determine the extent and conditions of discovery in any adjudicative proceeding, considering the criteria set forth in RCW 34.05.446(3) and WAC 208-08-070 and 208-08-080. The presiding officer ((shall)) must rule upon the motion only after all parties have responded or the time for response has passed.

(7) Spoliation. When, upon proof by a preponderance of the evidence, and without a motion to the presiding officer, a party alters, destroys, suppresses, or withholds records or information subject to discovery, the presiding officer may presume the evidence would have been unfavorable to that party's position.

(8) Failure to comply with discovery. Failure to comply with a lawful discovery request is grounds for default under RCW 34.05.440(2).

(9) Appeal of discovery decision. All decisions regarding discovery are subject to the process set forth in WAC 208-08-160 in the event of an interlocutory appeal as set forth in that section.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-070 Production of documents to parties. (1) **Place of production.** When production of documents is allowed, they ~~((shall))~~ will be produced for inspection and copying at the department's headquarters, at such other place as the parties may agree in writing, or as the presiding officer orders.

(2) Removal from the department's headquarters by agreement. In the case of documents produced by the department, a party may not remove the documents from the department's offices other than by written agreement of the department. This agreement ~~((shall))~~ must specify the document subject to the agreement, the date for return of the document, and any other terms or conditions as are appropriate to provide for the safe keeping of the documents.

~~((+2))~~ (3) **Copying procedures and charges.** The party requesting production may photocopy any documents produced. The requesting party is responsible for the cost of photocopying. The documents produced by the department may be copied at the department's offices or such other places as the parties may agree. Charges for copies made by the department for a requesting party will be at a rate agreed upon by the parties, or as ordered by the presiding officer.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-080 Depositions upon oral examination. (1) **Recording, signing, and filing of transcripts.** If a deposition is allowed, it shall be recorded, including all questions and objections. If one of the parties orders a transcript, the testimony ~~((shall))~~ must be transcribed verbatim under the direction of the court reporter, who ~~((shall))~~ must certify the transcript. The witness ~~((shall))~~ must sign the transcript or waive signature. If a deposition is transcribed, the court reporter ~~((shall))~~ must file the original transcript and any exhibits to it with the presiding officer. The witness and any party may purchase a copy of the transcript from the court reporter.

(2) **Cost.** The party requesting the deposition ~~((shall))~~ must pay the cost of the deposition, including any sitting or facility fee. A party ordering a copy of a transcript must make appropriate arrangements to pay the court reporter.

(3) **Videotaping of depositions.** If a videotaped deposition is allowed, Superior Court Civil Rule 30 (b)(8) ~~((shall apply))~~ applies.

NEW SECTION

WAC 208-08-083 Authentication of evidence. (1) **Production of documents - Self-authenticating.** A party's production of a document in response to written discovery or other legal process authenticates the document for use against that party in any prehearing proceeding or at hearing unless, within ten days after the producing party has actual

notice that the document may be used, the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection.

(2) **Objection.** An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document must be given a reasonable opportunity to establish its authenticity.

NEW SECTION

WAC 208-08-085 Validity of unsworn declaration. (1) If a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of this section has the same effect as a sworn declaration if it:

- (a) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (b) Is subscribed by the person;
- (c) States the date and place of its execution; and
- (d) States that it is so certified or declared under the laws of the state of Washington.

(2) The certification or declaration may be in substantially the following form:

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":

.....

(Date and Place)

(Signature)

(3) This section does not apply to:

- (a) A deposition;
 - (b) An oath of office;
 - (c) An oath required to be given before a specified official other than a notary public;
 - (d) A declaration to be recorded pursuant to Titles 64 or 65 RCW;
- or
- (e) An oath required by RCW 11.20.020.

(4) As used in this section:

- (a) "Sworn declaration" means a declaration in a signed record given under oath. The term includes a sworn statement, verification, certificate, or affidavit; and
- (b) "Unsworn declaration" means a declaration in a signed record that is not given under oath, but is given under penalty of perjury.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-090 Submission on stipulated facts. (1) Department's agreement. With the agreement of the department, a party may waive a hearing and submit its case upon stipulated facts and briefs.

