

DEPARTMENT OF PUBLIC HEALTH

NOTICE OF PROPOSED AMENDMENTS

- 1) Heading of the Part: Rules of Practice and Procedure in Administrative Hearings
- 2) Code Citation: 77 Ill. Adm. Code 100
- 3)

<u>Section Numbers</u> :	<u>Proposed Action</u> :
100.1	Amend
100.2	Amend
100.3	Amend
100.4	Amend
100.5	Amend
100.6	Amend
100.7	Amend
100.8	Amend
100.10	Amend
100.11	Amend
100.12	Amend
100.13	Amend
100.14	Amend
100.16	Amend
100.17	Amend
100.18	Amend
100.19	Amend
100.20	New
- 4) Statutory Authority: Section 5-10(a)(i) of the Illinois Administrative Procedure Act [5 ILCS 100/5-10(a)(i) and Section 55 through 55.63 of the Civil Administrative Code of Illinois [20 ILCS 2310/55 through 55.63]
- 5) A Complete Description of the Subjects and Issues Involved: The Department's hearing rules are being amended to update hearing procedures and referenced materials, to more accurately reflect statutory language, and to add provisions that simplify and streamline procedures for hearings conducted in regard to violations of the Smoke Free Illinois Act [410 ILCS 82]. Public Act 95-1029 amended the Smoke Free Illinois Act to provide for the issuance of citations and to provide an opportunity for a violator to contest the citation in accordance with the Illinois Administrative Procedure Act. Hearings are to be conducted in accordance with the Department's rules established for conducting hearings under the Illinois Administrative Procedure Act. The Public Act also requires the hearings to be conducted at the nearest regional office of the Department, or in a location contracted by the Department in the county where the citation was issued. Parties to the

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hearing are the enforcing agency (either the Department, a local health department, or a local law enforcement agency) and the violator.

- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this rulemaking replace any emergency rulemaking currently in effect? No
- 8) Does this rulemaking contain an automatic repeal date? No
- 9) Does this rulemaking contain incorporations by reference? No
- 10) Are there any other proposed rulemakings pending on this Part? No
- 11) Statement of Statewide Policy Objective: This rulemaking does not create or expand a State Mandate.
- 12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Interested persons may present their comments concerning this rulemaking within 45 days after the publication of this issue of the *Illinois Register* to:

Susan Meister
Division of Legal Services
Illinois Department of Public Health
535 W. Jefferson St., 5th floor
Springfield, Illinois 62761

217/782-2043
e-mail: dph.rules@illinois.gov

- 13) Initial Regulatory Flexibility Analysis:
 - A) Types of small businesses, small municipalities and not for profit corporations affected: Local law enforcement agencies, Certified Local Health Departments, liquor licensees and restaurants
 - B) Reporting, bookkeeping or other procedures required for compliance: Section 100.18 sets forth requirements for Records of Proceedings.

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- C) Types of professional skills necessary for compliance: None
- 14) Regulatory Agenda on which this rulemaking was summarized: This rulemaking was not included on either of the two most recent regulatory agendas because: The need for the rulemaking was not apparent when the Regulatory Agendas were prepared.

The full text of the Proposed Amendments begins on the next page:

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TITLE 77: PUBLIC HEALTH
CHAPTER I: DEPARTMENT OF PUBLIC HEALTH
SUBCHAPTER a: GENERAL RULES

PART 100

~~RULES OF PRACTICE AND PROCEDURE IN ADMINISTRATIVE HEARINGS~~

Section

100.1	Authority and Applicability of these Rules
100.2	Definitions
100.3	Parties to Hearings
100.4	Appearance – Right to Counsel
100.5	Emergency Action
100.6	Hearings Requested by Complainants
100.7	Initiation of a Contested Case
100.8	Motions
100.9	Form of Papers
100.10	Service
100.11	Prehearing Conferences
100.12	Discovery
100.13	Hearings
100.14	Subpoenas
100.15	Administrative Law Judge's Report and Recommendations
100.16	Proposal for Decision
100.17	Final Orders
100.18	Records of Proceedings
100.19	Miscellaneous
<u>100.20</u>	<u>Referenced Materials</u>

AUTHORITY: Implementing and authorized by Section 5-10(a)(i) of the Illinois Administrative Procedure Act [5 ILCS 100/5-10(a)(i)] and Sections 55 through 55.63 of the Civil Administrative Code of Illinois [20 ILCS 2310/55 through 55.63].

SOURCE: Adopted at 2 Ill. Reg. 38, p. 91, effective September 23, 1978; amended and codified at 4 Ill. Reg. 43, p. 127, effective October 14, 1980; amended at 5 Ill. Reg. 14167, effective December 9, 1981; amended at 6 Ill. Reg. 2235, effective February 2, 1982; amended at 11 Ill. Reg. 1937, effective January 9, 1987; amended at 18 Ill. Reg. 5980, effective April 1, 1994; amended at 21 Ill. Reg. 3208, effective March 3, 1997; amended at 33 Ill. Reg. _____, effective _____.

