

**R151. Commerce, Administration.**

**R151-46b. Department of Commerce Administrative Procedures Act Rules.**

**R151-46b-1. Title.**

These rules are known as the "Department of Commerce Administrative Procedures Act Rules."

**R151-46b-2. Definitions.**

In addition to the definitions in Title 63, Chapter 46b, Administrative Procedures Act, which apply to these rules:

(1) "Agency head" means the executive director of the department, the director of a division, or the administrative secretary of the committee, respectively, as used in context.

(2) "Applicant" means a person who submits an application.

(3) "Application" means a request for licensure, certification, registration, permit, or other right or authority granted by the department.

(4) "Committee" means the Committee of Consumer Services of the department.

(5) "Department" means the department, a division, or the committee, respectively or collectively, as used in context.

(6) "Division" means a division of the department.

(7) "Intervenor" means a person permitted to intervene in an adjudicative proceeding before the department.

(8) "Motion" means a request for any action or relief submitted to the presiding officer in an adjudicative proceeding.

(9) "Petition" means the charging document, typically incorporated by reference into a notice of agency action, setting forth a statement of jurisdiction, statement of allegations, statement of legal authority, and prayer for relief.

(10) "Pleadings" include the notice of agency action or request for agency action, any response filed thereto, the petition, motions, briefs or other documents filed by the parties to an adjudicative proceeding, any request for agency review or agency reconsideration, any response filed thereto, and any motions, briefs or other documents filed by the parties on agency review.

(11) "Record" means the record of a hearing in an adjudicative proceeding or the record of the entire adjudicative proceeding, as used in context.

**R151-46b-3. Authority - Purpose.**

These rules are adopted by the department under the authority of Subsection 63-46b-1(6) and Section 13-1-6 to define, clarify, or establish the procedures which govern adjudicative proceedings before the department.

**R151-46b-4. Supplementing Provisions of Rule R151-46b.**

Any provision of these rules may be supplemented by division or committee rules unless expressly prohibited by these rules.

**R151-46b-5. General Provisions.**

(1) Liberal Construction.

These rules shall be liberally construed to secure the just, speedy, and economical determination of all issues presented in adjudicative proceedings before the department.

(2) Deviation from Rules.

The presiding officer may permit or require a deviation from these rules upon a determination that compliance therewith is impractical or unnecessary.

(3) Utah Rules of Civil Procedure.

The Utah Rules of Civil Procedure and case law thereunder may be looked to as persuasive authority upon these rules, but shall not, except as otherwise provided by Title 63, Chapter 46b, Administrative Procedures Act, or by these rules, be considered controlling authority.

(4) Computation of Time.

(a) Periods of time prescribed or allowed by these rules, by any applicable statute or by an order of a presiding officer shall be computed as to exclude the first day of the act, event, or default from which the designated period of time begins to run. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Whenever a party has the right or is required to do some act or take

some action within a prescribed period after the service of a notice or other paper upon him and service is by mail, three days shall be added to the prescribed period.

(b) For good cause shown, the presiding officer may extend a time period under these rules on his own motion or upon application from either party.

(5) Extension of Time; Continuance of Hearing.

When a statute, or these rules, authorizes the presiding officer to extend a time period or grant a continuance of a hearing, the presiding officer shall consider the following factors, and such other factors as may be appropriate, in determining whether to grant such extension or continuance:

(a) whether there is good cause for granting the extension or continuance;

(b) the number of extensions or continuances the requesting party has already received;

(c) whether the extension or continuance will work a significant hardship upon the other party;

(d) whether the extension or continuance will be prejudicial to the health, safety or welfare of the public; and

(e) whether the other party objects to the extension or continuance.

(6) Conflict.

In the event of a conflict between these rules and any statutory provision, the statute shall govern.

(7) Necessity of Compliance with GRAMA.

To the extent that the Utah Government Records Access and Management Act ("GRAMA") would impose a restriction on the ability of a party to disclose any record which would otherwise have to be disclosed under these rules, such record shall not be disclosed except upon compliance with the requirements of that Act.

**R151-46b-6. Representation of Parties.**

(a) A party may be presented by counsel or may represent himself individually, or if not an individual, may represent itself through an officer or employee. For the purpose of this provision, the term "counsel" includes active members of the Utah State Bar or active members of any other state bar.

(b) Counsel from a foreign licensing state shall submit a notice of appearance to the presiding officer along with a certificate of good standing from the foreign licensing state.

**R151-46b-7. Pleadings.**

(1) Docket Number and Title.

The department shall assign a docket number to each notice of agency action and request for agency action. The docket number shall consist of a letter code identifying the division or committee in which the matter originated (CORP-Corporations; CP-Consumer Protection; CCS-Committee of Consumer Services; DOPL-Occupational and Professional Licensing; RE-Real Estate, AP-Real Estate Appraisers; SEC-Securities), a numerical code indicating the year the matter arose, and another number indicating chronological position among notices of agency action or requests for agency action filed during the year. The department shall give each adjudicative proceeding a title which shall be in substantially the following form:

TABLE I

BEFORE THE (DIVISION/COMMITTEE)  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

In the Matter of  
(the application,  
petition or license  
of John Doe)

(Notice of Agency Action)  
(Request for Agency Action)

No. AA-2000-001

(2) Content and Size of Pleadings.

Pleadings shall be double-spaced, typewritten and presented on standard 8 1/2 x 11 inch white paper. Pleadings shall contain a clear and concise statement of the allegations or facts relied upon as the basis for the pleading, together with an appropriate prayer for relief when relief is sought.

(3) Signing of Pleadings.

Pleadings shall be signed by the party or the party's representative and shall show the signer's address. The signature shall be deemed to be a certification that the signer has read the pleading and that, to the best of his knowledge and belief, there is good ground to support it.

(4) Amendments to Pleadings.

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a party may amend a pleading only by leave of the presiding officer or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the presiding officer otherwise orders. Defects in a pleading which do not affect substantial rights of a party need not be amended and shall be disregarded.

