

NOTICES OF PROPOSED RULEMAKING

Unless exempted by A.R.S. § 41-1005, each agency shall begin the rulemaking process by first submitting to the Secretary of State's Office a Notice of Rulemaking Docket Opening followed by a Notice of Proposed Rulemaking that contains the preamble and the full text of the rules. The Secretary of State's Office publishes each Notice in the next available issue of the *Register* according to the schedule of deadlines for *Register* publication. Due to time restraints, the Secretary of State's Office will no longer edit the text of proposed rules. We will continue to make numbering and labeling changes as necessary. Under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.), an agency must allow at least 30 days to elapse after the publication of the Notice of Proposed Rulemaking in the *Register* before beginning any proceedings for adoption, amendment, or repeal of any rule. A.R.S. §§ 41-1013 and 41-1022.

NOTICE OF PROPOSED RULEMAKING

TITLE 20. COMMERCE, BANKING, AND INSURANCE

CHAPTER 4. BANKING DEPARTMENT

PREAMBLE

1. Sections Affected

	<u>Rulemaking Action</u>
R20-4-1201	Amend
R20-4-1202	Amend
R20-4-1203	Repeal
R20-4-1204	Amend
R20-4-1205	Repeal
R20-4-1206	Repeal
R20-4-1207	Repeal
R20-4-1208	Amend
R20-4-1209	Amend
R20-4-1210	Amend
R20-4-1211	Amend
R20-4-1212	Repeal
R20-4-1213	Repeal
R20-4-1214	Repeal
R20-4-1215	Repeal
R20-4-1216	Repeal
R20-4-1217	Repeal
R20-4-1218	Repeal
R20-4-1219	Amend
R20-4-1220	Amend

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

Authorizing statute: A.R.S. § 6-123(2)

Implementing statutes: A.R.S. §§ 6-123(1), 6-123(3), 6-137(E), and 6-138

3. A list of all previous notices appearing in the Register addressing the proposed rule:

Notice of Rulemaking Docket Opening: 6 A.A.R. 1812, May 19, 2000

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

Name: John P. Hudock
Address: 2910 North 44th Street, Suite 310
Phoenix, Arizona 85018
Telephone: (602) 255-4421, ext. 167
Fax: (602) 381-1225

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E-mail: jhudock@azbanking.com

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

These rules were originally made in February 1978 to govern practice and procedure in all proceedings before the Superintendent. The purpose of the present rulemaking is to reconcile the Department's procedural rules with A.R.S. §§ 41-1092 through 41-1092.12. Those provisions of state law were added by the legislature in Laws 1995, Ch. 251, § 14, and they have been amended several times. These new statutes also created the Office of Administrative Hearings ("OAH") and charged it to conduct most hearings in contested cases with, and administrative appeals of actions by, this Department. In turn, OAH has made its own procedural rules governing its conduct of those hearings. The OAH rules were filed with the Secretary of State and became legally effective on February 3, 1999.

The legislature's additions (codified as Article 10 of Title 41, A.R.S.), and the OAH rules (in the Arizona Administrative Code at R2-19-101 through R2-19-122) control procedures for hearing all contested cases and administrative appeals of agency actions. The procedures contained in the new statutory law and OAH rules largely supersede the Department's current rules at R20-4-1201 through R20-4-1220.

The Banking Department remains responsible for processing notices of administrative appeal or requests for hearing sent to the Department. In addition, it regularly conducts informal settlement conferences on contested cases and administrative appeals, reviews decisions arrived at through formal adjudication of administrative appeals before OAH, and entertains motions for rehearing on decisions arrived at through formal adjudication. The revisions contained in this proceeding will control when and how the Department performs these tasks. Specifically, the purpose of each rulemaking action in this proceeding is described in the following paragraphs:

R20-4-1201

This Section establishes the scope of Article 12. This rulemaking amends the Section to modernize the writing style, to enhance its clarity and readability, to make express reference to the controlling effect of A.R.S. §§ 41-1092 through 41-1092.12 and the Office of Administrative Hearings' procedural rules, and to precisely define the newly limited scope of the Article.

R20-4-1202

This Section contains definitions of terms used in Article 12. This rulemaking amends it for five purposes. First, some terms defined here are also defined in Arizona Revised Statutes. This Section's definitions of those terms are amended by this rulemaking to incorporate the statutory definition. Second, some terms defined here are also defined in R20-4-102. Definitions in that Section are applicable throughout Chapter 4 of the Code. For that reason, this proceeding deletes the definitions in Section R20-4-1202 because they are redundant. Third, at least one term defined in the existing text of R20-4-1202 is no longer used in A.R.S. §§ 41-1092 through 41-1092.12, or in the OAH procedural rules. For that reason, this proceeding removes that term and its definition from R20-4-1202. Fourth, this rulemaking amends several of the definitions in this Section either to insert references to OAH and its new role, or simply to modernize the writing style and enhance clarity and readability. Finally, this rulemaking removes the numbers from each definition in the Section.

