

NOTICES OF FINAL RULEMAKING

The Administrative Procedure Act requires the publication of the final rules of the state's agencies. Final rules are those which have appeared in the *Register* first as proposed rules and have been through the formal rulemaking process including approval by the Governor's Regulatory Review Council. The Secretary of State shall publish the notice along with the Preamble and the full text in the next available issue of the Register after the final rules have been submitted for filing and publication.

NOTICE OF FINAL RULEMAKING

TITLE 7. EDUCATION

CHAPTER 2. STATE BOARD OF EDUCATION

PREAMBLE

1. Sections Affected

R7-2-1156
R7-2-1158
R7-2-1181
R7-2-1182
R7-2-1183
R7-2-1185

Rulemaking Action

Amend
Amend
Amend
Amend
New
New

2. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statute: A.R.S. § 15-203

Implementing statute: A.R.S. § 15-213

3. Effective date of the rules:

September 8, 2000

4. A list of all previous notices appearing in the Register addressing the final rule:

Notice of Rulemaking Docket Opening: 4 A.A.R. 2171, August 7, 1998

Notice of Proposed Rulemaking: 4 A.A.R. 2740, October 2, 1998

5. The name and address of agency personnel with whom persons may communicate regarding the rule:

Name: Corinne L. Velasquez, Executive Director

Address: 1535 West Jefferson, Room 418
Phoenix, Arizona 85007

Telephone: (602) 542-5057

Fax: (602) 542-3046

6. An explanation of the rule, including the agency's reasons for initiating the rule:

In the case of *R.L. Augustine Const. Co., Inc. v. Peoria Unified School Dist.*, 188 Ariz. 368, 936 554 (1997), there were issues raised concerning the current procurement rules, which allow a governing board of a school district to hold hearings to resolve disputes. The Court in *Augustine* ruled that the State Board's rules were not valid related to this issue, and that the Board was required to amend its rules to establish a process by which disputes could be resolved by a party other than the district governing board.

Primarily, there were two issues raised concerning the State Board's procurement rules. The first issue related to the fact that the rules did not provide for judicial review, and that this was not compatible with the consistency requirement of A.R.S. §15-213(A). New rule R7-2-1183 has been proposed to address this issue.

The second issue raised is that of the governing board hearing a disputed matter when the governing board was also the purchaser. The Court indicated that the final administrative decision maker should be one other than the district governing board. The proposed language to resolve this issue is to delete references to the governing board and replacing that language with "hearing officer" in amendments to R7-2-1156, R7-2-1158, R7-2-1181 and R7-2-1182.

Additionally, R7-2-1185 is a new rule setting forth the qualifications for hearing officers and further amendment to R7-2-1158 will set forth the process for selection of a hearing officer.

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The summary of the economic, small business and consumer impact:

Construction disputes were formerly decided at the local governing board level. Hearings were held, however, costs for hearings most likely were relatively minimal. Under the new amendments and rules, costs for hearing officers will be shared equally between the parties. This process may result in additional costs to a school district and a contractor.

9. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

1. R7-2-1158(C): Added language that requires the costs associated with the hearing to initially be paid by the school district, and if the hearing officer decides in favor of the school district, the other party shall reimburse the school district for the costs. This change was suggested by the Attorney General's Office for clarification of intent and to afford due process.
2. R7-2-1158(E): Added language establishing a time limit on the process for selecting of a hearing officer, and the process that will be used after the time limit has expired if no hearing officer has been agreed upon. This change was suggested by the Attorney General's Office for clarification of intent.
3. R7-2-1185: Included additional qualifications, legal or procurement experience, for hearing officers. This change was suggested by the Attorney General's Office for clarification of intent.

10. A summary of the principal comments and the agency response to them:

The Board received oral and written comment from Barbara Robey, representing the Arizona School Boards Association and Ernest Calderon, Esq., who had represented the Peoria Unified School District in the *Augustine* matter. Both Ms. Robey and Mr. Calderon spoke in favor of the proposed new rules and amendments. There was no written comment received, for or against the proposed new rules and amendments.

11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

12. Incorporations by reference and their location in the rules:

None

13. Was this rule previously adopted as an emergency rule?

No

14. The full text of the rule follows:

TITLE 7. EDUCATION

CHAPTER 2. STATE BOARD OF EDUCATION

ARTICLE 11. SCHOOL DISTRICT PROCUREMENT CONTINUED

Sections

- R7-2-1156. District representative's decision
- R7-2-1158. Appeals to ~~the governing board~~ a hearing officer
- R7-2-1181. Hearing procedures
- R7-2-1182. Rehearing of decisions
- R7-2-1183. Judicial review
- R7-2-1185. Qualifications for hearing officers

ARTICLE 11. SCHOOL DISTRICT PROCUREMENT CONTINUED

R7-2-1156. District representative's decision

- A. No Change
- B. No Change
- C. Decision of the district representative. The district representative shall furnish a copy of the decision to the contractor by any method that provides evidence of receipt. The decision shall include:
 1. A statement of the district representative's decision, with supporting rationale; and
 2. A paragraph substantially as follows:

"This is the decision of the district representative of the _____ School District. This decision may be appealed to a hearing officer ~~the governing board of this school district~~. If you appeal, you must file a written notice of appeal with the district representative within ten days from the date of decision."