(5) Response to a Notice of Agency Action.

(a) Formal Adjudicative Proceedings.

In accordance with Subsection 63-46b-3(2)(a)(vi), a respondent in a formal adjudicative proceeding shall file a response to the notice of agency action.

(b) Informal Adjudicative Proceedings.

(i) In accordance with Subsection 63-46b-5(1)(a), a respondent in an informal adjudicative proceeding may file, but is not required to file except as provided in Subsection (ii), a response to a notice of agency action.

(ii) The presiding officer may, upon a determination of good cause, require a person against whom an informal adjudicative proceeding has been initiated to submit a response by so ordering in the notice of agency action or the notice of receipt of request for agency action.

(c) Time Period for Filing a Response.

Unless a different date is established by law, rule, or by the presiding officer, a response to a notice of agency action or a notice of receipt of request for agency action shall be filed within 30 days of the mailing date of the notice.

(6) Motions.

(a) General. Any motion which is relevant to an adjudicative proceeding and is timely may be filed. All motions shall be filed in writing, unless the necessity for a motion arises at a hearing and could not have been anticipated prior to the hearing. Subsection 63-46b-1(4)(b) shall not be construed to prohibit a presiding officer from granting a timely motion to dismiss for failure to prosecute, failure to comply with these rules, failure to establish a claim upon which relief may be granted, or any other good cause basis.

(b) Time for Filing Motions to Dismiss.

Any motion to dismiss on a ground described in Rule 12(b)(1) through (7) of the Utah Rules of Civil Procedure shall be filed prior to filing a responsive pleading if such a pleading is permitted unless the presiding officer allows additional time upon a determination of good cause.

(c) Memoranda and Affidavits.

The presiding officer shall permit and may require memoranda and affidavits in support or contravention of a motion. Unless otherwise governed by a scheduling order issued by the presiding officer, any memorandum or affidavits in support of a motion shall be filed concurrently with the motion, any memorandum or affidavits in response to a motion shall be filed no later than ten days after service of the motion, and any final reply shall be filed no later than five days after service of the response.

(d) Oral Argument.

The presiding officer may permit or require oral argument on a motion.

**R151-46b-8. Filing and Service.**

(1) Filing.

Pleadings shall be filed with the division or committee in which the adjudicative proceeding is being conducted. If an administrative law judge is conducting part of the adjudicative proceeding, then the party shall cause a courtesy copy of such pleadings to be filed with the administrative law judge. The filing of discovery documents is governed by Subsection R151-46b-9(11)(a).

(2) Service.

Pleadings filed by the parties and documents issued by the presiding officer shall be served upon the parties to the adjudicative proceeding concurrently with the filing or

issuance thereof. The party who files the pleading shall be responsible for service of the pleading. The presiding officer who issues a document shall be responsible for service of the document.

(a) Service may be made upon any person upon whom a summons may be served in accordance with the Utah Rules of Civil Procedure and may be made personally or upon the agent of the person being served. If a party is represented by an attorney, service may be made upon the attorney.

(b) Service may be accomplished by hand delivery or by mail to the last known address of the intended recipient.

(c) There shall appear on all documents required to be served a certificate of service in substantially the following form:

#### TABLE II

##### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the parties of record in this proceeding set forth below (by delivering a copy thereof in person) (by mailing a copy thereof, properly addressed by first class mail with postage prepaid, to):

(Name(s) of parties of record)

(Address(es))

Dated this (day) day of (month), (year).

(Signature)

(Title)

#### **R151-46b-9. Discovery - Formal Proceedings Only.**

This rule applies only to formal adjudicative proceedings. Discovery is prohibited in informal adjudicative proceedings.

(1) Scope of discovery.

(a) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

(b) Subject to the provisions of Subsections R151-46b-9(1)(c) and R151-46b-9(3)(a), a party may obtain discovery of documents and tangible things otherwise discoverable under Subsection R151-46b-9(1)(a) and prepared in anticipation of litigation or for hearing by or for another party or by or for that party's representative, including his attorney, consultant, insurer or other agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(c) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Subsection R151-46b-9(1)(a) and acquired or developed in anticipation of litigation or for hearing, may be obtained only through the disclosures required by Subsection R151-46b-9(3)(a).

(2) Disclosures Required By Initial Prehearing Order.

(a) Pursuant to the initial prehearing order issued in accordance with Subsection R151-46b-9(9)(c), the presiding officer may require each party to disclose:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, identifying the subjects of the information; and

(ii) a copy of, or a description by category and location of, and reasonable access to, all discoverable documents, data compilations, and tangible things which are in its possession, custody, or control and which support its claims or defenses.

(b) The order shall not require disclosure of expert testimony, which is governed by Subsection R151-46b-9(3)(a). The order also shall not require the disclosure of information regarding persons or things intended to be used solely for impeachment.

(c) The disclosures required by Subsection R151-46b-9(2)(a) shall be made within 14 days after the written initial prehearing order is issued unless that order provides

otherwise. A party joined after the initial prehearing conference shall make these disclosures within 30 days after being served unless otherwise stipulated by the parties or ordered by the presiding officer. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(3) Disclosures Otherwise Required.

(a) Expert Testimony.

A party shall disclose the name, address and telephone number of any person who may be called as an expert witness at the hearing.

(i) Except as otherwise stipulated by the parties or ordered by the presiding officer, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(ii) Unless otherwise stipulated by the parties or ordered by the presiding officer, the disclosures required by Subsection R151-46b-9(3)(a) shall be made within 30 days after the expiration of discovery as provided by Subsection R151-46b-9(7)(b) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Subsection R151-46b-9(3)(a)(i), within 60 days after the disclosure made by the other party.

(b) Prehearing Disclosures.