R20-4-1203

This Section controls who may appear and advocate a position in a contested case or administrative appeal. It is repealed because existing subsection R20-4-1203(A) is inconsistent with A.R.S. § 41-1092.01(D). In addition, the matters contained in subsection R20-4-1203(B) are covered in A.R.S. § 41-1092.03(B). Finally, the content of subsection R20-4-1203(C) is contained in OAH's rule R2-19-120.

R20-4-1204

This Section governs filing and service of permissive or required filings in matters before the Superintendent. This rulemaking amends the Section to harmonize it with OAH rule R2-19-108 and with A.R.S. §§ 41-1092.03, and 41-1092.04.

R20-4-1205

This Section mandates the form of filings with the Superintendent, requires that they be signed, and describes the substance of the signer's certification to the Department. This proceeding repeals Section R20-4-1205. All the substantive provisions of the repealed rule are replaced by OAH rules R2-19-108(C), and (D).

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R20-4-1206

This Section governs amendments to notices of hearing, orders, and responsive pleadings. This proceeding repeals Section R20-4-1206. All the substantive provisions of the repealed rule are replaced by A.R.S. §§ 41-1092.08, and 41-1092.09, the revised version of R20-4-1209, and R2-19-106.

R20-4-1207

This Section describes computation and enlargement of time periods described or allowed in the rules contained in this Article. The rulemaking repeals Section R20-4-1207. All the matters dealt with in the repealed rule are covered by OAH rule R2-19-107.

R20-4-1208

This Section governs the commencement of proceedings before the Superintendent. This proceeding amends Section R20-4-1208 to reconcile it with A.R.S. §§ 41-1092.03, and 41-1092.06. These amendments also remove passive constructions and streamline the writing style of the Section.

R20-4-1209

This Section controls the content and timing of an answer filed in response to a notice of hearing. In this rulemaking, the Department amends Section R20-4-1209 to reconcile it with both A.R.S. § 41-1092.07(D) and OAH rule R2-19-108 as well as to specify the rights and responsibilities of a party responding to a notice of hearing.

R20-4-1210

This Section controls the Superintendent's discretion in granting a stay of operation of any order. The Department amends Section R20-4-1210 in this proceeding in order to specify the permissible grounds of a motion to stay the operation of an order. Retention of this rule in its amended form is necessary because it grants substantive rights, and because the OAH rules do not contain authority for a stay order issued either by the Superintendent or by OAH's administrative law judge.

R20-4-1211

This Section controls intervention in proceedings before the Superintendent. In this rulemaking, the Department amends Section R20-4-1211 to specify the permissible grounds of a motion, made under OAH rule R2-19-106, requesting permission for a person to intervene in a contested case or an appeal from an agency action. Retention of this rule in its amended form is necessary because it grants substantive rights, and because the OAH rules do not contain authority for intervention by any person either by the Superintendent's order or by that of OAH's administrative law judge.

R20-4-1212

This Section governs consolidation of matters before the Superintendent. This proceeding repeals Section R20-4-1212. All the substantive provisions of the repealed rule are replaced by OAH rule R2-4-109.

R20-4-1213

This Section governs conferences. The Department repeals Section R20-4-1213 in this rulemaking because the matters dealt with in the repealed rule are covered in A.R.S. § 41-1092.05(F) and in OAH rule R2-19-112.

R20-4-1214

This Section governs the granting of continuances of hearings. This proceeding repeals Section R20-4-1214. All the substantive provisions of the repealed rule are replaced by OAH rules R2-19-106(A)(1) and R2-19-110.

R20-4-1215

This Section controls depositions taken in proceedings before the Superintendent. The Department repeals Section R20-4-1215 in this rulemaking. A.R.S. § 41-1092.07(F)(4) replaces all the substantive provisions of the repealed rule.

R20-4-1216

This Section governs the issuance of subpoenas by the Superintendent. This proceeding repeals Section R20-4-1216. All the substantive provisions of the repealed rule are replaced by OAH rule R2-19-113, and A.R.S. § 41-1092.07(C).

R20-4-1217

This Section controls the appointment of hearing officers. The Department repeals Section R20-4-1217 in this rule-making because all its substantive provisions are covered in OAH rule R2-19-104, and A.R.S. §§ 41-1092.01(H)(1), 41-1092.07(A), and 41-1092.08.

R20-4-1218

This Section sets standards for the content of a decision issued by the Superintendent. This proceeding repeals Section R20-4-1218. All the substantive provisions of the repealed rule are replaced by A.R.S. § 41-1092.08.

R20-4-1219

This Section controls rehearing of matters decided by the Superintendent. In this rulemaking, the Department amends Section R20-4-1219 to reconcile it with A.R.S. § 41-1092.09.

R20-4-1220

This Section limits the circumstances in which the Department will permit resolution of a matter by consent agreement. This proceeding amends Section R20-4-1220 to modernize the writing style, remove mere statements of policy and passive constructions, and enhance clarity and readability.

6. A reference to any study that the agency proposes to rely on in its evaluation of or justification for the proposed rule and where the public may obtain or review the study, all data underlying each study, any analysis of the study, and other supporting material:

The Department does not propose to rely on any study as an evaluator or justification for the proposed rule.