(2) **Sufficiency of evidence required.** Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses.

(3) **Review by presiding officer.** The presiding officer ((shall)) will review the submissions of the parties and ((shall)) must enter a proposed order, including findings of fact and conclusions of law.

(4) **Submission to director or designee.** If the parties agree, they may submit the stipulated facts to the director or designee for a final order, bypassing the presiding officer.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-110 Prehearing conferences. The department encourages the use of prehearing conferences. If a party requests a prehearing conference, the presiding officer ((shall)) will grant the request unless good cause is shown for not holding a prehearing conference. WAC 10-08-130 governs the conduct of prehearing conferences.

AMENDATORY SECTION (Amending WSR 96-11-035, filed 5/6/96, effective 6/6/96)

WAC 208-08-120 Informal settlements. The department encourages informal settlement of matters before the agency. Any ((person)) party who believes ((his or her)) their interest in an adjudicative proceeding may be settled informally may contact the ((department)) department's designated representative and communicate their settlement proposal to the designated representative. The department specifically adopts WAC 10-08-230 setting forth procedures for informal settlements.

NEW SECTION

WAC 208-08-150 Amending initiating document. (1) Prior to the assignment of a presiding officer the initiating document may be amended at any time.

(2) After the assignment of a presiding officer the initiating document may be amended upon motion filed by the department and service to all parties. The motion will be granted unless the presiding officer finds a party will be unduly prejudiced or burdened.

(3) When the initiating document is a statement of charges, a party must submit an answer within thirty days.

(4) The presiding officer may delay all or part of the hearing if necessary to afford a party the opportunity to respond or prepare.

NEW SECTION

WAC 208-08-160 Interlocutory decision—Discretionary review.

(1) **Definitions.** Unless the context indicates otherwise, as used in this chapter, the following terms mean:

(a) **"Interlocutory decision"** means any initial decision or order of the presiding officer that does not terminate or fully resolve the matter before the presiding officer.

(b) **"Motion for discretionary review"** means a motion to the director for discretionary review of an interlocutory decision by the presiding officer and does not mean a petition for review under RCW 34.05.464.

(c) **"Petition for reconsideration"** means a petition before the presiding officer for reconsideration of an interlocutory decision and does not mean a petition for review under RCW 34.05.464 or a petition for reconsideration under RCW 34.05.470.

(2) **Actions reviewed.** A party may seek discretionary review by the director of any interlocutory decision, including procedural or substantive decisions or orders.

(3) **Exhaustion of administrative remedies.**

(a) **Filing a petition for reconsideration.** Prior to filing a motion for discretionary review, the party must file a petition for reconsideration with the presiding officer within ten days of service of the interlocutory decision.

(b) **Service.** Copies of the petition for reconsideration must be served on all other parties or their representatives at the time the petition is filed.

(c) **Party hearing the petition for reconsideration.** The petition for reconsideration is considered and disposed of by the presiding officer who entered the interlocutory decision, if reasonably available.

(d) **Requirement of a written order.** The disposition is in the form of a written order pursuant to WAC 10-08-210.

(e) An order denying reconsideration is not subject to judicial review prior to final order by the director in relation to a respondent as to all matters in a case.

(4) **Motion for discretionary review.**

(a) **Party filing.** Any party to an adjudicative proceeding may file a motion for discretionary review of a written order disposing of a petition for reconsideration.

(b) **How to file.** The motion for discretionary review must be filed with the director within ten days of the date of service of the written order disposing of the petition for reconsideration. The motion must state the specific grounds upon which relief is requested.

(c) **Service.** Copies of the motion for discretionary review must be served upon all other parties or their representatives at the time the motion for discretionary review is filed. Filing of the motion for discretionary review with the director is delivery of a copy of the motion for discretionary review to the office of the director at the principal office of the department. For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

(d) **Contents of motion.** The motion for discretionary review must specify the portions of the interlocutory decision to which exception is taken and must refer to the evidence of record which is relied upon to support the motion for discretionary review.