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Section 100.1 Authority and Applicability ~~of these Rules~~

- a) This Part governing~~of~~ practice and procedure for administrative hearings is promulgated pursuant to Section 5-10(a)(i) of the Illinois Administrative Procedure Act (IAPA) ~~[5 ILCS 100/5-10(a)(i)]~~.
- b) This Part shall govern all contested cases in the Department of Public Health, State of Illinois, except as noted in subsections (d) and (e) of this Section. If~~Where~~ a licensing statute prescribes certain procedures or requirements for licensure hearings, those procedures or requirements will be followed as though they were set forth in this Part~~these rules~~. If~~In the event~~ there is a conflict between the licensing statute and this Part, the licensing statute shall prevail.
- c) This Part does~~shall~~ also apply to contested cases resulting from the Department's administration of any program on behalf of the United States government. If~~In the event~~ there is a conflict between federal regulations and this Part~~these rules~~, federal regulations shall prevail.
- d) This Part does~~shall~~ not govern the various informal administrative procedures established by the Department to resolve licensing issues or conflicts prior to initiating any action requiring a formal hearing.
- e) This Part does~~shall~~ not govern contested cases conducted pursuant to 77 Ill. Adm. Code 1130 (Health Facilities Planning Procedural Rules)~~1180 (Practice and Procedure in Administrative Hearings)~~ (Health Facilities Planning Board).

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.2 Definitions

"Administrative Law Judge" shall mean any attorney licensed to practice law in Illinois, appointed by the Director to preside at an administrative hearing. For the purpose of hearings conducted pursuant to Sections 2-100(d) and 3-410 of the Nursing Home Care Act (NHCA), the Department's Regional Health Officer in the region in which the facility is located shall act as administrative law judge~~Administrative Law Judge~~.

"Alleged Violator" shall mean a person issued a citation under the Smoke Free

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Illinois Act.

"Citation" shall mean a document alleging a violation of the Smoke Free Illinois Act.

"Contested ~~Case~~ease" shall have the meaning ascribed to it in Section 1-30 of the IAPA and shall include hearings pursuant to the Smoke Free Illinois Act.

"Department" shall mean the Illinois Department of Public Health, ~~State of Illinois.~~

"Director" shall mean the Director or the designee of the Director of the Department of Public Health, ~~State of Illinois.~~

"Enforcing Agency" shall be as described in Section 40 of the Smoke Free Illinois Act.

~~"IAPA" shall mean the Illinois Administrative Procedure Act [5 ILCS 100].~~

"License" shall have the meaning ascribed to it in Section 1-35 of the IAPA.

"Licensing" shall have the meaning ascribed to it in Section 1-40 of the IAPA.

~~"NHCA" shall mean the Nursing Home Care Act [210 ILCS 45].~~

"Person" shall have the meaning ascribed to it in Section 1-60 of the IAPA.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.3 Parties to Hearings

- a) Except for hearings conducted pursuant to the NHCA and the Smoke Free Illinois Act, ~~Nursing Home Care Act and the WIC Vendor Management Act~~, the parties to an administrative hearing before the Department are the Department (as Complainant) and the Respondent.
- b) For hearings conducted pursuant to the NHCA:
 - 1) In a Complainant's hearing (Section 3-702(g) of the NHCA), the parties

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are the Department and the Complainant. The facility ~~that~~which was investigated may participate as a third party (see Section 100.6 of this Part).

- 2) In a denial of access hearing (Section 2-110(d) of the NHCA), the parties are the person who requested a hearing based on denial of access to a facility and the facility.
- 3) In an involuntary transfer/discharge hearing, the parties are the resident who is to be transferred/discharged and the facility.
- 4) In all other NHCA hearings, the parties are the Department (as Complainant) and facility (as Respondent). If the action resulted from a complaint filed with the Department, the person who filed the complaint may participate as a third party.
- 5) A third party ~~shall~~must file an appearance with the ~~Administrative Law Judge~~administrative law judge on or before the date of the prehearing conference, if one is scheduled, or prior to the hearing date if no prehearing conference was scheduled.

c) For hearings conducted pursuant to the Smoke Free Illinois Act, the parties to the hearing shall be the enforcing agency and the alleged violator, unless the Department issues the citation, in which case the Department shall be a party. (Section 40(d) of the Smoke Free Illinois Act)

~~e) For hearings conducted pursuant to the WIC Vendor Management Act [410 ILCS 255]:~~

- ~~1) In denial of application cases, the parties are the entity whose application is being denied (as Applicant) and the Department (as Respondent).~~
- ~~2) In all other cases, the parties are the Department (as Complainant) and the authorized or unauthorized vendor (as Respondent).~~

d) A Respondent or alleged violator is a person or entity against whom a complaint or petition is filed or to whom a citation or notice of an opportunity for hearing is directed.