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 preliminary summary of the economic, small business, and consumer impact:

A. The Banking Department

The Banking Department expects to realize at least one specific economic benefit from this rulemaking. Many of the existing rules have no legal or practical effect since the creation of the Office of Administrative Hearings. Those rules will be repealed in this proceeding. The Department will save money by not having to review and revise the repealed rules.

Beyond that specific point, this rulemaking confers due process rights on contested case parties and appellants. The overall economic effect of codifying these procedures, rights, and remedies is positive.

B. Other Public Agencies

The state will incur normal publishing costs incident to rulemaking, including a review by G.R.R.C. Staff and the cost of publication by the Secretary of State.

C. Private Persons and Businesses Directly Affected

Costs of services will not increase to any measurable degree. Also, these revisions should not increase any licensee's cost of doing business in compliance with these rules.

D. Consumers

No measurable effect on consumers is expected.

E. Private and Public Employment

The Department expects no measurable effect on private and public employment.

F. State Revenues

This rulemaking will not change state revenues.

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9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:

Name: John P. Hudock
Address: 2910 North 44th Street, Suite 310
Phoenix, Arizona 85018
Telephone: (602) 255-4421, ext. 167
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10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rule or, if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

No oral proceedings are scheduled. The Department will schedule an oral proceeding on the proposed rule if it receives a written request for a proceeding within 30 days after the publication date of this notice, under the provisions of A.R.S. § 41-1023(C). Send requests to the Department personnel listed in this preamble's answers to items #4 and #9. The Department invites and will accept written comments on the proposed rule or the preliminary economic, small business, and consumer impact statement. Submit comments during regular business hours, at the address listed in this preamble's answer to item #9, until the close of the record for this proposed rulemaking. The record will close on the 31st day following publication of this notice, unless the Department schedules an oral proceeding.

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:

There is no material incorporated by reference in these rules.

13. The full text of the rules follows:

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ARTICLE 12. RULES OF PRACTICE AND PROCEDURE BEFORE THE SUPERINTENDENT

Section

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ARTICLE 12. RULES OF PRACTICE AND PROCEDURE BEFORE THE SUPERINTENDENT

R20-4-1201. Scope of Article

These rules of practice and procedure govern the procedure in all proceedings in which the legal rights, duties or privileges of a party are required by law to be determined by the Superintendent after a hearing or an opportunity for hearing. These rules shall be construed to secure the just, speedy and inexpensive determination of every such proceeding. In connection with any particular matter, reference should also be made to special procedural requirements prescribed by statute or other rules of the Superintendent, which special requirements, if applicable, shall govern. These rules do not apply to rulemaking or investigative proceedings before the Superintendent.

This Article governs procedures in all contested cases and appealable agency actions, including administrative appeals, filed with the Department. The Department shall use the authority of A.R.S. §§ 41-1092 through 41-1092.12, and the Office of Administrative Hearings' procedural rules, to govern the initiation and conduct of proceedings. In a case or action, special procedural requirements in state statute or another Section in this Chapter shall also govern the proceedings unless the requirements are inconsistent with either A.R.S. §§ 41-1092 through 41-1092.12, or the Office of Administrative Hearings' rules. This Article does not apply to rulemaking, or to investigative proceedings before the Superintendent.

R20-4-1202. Definitions

In this Article, unless the context otherwise requires:

1. "Administrative law judge" has the meaning stated at A.R.S. § 41-1092(1).
"Attorney General" means the duly qualified and acting Attorney General of Arizona or his duly appointed assistant.
"Appealable agency action" has the meaning stated at A.R.S. § 41-1092(3).
2. "Contested case" has the meaning stated at A.R.S. § 41-1001(4). means any proceeding in that the legal rights, duties or privileges of a party are required by law to be determined by the Superintendent after an opportunity for hearing.
3. "Department" means the Arizona State Banking Department.
4. "Hearing officer" means the person appointed by the Superintendent pursuant to R20-4-1217 to hear a contested case and make recommendations to the Superintendent.
5. "License" has the meaning stated at A.R.S. § 41-1001(10). includes the whole or part of any license, permit, certificate, approval, consent, registration, charter or similar form of permission required by law to be issued or given by the Superintendent.
6. "Party" means:
 - a. the department Department, and;
 - b. the Superintendent, and;
 - c. each person either named or admitted as a party, or;
 - d. both properly seeking, and entitled, as of right to be admitted as a party.
7. "Person" means any individual, partnership, corporation, association, or public or private organization.
8. "Superintendent" has the meaning stated in A.R.S. § 6-101(16) means the Superintendent of Banks or the Assistant Superintendent of Banks.

