

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES

DIRECTOR'S OFFICE

MIOSHA SAFETY AND HEALTH STANDARDS

(By authority conferred on the department of consumer and industry services by section 69 of Act No. 154 of the Public Acts of 1974, as amended, being §408.1069 of the Michigan Compiled Laws)

PART 12. VARIANCES

GENERAL PROVISIONS

R 408.22201 Purpose and scope.

Rule 1201. (1) This part pertains to the practice and procedure for administrative proceedings to grant variances under section 27(1), (2), and (4) of the Michigan occupational safety and health act.

(2) These rules shall be construed and applied to secure a prompt and just conclusion of the proceedings subject hereto.

(3) These rules shall not apply to experimental variances which may be granted pursuant to section 27(3) of the act. Whenever experimental variances are sought or requested, the procedures for granting the variances shall be in accordance with the intent of the procedures of these rules, but shall be adapted to the circumstances of the request.

History: 1979 AC.

R 408.22203 Definitions; A to E.

Rule 1203. (1) "Act" means Act No. 154 of the Public Acts of 1974, as amended, being §408.1001 et seq. of the Michigan Compiled Laws.

(2) "Administrative procedures act" means Act No. 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws.

(3) "Affected employee" means an employee who would be affected by the issuance or denial of a variance or any of the employee's authorized representatives, such as the employee's collective bargaining agent.

(4) "Department" means the department of consumer and industry services.

(5) "Director" means the director of the department of consumer and industry services.

(6) "Experimental variance" means a written order issued by a department authorizing an employer to deviate from the requirements of an occupational safety or health standard while conducting or participating in an experiment to demonstrate or validate techniques to safeguard the health or safety of workers.

History: 1979 AC; 1998-2000 AACS.

R 408.22204 Definitions; I to T.

Rule 1204. (1) "Interim order" means a written order issued by the department authorizing an employer to continue to operate equipment, or to carry on processes, procedures, or practices which do not meet the requirements of a standard pending a determination on the merits of a variance application.

(2) "Party" means a person admitted to participate in a hearing conducted pursuant to these rules. An applicant for relief and any affected employee shall be entitled to be named parties. A department shall be deemed to be a party without the necessity of being named.

(3) "Permanent variance" means a written order issued by a department authorizing an employer to deviate from the requirements of an occupational safety or health standard when protection is provided to employees equal to that which would be provided by compliance with the requirements of the standard.

(4) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or organized group of individuals, or an agency, authority, or instrumentality of the state or a political subdivision thereof.

(5) "Temporary variance" means a written order issued by a department authorizing an employer to deviate from the requirements of an occupational safety or health standard prior to the effective date of the standard for the specific period of time necessary for the employer to achieve compliance with the standard.

History: 1979 AC.

R 408.22212 Effect of variance.

Rule 1212. A variance granted pursuant to this part shall have only future effect. In his discretion, a director may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employer involved, and a proceeding on the citation or a related issue concerning a proposed penalty or period of abatement is pending before a department or the board of health and safety compliance and appeals, until the completion of that proceeding.

History: 1979 AC.

R 408.22213 Notice of granted variance; publication.

Rule 1213. Notice that a variance has been granted under this part shall be published in the MIOSHA News, a quarterly publication of the department of consumer and industry services.

History: 1979 AC; 1998-2000 AACS.

R 408.22214 Notice to applicant and affected employees.

Rule 1214. (1) A department, upon granting a variance, shall notify by mail the applicant and affected employees, if known, of the granting of the variance, including the terms and conditions thereof.

(2) An employer, upon receiving notice that a variance has been granted, shall notify affected employees of the granting of the variance by giving to them a copy of the variance and posting a statement containing a summary of the variance. A summary of the variance shall specify where a copy of the variance may be examined. The posting shall be at the area in which the affected employees work.

History: 1979 AC.

R 408.22215 Form of documents, subscriptions, copies.

Rule 1215. A particular form is not prescribed for applications and other papers which may be filed in proceedings under these rules. However, an application and other papers shall be clearly legible, comply with the provisions of section 27 of the act, and be signed by the person filing them.

History: 1979 AC.

APPLICATION FOR VARIANCE

R 408.22221 General application requirements.

