

## Chapter ERC 94

### HEARINGS, DECISIONS AND REVIEW

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**Note:** Chapter PC 5 was renumbered Chapter ERC 94 under s. 13.92 (4) (b) 1., Stats., Register December 2014 No. 708.

**ERC 94.01 Hearing examiners. (1) DESIGNATION.** Any matter to be heard by the commission may be designated for hearing by one or more commissioners or by such other persons as may be permitted by statute. Hearing examiners shall have all powers necessary to conduct commission hearings. When a hearing is conducted before the commission itself, the hearing shall be presided over by the chairperson or, in the chairperson's absence, by another commissioner designated by the commission.

**(2) LIMITATION AGAINST FINAL DISPOSITION.** Notwithstanding sub. (1), no hearing examiner shall decide any motion which would require final disposition of any case except when the commission has by order directed that the hearing examiner's decision shall be the final decision of the commission.

**(3) DISQUALIFICATION.** If a presiding authority is unqualified to preside for reasons of conflict of interest or personal bias, the presiding authority shall withdraw and notify the commission and the parties of the disqualification.

**(4) MOTIONS FOR SUBSTITUTION OR DISQUALIFICATION OF PERSONS CONDUCTING HEARINGS.** If a party deems the presiding authority to be unqualified for reasons of conflict of interest or bias, the party may move in a timely manner for substitution of a different examiner or disqualification of the commissioner. The motion shall be accompanied by a written statement setting forth the basis for the motion. If a hearing examiner does not grant a motion for substitution, it shall be referred to the commission, which shall determine the sufficiency of the ground alleged.

**(5) UNAVAILABILITY.** If the presiding authority becomes unavailable during the course of a hearing, the commission shall designate a substitute. The substitute may confer with the original presiding authority regarding the case.

**History:** Cr. Register, March, 1980, No. 291, eff. 4-1-80; renum. from PC 3.01 and am., Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.02 Continuances. (1) REQUIREMENTS.** Prior to requesting a continuance of a hearing date, a party shall seek agreement for a continuance from all other parties to the case. In making the request to the hearing examiner or a commissioner, the party seeking the continuance shall advise the hearing examiner or commissioner if agreement between the parties has been reached. Requests for continuances of a hearing date shall only be granted upon a showing of good cause and after consideration of any hardship on the other parties. In any case in which a hearing examiner has been designated, the request shall be directed to the hearing examiner, if available. The hearing examiner or commissioner may require presentation of evidence before considering the request.

**(2) NOTIFICATION OF WITNESSES.** Each party is responsible for advising the party's own witnesses of any continuance.

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.03 Conduct of hearings. (1) GENERALLY.** The commission is not bound by the strict rules of procedure and the customary practices of courts of law.

**(2) OPEN TO THE PUBLIC.** Except where requested by an appellant pursuant to s. 230.44 (4) (a), Stats., or to the extent necessary to protect the confidentiality of materials or testimony as provided by law, all hearings conducted by the commission shall be open to the public.

**(3) OPENING STATEMENTS.** Opening statements are optional and shall be confined to a brief summary of the nature of the case, the evidence intended to be offered, and the controlling legal authorities.

**(4) ORDER OF PROCEEDING.** The petitioner shall present evidence first unless the case falls into a category in which the commission, the judiciary, or the legislature through statutory enactment has determined that the burden of proof shall be on the respondent. In such cases, the respondent shall proceed first. The order of proceeding may be varied by the hearing examiner or commission in the interest of obtaining the most cogent presentation of the case.

**Note:** For example, the burden of proof in an appeal of a discharge decision is on the respondent. *Reinke v. Personnel Board*, 53 W (2d) 123, 191 NW (2d) 833 (1971).

**(5) EVIDENCE.** As specified in s. 227.45, Stats., the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted, and immaterial, irrelevant or unduly repetitious testimony shall be excluded. The hearing examiner and the commission shall give effect to the rules of privilege recognized by law. Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

**(6) TESTIMONY OF WITNESSES. (a)** Witnesses may testify either by answering questions posed to them or in narrative form.

**(b)** Cross-examination is not limited to matters to which the witness testified on direct examination.

**(c)** At the discretion of the hearing examiner or the commission, witnesses' testimony may be taken via telephone rather than in person.

**(d)** At the request of either party, the hearing examiner or the commission may order the exclusion of witnesses in accordance with the provisions of s. 906.15, Stats.

**(7) STIPULATIONS.** Parties may stipulate to some or all of the facts that are material to a case and the commission may base an order upon the stipulation.

**(8) SANCTIONS. (a)** Unless good cause can be shown, any party who fails to appear at a hearing after due notice is deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made. If the absent party has the burden of proof, the commission shall consider a motion to dismiss by the parties present without requiring presentation of any evidence.

**(b)** If a witness fails to appear despite the issuance of a letter or subpoena as provided in s. ERC 93.05, the commission may seek initiation of contempt proceedings.

**Note:** Any person who, without reasonable excuse, fails to attend or to testify as lawfully required before a hearing examiner or the commission or otherwise fails to act as set forth in s. 885.12, Stats., is subject to the penalties set forth therein.