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R7-2-1158. Appeals to ~~the governing board~~ a hearing officer

- A. No Change
- B. No Change
- C. All costs associated with conducting a hearing, including the costs of the hearing officer, shall be paid by the school district. If the hearing officer decides in favor of the school district, the other party shall reimburse the school district for the costs of the hearing.
- D. The Executive Director of the State Board of Education (“Executive Director”) shall prepare and maintain a list of individuals who meet the qualifications specified in R7-2-1185 to serve as hearing officers.
- E. A hearing officer may be selected by mutual agreement of both parties. If the parties are unable to mutually agree on a hearing officer, three hearing officers shall be selected randomly by the Executive Director and shall be screened to determine availability and possible bias. Once the Executive Director has selected three hearing officers who are available and show no evidence of bias, the three names shall be provided to both parties. Both parties have the opportunity to strike one name from the list provided, but must do so within 14 calendar days from the date on which the Executive Director provided the list to the parties. If after the time period for striking a hearing officer has passed and more than one person remains on the list, the Executive Director shall select one of the remaining individuals on the list as the hearing officer unless either party objects for cause and provides such reason in writing to the Executive Director. If after the time period for striking a hearing officer has passed and there is only one person remaining on the list, the remaining individual shall be named as the hearing officer unless either party objects for cause and provides such reason in writing to the Executive Director. Objections for cause shall require specific evidence that the individual does not meet the criteria specified in R7-2-1185. The Executive Director shall review the evidence submitted and determine the qualifications of the individual. If the Executive Director determines that the individual is not qualified to serve as the hearing officer, the Executive Director shall repeat the process and select three additional hearing officers to be provided to the parties.

R7-2-1181. Hearing procedures

- A. If a hearing is required or permitted under this Article, this Section shall apply. ~~The governing board either shall act as a hearing officer or shall appoint a hearing officer. Hearing officers shall be selected pursuant to R7-2-1158.~~
- B. The Arizona Administrative Procedure Act (Article 1, Chapter 6, Title 41, Arizona Revised Statutes, A.R.S. § 41-1001 et seq.) shall apply where the Act is not inconsistent with this Article.
- C. The hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing.
- D. The hearing officer may:
 - 1. Hold pre-hearing conferences to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding;
 - 2. Require parties to state their positions concerning the various issues in the proceeding;
 - 3. Require parties to produce for examination those relevant witnesses and documents under their control;
 - 4. Rule on motions and other procedural items on matters pending before such officer;
 - 5. Regulate the course of the hearing and conduct of participants;
 - 6. Establish time limits for submission of motions or memoranda;
 - 7. Impose appropriate sanctions against any person failing to obey an order under these procedures, which may include:
 - a. Refusing to allow the person to assert or oppose designated claims or defenses, or prohibiting that person from introducing designated matters in evidence;
 - b. Excluding all testimony of an unresponsive or evasive witness; and
 - c. Expelling person from further participation in the hearing;
 - 8. Take official notice of any material fact not appearing in evidence in the record, if the fact is among the traditional matters of judicial notice; and
 - 9. Administer oaths or affirmations.
- E. A transcribed record of the hearing shall be made available at cost to ~~the~~ any requesting party.
- ~~F. Recommendation of the hearing officer. Where the governing board appoints a hearing officer, the hearing officer shall submit a written recommendation, which shall include proposed findings of fact and conclusions of law, to the governing board. The recommendation of the hearing officer may be approved as submitted, modified or rejected by the governing board. The decision, when approved or modified by the governing board, is the finding, order or decision of the governing board. If the governing board declines to approve the decision of the hearing officer, in whole or in part, the governing board may order any further proceedings it deems appropriate.~~
- G.F. Decision by the governing board hearing officer. A decision by the governing board hearing officer shall be sent within 30 days after the conclusion of the hearing to all parties by any means evidencing receipt. A decision shall contain:
 - 1. A statement of facts;
 - 2. A statement of the decision with supporting rationale; and
 - 3. A statement that the parties may file a motion for rehearing within 15 days from the date a copy of this decision is served upon the party.