Rule 1221. (1) An employer desiring a temporary or permanent variance from a standard, or a portion of a standard, shall file a written application containing the information prescribed in this rule and R 408.22222 or R 408.22223 with the appropriate division of the Department of Consumer and Industry Services, Bureau of Safety and Regulation, State Secondary Complex, 7150 Harris Drive, Box 30643, Lansing, Michigan 48909.

(2) An application for a variance shall include all of the following information.

(a) The name and address of the firm, and the name and title of the person filing the application.

(b) The address of the place of employment involved.

(c) A specification of the standard, or portion of the standard, from which the application seeks a variance.

(d) A request for a hearing, as provided in these rules.

(e) A statement that the applicant has informed affected employees of the application, at the time the application for a variance was filed, by giving a copy of the application to the affected employees' authorized representative, if any, and by posting a copy of the application or a statement containing a summary of the application. A summary of the application shall specify where a copy of the application may be examined. Posting shall be at the area in which the affected employees work.

(f) A description of how affected employees have been informed of the variance application, and of their right to petition the director for a hearing.

(3) The department may issue an interim order subject to the following conditions.

(a) An application for an interim order may be made to be effective until a decision is rendered on the application for the variance. An application for an interim order shall include a statement of facts and reasons as to why the applicant believes that the requested order should be granted. The department may rule ex parte upon the application for an interim order.

(b) The department may grant an interim order on its own motion.

(c) If an application for an interim order filed pursuant to subdivision (a) of this subrule is denied, then the applicant shall be given prompt written notice of the denial. This notice shall include a statement of the grounds for denial.

(d) If an interim order is granted, then the department shall serve a copy of the order upon the applicant and other parties. The terms of the interim order may specify necessary or appropriate conditions. The order shall provide that the applicant shall give notice of the granting of the order and its terms to affected employees by the same means used to inform them of an application for a variance.

(4) Where the application for a variance concerns a state standard or a portion of a state standard, identical in requirements and substance to a federal standard, the applicant shall do all of the following.

(a) Identify the identical federal standard.

(b) Certify whether the applicant has filed for a variance, on the same facts, with the assistant secretary for occupational safety and health, U.S. department of labor.

(c) Certify whether citations for violations of the identical federal standard, or portion of the federal standard, have been issued to the applicant by the federal government. If a citation has been issued, then identification shall be included.

(5) Variances granted by the U.S. department of labor to multistate employers pursuant to 29 CFR 1905.13(c) (1975) shall be deemed as an authoritative interpretation of the employers' compliance obligation with the state standard.

History: 1979 AC; 2000 AACCS.

R 408.22222 Application for temporary variance.

Rule 1222. An employer submitting an application for a temporary variance shall include in the application, in addition to the information required in R 408.22221, the following.

(a) A statement that the applicant is unable to comply with the standard, or portion thereof, and a detailed explanation of the reason why.

(b) A statement of the steps the applicant has taken and shall take, with specific dates where appropriate, to protect employees against the hazard covered by the standard.

(c) A statement indicating when the applicant shall comply with the standard, and what steps the applicant has taken and shall take, with specific dates where appropriate, to comply with the standard.

(d) A statement of the facts establishing that the applicant is unable to comply with a standard by its effective date because of the unavailability of professional or technical personnel, because of the unavailability of materials needed to come into

compliance with the standard, or because necessary construction or alteration of facilities cannot be completed by the effective date.

History: 1979 AC.

R 408.22223 Application for permanent variance.

Rule 1223. An employer submitting an application for a permanent variance shall include in the application, in addition to the information required in R 408.22221, the following.

(a) A description of the conditions, practices, means, methods, operations, and processes used or proposed to be used by the applicant.

(b) How the conditions, practices, means, methods, operations, and processes used or proposed to be used would provide employment to employees which is as safe and healthful as those required by the standard for which a variance is sought.

History: 1979 AC.

R 408.22224 Application for modification, revocation, and renewal of variance; contents; informing affected employees; furnishing copy of application to employer; notice of intent to revoke or modify a variance; publication of notice.

Rule 1224. (1) An employer or an affected employee may apply in writing to the department for a modification, revocation, or renewal of a variance issued under section 27 of the act. The application shall contain all of the following information.

