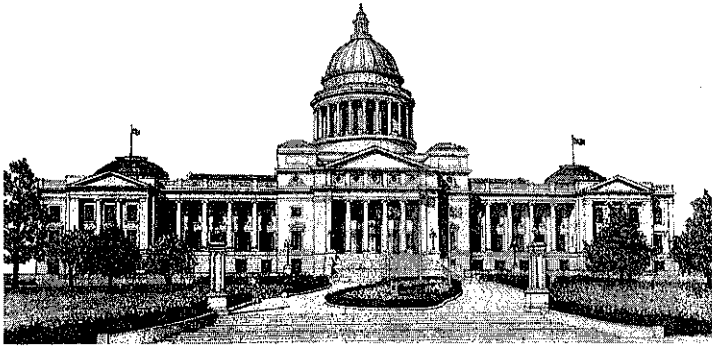


ARKANSAS REGISTER

Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



Secretary of State

John Thurston

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Little Rock, Arkansas 72201-1094

(501) 682-5070

www.sos.arkansas.gov



For Office

Use Only:

Effective Date _____ Code Number _____

Name of Agency Department of Labor and Licensing

Department Division of Labor, Labor Standards Section

Contact Denise Oxley E-mail denise.oxley@arkansas.gov Phone 501-682-4502

Statutory Authority for Promulgating Rules ACA 11-3-203(c); 11-4-209; 11-6-111(b)(2); 11-12-105; and 25-15-203(a).

Rule Title: Administrative Rules Regarding Organization and Procedure of the Labor Standards Section

Intended Effective Date

(Check One)

Date

☐ Emergency (ACA 25-15-204)

Legal Notice Published

2/28/2020-3/1/2020

☒ 10 Days After Filing (ACA 25-15-204)

Final Date for Public Comment

4/15/2020

☐ Other _____
(Must be more than 10 days after filing date.)

Reviewed by Legislative Council

6/19/2020

Adopted by State Agency

6/19/2020

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Denise Oxley

denise.oxley@arkansas.gov

6/22/2022

Contact Person

E-mail Address

Date

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Denise Oxley

Signature

501-682-4502

Phone Number

denise.oxley@arkansas.gov

E-mail Address

General Counsel

Title

6/22/2020

Date

**ADMINISTRATIVE RULES REGARDING ORGANIZATION
AND PROCEDURE
LABOR STANDARDS SECTION
DIVISION OF LABOR
ARKANSAS DEPARTMENT OF LABOR AND LICENSING**

Rules effective as of
July 2, 2020

**Arkansas Department of Labor and Licensing
Division of Labor
Labor Standards Section
900 West Capitol, Suite 400
Little Rock, Arkansas 72201
(501) 682-4534
Fax: (501) 682-4506**

010.14 Administrative Rules of the Labor Standards Section of the Division of Labor, Department of Labor and Licensing

010.14-001 Statement of Organization and Operations

The Arkansas Department of Labor and Licensing is an agency of state government created by Act 910 of 2019, Ark. Code Ann. § 25-43-1101 *et seq.* The Labor Standards Section is working unit within the Division of Labor, Department of Labor and Licensing. The Director of the Division of Labor has regulatory or enforcement authority over:

1. Minimum wage and overtime;
2. Child labor;
3. Private employment agencies;
4. Claims for unpaid wages of less than \$2,000; and
5. A number of miscellaneous employment standards laws, the enforcement of which is not otherwise provided for by state law or is specifically vested with the Director of the Division of Labor.

The Labor Standards Section also oversees the licensure of private employment agencies. Ultimate authority for the operation of the agency is in the Secretary of the Department of Labor and Licensing, who is appointed by the Governor. The Director of the Division of Labor has the regulatory, enforcement, and administrative authority for the Labor Standards Section. The individual charged with the day-to-day operations is referred to as the Labor Standards Manager, who is selected by the director. From time to time, the director promulgates rules.

010.14-002 Information for Public Guidance

The mailing address and telephone number for the Labor Standards Section is:

Labor Standards Section
Division of Labor
Arkansas Department of Labor and Licensing
900 West Capitol, Suite 400
Little Rock, AR 72201
(501) 682-4535

The division makes available a list of persons holding certain responsibilities for handling FOIA requests, licensing questions, and complaints against licensees so that the public may obtain information about the agency or make submissions or requests. The names, mailing addresses, telephone numbers, and electronic addresses can be obtained from the agency's office or website. Additionally, the Labor Standards Section can be contacted directly as listed above.