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(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.4 Appearance – Right to Counsel

- a) Any party to a proceeding may appear and be represented by an attorney authorized to practice law in the State of Illinois. Any individual party may waive this right and ~~either~~ represent himself or herself. For hearings conducted pursuant to Sections 2-100(d) and 3-410 of the NHCA, a visitor or resident shall have the option of being represented by a non-attorney of his or her choosing. A corporation, partnership or association shall appear and be represented only by an attorney authorized to practice law in the State of Illinois. A shareholder, corporate officer, employee, or member of the board of directors may not appear or represent a corporation or association unless that individual is authorized to practice law in the State of Illinois.
- b) All persons appearing in proceedings before the Department, including a visitor's or resident's non-attorney representative, shall conform to the standards of ethical conduct required of attorneys before the courts of Illinois. If any person or attorney does not conform to ~~thosesueh~~ standards, the administrative law judge may decline to permit ~~thatsueh~~ person to appear in any proceeding.
- c) Any attorney or other person appearing before the Department as a representative of a visitor or resident shall file an Appearance form containing: the name of the party represented; the name, address and telephone number of the attorney or representative; an affirmative statement that the attorney is or is not duly licensed in the State of Illinois; and the written signature of the attorney or representative.
- d) Special appearances are not recognized. The initial appearance, regardless of form, is deemed a general appearance.
- e) An attorney may withdraw his or her appearance and/or representation only upon motion and appropriate ruling by the administrative law judge. However, attorneys may be substituted without motion upon notice to all parties and the administrative law judge if the substitution will not delay the proceedings, a statement to that effect is contained in the notice, and a substitute Appearance form is filed concurrently with the notice~~Notice~~.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

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Section 100.5 Emergency Action

If the Director finds that the public interest, safety or welfare imperatively requires emergency action, and if the Director incorporates a finding to that effect in an order, summary suspension of a license or [summary suspension of](#) authorization to conduct a particular activity may be ordered, pending proceedings for revocation, termination or other [action](#). ~~Those actions, which~~ proceedings shall be promptly instituted and determined. (Section 10-65 of the IAPA)

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.6 Hearings Requested by Complainants

Pursuant to Section 3-702(g) of the NHCA, a complainant who is dissatisfied with the determination or investigation [of his or her complaint](#) by the Department ~~of his or her complaint~~ may request a hearing. [\(Section 3-702\(g\) of the NHCA\) Any complainant requesting a hearing shall be deemed to have consented in writing to disclosure of his or her name.](#)

- a) The parties to administrative hearing pursuant to this Section are the Department and the Complainant. *The facility shall be given notice of any such hearing and may participate in the hearing as a third party* (Section 3-702(g) of the NHCA). A request to participate as a third party must be filed in accordance with Section 100.3(b)(5) of this Part.
- b) For the purposes of this Section, a Complainant is an individual who has filed a complaint pursuant to the NHCA. If the individual filing the complaint indicates that she or he is acting as the agent of an organization or another individual, and so requests, [thesaid](#) organization or other individual will be the Complainant for the purposes of this Section. In that case, the individual who acted as agent for the organization or other individual will be a "referring agent". Unless objected to by the Complainant, the referring agent shall be entitled to receive Notice of Complaint Determination and any request for hearing made pursuant to this Part.
- c) In accordance with Sections 3-703 through 3-712 of the NHCA, the Director shall designate an administrative law judge to conduct hearings requested by dissatisfied Complainants. All hearings shall be conducted pursuant to the provisions of this Part.
- d) Dissatisfied Complainants pursuant to this Section shall have the opportunity to contest the adequacy of the Department's investigation and its determination as to

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whether the complaint was valid, invalid, or undetermined and also the Department's determination as to whether to issue any violation as a result of ~~the said~~ determination. Whenever "determination" is used in this Section, it shall include any investigation resulting in ~~the said~~ determination.

- e) Dissatisfied Complainants pursuant to this Section do not have the opportunity to contest any other determinations or decisions of the Department.
- f) Nothing contained ~~in this Section~~ ~~herein~~ shall be deemed to entitle a dissatisfied Complainant to additional hearings or to a rehearing of a case ~~that which~~ has already been the subject of a formal administrative hearing or a Final Order.
- g) Complainants pursuant to this Section shall carry the burden to prove, by a preponderance of the evidence, that the aforesaid determinations of the Department were improper.
- h) At the conclusion of the hearing, the administrative law judge shall prepare a report in accordance with Section 100.15, and make a recommendation to the Director specifying whether the complaint should be reinvestigated and/or any invalid or undetermined finding should be changed to a valid finding or the Department should reconsider the failure to cite a facility with any violation.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.7 Initiation of a Contested Case

- a) In contested cases, except those held pursuant to Section 100.6, the Department shall serve on the Respondent a Notice of Opportunity for an Administrative Hearing, which shall contain:
 - 1) *a statement of the time, place and nature of the action;*
 - 2) *a statement of the legal authority and jurisdiction under which the hearing is to be held~~action is being initiated~~;*
 - 3) *a reference to the particular Sections of the substantive and procedural statutes and rules involved;*
 - 4) *allegations of noncompliance;*