(a) The name and address of the firm, and the name and title of the applicant.

(b) A description of the relief, whether modification, revocation, or renewal, which is sought.

(c) A statement setting forth with particularity the grounds for the modification, revocation, or renewal.

(d) Any request for a hearing as provided in these rules.

(2) If the applicant is the employer, a certification shall be made that the applicant has informed his affected employees of the application by doing both of the following.

(a) Giving a copy of the application to the affected employees' authorized representative.

(b) Posting a copy of the application or a statement containing a summary of the application. If a summary of the application is posted, it shall specify where a copy of the full application may be examined. Posting shall be at the area in which the affected employees work.

(3) If the applicant is an affected employee, then the department shall make a certification that a copy of the application has been furnished to the employer.

(4) A department may, on its own motion, proceed to modify or revoke a variance. In that event, the department shall give actual notice of its intention to revoke or modify to the employer and affected employees. The notice shall inform the employer and affected employees of their right to request a hearing. A request for a hearing shall include a short and plain statement of the following.

(a) How the proposed modification or revocation will affect the requesting party.

(b) What the requesting party seeks to show on the subjects or issues involved.

(5) A notice of the department's own intention to modify or revoke a variance shall be published in the MIOSHA News in the same manner as required by R 408.22227.

History: 1979 AC; 1998-2000 AACCS.

R 408.22225 Action on defective variance application.

Rule 1225. (1) If an application filed pursuant to these rules is defective by not conforming to the applicable requirements, a department shall promptly return the application to the applicant with a brief statement indicating the reason for its return.

(2) The return of an application because it is defective shall be without prejudice to the filing of another application.

History: 1979 AC.

R 408.22226 Requests for hearing on application.

Rule 1226. (1) Within 10 days after the time the employer gives notice to employees of the filing of an application for a variance in accordance with employee notice requirements of these rules, the applicant or affected employee may file with the department a request for a hearing on the application.

(2) A request for a hearing filed pursuant to subrule (1) shall include the following.

(a) A concise statement of facts showing how the applicant or employee would be affected by the relief applied for.

(b) A specification of any statement or representation in the employer's application which is in dispute, and a concise summary of the facts that would be presented.

(c) Views or arguments on any issue of fact or law presented.

(3) The department, on its own motion or that of a party, may consolidate or contemporaneously consider 2 or more proceedings which involve the same or closely related issues.

History: 1979 AC.

R 408.22227 Application for variance; interim order; publication of summary; opportunity for public response; informal hearing; notice; issuance of denial or variance.

Rule 1227. (1) Upon receipt of a valid application for a variance, and if the application has not been denied pursuant to this part, the department may issue an interim order and shall publish in the MIOSHA News a summary of the application. The published notice shall include a statement outlining the opportunity for public response and an informal hearing. This informal hearing is separate from the formal hearing that is provided for in R 408.22226 and R 408.22231 to R 408.22251 of this part.

(2) Upon request for an informal hearing resulting from the published application for a variance, the department shall notify the person requesting the hearing, the

employer applying for the variance, the employer's employees, or the authorized employee representative, of all of the following.

(a) The time, date, place, and the subject matter of the hearing.

(b) The authority under which the hearing is to be held.

(3) The department shall consider the views expressed by the participants at the informal hearing, if held, and shall issue a denial of the application or shall issue the variance.

History: 1979 AC; 1998-2000 AACSS.

HEARINGS

R 408.22231 Notice of hearing; contents; referral to hearing officer.

Rule 1231. (1) Upon request for a hearing as provided in R 408.22226 or upon its own initiative, a department shall serve or cause to be served on the parties a reasonable notice of hearing.

(2) A notice of hearing served under subrule (1) shall include the following.

(a) The time, date, place, and nature of the hearing.

(b) The legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the section of the act and rules involved.

(d) A brief statement of the issues involved.

(3) The matter shall be referred to a hearing officer or another department official designated by the department who shall serve as the hearing officer at the hearing on a variance.

History: 1979 AC.

R 408.22232 Manner of service.

Rule 1232. Service of a document upon any party shall be made by personal delivery or mailing by certified mail to the last known address of the party. The person serving the document by personal delivery shall certify to the manner and the date of the service.