The section has a list of official forms used by the section and a list of all formal, written

statements of policy and written interpretative memoranda, and orders, decisions and opinions resulting from adjudications, which may be obtained from the section's office or website. The Division of Labor website is: <https://www.labor.arkansas.gov/>.

Copies of all forms used by the section, written statements of policy and written interpretive memoranda, and all orders issued by the agency may be obtained from the section's office.

010.14-003 General Organization

A. The Labor Standards Section is generally divided into an office staff and a field staff. The field staff is composed of investigators.

B. All public meetings will be conducted pursuant to Robert's Rules of Order and in conformity with the Arkansas Freedom of Information Act.

C. The director may create standing and ad hoc committees. The director will select members of committees. A quorum for the transaction of committee business is a majority of the number of voting members of the committee.

010.14-004 Rule-Making

A. Authority

The director has been authorized by the Legislature to promulgate rules. Ark. Code Ann. § 11-4-209(a)(minimum wage and overtime); §§ 11-6-111(b)(2) and 11-12-105(1)(child labor); and § 11-11-204(d)(private employment agencies). The agency follows the procedural requirements of the Arkansas Administrative Procedure Act, in particular Ark. Code Ann. § 25-15-203 and § 25-15-204. Additionally, the agency is required to abide by the provisions of Ark. Code Ann. §10-3-309.

B. Initiation of Rule-Making

The process of adopting a new rule or amending or repealing an existing rule (hereinafter referred to "rule-making") may be initiated by request of the director that the staff submit proposed drafts. Additionally, staff of the agency may request permission of to initiate rule-making. Third persons outside the agency may petition for the issuance, amendment, or repeal of any rule.

C. Petition to Initiate Rule-Making

Third parties may initiate rule-making to adopt, amend, or repeal a rule by filing a petition with the division to initiate rule-making. The petition must contain the name, address, and telephone number of the petitioner, the specific rule or action requested, the reasons for the rule or action requested, and facts showing that the petitioner is regulated by the division or has a substantial interest in the rule or action requested.

The petition to initiate rule-making shall be filed with the Director of the Division of Labor.

Within thirty (30) days after submission of the petition, the director will either deny the petition, stating its reasons in writing, or will initiate rule-making.

D. Pre-Filing with the Bureau of Legislative Research

Thirty (30) days before the public-comment period ends, the division will file with the Bureau of Legislative Research the text of the proposed rule or amendment as well as a financial impact statement and a Bureau of Legislative Research questionnaire as provided by Ark. Code Ann. § 10-3-309.

E. Public Input

1. Before finalizing language of a proposed new rule or an amendment to, or repeal of, an existing rule, the director or his designee will receive public input through written comments and/or oral submissions. The division will designate in its public notice the format and timing of public comment.

2. Any public hearing will provide affected persons and other members of the public a reasonable opportunity for presentation of evidence, arguments, and oral statements within reasonable conditions and limitations imposed by the division to avoid duplication, irrelevant comments, unnecessary delay, or disruption of the proceedings.

3. The director or his designee may preside at the public hearing. The division must ensure that the division personnel responsible for preparing the proposed rule or amendment are available and will notify third parties initiating rule changes to be available to explain the proposal and to respond to questions or comments regarding the proposed rule.

4. The division will preserve the comments made at the public hearing by a recording.

5. Any person may submit written statements within the specified period of time. All timely, written statements will be considered by the director and be made a part of the rule-making record.

F. Notice of Rule-Making

The division will give notice of proposed rule-making to be published pursuant to Ark. Code Ann. § 25-15-204. The notice will set any written comment period and will specify the time, date, and place of any public hearing.

G. The Decision to Adopt a Rule

1. The division will not finalize language of the rule or decide whether to adopt a

rule until the period for public comment has expired and the proposed rule has been reviewed and approved by the Legislative Council or other legislative committee pursuant to Ark. Code Ann. § 10-3-309.

2. Before acting on a proposed rule, the division will consider all of the written submissions and/or oral submissions received in the rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in the rule-making proceedings.

3. The division may use its own experience, specialized knowledge, and judgment in the adoption of a rule or consider the experience, specialized knowledge and judgment of division staff.

H. Variance Between Adopted Rule and Published Notice of Proposed Rule

1. The division may not adopt a rule that differs from the rule proposed in the published notice of the intended rule-making on which the rule is based unless:

a. The final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or

b. The notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment.

2. In determining whether the final rule is in character with the original scheme and was a logical outgrowth of the notice and comments, and that the notice of intended rule-making provided fair warning that the outcome of that rule-making proceeding could be the rule in question; the division must consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests; and

b. The extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intended rule-making; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intended rule-making.