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- 5) a statement of the procedure for requesting an administrative hearing (see Section 10-25 of the IAPA), including a date by which the request must be received by the Department, which must be set at least 10ten days after the Notice is mailed or personally served;
 - 6) ~~unless~~Unless the case is brought pursuant to the Smoke Free Illinois Act, Title XVIII (health insurance for the aged and disabled) or XIX (medical assistance) of the Social Security Act, or the NHCA ~~or the WIC Vendor Management Act~~, a statement setting forth the requirement of an Answer, pursuant to subsection (d) of this Section; and
 - 7) *except where a more detailed statement is otherwise provided for by law, a short and plain statement of the matters asserted, the consequences of a failure to respond, and the official file or reference number.* (Section 10-25 of the IAPA)
- b) A person who receives a Notice of an Opportunity for an Administrative Hearing must submit a written request for a hearing to the Department. The request is to be sent to the Department at the address stated in the Notice and must be received by the date set forth in the Notice. Failure to comply with this Section shall constitute a waiver of the person's right to an administrative hearing. A person receiving a Citation pursuant to the Smoke Free Illinois Act shall submit a request for hearing to the enforcing agency or its designee as written in the citation, which shall promptly forward the request to the Department for scheduling. Failure to request a hearing within 10 calendar days after service of the citation (or failure to attend a hearing when scheduled) or failure to pay the total amount of the fine, without objection, within 28 calendar days after service of the citation will result in a final decision and order being entered against the alleged violator.
- c) Upon receipt of a timely request for hearing, the Department shall issue a Notice of Hearing or Prehearing Conference. ~~The Notice~~notice of Hearing~~hearing or Prehearing Conference~~prehearing conference shall contain:
- 1) *a statement of the time, place, and nature of the hearing;*
 - 2) ~~a statement of the time and place that the hearing or Prehearing Conference will be held;~~

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~~2)3)~~ *a statement of the legal authority and jurisdiction under which the hearing is to be held; and*

~~3)4)~~ *the names and mailing addresses of the administrative law judge, all parties, and all other persons to whom the agency gives notice of the hearing, unless otherwise confidential by law. (Section 10-25 of the IAPA)*

- d) Unless the case is brought pursuant to [the Smoke Free Illinois Act](#), Title XVIII or XIX of the Social Security Act, [or the NHCA](#), ~~or the WIC Vendor Management Act~~, a written Answer to the Allegations of Noncompliance shall be filed by a Respondent. The Answer must be served on all parties within 20 days after receipt of the notice alleging noncompliance. If a Respondent fails to file an Answer, each alleged violation of a statute or Department rule by the Respondent shall be deemed to have been admitted. If the Respondent has insufficient knowledge of the facts to form a belief as to the truth of the allegation, the Respondent may so state with an affidavit of insufficient knowledge. If the Respondent wishes to raise defenses ~~thatwhich~~ are affirmative in nature or would be likely to take the Department by surprise, the Respondent must do so in the Answer. If Affirmative Defenses are filed within an Answer, the Department shall reply to ~~thesueh~~ Affirmative Defenses within 20 days after receipt of the Answer.
- e) Amendments to the Allegations of Noncompliance and Answers may be allowed upon proper motion at any time during the pendency of the proceedings on such terms as shall be just and reasonable.
- f) All written documents provided for under this Section shall be liberally construed with a view toward doing substantial justice between the parties.
- g) Venue shall be the location designated in the Notice of Administrative Hearing. Venue may be moved to another location upon stipulation by all parties or upon a showing to and a finding by the administrative law judge that exceptional circumstances [exist](#), including, but not limited to, age, infirmity or inability to travel, ~~that-exist thatwhich~~ make it desirable, in the interest of justice, to allow a change of venue.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

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Section 100.8 Motions

- a) Motions, unless made during a hearing, shall be made in writing and shall set forth the relief or order sought and the legal authority for the action requested. Except as otherwise provided in this Part or by a specific statute, motions may seek any relief or order recognized in the ~~Illinois~~ Code of Civil Procedure and Rules of the Illinois Supreme Court, and shall include a reference to the applicable Section of ~~the such~~ Code or Rules. Motions based on a matter ~~that which~~ does not appear of record shall be supported by affidavit.
- b) Written motions shall be titled as to the party making the motion and the nature of the relief sought. ~~The Such~~ title shall be in capital letters and shall be placed either below the caption or to the right of the caption beneath the docket number. No motion shall be identically titled with any other motion. Examples of properly-titled motions: Respondent's Motion to Dismiss, Respondent's Second Motion to Dismiss.
- c) Motions to the pleadings if not raised at the earliest opportunity shall be deemed waived. Motions to the pleadings shall not be granted if the pleadings ~~conform to are in conformity with~~ Section 100.7.
- d) The administrative law judge shall not have the authority to dismiss, postpone, vacate, or overturn an Order or Notice issued by the Director, but may make a recommendation to the Director ~~at~~ any time that circumstances merit such a recommendation.
- e) Motions for a continuance shall be granted only for good cause shown. Motions for a continuance shall be in writing and filed at least ~~five~~ working days prior to the hearing. Motions for a continuance shall be made immediately when the party learns that a continuance is needed. ~~Statements and statements~~ as to when the party learned that a continuance was needed, steps that were taken to avoid the continuance, and the current reasons the continuance is needed shall be contained in the motion. After one continuance has been granted to a party, additional continuances may be granted to that party only if:
- 1) a hearing on the issue of whether ~~or not~~ to grant the continuance has been held and the administrative law judge finds that the moving party has presented sufficient evidence showing entitlement to another continuance;
- or

