

**Plumbing and Mechanical Systems Examining Board
Rules Committee Meeting Minutes
April 2, 2009**

Committee Members Present:

Sue Salsman, Chairperson
Ron Masters
Dennis Molden
Ken Sharp
Stuart Crine

Staff Attending:

Cindy Houlson, Executive Officer
Matt Oetker, Assistant Attorney General

Chair Sue Salsman opened the meeting at 4:00 pm.

Acceptance of minutes was tabled until April 30, 2009 meeting so there would be adequate time to review. It was asked that any suggested revisions be sent to Wendy by 4/10/09.

Today's primary agenda item is Contested Case Rule. A few conversations were had prior this topic, they included:

- 1) Stuart Crine reported that the electrician bill was signed today. Our bill continues to experience challenges and we reference what the electricians do to gauge what we might expect.
- 2) Chair Salsman requested that
 - a. Agenda and supporting documents be sent to committee members a 1 week in advance of meetings so material can be reviewed prior to the meeting. Staff will try to honor request, based on work load
 - b. Handouts include page numbers for easier reference in discussions
 - c. Notes are included in minutes to identify when Board responses/decisions are limited by the legislation so the general public can distinguish who they need to address in order to make change. There are many instances where the public thought the rules created by the Board were not in the best interest of the public or profession, but the Board could not write better rules because of limitations placed on them by the Legislators.
- 3) Feedback was requested to determine if the general public is going to the web. Staff received emails indicating the public is getting the information some place. We also have over 1500 members on our list serv.
- 4) Update was requested on the number of applications that have been received. Cindy Houlson replied that currently 1700, but the number may not be totally representative of the licensing process. As staff approves licenses, the number goes down and then when others apply it goes up. There may be a lack of understanding what the number actually represents.
 - a. Additional question was asked if this is what we were expecting. Licensing began late February, and we did not have any expectations. There have been 2000 license applications and with grandfathering and multiple licensing, we may be seeing an affect on the totals. The program actually accounts for licenses applied for, not licensees. One licensee may be requesting up to 5 licenses at this time.
- 5) Ron shared his frustration with the guideline the Board has given for 5 years of applicable experience. He has been deluged by those who do not meet the definition, but have completed a

4 year apprentice program that is not being counted as experience. Ron is not the only one who is unhappy with the Board decision. Ron will be meeting with Ken Sharp to discuss the issue. The issue has been placed on the April Board agenda.

- a. Many scenarios were discussed and all in attendance felt that change can occur if it was a wrong decision.
- b. Ron felt he would speak from the floor at the Board meeting to address the topic. A word of caution was shared that those who felt everyone should test prior to being given a license may see this as a means of making it easier to get a license.
- c. Minutes from the last Board meeting do not show a vote was taken, support was given by consensus.
- d. Ron indicated that the request for change to include apprentice time would only be for the journey license.

Legislative Update: The Plumbing bill is still in the House. Once the House passes the bill with their amendment/s it will return to the Senate. The Senate will have to accept the House bill in order for it to pass to the Governor for signature. They are wanting to adjourn this next Sunday, if they can't they have indicated the latest would be in two weeks from Sunday.

Contested Cases:

Time was taken to review the Contested Case rules. Matt informed they are consistent with other boards, and legal staff in the AAG office has also provided guidance. These procedures have all been tested from previous applications.

The committee determined it was best to read through the document and bring up questions as they proceeded. The number is indicated in X due to the fact Matt was unsure where they fit in the Rule numbering scheme. It will be renumbered once it is ready to go for Board approval.

Clarification of definition and/or understanding was requested throughout the review of the document. Matt addressed these discussions as follow:

“Contested case” means a proceeding defined by Iowa Code section 17A.2 (5) and includes any matter defined as a no factual dispute contested case under Iowa Code section 17A.10A.

Question: What does “no factual” means. Answer: no facts in case are disputed. Example would be Ron’s issue that person with 4 years of experience and 1 year of journey. Neither party would dispute these facts - they are not in question.