I. Concise Statement of Reasons

1. When requested by an interested person, either prior to the adoption of a rule or within thirty (30) days after its adoption, the division shall issue a concise statement of the principal reasons for and against the adoption of the rule. Requests for such a statement must be in writing and be delivered to the Director of the Division of Labor. The request should

indicate whether the statement is sought for all or only a specified part of a rule. A request will be considered to have been submitted on the date on which it is received by the division.

2. The concise statement of reasons must contain:
 - a. The division's reasons for adopting the rule;
 - b. An indication of any change between the text of the proposed rule and the text of the rule as finally adopted, with explanations for any such change; and
 - c. The principal reasons urged in the rule-making procedure for and against the rule, and the division's reasons for overruling the arguments made against the rule.

J. Contents

The division shall cause its rules to be published and made available to interested persons. The publication must include:

1. The text of the rule; and
2. A note containing the following:
 - a. The date(s) the division adopted or amended the rule;
 - b. The effective date(s) of the rule;
 - c. Any findings required by any provisions of law as a prerequisite to adoption for effectiveness of the rule; and
 - d. Citation to the entire specific statutory or other authority authorizing the adoption of the rule;
3. The publication of the rule(s) must state the date of publication.

K. Format

The published rules of the division will be organized substantially in the following format:

1. Statement of Organization and Operations
2. Information for Public Guidance
3. General Organization
4. Purpose and Scope
5. Definitions
6. Rule-making
7. Emergency Rule-making
8. Declaratory Orders

9. Adjudicative Hearings
10. Licensing
11. *Et seq.*, Substantive rules and other rules of ~~Agency~~ the division

L. Incorporation by Reference

By reference in a rule, the division may incorporate all or any part of a code, standard, rule, or other matter if the division finds that copying the matter in the division's rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the rule must fully and precisely identify the incorporated matter by title, citation, date, and edition, if any; briefly indicate the precise subject and general contents of the incorporated matter; and state that the rule does not include any later amendments or editions of the incorporated matter. The division may incorporate such a matter by reference in a proposed or adopted rule only if the division makes copies of the incorporated matter readily available to the public. The rules must state how and where copies of the incorporated matter may be obtained at cost from the division, and how and where copies may be obtained from an agency of the United States, this state, another state, or the organization, association, or persons originally issuing that matter. The division must retain permanently a copy of any materials incorporated by reference in a rule.

M. Filing

1. After the division formally adopts a new rule or amends a current rule or repeals an existing rule, and after the rule change has been reviewed and approved by the Legislative Council, the agency staff will file final copies of the rule with the Secretary of State, the Arkansas State Library, and the Bureau of Legislative Research, or as otherwise provided by Ark. Code Ann. § 25-15-204(d).

2. Proof of filing a copy of the rule, amendment, or repeal with the Secretary of State, the Arkansas State Library, and the Bureau of Legislative Research will be kept in a file maintained by the Legal Section of the Division of Labor.

3. Notice of the rule change will be posted on the division website.

010.14-005 Emergency Rule-Making

A. Request for Emergency Rule-Making

The proponent of a rule may request the division to adopt an emergency rule. In addition to the text of the proposed rule or amendment to an existing rule and any other information required by Rule 010.14-004(C), the proponent will provide a written statement setting out the facts or circumstances that would support a finding of imminent peril to the public health, safety, or welfare.

B. Finding of an Emergency

Upon receipt of the written statement requesting an emergency rule-making and documents or

other evidence submitted in support of the assertion that an emergency exists, the division will make an independent judgment as to whether the circumstances and facts constitute an imminent peril to the public health, safety, or welfare requiring adoption of the rule upon fewer than 30 days' notice. If the division determines that the circumstances warrant emergency rule-making, it will make a written determination that sets out the reasons for its finding that an emergency exists. Upon making this finding, the division may proceed to adopt the rule without any prior notice or hearing, or it may determine to provide an abbreviated notice and hearing.

C. Effective Date of Emergency Rule

1. The division shall not finalize an emergency rule or file an emergency rule with the Secretary of State for adoption until the emergency rule has been approved under Ark. Code Ann. § 10-3-309.

The emergency rule will be effective immediately upon filing, or at a stated time less than ten (10) days thereafter, if the division finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The division will file with the rule the division's written findings justifying the determination that emergency rule-making is appropriate and, if applicable, the basis for the effective date of the emergency rule being less than ten (10) days after the filing of the rule pursuant to Ark. Code Ann. § 25-15-204(e). The division will take appropriate measures to make emergency rules known to persons who may be affected by them.