R20-4-1203. Appearance and Practice before the Superintendent Repealed

- ~~A. Any person may appear in his own behalf or by counsel, except that a corporation may only appear through legal counsel.~~
- ~~B. When an attorney, other than the Attorney General, intends to appear before the Superintendent he shall promptly advise the Superintendent of his name, address and telephone number and the name and address of the person on whose behalf he intends to appear.~~
- ~~C. Conduct at any hearing that, in the discretion of the Superintendent, is deemed contemptuous shall be grounds for exclusion from the hearing.~~

R20-4-1204. Filing; Service

- ~~A. A person shall either personally deliver all AH papers permitted or required to be filed with the Superintendent shall be personally filed at the office of the Superintendent or shall mail them by first class, certified, or express mail, or send them by facsimile transmission may be mailed, pursuant to subsection (D), to the Superintendent at 2910 North 44th Street, Suite 310, 1601 West Jefferson, Room 101, Phoenix, Arizona 85018-7270, 85007 or shall serve them by any method permitted under either or R2-19-108. The Department considers papers filed when actually received at the Superintendent's address stated in this subsection. No paper shall be deemed filed until actually received by the Superintendent.~~
- ~~B. Unless otherwise provided by these rules, copies of all papers filed, shall, at or before the time of filing, be served on the hearing officer, if any, the Attorney General, and all parties to the proceeding.~~
- ~~BC. A party in a contested case or appeal from an agency action shall make any required or permitted service in the manner permitted under R2-19-108. A party shall make service upon each represented party's attorney unless the administrative law judge orders separate service on the actual party. A party shall make service upon each unrepresented party by service on the actual party. Whenever under these rules service is required or permitted to be made upon a party represented by an~~

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attorney, the service shall be made upon the attorney, unless service upon the party himself is ordered by the Superintendent.

- ~~D.~~ Service upon the attorney, or upon a party, shall be made personally in accordance with Rule 5(c) of the Arizona Rules of Civil Procedure, or by mail by enclosing a copy thereof in a sealed envelope and depositing same, postage prepaid, in the United States mail, addressed to the party to be served or his attorney at the address shown by the records of the Superintendent. Service by mail is complete upon mailing.
- ~~E.~~ All notices of hearings and final decisions issued by the Superintendent shall be, when mailed, mailed by certified mail.
- ~~F.~~ Proof of service shall be made by filing with the Superintendent a written certification or other statement that service was made or by oral testimony of the person making such service.

R20-4-1205. ~~Form of all Filings; Signature Repealed~~

- ~~A.~~ All papers filed with the Superintendent shall be typewritten on 8 1/2 x 11 1/4 inch paper.
- ~~B.~~ Every paper filed with the Superintendent under these rules shall be signed by the party filing it or by at least one attorney, in his individual name, who represents the party. The signature constitutes a certificate by the signer that he has read the paper, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay.

R20-4-1206. ~~Amendments Repealed~~

Except where otherwise provided by law or these rules, the Superintendent may amend any notice of hearing or prior order issued by the Superintendent or permit the amendment of any answer where justice requires such amendment.

R20-4-1207. ~~Time Computation; Enlargement Repealed~~

- ~~A.~~ In computing any period of time prescribed or allowed by these rules, by order of the Superintendent, or by any applicable statute, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that 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.
- ~~B.~~ When by these rules or by a notice given thereunder or by order of the Superintendent, an act is required or allowed to be done at or within a specified time, the Superintendent for cause shown may at any time in his discretion
 1. With or without a motion or notice, order the period enlarged if request thereof is made before the expiration of the period originally prescribed or as extended by a previous order, or
 2. Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect, but the Superintendent shall not extend the time for taking any action under R20-4-1208, subsection (B), or R20-4-1219, subsections (A) or (E).
- ~~C.~~ Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, five days shall be added to the prescribed period.

R20-4-1208. ~~Commencement of Proceedings; Notice of Hearing~~

- ~~A.~~ A person may obtain a hearing under A.R.S. § 41-1092.03(B) on any appealable agency action or contested case, including the following, unless otherwise provided by law. Unless otherwise provided by law, any person aggrieved by any of the following actions or orders made or issued by the Superintendent without prior hearing or opportunity for hearing may file with the Superintendent a request for hearing seeking review by the Superintendent of such action or order:
 1. A letter or order granting or denying a license;
 2. A license issued with restrictions or conditions;
 3. A cease and desist order, other than one issued under A.R.S. § 6-361;
 4. An order to remedy unsafe or unsound conditions;
 5. An order to remedy an impairment of capital;
 6. An order taking possession and control of a financial institution or enterprise;
 7. An order assessing a fine;
 8. Any other order or matter reviewable in a hearing either under the authority of these rules, a statute or administrative rule enforced by the Superintendent, for which a hearing to review such order is specifically provided for under the rules of the Superintendent, by statute, or by the order's express terms of the order.
- ~~B.~~ Unless otherwise provided by statute or these rules, a request for hearing filed under this rule must be filed with the Superintendent within 15 days of service of the letter or order to be reviewed and shall identify with specificity the action or order for which review is sought. If the party seeking review is represented by counsel, the information required by R20-4-1203, subsection (B), shall be included in the request for hearing.
- ~~C.~~ In proceedings in which the Superintendent is considering the suspension or revocation of a license or in which other legal rights, duties or privileges of a party are required by law to be determined by the Superintendent after a hearing or oppor-

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tunity for hearing, or upon the filing of a request for hearing under subsection (A), the Superintendent shall issue a notice of hearing scheduling the matter for hearing in accordance with these rules.