In addition to the disclosures required pursuant to Subsection R151-46b-9(3)(a), a party shall disclose the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(i) the name and, if not previously provided, the address and telephone number of each witness, including the general scope of their anticipated testimony, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(ii) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(iii) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at least 30 days before the hearing unless otherwise ordered by the presiding officer. A party may serve and file any objection to the use under Subsection R151-46b-9(13)(i) of a deposition designated by another party under Subsection R151-46b-9(3)(b)(ii) and any objection, together with the grounds therefor, as to the admissibility of materials identified under Subsection R151-46b-9(3)(b)(iii). Any such objections shall be made within 14 days after service of the disclosures required by Subsection R151-46b-9(3)(b) unless a different time is specified by the presiding officer. Objections not timely made under this Subsection, other than objections on grounds of relevancy, shall be deemed waived unless excused by the presiding officer for good cause shown.

(c) Form of Disclosures.

Unless otherwise stipulated by the parties or ordered by the presiding officer, all disclosures under Subsections R151-46b-9(2) through (3)(b) shall be made in writing, signed and served.

(4) Other Discovery Methods.

Parties may also obtain discovery by one or more of the following methods: depositions upon oral examination as provided in these rules, production of documents or things, permission to enter upon land or other property for inspection and other purposes, and physical and mental examinations.

(5) Limits on Use of Discovery.

The frequency and extent of use of the discovery methods set forth in Subsection R151-46b-9(4) shall be limited by the presiding officer if it is determined that:

- (a) the discovery sought is unreasonably cumulative, duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (c) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The presiding officer may act on his own motion after reasonable notice or pursuant to a motion under Subsection R151-46b-9(6).

(6) Protective Orders.

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (a) that the discovery not be had;
- (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (d) the certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (e) that discovery be conducted with no one present except persons designated by the presiding officer;
- (f) that a deposition after being sealed be opened only by order of the presiding officer;
- (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(7) Timing, Completion and Sequence of Discovery.

(a) A party may not use any of the discovery methods described in Subsection R151-46b-9(4) prior to the date that the disclosures required in the initial prehearing order are received unless otherwise stipulated by the parties or ordered by the presiding officer. If the initial prehearing order does not require the parties to make disclosures, then the parties may use those discovery methods at any time after the date of the initial prehearing conference.

(b) Unless otherwise stipulated by the parties or ordered by the presiding officer for good cause shown, all discovery, except for prehearing disclosures governed by Subsection R151-46b-9(3), shall be completed within 120 days after the date of the initial prehearing conference. Factors the presiding officer shall consider in determining whether a party has demonstrated good cause to shorten this time period include whether that party's interests will be prejudiced if the time period is not shortened, whether the relative simplicity or nonexistence of factual issues justifies a shortening of discovery time, and whether the health, safety or welfare of the public will be prejudiced if the time period is not shortened. Factors the presiding officer shall consider in determining whether a party has demonstrated good cause to extend this time period include, in addition to those set forth in R151-46b-5(5), whether the complexity of the case warrants additional discovery time, and whether that party has made reasonable and prudent use of the discovery time that has already been available to the party since the proceeding commenced.

(c) Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, and except as otherwise provided by these rules, methods of discovery described in Subsection R151-46b-9(4) may be used in any sequence. The fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(8) Supplemented Disclosures and Amended Responses. A party who has made a disclosure under Subsections (2) or (3) or responded to a request for discovery with a response that was complete when made shall supplement the disclosure or amend the response to include

information thereafter acquired if ordered by the presiding officer or in the following circumstances:

(a) A party shall supplement at appropriate intervals disclosures under Subsections R151-46b-9(2) and (3) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Subsection R151-46b-9(3)(a), the duty extends to information contained in the report, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Subsection R151-46b-9(3)(b) are due.

(b) A party shall amend a prior response to a request for production within a reasonable time after the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(9) Initial Prehearing Conference.

(a) The party initiating the adjudicative proceeding shall file a written request for the scheduling of an initial prehearing conference and provide a copy to the presiding officer within 10 days after the filing of the response to the notice of agency action or within 10 days after the filing of the request for agency action in a case commenced by such a request. The presiding officer shall contact the parties upon receiving that request for the scheduling of the conference and arrange for that conference to be held at the earliest feasible time. Nothing in this rule shall limit the ability of the presiding officer to contact the parties and schedule the conference on his own initiative.

(b) The conference may be conducted either in person or telephonically. All parties, or their counsel, shall participate in the conference. The conference shall include discussion of discovery, prehearing motions and other matters pertaining to the orderly management of the proceeding.

(c) During the initial prehearing conference, the presiding officer shall issue a verbal order regarding the following matters, and shall issue a written order to the same effect after the conference is concluded:

(i) scheduling any additional prehearing conferences;

(ii) setting a deadline for the filing of prehearing motions, including motions for summary judgment;

(iii) modifying, if appropriate, any of the deadlines for disclosures under Subsection R151-46b-9(3);

(iv) resolving any discovery issues;

(v) scheduling a tentative hearing date; and

(vi) dealing with any other matters appropriate in the circumstances of the case.

(d) A party joined after the initial prehearing conference is bound by the order issued as a result of that conference, unless the presiding officer orders on stipulation or motion a modification of that order. Any such stipulation or motion shall be filed within a reasonable time after joinder.

(10) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(a) Every disclosure made pursuant to Subsections R151-46b-9(2) and (3) shall be signed by at least one attorney of record or by the party if not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it was made.

(b) Every request for discovery or any response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is:

(i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, and the importance of the issues at stake in the proceeding.

(c) If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the

request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(11) Filing of Discovery Requests or Disclosures.

(a) Unless otherwise ordered by the presiding officer, a party shall not file any request for or response to discovery, but shall file only the original certificate of service stating that the request or response has been served on the other parties and the date of service. Unless otherwise ordered by the presiding officer, a party shall not file any of the disclosures required by the initial prehearing order pursuant to Subsection R151-46b-9(2) or any of the disclosures required by Subsection R151-46b-9(3)(a), but shall file only the original certificate of service stating that the disclosures have been served on the other parties and the date of service. Except as provided in Subsection R151-46b-9(13)(f)(i) or unless otherwise ordered by the presiding officer, depositions shall not be filed. A party shall file the disclosures required by Subsection R151-46b-9(3)(b) unless otherwise ordered by the presiding officer.

