

OUTFITTERS & GUIDES LICENSING BOARD POLICY MANUAL	POLICY NUMBER: 3003	PAGE NUMBER: 1 of 5
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1.00.00 POLICY OF THE AGENCY

It is the policy of the Outfitters and Guides Licensing Board that the Agency complies with applicable state statutes regarding the Complaint Investigation and Enforcement Proceedings.

2.00.00 PROCEDURE

2.01.00 The Administrative Hearing Process

The administrative hearing process is controlled by state statute and rules. Some Boards employ the services of a hearing officer and simply review the record, findings of fact, conclusions of law and recommendations of the hearing officer. Other Boards employ a hearing officer to sit as a judge and rule on motions and evidence while the Board members sit as a jury. Though a Board may do without a hearing officer and sit as both judge and jury, this method is not usually recommended. Regardless of the method chosen, the Board's responsibility is to reach a decision and render a judgment, and the Board may not delegate that decision-making function to a hearing officer or anyone else.

2.01.01 What is a "Contested Case"

The contested case provisions of the Administrative Procedure Act (APA), title 67, chapter 52, Idaho Code, govern all proceedings by an agency that may result in the issuance of an "order," unless otherwise provided by law. "Order" is defined by the APA as an "agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one (1) or more specific persons." Therefore, it is the legal effect of the decision—whether it affects an enumerated interest—that determines whether a Board must conduct a contested case, not whether the legislature has provided by statute for a hearing.

2.01.02 Informal Disposition of Disputes

As discussed above, most disputes between a Board and a licensee are resolved through informal methods rather than through contested case proceedings. The APA explicitly recognizes that informal settlement of matters is to be encouraged. The statute allows the parties to negotiate, stipulate, settle or use consent orders rather than go to hearing. When presented with a consent order, the Board must either accept or reject it, indicate how it must be modified to be acceptable, or inform the parties what further information is required for the Board's consideration of it. Disposition of a dispute under any of these provisions is a "final agency action."

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2.01.03 Procedure at the Evidentiary Hearing

The APA requires that all parties to a contested case be notified of the time, place, and nature of the hearing, the legal authority under which it is to be held and a short and plain statement of the matters asserted or the issues involved. In Idaho, these minimal statutory provisions are supplemented by the Board's and the Attorney General's procedural rules. These rules provide the procedures applicable to intervention, pre-hearing conferences, pleadings, briefs and motions, service and subpoenas, discovery orders and protective orders.

The goal of all contested case proceedings is to ensure that there is a full disclosure of all relevant facts and issues. The APA specifically obligates the presiding officer to conduct the hearing to assure that all parties have the opportunity to present evidence and argument, and respond to all the issues.

The APA requires the presiding officer to create a record of the evidentiary hearing. A sound or video recording is sufficient; the Board is not required to create a stenographic record. All or part of the hearing may be conducted by telephone, television, or other electronic means. The Board is responsible for the cost of recording the hearing.

The drafters of the APA adopted the clear trend in Idaho case law and left the admission of evidence almost entirely to the discretion of the presiding officer. Thus, a presiding officer is authorized to exclude evidence that is irrelevant or unduly repetitious, or that is excludable on constitutional or statutory grounds, or the subject of an evidentiary privilege provided by statute or recognized by courts. The officer may also receive evidence in written form and may accept copies of documentary evidence.

The APA also recognizes that a Board's experience, technical competence, and specialized knowledge may be used in the evaluation of evidence. This is an explicit statutory recognition that the Board's repeated exposure to a specialized subject matter is a source of specialized knowledge that is useful in evaluating evidence.

If any party fails to attend any stage of a contested case, the presiding officer may serve a notice of proposed default order on all parties. The party who is proposed to be in default must petition the presiding officer within seven days after service of the proposed order to request that the order be vacated. When a default order is issued, the presiding officer is to conduct further proceedings in the contested case without the participation of the defaulted party and must determine all issues in the adjudication including those affecting the defaulted party.

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2.01.04 Securing an Unbiased Hearing

A fundamental tenant of due process is the unbiased decision maker. The disqualification of a presiding officer or Board member, and of *ex parte* communications, comprise the core of the APA's impartiality requirements. These sections are intended to ensure that the decision maker bases the order solely on the facts and arguments contained in the records created at the evidentiary hearing.

Hearing officers may be disqualified from hearing a contested case in two situations. First, each party has a right to one disqualification without the need to specify cause. Second, each party has the right to disqualify a hearing officer for cause. Hearing officers, however, may only be disqualified for bias, prejudice, interest, substantial prior involvement in the case other than as a presiding officer, or any other cause for which a judge may be disqualified, but also for lack of professional knowledge of the subject matter of the contested case.

Board members may be disqualified as well if a Board member has either a financial interest in the outcome of the proceeding or has a personal bias and/or prejudice, unless to do so would prevent a quorum from deciding the case. However, there is case law that suggests that if a tainted Board member did participate in the case, the licensee/registrant has the ability to appeal and ask that the decision be set aside on the grounds that he/she was not afforded a fair and impartial hearing. Thus, in order to avoid situations in which a Board member could be challenged, it is best to avoid *ex parte* communications with parties or potential parties in a contested case. If *ex parte*, contact does occur and the appearance of bias or prejudice is created, the Board member should voluntarily refuse him or herself from participating in the deliberations and should not discuss any facts learned with any of the other Board members or the Enforcement Attorney.