010.14-006 Declaratory Orders

A. Purpose and Use of Declaratory Orders

A declaratory order is a means of resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the division has authority. A petition for declaratory order may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory order is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition or declaratory order must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

B. The Petition

The process to obtain a declaratory order is begun by filing with the Director of the Division of Labor a petition that provides the following information:

1. The caption shall read: Petition for Declaratory Order Before Arkansas Division of Labor, Labor Standards Section.

2. The name, address, telephone number, and facsimile number of the petitioner.

3. The name, address, telephone number, and facsimile number of the attorney of the petitioner.

4. The statutory provision(s), division rule(s), or division order(s) on which the declaratory order is sought.

5. A description of how the statutes, rules, or orders may substantially affect the petitioner and the petitioner's particular set of circumstances, and the question or issue on which petitioner seeks a declaratory order.

6. The signature of the petitioner or petitioner's attorney.

7. The date.

8. Request for a hearing, if desired.

C. Division Disposition

1. The division may hold a hearing to consider a petition for declaratory statement. If a hearing is held, it shall be conducted in accordance with Ark. Code Ann. §§ 25-15-208 and 25-15-213, and the division's rules for adjudicatory hearings.

2. The division may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within ninety (90) days of the filing of the petition, the division will render a final order denying the petition or issuing a declaratory order.

010.14-007 Adjudicative Hearings

A. Scope of This Rule

This Rule, 010.14-007, applies in all administrative adjudications conducted by the Labor Standards Section of the Division of Labor. This procedure is developed to provide a process by which the division formulates orders (for example, an order revoking a license to practice, or imposing civil penalties).

B. Presiding Officer

The Director of the Division of Labor shall preside at a hearing or may designate an examiner, referee, or hearing officer to preside at a hearing.

C. Appearances

1. Any party appearing has the right, at his or her own expense, to be represented by counsel.

2. The respondent may appear on his or her own behalf.
3. Any attorney representing a party to an adjudicatory proceeding must file notice of appearance as soon as possible.
4. Service on counsel of record is the equivalent of service on the party represented.
5. On written motion served on the party represented and all other parties of record, the presiding officer may grant counsel of record leave to withdraw for good cause shown.

D. Consolidation

If there are separate matters that involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

E. Notice to Interested Parties

If it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that an absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

F. Service of Papers

Unless the presiding officer otherwise orders, every pleading and every other paper filed for the proceeding, except applications for witness subpoenas and the subpoenas, shall be served on each party or the party's representative at the last address of record.

G. Initiation and Notice of Hearing

1. An administrative adjudication is initiated by the issuance by the division of a notice of hearing.
2. The notice of hearing will be sent to the respondent by U.S. Mail, return receipt requested, delivery restricted to the named recipient or his agent, as well as by regular U. S. mail. Notice shall be sufficient when it is so mailed to the respondent's latest address on file with the agency.

3. Notice will be mailed at least twenty (20) days before the scheduled hearing.
3. The notice will include:

- a. a statement of the time, place, and nature of the hearing;
- b. a statement of the legal authority and jurisdiction under which the hearing is to be held; and
- c. a short and plain statement of the matters of fact and law asserted.

H. Motions

All requests for relief will be by motion. Motions must be in writing or made on the record during a hearing. A motion must fully state the action requested and the grounds relied upon. The original written motion will be filed with the division. When time allows, the other parties may, within seven (7) days of the service of the written motion, file a response in opposition. The presiding officer may conduct such proceedings and enter such orders as are deemed necessary to address issues raised by the motion. However, a presiding officer, other than the ~~Director~~ director, will not enter a dispositive order unless expressly authorized in writing to do so.

I. Answer

A respondent may file an answer.

J. Discovery

1. Upon written request, the division will provide the information designated in Ark. Code Ann. § 25-15-208(a)(3).
2. Such requests should be received by the agency at least ten (10) days before the scheduled hearing.

K. Continuances

1. The presiding officer may grant a continuance of hearing for good cause shown. Requests for continuances will be made in writing. The request must state the grounds to be considered and be made as soon as practicable and, except in cases of emergencies, no later than five (5) days prior to the date noticed for the hearing. In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlements;
- d. The existence of an emergency;

- e. Any objection;
 - f. Any applicable time requirement;
 - g. The existence of a conflict of the schedules of counsel, parties, or witnesses;
 - h. The time limits of the request; and
 - i. Other relevant factors.
2. The presiding officer may require documentation of any grounds for continuance.