(b) A party filing a motion for a protective order or a motion for an order compelling discovery shall attach to the motion a copy of the request for discovery or the response which is at issue.

(12) Subpoenas.

(a) Every subpoena shall be issued by the presiding officer under the seal of the department or applicable division, shall state the title of the action, and shall command every person to whom it is directed to attend and give testimony at a hearing or deposition at a time and place therein specified. A subpoena may also command the person to whom it is directed to produce books, papers, or tangible things designated therein, and in the case of a subpoena for a deposition, to also permit inspection and copying of such items. A subpoena for a deposition must limit its designation of such items to matters which properly fall within the scope of discoverable information as provided in Subsection R151-46b-9(1)(a). The presiding officer shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) Service of a subpoena upon a person named therein shall be accompanied by a tender of fees for one day's attendance and the mileage allowed by law.

(c) A subpoena commanding a person to appear at a hearing or a deposition being held in this state may be served at any place within this state. A person who resides in this state may be required to appear at a deposition only in the county where the person resides, or is employed, or transacts business in person, or at such other place as the presiding officer may order. A person who does not reside in this state may be required to appear at a deposition only in the county of this state where the person is served with a subpoena, or at such other place as the presiding officer may order.

(d) A subpoena commanding a person to appear at a deposition or to produce or allow the inspection of documents, tangible things or premises located outside this state shall be served in accordance with the requirements of the jurisdiction in which such service is made.

(e) Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, the presiding officer may:

- (i) quash or modify the subpoena, if it is shown to be unreasonable and oppressive; or
- (ii) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(f) In the case of subpoenas requiring the production of books, papers, or other tangible things at a deposition, the person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena a written objection to production, inspection or copying of any or all of the designated materials. If such objection is made, the party serving the subpoena shall not be entitled to production, inspection or copying of the materials except pursuant to a further order of the presiding officer who issued the subpoena.

(13) Depositions Upon Oral Examination: General provision; Persons who may be deposed. Under the limited circumstances prescribed in this Subsection, a party may with leave of the presiding officer take the testimony by deposition upon oral examination of certain persons, including parties, who have knowledge of facts relevant to the claims or defenses of any party in the proceeding. The attendance of witnesses may be compelled by subpoena as provided in Subsection R151-46b-9(12). Depositions of expert witnesses shall not be permitted.

(a) Before a party may request leave to take a person's deposition, the party must first make diligent efforts to obtain discovery from that person by means of an informal interview. A party shall not be granted leave to take a deposition unless the party, upon motion, demonstrates to the satisfaction of the presiding officer that the person has knowledge of facts relevant to the claims or defenses of any party in the proceeding and:

- (i) has refused a reasonable request by the moving party for an informal interview;
- (ii) after having notice of at least two reasonable requests by that party for an informal interview, has failed to respond to those requests;
- (iii) has refused to answer reasonable questions propounded to him by that party in an informal interview; or
- (iv) will be unavailable to testify at the hearing.

In deciding whether to issue such an order, the presiding officer shall take into consideration the probative value which the testimony of that witness is likely to have in the proceeding. The burden of demonstrating the need for a deposition shall be upon the party requesting the deposition.

(b) Notice of Examination: General Requirements; Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(i) A party permitted to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced, as set forth in the subpoena, shall be attached to or included in the notice.

(ii) The parties may stipulate in writing or, upon motion, the presiding officer may order the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under Subsection R151-46b-9(13)(c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in this rule, and the certification of the officer required by Subsection R151-46b-9(13)(f), shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

(iii) The notice to a party deponent may be accompanied by a request made in compliance with Subsection R151-46b-9(14) for the production of documents and tangible things at the taking of the deposition.

(iv) A party may, in his notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(v) The parties may stipulate in writing or, upon motion, the presiding officer may order a deposition be taken by telephone.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the hearing under the provisions of the Utah Administrative Procedures Act and the Utah Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Subsection R151-46b-9(13)(b)(ii) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a

sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answer verbatim.

(d) Motion to Terminate or Limit Examination.

At any time during the taking of the deposition, on motion of either a party or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition, as provided in Subsection R151-46b-9(6). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the presiding officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore. The deposition may then be used as though signed, unless a motion to suppress is filed pursuant to Subsection R151-46b-9(13) (i) (c) (v) and the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(i) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the presiding officer, he shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly send the sealed transcript of the deposition to the attorney who arranged for the transcript to be made. If the party taking the deposition is not represented by an attorney, the transcript of the deposition shall be filed with the division or committee before which the proceeding is being held unless otherwise ordered by the presiding officer. An attorney receiving the transcript of the deposition shall store it under conditions that will protect it against loss, destruction, tampering or deterioration. The officer shall file, and serve upon all parties, a certificate indicating to whom he delivered the transcript, and the date he did so.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, he may either offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to the original transcript of the deposition pending final disposition of the case.

(ii) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(i) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the presiding officer may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(ii) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the presiding officer may order the party giving the notice to pay to

such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) Persons Before Whom Depositions May Be Taken.

(i) Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the presiding officer in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(ii) In a foreign country, depositions may be taken:

(A) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States; or

(B) before a person commissioned by the presiding officer. The person so commissioned shall have the power, by virtue of his commission, to administer any necessary oath and take testimony. A commission shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission that the taking of the deposition in any other manner is impracticable or inconvenient; and a commission may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title.

(iii) No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the proceeding.

(i) Use of Depositions in Agency Adjudicative Proceedings.

(a) Use of Depositions.

At a hearing or upon argument of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(i) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Utah Rules of Evidence.