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- 2) there is an emergency;⁵ or
- 3) all parties so stipulate.
- f) Whenever possible, as much of the hearing as possible shall be completed, and only those matters that must be continued shall be continued.
- g) If there is an unforeseen emergency, motions for a continuance may be made by telephone rather than in writing. Motions by telephone shall be made through a conference call involving the administrative law judge and all parties and shall be confirmed within ~~three~~ business days by the filing of a written motion.
- h) Responses shall be in writing unless made at a prehearing conference or a hearing.
- i) On motion made by any party, the administrative law judge who is the subject of ~~thesueh~~ motion shall determine whether he or she should be disqualified on the basis of bias or conflict of interest, and shall remove himself or herself if a determination is made that bias or a conflict of interest exists. If the motion is granted, the Director shall appoint a new administrative law judge. *An adverse ruling, in and of itself, shall not constitute bias or conflict of interest.* (Section 10-30 of the IAPA)
- j) Demands for a Bill of Particulars shall not be allowed.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.10 Service

- a) Notices under Section 100.7(a) shall be served either personally or by certified mail upon all parties (including complainants under the NHCA, ~~whenwhere~~ applicable) or their agents appointed to receive service of process unless the applicable licensing statute requires a different form of service, in which case service shall conform to the statute.
- b) Service to the last official address of a party or agent provided to the Department by a party shall be considered in compliance with this Section. Notices ~~and citations~~ sent by certified mail ~~thatwhich~~ have been returned to the Department, or to the enforcing agency in Smoke Free Illinois Act cases, as unclaimed or refused

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by the addressee shall be considered served. For purposes of this Section, the "last official address" shall be: the address listed on the most recent application submitted to the Department, unless the Department has been subsequently notified in writing of a change of address. For certified nursing assistants and habilitation aides, the "most recent application" shall be the information submitted by the training program or testing entity ~~that~~^{which} qualified the individual to be entered on the registry. Notice in Smoke Free Illinois Act cases shall be sufficient if served personally or if sent by certified mail to the alleged violator's address as it appears on the citation or as maintained with the Illinois Secretary of State as of the date of service.

- c) Service of pleadings or motions under this Section, unless otherwise provided for in this Section, shall be made by delivering in person or by depositing in the United States Mail, properly addressed with postage prepaid, one copy to each party to the proceedings. When any party or parties have appeared by attorney, service upon the attorney shall be deemed service upon ~~the~~^{such} party or parties. All pleading or motions under this Section shall also be served upon the administrative law judge.
- d) Proof of service under subsection (b) of this Section shall be by certificate of attorney, affidavit or acknowledgment.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.11 Prehearing Conferences

- a) A telephonic prehearing conference may be scheduled by the administrative law judge or Department ~~at their discretion~~ or as a result of a request pursuant to subsection (b) of this Section. This conference shall be held prior to the date of hearing and shall be for the purpose of considering:
- 1) the simplification of the issues;
 - 2) amendments to the pleadings;
 - 3) the possibility of obtaining admissions of fact and of documents ~~that~~^{which} will avoid unnecessary proof;
 - 4) the limitation of the number of expert ~~witnesses~~^{witness}; and

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- 5) any other matters ~~that~~which may aid in the disposition of the hearing.
- b) In any proceedings under this Section in which the Department has not scheduled a prehearing conference, any party to the proceedings may request the scheduling of a prehearing conference. ~~The~~Such request ~~shall~~must be made in writing and received by the administrative law judge at least ~~five~~5 days prior to the scheduled date of hearing. The requesting party shall serve all other parties to the proceedings with a copy of the request.
- c) Upon the receipt of a request for a prehearing conference in accordance with subsection (b) of this Section, the administrative law judge shall schedule the prehearing conference and notify all parties of the date, time and place of the conference.
- d) After a prehearing conference, the administrative law judge shall make a report ~~that~~which recites any action taken by the administrative law judge and any agreements made by the parties as to any of the matters considered.
- e) Any party may request additional prehearing conferences. The administrative law judge, in his or her discretion, may deny or grant such a request, based on the nature of the motion.
- f) A certified stenographic reporter (court reporter) will not be present at a prehearing conference unless one of the parties to the proceeding requests the Department to make arrangements for a court reporter to be present. ~~The~~Such request ~~shall~~must be received by the Department at least two working days in advance of the scheduled prehearing conference. The party requesting the presence of the court report shall be billed directly for the attendance fee of the reporter.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.12 Discovery

- a) Prior to or at the prehearing conference, the Department shall provide all parties with a copy of all of the Department's inspection or investigative reports relating to the Allegations of Noncompliance. If no pre-hearing conference is held, the Department shall provide copies of the investigative reports prior to the hearing.