“Presiding officer” means the board, a panel of board members, or a panel of nonboard member specialists as provided in Iowa Code subsections 272C.6 (1) and (2) in a disciplinary contested case

Question: Do all cases go to the Board. Answer: the board needs to determine who the Presiding Officer will be, the Board or panel. The way this rule is written gives flexibility to the Board. The board chair can appoint. There is no formal process identified, it may be a rolling panel. Panel members are required to be licensed to be on a panel and to vote on a case.

If a board member has a relationship with the person, they could possibly abstain from voting or not participate in the proceedings. The committee was cautioned, they were appointed to fulfill their obligations, and although it may be uncomfortable they would need to make sure their excusing of themselves was based on a pertinent issue such as bias or prejudice on the individual decision.

641—X.4 (17A, 272C) Probable cause. In the event the board finds there is probable cause for taking disciplinary action against a licensee, the board shall order a contested case hearing commenced by the filing and service of a statement of charges.

Question: Who brings the case to the Board, the Applicant or Board?? Answer: Either can. The applicant can file if they have been denied a license. The Board can file if there is a disciplinary action. This could occur if a post licensing complaint was filed.

641—X.5 (17A, 272C) Informal settlement. The board, board staff or a board committee may attempt to informally settle a disciplinary case before filing a statement of charges and notice of hearing. If the board and the licensee agree to a settlement of the case, a statement of charges shall be filed simultaneously with a consent order. The statement of charges and consent order may be separate documents or may be combined in one document. By electing to sign a consent order, the licensee waives all rights to a hearing and all attendant rights. The consent order shall have the force and effect of a final disciplinary order entered in a contested case and is an open record. Matters not involving licensee discipline which may culminate in a contested case may also be settled through consent order. Procedures governing settlement after notice of hearing is served are described in rule X.21 (272C).

Comments were consent agreements are included and no changes are being made, just clarification. Consent order is a final determination both parties agree to and the judge initials off on. Attendant has constitutional rights, whatever may be available or waived if agreement with both parties. Example would be waiving the right to a jury of peers.

641—X.6 (17A) Statement of charges.

X.6 (1) *Legal review.* Every statement of charges prepared by the board shall be reviewed by the office of the attorney general before it is filed.

X.6 (2) *Delivery.* Delivery of statement of charges constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. Publication as provided in the Iowa Rules of Civil Procedure.

X.6 (3) *Contents.* The statement of charges shall contain the following information:

- a. A statement by the board showing that there is probable cause to file the statement of charges;
- b. A statement of the time, place, and nature of the hearing;
- c. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- d. A reference to the particular sections of the statutes and rules involved;
- e. A short and plain statement of the matters asserted. This statement shall contain sufficient detail to give the respondent fair notice of the allegations so the respondent may adequately respond to the charges, and to give the public notice of the matters at issue;
- f. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and of parties' counsel where known;
- g. Reference to the procedural rules governing conduct of the contested case proceeding;
- h. Reference to the procedural rules governing informal settlement;
- i. Identification of the presiding officer as the board, a panel of board members, or a panel of nonboard member specialists as provided in Iowa Code subsections 272C.6(1) and

- (2);
- j. A statement requiring the respondent to submit an answer pursuant to subrule X.13(2) within 20 days after service of the statement of charges;

Clarification on (f.) it includes license applicant, their counsel, and Matt. Clarification on (j) on after service. The law specifies this.

641—X.7 (17A) Requests for contested case proceeding. Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the board action in question.

The request for a contested case proceeding shall state the name and address of the requester; identify the specific board action which is disputed; describe issues of material fact in dispute; and, where the requester is represented by a lawyer, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved. If the board grants the request, the board shall issue a notice of hearing. If the board denies the request, the board shall issue a written order specifying the basis for the denial.

Question: Can the board deny a request? Answer: Yes. Not everyone deserves a contested case. An example was our two vendors who competed for the testing contract. If the company that did not get the contract waited over 45 days to request a contested case, they would not qualify for a contested case because they missed a deadline. Appeal dates are set in stone.