History: 1979 AC.

R 408.22233 Hearing officers or other officials; powers and duties.

Rule 1233. (1) A hearing officer designated to preside over a hearing shall have all powers necessary or appropriate to conduct a fair, full, and impartial hearing, including the power to.

(a) Administer oaths and affirmations.

(b) Rule upon offers of proof and receive relevant evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Consider and rule upon procedural requests.

(f) Hold conferences for the settlement or simplification of the issues by consent of the parties.

(g) Make, or to cause to be made, an on-site visit to the place of employment involved.

(h) Prepare proposed decisions.

(2) Except to the extent required for the disposition of ex parte matters, a hearing officer shall not consult a person or a party on any fact at issue, unless upon notice and opportunity for all parties to participate.

(3) When a hearing officer deems himself disqualified to preside over a particular hearing, he shall withdraw therefrom by notice on the record directed to the director. A party who deems a hearing officer for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file with the director, a motion to disqualify and remove the hearing officer. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification. The director shall rule upon the motion.

History: 1979 AC.

R 408.22234 Pre-hearing conference.

Rule 1234. (1) Upon his or her own motion or the motion of a party, the hearing officer may request the parties or the parties' counsel to meet with the hearing officer for a conference to consider all of the following.

(a) Simplification of the issues.

(b) Necessity or desirability of amendments to documents for purposes of clarification, simplification, or limitation.

(c) Stipulations, admissions of fact, and contents and authenticity of documents.

(d) Limitation of the number of parties and of expert witnesses.

(e) Other matters as may tend to expedite the disposition of the proceeding, and to assure a just conclusion to the proceeding.

(2) The hearing officer shall state on the record the stipulations, agreements, and other matters agreed to by the parties at the conference.

History: 1979 AC; 1998-2000 AACCS.

R 408.22235 Consent findings and orders.

Rule 1235. (1) At any time before the hearing or before the reception of evidence in a hearing, or during a hearing, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and an order disposing of the whole or a part of the proceeding. The allowance of this opportunity and the duration thereof shall be in the discretion of the hearing officer, after considering the nature of the proceeding, the representations of the parties, and the

probability of an agreement which would result in a just disposition of the issues involved.

(2) An agreement containing consent findings and an order disposing of a proceeding shall also provide the following.

(a) That the consent finding and order shall have the same force and effect as if made after a full hearing.

(b) That the record on which an order may be based shall consist solely of the application and the agreement.

(c) A waiver of any further procedural steps before the hearing officer and the director.

(d) A waiver of any right to challenge or contest the validity of the consent findings and order made in accordance with the agreement.

(3) On or before the expiration of the time granted for negotiations, the parties or their counsel may.

(a) Submit the proposed agreement to the hearing officer for his consideration.

(b) Inform the hearing officer that agreement cannot be reached.

(4) In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the hearing officer shall accept the agreement by issuing his decisions based upon the agreed findings.

History: 1979 AC.

R 408.22236 Depositions.

Rule 1236. (1) For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition.

Depositions shall be taken before a person designated by the hearing officer having the power to administer oaths.

(2) A party desiring to take the deposition of a witness shall make application in writing to the hearing officer, setting forth the following.

(a) The reasons why the deposition should be taken.

(b) The time and date when, the place where, and the name and post office address of the person before whom the deposition is to be taken.

(c) The name and address of the witness.

(3) A notice, as the hearing officer may order, shall be given by the party taking the deposition to every other party.

(4) Taking and receiving in evidence shall be as follows.

(a) Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him.

(b) The questions propounded and the answers thereto, together with objections made, shall be reduced to writing, read by the witness, subscribed by the witness, and certified by the person before whom the deposition is taken.

(c) The person designated by the hearing officer, before whom the deposition is taken, shall mail 2 copies of the deposition by certified mail to the hearing officer.

(d) Subject to such objections to the questions and answers as were noted at the time of taking the deposition, and those objections would be valid were the witness personally present and testifying, the deposition may be read and offered in evidence by

the party taking it as against a party who was present, represented at the taking of the deposition, or who had due notice thereof.

(e) Except for purposes of impeachment, a deposition shall not be admitted in evidence if the witness is available.