(ii) The deposition of either a party or anyone who, at the time of taking the deposition, was an officer, director, or managing agent, or a person designated under Subsection R151-46b-9(13)(b)(iv) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(iii) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds that:

(A) the witness is dead;

(B) the witness is at a greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;

(C) the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(iv) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought, in fairness, to be considered with the part introduced, and any party may introduce any other parts.

All depositions lawfully taken and duly filed in any court or another agency of this state may be used as if originally taken in the pending proceeding. A deposition previously taken may also be used as permitted by the Utah Rules of Evidence.

(b) Objections to Admissibility.

Subject to the provisions of Subsection R151-46b-9(13)(i)(c), objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Errors and Irregularities in Depositions.

(i) All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(iv) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(v) Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(14) Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) Scope.

Upon approval by the presiding officer, any party may serve on any other party a request:

(i) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form, or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Subsection R151-46b-9(1)(a) and which are in the possession, custody or control of the party upon whom the request is served; or  
(ii) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Subsection R151-46b-9(1)(a).

(b) Procedure.

Before permitting a party to serve a request for production of documents, the presiding officer must first find that the party seeking such leave has demonstrated that the records he seeks have not already been provided to him in the initial disclosures submitted by another party. After approval by the presiding officer, the request may be served upon any party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within 20 days after the service of the request. The presiding officer may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Subsection R151-46b-9(16) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(15) Physical and Mental Examination of Persons.

(a) Order for Examination.

When the mental or physical condition, including the blood group, of a party or of a person in the custody or under the legal control of a party is in controversy, the presiding officer may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or person by whom it is to be made.

(b) Report of Examining Physician.

(i) If requested by the party against whom an order is made under Subsection (a) of this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled, upon request, to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The presiding officer on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report, the presiding officer may exclude his testimony if offered at the hearing.

(ii) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(iii) Subsection R151-46b-9(15) (b) applies to examination made by agreement of the parties unless the agreement expressly provides otherwise. Subsection R151-46b-9(15) (b) does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(16) Motion to Compel Discovery; Sanctions for Failure to Make or Cooperate in Discovery.

(a) A party may request entry of an order compelling discovery as follows:

(i) If a party fails to make disclosures required by an initial prehearing order pursuant to R151-46b-9(2), or a party fails to make the disclosures required by R151-46b-9(3), or a deponent fails to answer a question propounded under Subsection R151-46b-9(13), or a corporation or other entity fails to make a designation under Subsection R151-46b-9(13) (b) (iv), or a party, in response to a request for inspection submitted under Subsection R151-46b-9(14), fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling such disclosures, or an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the presiding officer denies the motion in whole or in part, the presiding officer may make such protective order as he would have been empowered to make on a motion made pursuant to Subsection R151-46b-9(6).

(ii) For purposes of Subsection R151-46b-9(16) (a) (i), an evasive or incomplete answer is to be treated as a failure to answer.

(b) Discovery Sanctions.

(i) If a party or other person fails to comply with an order compelling discovery issued by the presiding officer, the department may seek enforcement of that order by seeking civil enforcement in the district court as provided in Section 63-46b-19.

(ii) If a party, an officer, director, or managing agent of a party or a person designated under Subsection R151-46b-9(13) (b) (iv) to testify on behalf of a party fails to obey an order or provide or permit discovery, including an order made under Subsection R151-46b-9(16) (a), the presiding officer may make such orders in regard to the failure as are just, including:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iii) If a party fails to comply with an order under Subsection R151-46b-9(15) (a) requiring him to produce another for examination, the presiding officer may enter any order listed in paragraphs (A), (B), and (C) of Subsection R151-46b-9(16) (b) (ii) unless

the party failing to comply shows that he is unable to produce such person for examination.

(iv) If a party, an officer, director, or managing agent of a party or a person designated under Subsection R151-46b-9(13)(b)(iv) to testify on behalf of a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, fails to serve a written response to a request for inspection submitted under Subsection R151-46b-9(14), after proper service of the request, the presiding officer on motion may make such orders in regard to the failure as are just and may take any action authorized under paragraphs (A), (B) and (C) of Subsection R151-46b-9(16)(b)(ii). In lieu of any order or in addition thereto, the presiding officer shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the presiding officer finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in Subsection R151-46b-9(16) may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Subsection R151-46b-9(6).

(v) The failure to comply with Subsections R151-46b-9(1) through R151-46b-9(15) or to honor any certification made under those rules may be found by the presiding officer to be a default under Section 63-46b-11.

#### **R151-46b-10. Hearings.**

##### (1) Hearings Required or Permitted.

A hearing shall be held in all adjudicative proceedings in which a hearing is:

- (a) required by statute or rule and not waived by the parties; or
- (b) permitted by statute or rule and timely requested.

##### (2) Time to Request Permissive Hearing.

A request for a hearing permitted by statute or rule must be received no later than:

- (a) the time period for filing a response to a notice of agency action if a response is required or permitted;
- (b) twenty days following the issuance of a notice of agency action if a response is not required or permitted; or
- (c) the filing of the request for agency action.

##### (3) Scheduling of Hearings.

(a) The date, time, and place of a hearing shall be set forth in the notice of agency action or the notice of receipt of request for agency action, or, if not known at the time of the notice, in a separate notice of hearing.

(b) The presiding officer may, upon a determination of good cause, issue an order modifying the date, time, or place of a hearing.

##### (4) Hearings Open to Public; Exceptions.

(a) Any hearing in an adjudicative proceeding is open to the public unless closed by the presiding officer conducting the hearing, pursuant to Title 63, Chapter 46b, the Administrative Procedures Act, or by a presiding officer who is a public body, pursuant to Title 52, Chapter 4, the Open and Public Meetings Act.

(b) The deliberative process of an adjudicative proceeding is a quasi-judicial function exempt from the Open and Public Meetings Act. Deliberations are closed to the public.