R20-4-1209. Answer to Notice of Hearing

- A. ~~The Superintendent may, in a notice of hearing, direct one or more parties to file an answer to the assertions in the notice of hearing. Any party to the proceeding may file an answer without being directed to do so. In any notice of hearing issued by the Superintendent, the Superintendent may direct that one or more parties shall file an answer to the assertions contained in the notice of hearing. Even though not directed to do so, any party may file such an answer.~~
- B. ~~A party directed to file an answer shall do so within 20 days after issuance of a notice of hearing, unless the notice of hearing states a different time period for the answer. The Superintendent may require any party to answer, in a reasonable time, amendments to the notice's assertions made after service of the original notice. Except where a different period is provided by the notice of hearing, a party directed to file an answer shall do so within 20 days after issuance of the notice of hearing. Where amendments to the assertions contained in the notice of hearing are made subsequent to service of the notice of hearing, one or more of the parties may be required to answer within a reasonable time the amended assertions.~~
- C. ~~Unless otherwise directed by the Superintendent, An~~ an answer filed under this rule shall briefly state the party's position or defense to the proceeding and shall specifically admit or deny each of the assertions ~~contained~~ in the notice of hearing. ~~An~~ If the answering party ~~that does not have~~ ~~is without,~~ or ~~cannot~~ ~~is unable~~ ~~easily~~ ~~to~~ ~~reasonably~~ obtain knowledge or information sufficient to ~~admit or deny~~ ~~form a belief as to the truth of~~ an assertion ~~shall state that inability in its answer. That statement, he shall so state, which shall have the effect of a denial. A party admits each assertion that it does not deny. Any assertion not denied shall be deemed to be admitted. An~~ When an answering party ~~that~~ intends ~~in good faith~~ to deny only a part or a qualification of an assertion, ~~or to qualify an assertion,~~ ~~he shall expressly admit as specify~~ so much of ~~that assertion~~ ~~it~~ as is true and shall deny ~~only~~ the remainder.
- D. ~~A~~ If a party ~~that~~ fails to file an answer required by this rule within the time ~~allowed~~ ~~provided,~~ such person shall be deemed is in default. ~~The Superintendent may resolve the proceeding against a defaulting party. In doing so, the Superintendent may regard any assertions in the notice of hearing as admitted by the defaulting party, and the proceeding may be determined against him by the Superintendent and one or more of the assertions contained in the notice of hearing may be deemed to be admitted.~~
- E. ~~An answering party waives all~~ Any defenses not raised in ~~its~~ the answer shall be deemed to be waived.

R20-4-1210. Stays

~~A person aggrieved by the Department's action or order who files a timely written request for a hearing may ask, in the request for a hearing, that the Superintendent stay an action or any part of an order that will become effective before the Department can hold a hearing. The Superintendent may, in the Superintendent's discretion, stay the legal effectiveness of any action or order until the matter can be heard and finally decided if the aggrieved person's request demonstrates that: Where an order by its terms or by statute or by these rules will become effective before a hearing can be held, any aggrieved person who has filed a timely request for hearing under this rule or a response under A.R.S. § 6-361 may request in writing that the Superintendent stay part or all of such order until the matter has been heard and a final decision issued. The Superintendent may in his discretion grant such a stay where the applicant has adequately demonstrated that~~

1. ~~The person applicant has a reasonable defense that might prevail result in his prevailing~~ on the merits at the hearing,
2. ~~The person applicant will suffer irreparable injury be irreparably injured unless in the absence of the Superintendent grants the stay is granted,~~
3. The stay would not substantially or irreparably harm other interested persons, and
4. The stay would not jeopardize the public interest or contravene public policy.

R20-4-1211. Intervention

~~A person may only intervene in a proceeding if they timely apply and:~~

~~Upon timely application anyone may be permitted to intervene in a proceeding when~~

1. A statute confers a right to intervene, or
2. ~~The person's applicant's claim or defense shares and the main proceeding have~~ a question of law or fact in common ~~with the main proceeding.~~

R20-4-1212. Consolidation Repealed

~~Proceedings involving a common question of law or fact may be consolidated for hearing of any or all of the matters in issue where such consolidation may tend to avoid unnecessary costs or delay.~~

R20-4-1213. Conferenees Repealed

~~The Superintendent, on application of a party, or on his own motion, may call a conference with the parties at any time for the purpose of clarifying the procedural steps to be followed in a proceeding, or clarifying or limiting the legal or factual issues involved in a proceeding.~~

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R20-4-1214. Continuance of hearings Repealed

The Superintendent, on his own motion, or upon motion of a party and for good cause shown, may continue or reschedule any hearing before the Superintendent.