(c) If a witness refuses to answer a proper question or otherwise engages in misconduct, the hearing examiner or the commission may exclude the witness, may strike all or part of the witness' testimony, may make an appropriate inference or may impose any combination of sanctions under this paragraph.

(d) The hearing examiner or the commission may exclude persons other than witnesses from the hearing for misconduct.

**(9) RECORD OF PROCEEDINGS AND TRANSCRIPTS.** A stenographic, electronic or other record of all hearings and such other proceedings as the commission may designate shall be made. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. Copies of tape recordings or transcripts shall also be furnished at the expense of the party making the request. However, upon a showing of indigency and legal need, a party may be provided a copy of the transcript or tape recording without charge. Where indigency and legal need have been found, the commission shall, in its discretion, determine whether to provide a copy of the transcript or to provide a copy of the tape recording.

**History:** Cr. Register, March, 1980, No. 291, eff. 4-1-80; renum. from PC 3.03 (1), (3), (4), (5) and (8) and am., cr. (2), (5), (6) (a) to (c), (8) and (9), Register, August, 1987, No. 380, eff. 9-1-87; correction in (8) (b) made under s. 13.92 (4) (b) 7., Stats., Register December 2014 No. 708.

**ERC 94.04 Proposed decisions and orders.** For those cases in which a proposed decision and order is required pursuant to s. 227.46 (2), Stats., a copy of the proposed decision and order prepared by the hearing examiner shall be served on the parties and shall prescribe reasonable periods for the parties to file any motions for fees and costs, written objections to the proposed decision and order, and any request for oral arguments.

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.05 Motions for fees and costs. (1) GENERALLY.** Each party seeking an award of fees, costs or both shall file a motion and all of the following supporting documentation:

(a) The number of hours for which compensation is sought, itemized according to the work that was performed, the date it was performed, the hours claimed for the work and the individual who performed the work;

(b) The hourly rate customarily charged by each individual for whom compensation is sought;

(c) Other factors that affect the computation of fees or costs, as determined by the judiciary and by decisions of the commission;

(d) Documentation of costs for which the party seeks reimbursement.

**(2) MOTION RAISED UNDER S. 111.39., STATS.** Motions for fees and costs raised under s. 111.39, Stats., shall include supporting documentation of the rates prevalent in the practice of law for attorneys in the same locale with comparable experience and expertise.

**(3) MOTION RAISED UNDER S. 227.485, STATS.** Motions for fees and costs raised under s. 227.485, Stats., shall be heard under the standards and procedures noted in s. 227.485, Stats.

**Note:** The commission's authority to award fees and costs is derived from ss. 103.10 (12) (d), 227.485 and 230.85 (3), Stats., and from *Watkins v. LIRC*, 117 W (2d) 753, 345 NW (2d) 482 (1984).

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87; am. Register, May, 1996, No. 485, eff. 6-1-96.

#### **ERC 94.06 Written objections and oral arguments.**

**(1) WRITTEN OBJECTIONS.** When a party adversely affected by a proposed decision files written objections, the opposing parties shall be provided a period of 10 days to file a written response to the objections unless the hearing examiner or the commission concludes that some other period is more appropriate.

**(2) ORAL ARGUMENTS.** A request for oral argument may be granted if the commission determines, in its discretion, that an issue or question is better addressed by oral argument rather than written argument.

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.07 Computation of interest.** Any interest that may be awarded on a back pay award made by the commission shall be added to the award and computed at the annual rate specified in s. 814.04 (4), Stats., simple interest. Interest shall be computed by calendar quarter. Interest shall begin to accrue on the last day of each calendar quarter, or portion thereof, in the back pay period on the net amount of back pay attributable to that calendar quarter, or portion thereof, after any set-offs, and shall continue to accrue until the date of compliance with the back pay order.

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.08 Time limit for decisions.** The 90 day period established in s. 230.44 (4) (f), Stats., for the issuance of certain decisions shall commence on the last date for filing objections to the proposed decision and order under s. 227.46, Stats., or the date for the last written or oral argument, whichever is later.

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.09 Requests for rehearing.** Requests for rehearing may be granted for those reasons specified in s. 227.49, Stats.

**History:** Cr. Register, March, 1980, No. 291, eff. 4-1-80; renum. from PC 3.05 and am. Register, August, 1987, No. 380, eff. 9-1-87.

**ERC 94.10 Determinations of parties for purposes of judicial review.** The hearing examiner or the commission shall prepare a list of persons who are considered parties by the hearing examiner or the commission for purposes of judicial review as required by s. 227.47, Stats. The list shall be found at the end of every final decision issued by the commission and shall be based upon the following criteria:

**(1)** The nature of the case;

**(2)** The persons affected by the decision and the degree of that impact;

**(3)** The nature of the participation by those involved in the case, including attendance at hearings, cross-examination of witnesses, and submission of briefs.

**Note:** The list of parties is not necessarily coextensive with the definition of "party" found in s. ERC 91.02 (13).

**History:** Cr. Register, August, 1987, No. 380, eff. 9-1-87.