##### (5) Bifurcation of Hearing.

The presiding officer, good cause appearing, may order a hearing bifurcated into a findings phase relative to the allegations set forth in the petition, and a sanctions phase, if required, based upon the findings.

##### (6) Order of Presentation in Hearings.

The order of presentation of evidence in hearings in formal adjudicative proceedings shall normally be as follows:

- (a) opening statement of the party with the burden of proof;
- (b) opening statement of the opposing party, unless the party reserves the opening statement until the presentation of its case-in-chief;
- (c) case-in-chief of the party which has the burden of proof and cross examination of witnesses by opposing party;
- (d) case-in-chief of the opposing party and cross examination of witnesses by the party with the burden of proof;
- (e) rebuttal case by the party which has the burden of proof;
- (f) surrebuttal case by the opposing party;
- (g) further rebuttal or surrebuttal as permitted by the presiding officer;

- (h) closing argument by the party which has the burden of proof;
- (i) closing argument by the opposing party; and
- (j) final argument by the party which has the burden of proof.

(7) Telephonic Testimony.

(a) Telephonic testimony is only permissible in a formal adjudicative proceeding upon the consent of the parties or if warranted by exigent circumstances. Normally, expenses which would be incurred by a party to produce in-person testimony do not constitute an exigent circumstance as to justify telephonic testimony in a formal adjudicative proceeding. Telephonic testimony is generally permissible in an informal proceeding upon the request of any party.

(b) When telephonic testimony is to be presented, the presiding officer shall require that the identity of any witness so testifying be established. The presiding officer shall also provide safeguards to assure the witness does not refer to documents improperly and to reduce the possibility the witness may be coached or influenced during their testimony.

(8) Standard of Proof.

The standard of proof in all proceedings under these rules, whether initiated by a notice of agency action or request for agency action, shall be a preponderance of the evidence.

(9) Burden of Proof.

The department has the burden of proof in any proceeding initiated by a notice of agency action. The party who seeks action from the department has the burden of proof in any proceeding initiated by a request for agency action.

(10) Default Procedures.

(a) Order entering the default of a party.

(i) The presiding officer may enter the default of a party in accordance with Section 63-46b-11, sua sponte or upon motion of a party.

(ii) A party filing a motion for entry of default shall also file an affidavit substantiating the grounds for the motion.

(iii) If the submissions establish a basis for entry of default, the presiding officer may enter the default without notice to the defaulting party or a hearing.

(b) Additional proceedings.

(i) Following the entry of default, the presiding officer may, sua sponte or upon motion of a party, conduct further proceedings and enter a final order based on the submissions filed without notice to or participation by the defaulting party when:

(A) the relief sought against the party is specifically set forth in the pleadings that were served upon that party;

(B) the factual allegations contained in those pleadings are supported by affidavit or by a verified petition; and

(C) those factual allegations, and applicable law, support the granting of the relief sought against that party.

(ii) In all other cases, the presiding officer shall not enter a final order without conducting a hearing in which the party seeking relief may submit proffers, evidence, or legal arguments in support of the relief it requests against the defaulting party. The hearing may be held without notice to or participation by the defaulting party if the pleadings served upon the defaulting party set forth the potential relief which could be obtained against such party.

(c) The order of default and the final order may be concurrently issued.

(11) Record of Hearing.

(a) Record Requirement.

The presiding officer shall cause a record to be made of all prehearing conferences and all hearings which are conducted.

(b) Record Methods.

(i) Formal Adjudicative Proceedings.

The presiding officer shall cause the record of a hearing in a formal adjudicative proceeding to be made by means of a certified shorthand reporter, unless the presiding officer determines it to be unnecessary or impracticable, in which case he shall cause the record to be made by means of an audio or video cassette recorder or other recording device.

(ii) Informal Adjudicative Proceedings.

The presiding officer may cause a record of a hearing in an informal adjudicative proceeding to be made by a method set forth in Subsection (i) or by minutes prepared or adopted by the presiding officer.

(c) Record Expense.

The hearing in an adjudicative proceeding shall be recorded at the expense of the agency.

- (d) Transcription of Record.
- (i) The record of a hearing is not required to be transcribed. However, a party may elect to have the record of a hearing transcribed by the reporter who reported the hearing or by a reporter approved by the presiding officer.
- (ii) The party requesting the transcript shall bear the cost of the transcription.
- (iii) The original transcript of a record of a hearing shall be filed with the presiding officer.

(12) Fees.

(a) Witness Fees.

Witnesses appearing upon the demand or at the request of a party shall be entitled to receive payment from that party in the amount of \$18.50 for each day in attendance and, if traveling more than 50 miles to attend and return from the hearing, shall be entitled to receive 25 cents per mile for each mile thus actually and necessarily traveled. Any witness subpoenaed by a party other than the department may, at the time of service of the subpoena, demand one day's witness fee and mileage in advance and unless such fee is tendered, the witness shall not be required to appear.

(b) Interpreter and Translator Fees.

Interpreters and translators, including those skilled in foreign languages and communication with the deaf, shall be allowed such compensation for their services as the presiding officer may allow.

(c) Officers and Employees not Entitled to Fees - Exception.

No officer or employee of the United States, or of the State of Utah, or of any county, incorporated city or town within the State of Utah, shall receive any witness fee when testifying in an adjudicative proceeding unless the officer or employee is required to testify at a time other than during his normal working hours.

(d) Only One Fee Per Day Allowed.

No witness shall receive fees in more than one adjudicative proceeding on the same day.

**R151-46b-11. Orders.**

(1) Requirements.

All orders issued by a presiding officer shall comply with the requirements of Subsection 63-46b-5(1)(i) or Section 63-46b-10, respectively. In the case of default orders and orders issued subsequent to a default order, the requirements of Subsections 63-46b-5(1)(i)(iii) and (iv) and 63-46b-10(1)(e), (f) and (g) are satisfied if the order includes a notice of the right to seek to set aside the order as provided in Subsection 63-46b-11(3).