641—X.9 (17A, 105,272C) Presiding officer in a disciplinary contested case. The presiding officer in a disciplinary contested case shall be the board, a panel of not less than three board members who are licensed under Iowa Code chapter 105, or a panel of nonboard member specialists as provided in Iowa Code subsections 272C.6(1) and (2). The board or a panel of board members when acting as presiding officer may request that an administrative law judge perform certain functions as an aid to the board or board panel, such as ruling on prehearing motions, conducting the prehearing conference, ruling on evidentiary objections at hearing, assisting in deliberation, or drafting the written decision for review by the board or board panel. Decisions of the administrative law judge serving in this capacity are subject to the interlocutory appeal provisions of rule X.27 (17A).

Clarification was provided that this provision is for both disciplinary and non-disciplinary cases. Interlocutory means the right to appeal before final judgment has been issued. Both X.9 and X.10 come straight from 272C. Disciplinary cases can be heard by the board or a panel. Non-disciplinary an administrative law judge (ALJ) could preside. X.10 (2) lists those out. The Board determined at the March meeting that tan ALJ would not be over disciplinary cases. ALJ's come from the Department of Inspections and Appeals and everyone there has a degree.

641—X.10 (17A) Presiding officer in a nondisciplinary contested case.

X.10 (1) A "nondisciplinary contested case" includes license denial proceedings. Any party in a nondisciplinary contested case, including an appeal of a denial of licensure, who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board.

X.10 (2) The board may deny the request only upon a finding that one or more of the following apply:

- a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- b. An administrative law judge with the qualifications identified in subrule xx.10(4) is

- c. unavailable to hear the case within a reasonable time.
- c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.
- d. The demeanor of the witnesses is not likely to be dispositive in resolving the disputed factual issues.
- e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.
- f. The request was not timely filed.
- g. The request is not consistent with a specified statute.

X.10(3) The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in subrule xxx.10(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

x.10(4) An administrative law judge assigned to act as presiding officer in a nondisciplinary contested case shall possess a juris doctorate degree.

x.10(5) Except as provided otherwise by a provision or law, all rulings by an administrative law judge acting as presiding officer in a nondisciplinary case are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies. Such appeals must be filed within 10 days of the date of the issuance of the challenged ruling but no later than the time for compliance with the order or the date of the hearing, whichever is first.

x.10(6) Unless otherwise provided by law, when reviewing a proposed decision of an administrative law judge in a nondisciplinary contested case upon appeal, the board shall possess the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

Question: Is due process being limited? Answer: No. Due process means notice and right to appear and be heard. 272C was made available in the Plumbing and Mechanical Systems Examining Board Binder that Board members received at the very first meeting. The can make ALJ recommendations to the Board, but the Board has the final say.

641—X.13(17A) Pleadings.

X.13(1) Pleadings may be required by rule, by the statement of charges, or by order of the presiding officer.

X.13(2) *Answer.* An answer shall be filed within 20 days of service of the statement of charges. An answer shall:

- a. Identify on whose behalf it is filed;
- b. Set forth the name, address and telephone number of the person filing the answer, the person on whose behalf it is filed, and the attorney representing that person, if any;
- c. Specifically admit, deny, or otherwise answer all material allegations of the statement of charges; and
- d. Set forth any facts deemed necessary to show an affirmative defense and contain as many additional defenses as the respondent may claim.

Any allegation in the statement of charges not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

X.13(3) *Amendments.* Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Otherwise, a party may amend a pleading only with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

X.13.2 paragraph after D was explained. Question: Can appeal be done to raise another defense? Answer: Statement of charges has a specific number of statements. Heart of the matter is farther down. Technically a pleading has to be made to each statement. If one is left blank – they would

be required to file an answer. Question of fundamental fairness.

Next meetings were scheduled April 30, 4-6; May 7, 4-6; and May 21, 4-6.

When the new legislation is passed the committee will be challenged with revisiting all the rules and establishing a timeline to accomplish the changes. That timeline will be taken to the full Board for recommendations. The Board will be under pressure to develop the rules. The committee will need to stay on track finalizing the last remaining rules, reciprocity, and additional disciplinary rules.

Committee members are to let staff know if any item needs to be on the next Board agenda. Staff shared that guidance is needed from the Board to support additional guidelines for approving additional application survey questions. Specifically health related information and sanctions from other jurisdictions.

The meeting was adjourned at approximately 6:00 pm.

Respectfully submitted,
Cindy Houlson