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- b) Except for cases prosecuted under the Smoke Free Illinois Act, at least 21 days prior to the commencement of the hearing, each party shall provide all other parties with a copy of any document that which it may intend to offer into evidence. This subsection shall not require any party to again provide copies of those documents already provided by the Department under subsection (a) ~~above~~.
- c) Except for cases prosecuted under the Smoke Free Illinois Act, at least 21 days prior to the commencement of the hearing, each party shall provide all other parties with a list containing the name and address of any witness who may be called to testify.
- d) All parties shall be entitled to any exculpatory evidence in the Department's possession that which tends to support the Respondent's position or that which might impeach the credibility of a Department witness.
- e) Upon a written request by the Department, at any time after a notice or hearing request is filed, or at any stage of the hearing, the Respondent shall be required to produce within seven 7 days documents, books, records, or other evidence that ~~relates~~ which relate directly to conduct of the business entity or other subject of the administrative hearing.
- f) All parties shall be under a continuing obligation to promptly update requested discovery until the hearing is concluded without the necessity for further or additional requests.
- g) There shall be no depositions for discovery purposes or interrogatories allowed in any proceedings brought pursuant to this Part, except as agreed to by the parties.
- h) Except for cases brought against an individual under the Smoke Free Illinois Act, requests Requests to Admit Facts and Genuineness of Documents shall be allowed in accordance with Supreme Court Rule 216.
- i) Nothing contained in this Section herein shall preclude the parties from agreeing to the voluntary exchange of more information than is required.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.13 Hearings

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- a) All hearings conducted in any proceedings shall be open to the public.
- b) Hearings will be conducted by the Director or by an administrative law judge appointed by the Director. If the Director conducts the hearings, any reference in this Section to the administrative law judge shall be read to refer to the Director.
- c) The administrative law judge shall conduct hearings; administer oaths; issue subpoenas; hold informal conferences for the settlement, ~~simplifications~~simplification, or definition of issues; dispose of procedural requests, motions, and similar matters; continue the hearing from time to time when necessary; examine witnesses; and rule upon the admissibility of evidence.
- d) The administrative law judge shall direct all parties to enter their appearances on the record.
- e) Written opening arguments and written closing arguments shall not be permitted unless all parties so stipulate.
- f) Parties may by stipulation agree upon any facts involved in the proceeding. The facts stipulated shall be considered as evidence in the proceeding. Unless precluded by law, disposition may be made of any contested case by stipulation, agreed settlement, consent order, default, or ~~by~~ motion.
- g) At any stage of the hearing or after all parties have completed the presentation of their evidence, the administrative law judge may call for further testimony, subject to cross-examination by the parties.
- h) *The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. ~~Evidence~~However, evidence not admissible under ~~those~~such rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent ~~persons~~persons in the conduct of their affairs. Immaterial, irrelevant or unduly repetitious material shall be excluded~~Immaterial, irrelevant, or unduly repetitious material shall be excluded~~. A copy of the whole or any part of an admissible book, record, paper, or memorandum of the Department ~~that~~which is made by photostatic or other method of accurate and permanent reproduction ~~shall~~may be admitted in evidence at the hearing without further proof of the accuracy of ~~the~~such copy. *Objections to evidentiary offers may be made and shall be noted in**

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the record. (Section 10-40(a) of the IAPA)

- i) Official notice may be taken of matters of which *the* circuit courts of this State may take judicial notice. In addition, official notice may be taken of generally recognized technical or scientific facts within the ~~Department's~~ Department's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The ~~Department's~~ Department's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence. (Section 10-40(c) of the IAPA)
- j) A party may offer into evidence any of the following documents without foundation or other proof, provided that a copy of the document has been timely provided to all other parties in accordance with Section 100.12(b):
 - 1) records and reports of health care facilities, doctors, nurses, physical therapists; or other health care providers; however, ~~thesesuch~~ records and reports shall not include affidavits or other documents specifically prepared for litigation;
 - 2) investigation reports from ~~governmental~~ government law enforcement agencies;
 - 3) official police investigative reports and narratives, prepared by sworn Illinois police officers, Sheriff's Deputies and officers of the Illinois State and Secretary of State Police, prepared in the course of official duty, in cases brought under the Smoke Free Illinois Act;
 - 4) the enforcing agency's inspection or investigative reports produced pursuant to Section 100.12(a);
 - 5) copies of any official records maintained by a governmental agency.
- k) For good cause shown, including, but not limited to, age, infirmity, or inability to travel, evidentiary depositions shall be allowed.
- l) Absent a showing of good cause, no document shall be offered into evidence ~~thatwhich~~ was not disclosed in accordance with the requirements ~~ofin~~ Section

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100.12(b), and no witness shall testify whose name was not provided pursuant to Section 100.12(c). For purposes of this subsection, a showing of good cause shall mean that a party, through no fault of its own, did not have knowledge of a document to be offered into evidence or the name of a witness within the timeframe necessary for compliance with Section 100.12(b) and (c).