(2) Effective Date.

The effective date of the final order in an adjudicative proceeding shall be 30 days after the issuance thereof unless otherwise provided in the order.

(3) Clerical Mistakes.

Clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the department on its own initiative or on the motion of any party and after such notice, if any, as the department orders. Such mistakes may be so corrected at any time prior to the docketing of a petition for judicial review or as governed by Rule 11(h) of the Utah Rules of Appellate Procedure.

**R151-46b-12. Agency Review.**

(1) Availability of Agency Review.

Except as otherwise provided in Subsection 63-46b-11(3)(c), an aggrieved party may obtain agency review of a final order by filing a request with the executive director of the department within thirty days following the issuance of the order.

(2) When Agency Review is Not Available.

Agency review is not available as to any order or decision entered by the Real Estate Appraiser Licensing and Certification Board, the Utah Motor Vehicle Franchise Board, the Utah Powersport Advisory Board and the Pete Suazo Utah Athletic Commission. However, agency reconsideration is available pursuant to R151-46b-13.

(3) Content of a Request for Agency Review - Transcript of Hearing - Service.

(a) The content of a request for agency review shall be in accordance with Subsection 63-46b-12(1)(b). The request for agency review shall include a copy of the order that is the subject of the request.

(b) A party requesting agency review shall set forth any factual or legal basis in support of that request, including adequate supporting arguments and citation to appropriate legal authority and to the relevant portions of the record developed during the adjudicative proceeding.

(c) If a party challenges a finding of fact in the order subject to review, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence. A party challenging the facts bears the burden to marshal or gather all of the evidence in support of a finding and to show that despite such evidence, the finding is not supported by substantial evidence. The failure to so marshal the evidence permits the executive director to accept a division's findings of fact as conclusive. A party challenging a legal conclusion must support the argument with citation to any relevant authority and also cite to those portions of the record that are relevant to that issue.

(d) If the grounds for agency review include any challenge to a determination of fact or conclusion of law as unsupported by or contrary to the evidence, the party seeking agency review shall order and cause a transcript of the record relevant to such finding or conclusion to be prepared. When a request for agency review is filed under such circumstances, the party seeking review shall certify that a transcript has been ordered and shall notify the department when the transcript will be available for filing with the department. The party seeking agency review shall bear the cost of the transcript.

(e) A party seeking agency review shall, in the manner described in R151-46b-8, file and serve copies of the request for agency review, pleadings, and other submissions to the appropriate division whose order is challenged. If an attorney enters an appearance on behalf of the division, the party seeking agency review shall thereafter serve copies of relevant documents to the attorney.

(f) Failure to comply with this rule may result in dismissal of the request for agency review.

(4) Stay Pending Agency Review.

(a) Upon the timely filing of a request for agency review, the party seeking review may request that the effective date of the order subject to review be stayed pending the completion of review. If a stay is not timely requested, the order subject to review shall take effect according to its terms.

(b) The division or committee that issued the order subject to review may oppose the request for a stay in writing within ten days from the date the stay is requested. Failure to oppose a timely request for a stay shall result in an order granting the stay unless the department determines that a stay would not be in the best interest of the public. The department may also enter an interim order granting a stay pending a decision on the motion for a stay.

(c) In determining whether to grant a request for a stay or a motion opposing that request, the department shall review the division's or committee's findings of fact, conclusions of law and order to determine whether granting a stay would, or might reasonably be expected to, pose a significant threat to the public health, safety and welfare. The department may also issue a conditional stay by imposing terms, conditions or restrictions on a party pending agency review.

(5) Memoranda.

(a) The department may order or permit the parties to file memoranda to assist in conducting agency review. Any memoranda shall be filed consistent with these rules or as otherwise governed by any scheduling order entered by the department.

(b) When no transcript is necessary to conduct agency review, any memoranda supporting a request for such review shall be concurrently filed with the request. If a transcript is necessary to conduct agency review, any supporting memoranda shall be filed no later than 15 days after the filing of the transcript with the department.

(c) Any response to a request for agency review and any memoranda supporting that response shall be filed no later than 15 days from the filing of the request for agency review or no later than 15 days from the filing of any subsequent memoranda supporting that request. Any final reply memoranda shall be filed no later than five days after the filing of a response to the request for agency review.

(6) Oral Argument.

The request for agency review or the response thereto shall state whether oral argument is sought in conjunction with agency review. The department may order or permit oral argument if the department determines such argument is warranted to assist in conducting agency review.

(7) Standard of Review.

The standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings, as set forth in Subsection 63-46b-16(4).

(8) Type of Relief.

The type of relief available on agency review shall be the same as the type of relief available on judicial review, as set forth in Subsection 63-46b-17(1)(b).

(9) Order on Review.

The order on review shall comply with the requirements of Subsection 63-46b-12(6).

**R151-46b-13. Agency Reconsideration.**

(1) Filing requirements for agency reconsideration.

(a) Before seeking judicial review of any order or decision entered by the Real Estate Appraiser Licensing and Certification Board, the Utah Motor Vehicle Franchise Board, the Utah Powersport Advisory Board and the Pete Suazo Utah Athletic Commission, an aggrieved party may file a petition for reconsideration by the relevant board or commission pursuant to Section 63-46b-13.

(b) The request shall be signed by the party seeking reconsideration. Any response to the request for reconsideration shall be filed with the division within ten days of the filing of the request for reconsideration. Responses relating to matters before the Real Estate Appraiser Licensing and Certification Board shall be filed with the Division of Real Estate. All other responses shall be filed with the executive director of the Department.

(2) Stay Pending Reconsideration.

Upon the timely filing of a request for reconsideration by the board, the effective date of the previously issued order or decision shall be suspended pending the completion of reconsideration.

(3) Order on reconsideration.

Any order on reconsideration constitutes final agency action for purposes of Section 63-46b-14. The order shall provide notice to any aggrieved party of any right to judicial review.