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R7-2-1182. Rehearing of decisions

- A.** Procedure; grounds. A decision of the ~~governing board~~ hearing officer may be vacated and new hearing granted on motion of the aggrieved party for any of the following causes materially affecting his rights:
1. Irregularity in the proceedings of the ~~governing board~~, hearing officer or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair hearing.
 2. Misconduct of the prevailing party.
 3. Accident or surprise which could not have been prevented by ordinary prudence.
 4. Material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the hearing.
 5. Excessive or insufficient damages or penalties.
 6. Error of law occurring at the hearing of during the progress or the proceeding.
 7. That the findings of fact or decision is not justified by the evidence or is contrary to law.
- B.** Scope. A rehearing may be granted to all or any of the parties and on all or part of the issues in the proceeding for any of the reasons for which rehearings are authorized by law or rule of court. On a motion for a rehearing, the ~~governing board or on its direction, its~~ hearing officer, may open the decision, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new decision.
- C.** Contents of motion; amendment; rulings reviewable.
1. The motion for rehearing shall be in writing, shall specify generally the grounds upon which the motion is based, and may be amended at any time before it is ruled upon by the ~~governing board~~ hearing officer.
 2. Upon the general ground that the ~~governing board or the~~ hearing officer erred in admitting or rejecting evidence, the ~~governing board or~~ hearing officer shall review all rulings during the hearing upon objections to evidence.
 3. Upon the general ground that the findings of fact or decision ~~is are~~ not justified by the evidence, the ~~governing board or the~~ hearing officer shall review the sufficiency of the evidence.
- D.** Time for motion for rehearing. A motion for rehearing shall be filed not later than 15 days after service of the decision upon the party.
- E.** Time for serving affidavits. When a motion for rehearing is based upon affidavits they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the ~~governing board or the~~ hearing officer for good cause shown or by the parties by written stipulation. The ~~governing board or the~~ hearing officer may permit reply affidavits.
- F.** On initiative of ~~governing board~~ hearing officer. Not later than 15 days after the date of decision, the ~~governing board hearing officer of its own initiative~~ may order a rehearing for any reason for which it might have granted a rehearing on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the ~~governing board hearing officer~~ may grant a motion for rehearing, timely served, for a reason not stated in the motion. In either case, the ~~governing board hearing officer~~ shall specify in the order the grounds therefor.
- G.** Questions to be considered in rehearing. A rehearing, if granted, shall be only a rehearing of the question or questions with respect to which the decision is found erroneous, if separable. If a rehearing is ordered because the damages or penalties are excessive or inadequate and granted solely for that reason, the decision shall be set aside only in respect of the damages or penalties, and shall stand in all other respects.
- H.** Motion on ground of excessive or inadequate damages. When a motion for rehearing is made upon the ground that the damages or penalties awarded are either excessive or insufficient, the ~~governing board~~ hearing officer may grant the rehearing conditionally upon the filing within a fixed period of time, not to exceed 15 days, of a statement by the party adversely affected by reduction or increase of damages or penalties accepting that amount of damages or penalties which the ~~governing board hearing officer~~ shall designate. If such a statement is filed within the prescribed time, the motion for rehearing shall be regarded as denied as of the date of such filing. If no statement is filed, the motion for rehearing shall be regarded as granted as of the date of the expiration of the time period within which a statement could have been filed. No further written order shall be required to make an order granting or denying the rehearing final. If the conditional order of the ~~governing board hearing officer~~ requires a reduction of or increase in damages or penalties, then the rehearing will be granted in respect of the damages or penalties only and the decision shall stand in all other respects.
- I.** Number of motions for rehearing. Not more than two motions for rehearing shall be granted to any party in the same action.
- J.** Specifications of grounds of rehearing in order. An order granting a motion for rehearing shall specify with particularity the ground or grounds on which the rehearing is granted.
- K.** Final decision.
1. If a motion for a rehearing is denied, the final decision denying the motion for rehearing shall be sent within five days after the denial to all parties by any means evidencing receipt. A final decision shall contain a paragraph substantially as follows:
"This is the final decision of the ~~governing board of the _____~~ School District hearing officer in the matter of _____."

2. If the motion for a rehearing was granted, after the rehearing is completed, a final decision shall be made and shall be sent within five days after the conclusion of the rehearing to all parties as required in paragraph (1). A final decision shall contain:
 - a. A statement of facts;
 - b. A statement of the decision with supporting rationale; and
 - c. A paragraph substantially as stated in paragraph (1).

R7-2-1183. Judicial review

Any final decision made as a result of a hearing held pursuant to this Article is subject to judicial review in accordance with A.R.S. Title 12, Chapter 7, Article 6.

R7-2-1185. Qualifications for hearing officers

A. A “hearing officer” means a person or persons assigned to preside at a hearing held pursuant to this Article and whose duty it is to assure that proper procedures are followed and that the rights of the parties are protected.

B. A hearing officer shall be:

1. Unbiased - not prejudiced for or against any party in the hearing;
2. Disinterested - not having any personal or professional interest which would conflict with his/her objectivity in the hearing; and
3. Independent - may not be an officer, employee or agent of the contractor or governing board, or of any other public agency involved in the dispute to be settled. A person who otherwise qualifies to conduct a hearing is not an employee of the contractor or governing board solely because he or she is paid by the parties to serve as a hearing officer.

C. A hearing officer shall have:

1. A minimum of 3 years of verified experience in the practice of law; or
2. A minimum of 3 years of verified experience in school procurement or school facilities management and a minimum of 1 year of verified experience in conducting hearings. Completion of a course or program in conducting a hearing or arbitration may substitute for the 1 year of verified experience in conducting hearings.