The APA prohibits parties in contested cases from communicating with the hearing officer or Board members in a contested case regarding the substance of the contested case, except upon notice and opportunity for all parties to participate in the communication. There are three exceptions to this prohibition on *ex parte* communication. First, the prohibition does not apply to *ex parte* communications specifically authorized by statute; second, the prohibition does not apply to communications regarding any procedural matters; and third, the prohibition does not apply to non-parties.

The issue whether the same Enforcement Attorney may prosecute a revocation matter and also advise a Board during deliberations of the same case is not clearly settled. However, there have been a sufficient number of courts that have held that the duality of function is fundamentally unfair and offends traditional notions of justice and fair play. As such, it should be avoided. Counsel associated with either the prosecution or defense should not be present during a Board's deliberations. If a Board wishes to have legal counsel present to give

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procedural advice during this process, separate counsel, should be retained.

2.01.05 Decision Making in Contested Cases

A Board's deliberation process is governed by the state's open meeting laws, which provide for "executive sessions" whereby the Board closes the meeting to consider the imposition of discipline upon a licensee based upon the evidence presented in a contested case. The Board shall comply with its policy regarding Open Meetings as set forth in Board Policy 1003.

The Board may choose to utilize the services of a Hearing Officer. If the Executive Director anticipates that a hearing may require more than four (4) hours of evidence, testimony, and argument, the Executive Director shall have the authority to appoint a Hearing Officer to hear all matters involved in the administrative complaint and to render a proposed or preliminary order. If the Board determines that the circumstances of a particular case warrant the use of a Hearing Officer, the Board shall retain the services of a Hearing Officer pursuant to the provisions of the Idaho Administrative Procedures Act.

2.01.06 Orders

Idaho's APA provides for four kinds of orders: recommended orders, preliminary orders, final orders, and emergency orders. The distinction between recommended and preliminary orders is the degree of finality that is attached to each. If the order does not become final until the agency head has reviewed it, the order is a recommended order. If the order becomes final unless a party seeks review it, the order is a preliminary order. A Board can issue an emergency order without conducting a hearing, and the order is effective upon issuance. The APA specifies procedures to be employed in emergency proceedings when a Board may issue an order to address a situation involving an immediate danger to the public health, safety, or welfare requiring immediate Board action. In issuing an emergency order, the Board is to take only such actions as are necessary to prevent or avoid the immediate danger. After issuing the emergency order, the Board is required to initiate the procedures that would have been required but for the immediate danger.

All orders, whether preliminary, recommended, final, or emergency, must be in writing and must contain two types of information. First, each order must contain a reasoned statement in support of the decision, including a concise and explicit statement of the underlining facts in supporting findings. Except for emergency orders, findings of fact must be based exclusively on the evidence in the record or on matters officially noticed. Second, the order must include a statement of the available procedures for seeking administrative or judicial review.

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2.01.07 Imposition of Attorney Fees and Costs

The Board may include, as part of its final order, the requirement for the licensee to reimburse the Board for the costs and expenses related to the investigation, enforcement, and legal services rendered in each case. An award of attorney fees is a sanction, which, like any other penalty, must be tied to the sanctioned conduct. The imposition of attorney fees and costs on a licensee is discretionary, and the Board shall act consistently with the legal standards applicable to the available choices, and shall reach a decision through an exercise of reason. The Board shall be guided by the principle that the sanction must be related to the discipline. The Board shall consider how many of the claims the licensee prevailed on, the overall success of the Enforcement Attorney and/or Enforcement Supervisor in supporting the Board's allegations and the amount of time and effort devoted to proving the claimed misconduct for which discipline was imposed. If the Board imposes as a sanction the imposition of attorney fees and costs, the Board shall afford the licensee an opportunity to respond or object to the proposed award of attorney fees and costs. The Board shall consider the reasonableness of the attorney fees and costs given the nature and scope of the services and the rate charged for the legal services.

2.01.08 Contested Case Record

To facilitate any subsequent administrative or judicial review of the order, the Board is required to maintain the official record of each contested case for at least six months after the expiration of the last date for judicial review. The record must include all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings; evidence received or considered; a statement of matters officially noticed; offers of proof and objections and rulings; the record prepared by the proceeding officer and any transcript of the record; and any recommended order, preliminary order, final order, or order on reconsideration.

2.01.09 Judicial Review

The APA provides for judicial review of all agency actions, including orders issued in contested cases. On appeal, the court's role is to review the record created before the Board and determine whether the Board's decision was both reasonable and sufficiently explained. To reverse the Board's decision, the reviewing court is required to conclude that the decision was in violation of constitutional or statutory provisions, in excess of the statutory authority of the Board, made upon unlawful procedure, or arbitrary capricious or an abuse of discretion.