R20-4-1215. Depositions Repealed

- A.** Any party desiring to take a deposition shall file a written motion, setting forth the reasons why such deposition should be taken, the name and address of the witness, the matters concerning which it is expected to question the witness, the documents, if any, sought to be produced and the time and place proposed for taking of the deposition. If it appears that the prospective witness may be unable to attend or may be prevented from attending a hearing, or may have relevant information or information that appears reasonably calculated to lead to the discovery of admissible evidence, and that it is necessary to take his deposition in the interest of justice, the Superintendent may in his discretion issue an order permitting the deposition to be taken. The Superintendent's order shall identify the witness to be deposed, state the scope of the testimony to be taken and the documents, if any, to be produced, and specify the time when, the place where, and the designated officer before whom the witness is to testify or produce documents. Such order shall be served on all parties and the Attorney General a reasonable time in advance of the time fixed for taking the deposition.
- B.** Depositions taken under this rule shall be conducted and may be used as provided in the Arizona Rules of Civil Procedure.

R20-4-1216. Subpoenas Repealed

- A.** Any party desiring the issuance of a subpoena to compel the appearance of a witness or the production of documents at any hearing or deposition shall file a written ex parte application therefor setting forth the name and address of the witness, the matters concerning which it is expected to question the witness, the documents sought to be produced, and the time and place of the hearing or deposition. A copy of the application for a subpoena shall, at or before the time of filing, be served on the hearing officer. If it appears that the prospective witness' testimony or the documents requested is relevant, or in the case of a deposition, appears reasonably calculated to lead to the discovery of admissible evidence, the Superintendent shall issue the subpoena. Where a party desires a subpoena to compel the attendance of a witness or the production of documents at a deposition he shall combine his request for the subpoena with his request for a deposition under R20-4-1215.
- B.** Subpoenas shall be served as in civil actions. Subpoenas issued at the request of the Superintendent may be served by an employee of the Department or any attorney or agent of the Attorney General's Office.
- C.** Subpoenas may be amended at any time and the amended subpoena may be served as provided in subsection (B).

R20-4-1217. Hearing Officers Repealed

- A.** The Superintendent may appoint a hearing officer to hear any contested case before him. A hearing officer appointed by the Superintendent may make all determinations and enter all orders and process which the Superintendent is authorized to make or issue under these rules or any other order necessary for the orderly conduct of the hearing except orders granting a stay, orders on motions for rehearing, final decisions under R20-4-1218 or other orders or process that the hearing officer is specifically prohibited from entering by these rules or by order of the Superintendent.
- B.** Any party in a proceeding before the Superintendent may file an affidavit for change of hearing officer alleging any of the grounds set forth in A.R.S. § 12-409. An affidavit for change of hearing officer shall be filed within ten days after discovery that grounds exist for a change of hearing officer and in no event later than ten days before the date set for hearing. Copies of an affidavit filed under this subsection shall be served as provided in R20-4-1204 and upon receipt of a copy thereof the hearing officer shall take no further action until the affidavit has been acted on by the Superintendent, except that the hearing officer may make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury, loss or damage from occurring before the proceeding may be transferred to another hearing officer.
- C.** Within 30 days after the conclusion of the proceeding, the hearing officer shall submit to the Superintendent written recommendations which shall include proposed findings of fact, conclusions of law and order. Before submitting his recommendations to the Superintendent the hearing officer may submit a draft thereof to the Attorney General and the parties for the purpose of receiving their comments and suggestions.
- D.** The hearing officer's recommendations may be approved or modified by the Superintendent. The Superintendent's decision approving or modifying the hearing officer's recommendations shall be the final decision of the Superintendent, subject to the filing of a motion for rehearing under R20-4-1219.

R20-4-1218. Decisions Repealed

The final decision in a contested case before the Superintendent shall be signed by the Superintendent and shall state separately the findings of fact, conclusions of law and order of the Superintendent. The decision may incorporate by reference, with or without modifications, the recommendations of the hearing officer.

R20-4-1219. Rehearing

- A.** Except as provided in subsection (G), any party in a contested case before the Superintendent who is aggrieved by a decision rendered in that such case may file with the Superintendent, within time limits and other procedural guidelines con-

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tained in A.R.S. § 41-1092.09 not later than ten (10) days after service of the decision, a written motion for rehearing or review of the decision specifying the particular reason for rehearing grounds therefor.