**R151-46b-14. Exhaustion of Administrative Remedies.**

(1) In accordance with Section 63-46b-14, an aggrieved party may seek judicial review of a final order only after exhausting all administrative remedies available.

(2) The order on review constitutes final agency action for purposes of Subsection 63-46b-14(1).

**R151-46b-15. Stay and Other Temporary Remedies Pending Judicial Review.**

(1) Unless otherwise provided by statute, a motion for a stay of an order or other temporary remedy during the pendency of judicial review shall include:

(a) a statement of the reasons for the relief requested;

(b) a statement of the facts relied upon;

(c) affidavits or other sworn statements if the facts are subject to dispute;

(d) relevant portions of the record of the adjudicative proceeding and agency review thereof;

(e) a memorandum of law identifying the issues to be presented on appeal and supporting the aggrieved party's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, remand for a new hearing, or relief from the order entered;

(f) clear and convincing evidence that if the requested stay or other temporary remedy is not granted, the aggrieved party will suffer irreparable injury;

(g) clear and convincing evidence that if the requested stay or other temporary remedy is granted, it will not substantially harm other parties to the proceeding; and

(h) clear and convincing evidence that if the requested stay or other temporary remedy is granted, the aggrieved party will not pose a significant danger to public health, safety and welfare.

(2) The executive director of the department may grant a motion for a stay of an order or other temporary remedy during the pendency of judicial review upon a showing by the aggrieved party that the requirements for such relief established in this rule are met.

**R151-46b-16. Emergency Adjudicative Proceedings.**

Unless otherwise provided by statute or rule:

(1) When a division commences an emergency adjudicative proceeding and issues an order in accordance with Section 63-46b-20 which results in a continued impairment of the affected party's rights or legal interests, the division that issued the emergency order shall schedule a hearing upon written request of the affected party to determine whether the emergency order should be affirmed, set aside, or modified based on the standards set forth in Section 63-46b-20. The hearing will be conducted in conformity with Section 63-46b-8.

(2) Upon request for a hearing pursuant to this rule, the Division will conduct a hearing as soon as reasonably practical but not later than 20 days from the receipt of a written request unless the Division and the party requesting the hearing agree to conduct the hearing at a later date. The Division shall have the burden of proof to establish, by a preponderance of the evidence, that the requirements of Section 63-46b-20 have been met.

(3) Except as otherwise provided by statute, the division director or his designee shall select an individual or body of individuals to act as the presiding officer at the hearing. The presiding officer shall not include any individual who directly participated in issuing the emergency order.

(4) Within a reasonable time after the hearing, the presiding officer shall issue an order in accordance with the requirements of Section 63-46b-10. The order of the presiding officer shall be considered final agency action with respect to the emergency adjudicative proceeding and shall be subject to agency review in accordance with Section R151-46b-12.

#### **R151-46b-17. Declaratory Orders.**

(1) Filing of Petition for Declaratory Order.

A petition for the issuance of a declaratory order shall be filed with the agency head which has primary jurisdiction to enforce or implement the statute, rule, or order for which a declaratory order is sought. The petition shall set forth the question to be answered, the facts and circumstances related to the question, the statute, rule, or order to be applied to the question, and whether oral argument is sought in conjunction with the petition. The Petition shall comply with the requirements for pleadings set forth in Section R151-46b-7.

(2) Disposition of Petition.

Upon receipt of a petition for a declaratory order, the agency head shall issue a written order in accordance with Subsection 63-46b-21(6) or allow the petition to be denied in accordance with Subsection 63-46b-21(7).

(a) If the agency head issues a declaratory order declaring the applicability of the statute, rule, or order in question to the specified facts and circumstances set forth in the petition without setting the matter for an adjudicative proceeding, the order shall be based upon a review of the petition and oral argument upon the petition, if any; laws and rules applicable to the petition; records maintained by the agency; or any other relevant information reasonably available to the agency.

(b) If the agency head sets the matter for an adjudicative proceeding, a notice of adjudicative proceeding shall be issued in accordance with the requirements of Subsection 63-46b-3(2)(a), to the extent applicable.

(3) Classes of Circumstances in Which the Agency Will Not Issue a Declaratory Order.

The following are defined as classes of circumstances in which the agency will not issue a declaratory order:

- (a) questions involving circumstances set forth in Subsection 63-46b-21(3)(a)(ii) or (3)(b);
  - (b) questions which are not within the jurisdiction of the agency to address;
  - (c) questions which have already been adequately addressed by an agency in the form of an order;
  - (d) questions which can be adequately addressed by an agency in the form of informal advice;
  - (e) questions which are already clearly addressed by statute or rule and do not warrant a declaratory order;
  - (f) questions which are more properly addressed by statute or rule;
  - (g) questions which arise out of pending or anticipated litigation in a civil, criminal, or administrative forum which are more properly addressed by that forum; and
  - (h) questions which are irrelevant, insignificant, meaningless, or spurious.
- (4) Agency Review.

The recipient of a declaratory order may request agency review pursuant to Section 63-46b-12 and these rules.

**R151-46b-18. Record of an Adjudicative Proceeding.**

(1) Definition.

The record of an adjudicative proceeding includes the pleadings and exhibits filed by the parties, the recording of any hearing under Subsection R151-46b-10(11), any transcript of a hearing, and orders or other documents issued by any presiding officer in the adjudicative proceeding or on agency review or reconsideration of the adjudicative proceeding.

(2) Retention.

The record of an adjudicative proceeding shall be retained by the department pursuant to Title 63, Chapter 2, the Government Records Access and Management Act ("GRAMA"). As used herein, "department" means the department, division or committee before whom the adjudicative proceeding was conducted.

(3) Classification.

The record of an adjudicative proceeding is classified as a "public record" except as otherwise classified by the department pursuant to GRAMA.

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**DEPARTMENT OF COMMERCE  
ADMINISTRATIVE PROCEDURES  
ACT RULES**

**R151-46b  
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