- m) Except for cases brought under the Smoke Free Illinois Act, the The Department will arrange for a certified stenographic reporter (court reporter) to make a stenographic record of the hearing in all administrative hearings under this Part~~these rules~~. Any person may make arrangements to obtain a copy of the stenographic record from the reporter. The Department reserves the right to employ a certified stenographic reporter. A copy of any stenographic record made by a Department employee may be purchased from the Department at a cost of half the actual cost to the Department~~one dollar per page~~. There shall be no audio or video taping apart from any made by the certified stenographic reporter employed for those purposes by the Department without the express consent of the administrative law judge and all parties to the hearing. In cases brought under the Smoke Free Illinois Act for which no court reporter is present, the administrative law judge shall make an audio recording of the proceedings and shall maintain the recording until 90 days after the Director has entered a final order, unless a timely notice of civil administrative review is filed, in which case the administrative law judge shall cause the audio recordings to be transcribed by a certified stenographic reporter and shall cause the transcript to become part of the official record.
- n) Corrections to the transcript of the record may be made by the Director or administrative law judge.
- o) If a party, or any person at the instance of or in collusion with a party, violates any ruling of the administrative law judge, the administrative law judge, on motion, may enter such orders as are just, including, among others, the following:
- 1) that further proceedings be stayed until the order or rule is complied with;
 - 2) that the offending party be barred from filing any other pleadings relating to any issue to which the refusal or failure relates;
 - 3) that the offending party~~he or she~~ be barred from maintaining any particular claim or defense relating to that issue;

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- 4) that a witness be barred from testifying concerning that issue;
 - 5) that, as to claims or defenses asserted in any pleading to which that issue is material, an order of default be entered against the offending party or that his or her pleading be dismissed without prejudice; or
 - 6) that any portion of ~~the offending party's~~~~his or her~~ pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to the issue.
- p) At any time, the administrative law judge may order the removal of any person from the hearing room who is creating a disturbance, whether by physical actions, profanity or otherwise engaging in conduct ~~that~~~~which~~ disrupts the hearing.
 - q) At the request of any party, the administrative law judge may exclude all ~~witnesses~~~~witness~~ from the hearing room, except that each party or a representative of a party, in addition to legal counsel, shall be allowed to remain.
 - r) In cases brought under the Smoke Free Illinois Act, the failure of an alleged violator to appear, after receiving proper notice under this Part, shall result in a default judgment being entered by the administrative law judge. A default judgment entered against a violator after a failure to appear may be vacated by the Director within 15 days after entry in cases in which the alleged violator can demonstrate good cause, as that term is construed under Illinois law, for the failure to appear. In cases in which an enforcing agency fails to have any witness appear, after proper notice under this Part, the administrative law judge shall dismiss the case against the alleged violator. An alleged violator's failure to appear or an enforcing agency's failure to have a witness appear in one particular case shall not have any effect on any other case.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.14 Subpoenas

- a) Subpoenas requiring the attendance and the giving of testimony by witnesses, and subpoenas duces tecum requiring the production of books, papers, records or memoranda, may be issued by the Director or the administrative law judge upon his or her own motion or upon the written request of any party upon a showing of

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the relevancy of the request to the issues in the hearing. For good cause shown, the Director or the administrative law judge may deny or modify the request for subpoenas.

- b) Subpoenas issued by the Director or the administrative law judge upon the request of a party to the proceeding shall be delivered to the requesting party, who shall be responsible for serving the subpoenas. Subpoenas shall be served personally or by certified mail at least seven days before the date on which appearance is required. [Copies of the subpoenas and any documents obtained by subpoenas duces tecum shall be served on all other parties.](#)
- c) The witness fee for attendance and travel shall be the same as the fee of witnesses before the circuit courts of this State. When a witness is subpoenaed by the Director, or by the administrative law judge upon his or her own motion or upon the request of the Department, the witness fee shall be paid in the same manner as other expenses of the agency.
- d) The appearance at the hearing of a party, or a person who at the time of the hearing is an officer, director, or employee of a party, may be required by serving the party with a notice designating the person who is required to appear at least [seven](#) days before the date on which appearance is required.
- e) Subpoenas shall be enforced in the same manner as subpoenas issued by the circuit courts of this State.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.16 Proposal for Decision

- a) When the Director has not heard the contested case or read the record and his or her final decision would be adverse to any party other than the Department, a proposal for decision shall be served upon all parties to the proceedings. The proposal for decision shall contain:
 - 1) *A statement of the reasons* for the proposed decision;
 - 2) *A statement of each issue of fact or law necessary to the proposed decision.* (Section 10-45 of the IAPA)