History: 1979 AC.

R 408.22237 Hearings.

Rule 1237. (1) Except as may be ordered otherwise by the hearing officer, the party applicant for relief shall proceed first at a hearing.

(2) The party applicant shall have the burden of proof.

(3) A party shall be entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full disclosure of the facts.

Any oral and documentary evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs may be received, but a hearing officer may exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(4) The testimony of a witness shall be upon oath or affirmation administered by the hearing officer.

(5) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of an examination or cross-examination or to the failure to limit the scope, he shall state briefly the grounds for the objection. Rulings on objections shall appear in the record.

(6) A formal exception to an adverse ruling is not required.

(7) Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the departments by reason of their functions are presumed to be expert, if the parties are given adequate notice, at the hearing or by reference in the hearing officer's proposed decision, of the matters so noticed, and, upon timely request, are given adequate opportunity to show the contrary before the final decision.

(8) Hearings shall be recorded, but need not be transcribed, unless requested by a party. The party requesting the transcript shall pay for the transcription. Copies of the transcript may be obtained by the parties upon written application filed with a department and upon the payment of fees at the rate provided on notice by the department.

History: 1979 AC.

R 408.22238 Proposed decision of the hearing officer; service; contents; exception; inoperative while on referral; filing proposed order.

Rule 1238. (1) Within 10 days of the conclusion of a hearing or within 5 days of the receipt of the transcript, if any, or such additional time as allowed by the hearing officer, each party may file with the hearing officer a proposed order, including proposed findings of fact and conclusions of law, with such supporting argument and reasoning as are necessary to support the proposed order.

(2) Within 20 days of the conclusion of a hearing or within 15 days of the receipt of the transcript, if any, the hearing officer shall serve upon parties by certified mail or personal service a proposed decision which shall include the following.

(a) A statement of the reasons for the proposed decision.

(b) Issues of fact and law necessary for the proposed decision.

(3) Unless a party, within 10 days of the receipt of the proposed decision, files exceptions thereto with supporting reasons, the proposed decision shall become a final decision of the director. Exceptions shall refer to the specific issues of fact and law, or terms of the proposed decision excepted to. If the testimony was transcribed, reference shall be made to specific pages of the transcript, and shall suggest modified issues of fact and law, and terms of the proposed decision.

(4) The decision of the hearing officer shall be based upon consideration of the whole record and shall be made on the basis of a preponderance of reliable and probative evidence.

(5) A hearing officer's proposed decision under this rule shall not be operative while that decision is being referred to the director.

History: 1979 AC.

R 408.22239 Transmission of record.

Rule 1239. (1) If exceptions and objections thereto are filed, the hearing officer shall transmit the record of the proceeding to the director.

(2) The record shall include the following.

(a) Notices, pleadings, motions, and intermediate rulings.

(b) Questions and offers of proof, objections, and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would not serve a useful purpose.

(e) Proposed findings of fact and conclusions of law and exceptions and objection thereto.

(f) Any proposed decision, opinion, order, or report by the hearing officer.

History: 1979 AC.

R 408.22240 Decision of director.

Rule 1240. (1) Upon receipt of the record transmitted under these rules, the director shall, within a reasonable time, render his or her decision.

(2) The decision may affirm, modify, or set aside, in whole or in part, the findings, conclusions, and the rule or order contained in the proposed decision of the hearing officer, and shall include a statement of reasons which shall provide for each conclusion of law, supporting authority, or reasoned opinion.

(3) The director shall serve or cause to be served, a copy of his or her decision upon all parties and the hearing officer.

History: 1979 AC; 1998-2000 AACCS.

JUDICIAL REVIEW

R 408.22251 Request for rehearing or reconsideration.

Rule 1251. (1) An aggrieved party may file a petition for rehearing or reconsideration with the director within 60 days of the mailing of the notice of the director's decision. The request shall be in writing and include specific reasons in support of the request.

(2) Upon receipt of a petition for a rehearing, the director shall, within 10 days, grant or deny the request and provide notice of the decision to the parties.

(3) If the request for reconsideration or rehearing is denied, notice of the denial, along with the director's decision on the variance application, shall be deemed to be final department action for purposes of judicial review.

History: 1979 AC.