- B.** A party requesting rehearing under this rule may amend a motion for rehearing under this rule may be amended at any time before the Superintendent rules on the motion it is ruled upon by the Superintendent. Any other party, or the Attorney General, may file a response to the motion for rehearing may be filed within 15 ten (10) days after service of the such motion for rehearing, or the amended motion for rehearing by any other party or the Attorney General. The Superintendent may require a written brief of the filing of written briefs upon the issues raised in the motion and may allow provide for oral argument.
- C.** The Superintendent may grant a motion for A rehearing of the decision may be granted for any of the following causes materially affecting the moving party's rights:
1. Irregularity in the proceedings before the Superintendent, in or any order, or any abuse of discretion that deprives ; whereby the moving party was deprived of a fair hearing;
 2. Misconduct of the Superintendent, his employees, or the administrative law judge his hearing officer, or the prevailing party;
 3. Accident or surprise that which could not have been prevented by ordinary care prudence;
 4. Newly discovered material evidence that which could not reasonably with reasonable diligence have been discovered and produced at the original hearing;
 5. Excessive or insufficient penalties;
 6. Error in admitting the admission or rejecting rejection of evidence or other legal errors of law occurring at the hearing;
 7. The That the decision is not justified by the evidence or is contrary to law.
- D.** The Superintendent may affirm or modify the decision or grant a rehearing as to all or any of the parties and on all or part of the issues for any of the reason reasons listed set forth in subsection (C). An order granting a rehearing shall specify with particularity the ground or grounds for granting on which the rehearing is granted, and the rehearing shall cover only those matters so specified.
- E.** The Superintendent, within the time for filing a motion for rehearing under this rule, may without a motion on his own initiative order a rehearing or review of a his decision for any reason that would allow the granting of a motion for that he might have granted a rehearing by on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the Superintendent may grant a motion for rehearing, timely served, for a reason not stated in the motion. In either case, the order granting such a rehearing shall specify the reasons for granting rehearing ground therefor.
- F.** When a motion for rehearing is based on upon affidavits, the moving party they shall serve the affidavits be served with the motion. An opposing party or the Attorney General may within ten days after such service serve opposing affidavits within 10 days after service of the motion for rehearing.
- G.** The Superintendent may issue a final decision, subject only to judicial review, and without an opportunity for rehearing or administrative review if the Superintendent includes in the decision:
1. An express finding that the decision needs to be made immediately effective to preserve the public peace, health, and safety; and
 2. An express finding that a rehearing or review is:
 - a. Impossible,
 - b. Unnecessary, or
 - c. Contrary to the public interest.

If in a particular decision the Superintendent makes specific findings that the immediate effectiveness of such decision is necessary for the immediate preservation of the public peace, health and safety and that a rehearing or review of the decision is impracticable, unnecessary or contrary to the public interest, the decision may be issued as a final decision without an opportunity for a rehearing or review. If a decision is issued as a final decision without an opportunity for rehearing, any application for judicial review of the decision shall be made within the time limits permitted for applications for judicial review of the Superintendent's final decision.

R20-4-1220. Consent Agreements

- A.** The Department will enter into a consent agreement, either in litigation or in an administrative proceeding, only if the defendant or respondent admits to the allegations in the complaint, notice, or order relating to the jurisdiction of the Superintendent or the jurisdiction of the tribunal that will enter the judgment or order. The Superintendent has determined that in any civil lawsuit brought by him or in any matter pending before the Superintendent or the Hearing Board, it is important to avoid creating, or permitting to be created, an impression that a decree or order is being imposed when the conduct alleged did not in fact occur. Accordingly, it is the Superintendent's policy that he will not permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint, notice of hearing or order.

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- B.** A refusal to admit allegations is a denial. However, a defendant or respondent may consent to a judgment or order reciting that it does not admit or deny the allegations except those required by subsection (A). A consent agreement shall contain those additional provisions required by the Superintendent in a given matter, and may include:
1. Waiving any right to seek judicial review challenging the judgment's or order's validity.
 2. Waiving findings of fact and conclusions of law.
 3. Stating that the agreement is signed only to settle the matter and not as an admission that the defendant or respondent has violated the law.
- For purposes of this rule a refusal to admit the allegations is equivalent to a denial except that a defendant or respondent may consent to a judgment or order where he states in the consent agreement that he neither admits nor denies the allegations, other than those relating to the jurisdiction of the tribunal that is to enter the judgment or order. The consent agreement shall contain such additional provisions as the Superintendent deems appropriate including provisions waiving further procedural steps and all rights to seek judicial review or otherwise to challenge or contest the validity of the judgment or order. In addition, the agreement may contain, where appropriate, an express waiver of findings of fact and conclusions of law and a statement that the signing thereof is for settlement purposes only and does not constitute an admission by the defendant or respondent that the law has been violated.
- C.** The Superintendent has sole discretion to decide whether to resolve a matter by consent agreement. Nothing in this Section gives the Superintendent a duty to approve a consent agreement in any matter.
~~The approval of any consent agreement by the Superintendent is entirely within his discretion and nothing in this rule shall be construed to require the Superintendent to approve a particular consent agreement.~~