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- b) The ~~proposal for proposed~~ decision shall be prepared by the persons who conducted the hearing or one who has read the record. (Section 10-45 of the IAPA)
- c) Any party adversely affected by the proposed decision shall have 20 days from the receipt of the proposal for decision in which to file written exceptions and a brief. Failure to file written exceptions and a brief in the time provided for in the proposal for decision shall be deemed a waiver of the right to file exceptions and a brief. The Department shall have ~~ten (10)~~ days to respond to the exceptions or brief.
- d) The proposal for decision shall be served on all parties personally or by certified mail.
- e) The Director ~~in his or her discretion~~ may provide for oral arguments on the proposal for decision. If oral arguments are allowed, they shall be scheduled as convenient to the Director.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.17 Final Orders

- a) A written ~~final order~~ ~~Final Order~~ shall be issued in every contested case. *A final order shall include findings of fact and conclusions of law, separately stated. All final orders shall specify whether they are final and subject to the Illinois Administrative Review Law [735 ILCS 5/Art. III]* and any applicable licensing statute. (Section 10-50 of the IAPA)
- b) A final ~~order~~ ~~orders~~ shall be served on *parties or their agents appointed to receive service of process either personally or by registered or certified mail.* (Section 10-50 of the IAPA)
- c) All fines in Smoke Free Illinois Act cases shall be paid in full within 10 calendar days after the final order is entered.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.18 Records of Proceedings

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- a) A full and complete record shall be kept of all proceedings. *The record shall ~~include~~ consist of the following:*
- 1) *all pleadings (including all notices and responses thereto), motions, and rulings;*
 - 2) *~~an audio recording or stenographic~~ transcript of the hearing, if any, and all evidence received;*
 - 3) *a statement of matters officially noticed;*
 - 4) *any offers of proof, objections and rulings thereon;*
 - 5) *any proposed findings and exceptions;*
 - 6) *any decision, opinion, or report by the ~~administrative law judge~~ Administrative Law Judge;*
 - 7) *all staff memoranda or data submitted to the ~~administrative law judge~~ Administrative Law Judge or members of the Department in connection with their consideration of the case; and*
 - 8) *any communication prohibited by Section 10-60 ~~of the IAPA~~ of the IAPA. No such communication shall form the basis for any finding of fact. (Section 10-35 of the IAPA)*
- b) The record shall not contain the following unless a party requests that the document or documents be included in the record:
- 1) Subpoenas;
 - 2) Requests for Subpoenas;
 - 3) Cover letters;
 - 4) Notices of Filing;
 - 5) Certificates of Mailing for regular mail; and

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- 6) Discovery Requests.
- c) The Department shall be the official custodian of the records of administrative hearings held before the Department.

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.19 Miscellaneous

- a) Ex parte consultation. *Except in the disposition of matters that the Department is authorized by law to entertain or dispose of on an ex parte basis, the administrative law judge or Director shall not, after notice of hearing, communicate directly or indirectly, in connection with any other issue of fact, with any person or party, his or her representative, or any person interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate. However, a Department member may communicate with other members of the Department and ~~anor the~~ administrative law judge may have the aid and advice of one or more personal assistants.*
- 1) *An ex parte communication received by the Director, any Department employee, or the administrative law judge shall be made a part of the record of the pending matter, including all written communications, all written responses to the communications, and a memorandum stating the substance of all oral communications and all responses made and the identity of each person from whom the ex parte communication was received.*
- 2) *Communications regarding matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and status of proceedings, are not considered ex parte communications under this Section. (Section 10-60 of the IAPA)*
- b) Computation of Time. The time within which any act under this Section is to be done shall be computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or a holiday as defined or fixed by statute in force in this State, and then it shall also be excluded. If the day succeeding the last day is a Saturday, Sunday or a holiday as defined or fixed by statute in force in this State, that day shall also be excluded.

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- c) Construction of Rules. In case of any conflict between this Part and the IAPA or a specific licensing statute, the terms of the latter shall control.
- d) If the hearing is being conducted pursuant to federal law and there is a conflict between this Part and federal procedural or evidentiary requirements, then the federal requirements shall control.
- e) *Waiver. Compliance with any or all provisions concerning contested cases may be waived by written stipulation of all parties. (Section 10-70 of the IAPA)*

(Source: Amended at 33 Ill. Reg. _____, effective _____)

Section 100.20 Referenced Materials

The following federal laws, State laws and rules, and Illinois Supreme Court Rules are referenced in this Part:

- a) [Social Security Act \(42 USC 1395 and 1396\)](#)
- b) [Illinois Administrative Procedure Act \[5 ILCS 100\]](#)
- c) [Nursing Home Care Act \[210 ILCS 45\]](#)
- d) [Smoke Free Illinois Act \[410 ILCS 82\]](#)
- e) [Code of Civil Procedure \[735 ILCS 5\]](#)
- f) [Administrative Review Law \[735 ILCS 5/Art. III\]](#)
- g) [Health Facilities Planning Board: Health Facilities Planning Procedural Rules \(77 Ill. Adm. Code 1130\)](#)
- h) [Supreme Court Rule 216: Admission of Fact or of Genuineness of Documents](#)

(Source: Added at 33 Ill. Reg. _____, effective _____)