(e) **Reply to motion.** Any party may file a reply to a motion for discretionary review. The reply must be served in the same manner as the motion for discretionary review within ten days of the date of service of the motion for discretionary review, and copies of the reply must be served upon all other parties or their representatives at the time the reply is filed.

(f) **Considerations governing acceptance of discretionary review.** Discretionary review of an interlocutory decision by the presiding officer will be accepted by the director only:

(i) If the presiding officer has committed an obvious error which would render further proceedings useless; or

(ii) If the presiding officer has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or

(iii) If the presiding officer has so far departed from the accepted and usual course of administrative proceedings as to call for the exercise of review jurisdiction by the director.

(g) **Scope of review.** Unless the motion for discretionary review is deemed denied under (h) of this subsection, the motion for discretionary review is considered and disposed of by the director. The disposition is in the form of a written order. The director will review only the issues raised in the motion for discretionary review.

(h) **No oral argument; exception.** In the manner of a petition for review under RCW 34.05.464 or a petition for reconsideration under RCW 34.05.470, the director will not hear oral argument on a motion for discretionary review of an interlocutory decision unless (i) the issue before the director on motion for discretionary review is procedural in nature; and (ii) the director notifies the parties in writing of the date, time, and manner for hearing oral argument, which may include a scheduled teleconference. If the director elects to have oral argument on the motion for discretionary review, the director may designate a neutral officer of the department to hear such oral argument and confer with the director prior to the director issuing an order on the motion.

(i) **Suspension of proceeding.** Neither a motion for discretionary review nor any disposition of such motion suspends or stays the proceeding or effectiveness of the interlocutory order unless otherwise ordered by the director.

(j) **Denial.** The director is deemed to have denied the motion for discretionary review, if within twenty days from the date the motion for discretionary review is filed, the director does not either dispose of the motion or serve the parties with a written notice specifying the date by which the director will act on the motion. Denial of the motion does not affect the rights of a party to obtain later review of the presiding officer's decision or the issues included in that decision.

(k) **Judicial review.** Judicial review of the director's decision on motion for discretionary review occurs only after final order by the director in relation to a respondent as to all matters in a case.

NEW SECTION

WAC 208-08-170 Administrative hearings—Divisions of banks and credit unions with enforcement jurisdiction. (1) **Administrative hearings when the division of banks or division of credit unions is the charging authority.** An administrative hearing involving a notice of charges against a Washington state-chartered commercial bank under Title 30A RCW, savings bank under Title 32 RCW, savings association under Title 33 RCW, trust company under Title 30B RCW, credit union under chapter 31.12 RCW, the holding company of such commercial bank, savings bank, or savings association, a present or former director, officer, or employee of such commercial bank, savings bank, savings association, or credit union, or any other person subject to the jurisdiction of chapter 31.12 RCW, Titles 30A, 30B, 32, or 33 RCW, may be held at a place designated by the director and conducted by the department of financial institutions in accordance with chapter 34.05 RCW, the model rules of procedures and this chapter but without referral to the office of administrative hearings. To the extent the requirements of chapter 31.12 RCW, Titles 30A, 30B, 32, or 33 RCW, as applicable, are inconsistent with chapters 34.05 and 31.12 RCW, Titles 30A, 30B, 32, or 33 RCW, as applicable, will govern.

(2) **Administrative hearings involving miscellaneous nondepository entities when the division of banks is the charging authority.** In the case of an administrative hearing involving a notice of charges against a Washington state-chartered or state-licensed business development company under chapter 31.24 RCW, agricultural lender under chapter 31.35 RCW, or federally guaranteed small business lender under chapter 31.40 RCW, the requirements of chapters 31.24, 31.35 and 31.40 RCW, respectively, governs to the extent of any inconsistency with chapter 34.05 RCW.

(3) **Director's appointment of independent hearing officer.** If the department elects to conduct an administrative hearing as permitted by this section, the director must appoint a hearing officer from outside the division of the department bringing the notice of charges, who may be either an employee from another division or an independent contractor. The director may elect to either retain review jurisdiction or delegate authority for issuance of a final order to the appointed hearing officer.