NOTICE OF PROPOSED RULEMAKING

TITLE 20. COMMERCE, BANKING, AND INSURANCE

CHAPTER 5. INDUSTRIAL COMMISSION OF ARIZONA

PREAMBLE

- | | |
|------------------------------------|---------------------------------|
| <u>1. Sections Affected</u> | <u>Rulemaking Action</u> |
| R20-5-602 | Amend |
- 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. § 23-405(4)
Implementing statute: A.R.S. § 23-410
- 3. A list of all previous notices appearing in the Register addressing the proposed rule:**
Notice of Rulemaking Docket Opening: 7 A.A.R. 2086, May 18, 2001
- 4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**
- | | |
|------------|---|
| Name: | Patrick Ryan |
| Address: | Division of Occupational Safety and Health
Industrial Commission of Arizona
800 West Washington Street, Suite 203
Phoenix, Arizona 85007 |
| Telephone: | (602) 542-1695 |
| Fax: | (602) 542-1614 |
| E-mail: | pat.ryan@osha.gov |
- 5. An explanation of the rule, including the agency's reasons for initiating the rule:**
R20-5-602(A) requires change to incorporate two amendments to the general industry standard as published in 65 FR 76563-76567, on December 7, 2001, for the occupational exposure to cotton dust and as published in 66 FR 5317-5325, on January 18 2001, for the occupational exposure to bloodborne pathogens: needlestick and other sharps injuries. Under its approved state program enforcing the Occupational Safety and Health Act, the state must adopt standards that are at least as effective as those adopted by the U.S. Department of Labor. Therefore, the Industrial Commission updates its occupational safety and health standards by adopting by reference the most current and applicable federal occupational safety and health standards for general industry. Subsections (B), (C), and (D) of A.A.C.

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R20-5-602 are being removed as the State's Fire Marshal's Office is no longer a part of the Industrial Commission, and the provisions contained in these subsections are no longer being enforced by the Industrial Commission.

6. A reference to any study that the agency proposes to rely on in its evaluation of or justification for the proposed rule and where the public may obtain or review the study, all data underlying each study, any analysis of the study and other supporting material:

None

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 preliminary summary of the economic, small business, and consumer impact:

The Arizona Division of Occupational Safety and Health and the Federal Occupational Safety and Health Administration have determined that these amendments will have minimal to modest impact for most affected industry groups and has determined the amendments to be economically feasible for all industries including small business. Cost and benefit analysis of these amendments is available for inspection, review, and copying at the Industrial Commission of Arizona, Division of Occupational Safety and Health, 800 W. Washington, Phoenix, Arizona 85007.

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:

Name: Patrick Ryan
Address: Industrial Commission of Arizona
Division of Occupational Safety and Health
800 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-1695
Fax: (602) 542-1614
E-mail: pat.ryan@osha.gov

10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rule or, if no proceeding is scheduled, where, when and how persons may request an oral proceeding on the proposed rule:

An oral proceeding has been scheduled as follows:

Date: July 6, 2001
Time: 10:00 a.m.
Location: Third Floor Conference Room
Industrial Commission of Arizona
800 W. Washington
Phoenix, Arizona 85007

Written comments may be submitted on or before 10:00 a.m., July 6, 2001.

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. Incorporation by reference and their location in the rules:

29 CFR 1910, *Federal Occupational Safety and Health Standards for General Industry*, with amendments as of January 18, 2001. This incorporation by reference will appear in A.A.C. R20-5-602.

13. The full text of the rule follows:

TITLE 20. COMMERCE, BANKING, AND INSURANCE

CHAPTER 5. INDUSTRIAL COMMISSION OF ARIZONA

ARTICLE 6. OCCUPATIONAL SAFETY AND HEALTH ~~CONSTRUCTION~~ STANDARDS

Section

R20-5-602. The Federal Occupational Safety and Health Standards for General Industry, 29 CFR 1910

ARTICLE 6. OCCUPATIONAL SAFETY AND HEALTH ~~CONSTRUCTION~~ STANDARDS

R20-5-602. The Federal Occupational Safety and Health Standards for General Industry, 29 CFR 1910

- ~~A.~~ Each employer shall comply with the standards in Subparts C through Z inclusive of the *Federal Occupational Safety and Health Standards for General Industry*, as published in 29 CFR 1910, with amendments as of ~~January 18, 2001~~ ~~March 23, 1999~~, incorporated by reference and on file with the Office of the Secretary of State. Copies of these reference materials are available for review at the Industrial Commission of Arizona and may be obtained from the United States Government Printing Office, Superintendent of Documents, Washington, D.C. 20402. These standards shall apply to all conditions and practices related to general industry activity by all employers, both public and private, in the state of Arizona; provided that this rule shall not apply to those conditions and practices which are the subject of R20-5-601. This incorporation by reference does not include amendments or editions to 29 CFR 1910 published after ~~January 18, 2001~~ ~~March 23, 1999~~.
- ~~B.~~ “~~The State Fire Marshal’s office shall develop and make available, through the Arizona State Fire School Program, classes which provide the training necessary to meet the requirements for interior structural brigades~~”.
- ~~C.~~ The State Fire Marshal’s office shall also establish requirements for fire brigade instructors which shall require, at a minimum, that each instructor have at least 3 years experience in fire suppression; training in hose lays, ladders, ventilation, salvage, overhaul, fire prevention, use and operation of self-contained breathing apparatus, rescue and planning in a program approved by the State Fire Marshal’s office, or a program approved by an organized fire department of a city or town, or a program approved by an organized fire department of a volunteer fire district; and knowledge in the operation of fire extinguishers, stand pipe systems, sprinkler and Halon systems obtained either through experience in fire suppression or training in a program approved by the State Fire Marshal’s office, or approved by an organized fire department or city or town, or approved by an organized fire department of a volunteer fire district.
- ~~D.~~ These standards shall apply to all conditions and practices by all employers, both public and private, in the state of Arizona; provided that this rule shall not apply to those conditions and practices which are the subject of rule R20-5-601.