L. Hearing Procedures

1. The presiding officer presides at the hearing and may rule on motions, require briefs, and issue such orders as will ensure the orderly conduct of the proceedings; provided, however, any presiding officer other than the director shall not enter a dispositive order or proposed decision unless expressly authorized in writing to do so.
2. All objections must be made in a timely manner and stated on the record.
3. Parties have the right to participate or to be represented by counsel in all hearings or pre-hearing conferences related to their case.
4. Subject to terms and conditions prescribed by the Administrative Procedures Act, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and, upon request by the division, may submit briefs and engage in oral argument.
5. The presiding officer is charged with maintaining the decorum of the hearing and may refuse to admit, or may expel, anyone whose conduct is disorderly.

M. Order of Proceedings

The presiding officer will conduct the hearing in the following manner:

1. The presiding officer will give an opening statement, briefly describing the nature of the proceedings.
2. The parties are to be given the opportunity to present opening statements.
3. The parties will be allowed to present their cases in the sequence determined by the presiding officer.

4. Each witness must be sworn or affirmed by the presiding officer, or the court reporter, and be subject to examination and cross-examination as well as questioning by the division. The presiding officer may limit questioning in a manner consistent with the law.

5. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

N. Evidence

1. The presiding officer shall rule on the admissibility of evidence and may, when appropriate, take official notice of facts in accordance with all applicable requirements of law.

2. Stipulation of facts is encouraged. The division may make a decision based on stipulated facts.

3. Evidence in the proceeding must be confined to the issues set forth in the hearing notice, unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence outside the scope of the notice, over the objection of a party who did not have actual notice of those issues, that party, upon timely request, will receive a continuance sufficient to prepare for the additional issue and to permit amendment of pleadings.

4. A party seeking admission of an exhibit must provide three (3) copies of any exhibit in a hearing before the division. The presiding officer must provide the opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. All exhibits admitted into evidence must be appropriately marked and be made part of the record.

5. Any party may object to specific evidence or may request limits on the scope of the examination or cross-examination. A brief statement of the grounds upon which it is based shall accompany such an objection. The objection, the ruling on the objection, and the reasons for the ruling will be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve the ruling until the written decision.

6. Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony will briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

7. Irrelevant, immaterial, and unduly repetitive evidence will be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.

8. Reasonable inferences. The finder of fact may base its findings of fact upon reasonable inferences derived from other evidence received.

O. Default

If a party fails to appear or participate in an administrative adjudication after proper service of notice, the division may proceed with the hearing and render a decision in the absence of the party.

P. Subpoenas

1. At the request of any party, the Director of the Division of Labor shall issue subpoenas for the attendance of witnesses at the hearing. The requesting party shall specify whether the witness is also requested to bring documents and reasonably identify said documents.

2. A subpoena may be served by any person specified by law to serve process or by any person who is not a party and who is eighteen (18) years of age or older. Delivering a copy to the person named in the subpoena shall make service. Proof of service may be made by affidavit of the person making service. The party seeking the subpoena shall have the burden of obtaining service of the process and shall be charged with the responsibility of tendering appropriate mileage fees and witness fees pursuant to Rule 45, Arkansas Rules of Civil Procedure. The witness must be served at least two days prior to the hearing. For good cause, the division may authorize the subpoena to be served less than two days before the hearing.

3. Any motion to quash or limit the subpoena shall be filed with the division and shall state the grounds relied upon.

Q. Recording the Proceedings

The responsibility to record the testimony heard at a hearing is borne by the division. Upon the filing of a petition for judicial review, the division will provide a transcript of testimony taken before the division. If the division is successful upon appeal, the division may request that the court assess the costs against the opposing party.

R. Factors to be Considered in Imposing Sanctions or Fines

In addition to any other considerations permitted by law, if applicable, the division in imposing any sanction or fine may consider the following:

1. The nature and degree of the misconduct for which the sanction is being sought;
2. The seriousness and circumstances surrounding this misconduct;
3. The loss or damage to clients or others;
4. The assurance of future compliance;
5. The profit to the wrongdoer;

6. The avoidance of repetition;
 7. Whether the conduct was deliberate, intentional, or negligent;
 8. The deterrent effect on others;
 9. The conduct of the individual during the course of the disciplinary proceeding;
 10. Any prior enforcement or disciplinary actions or sanctions, including warnings;
- and
11. Matters offered in mitigation or extenuation, except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the individual demonstrates that he or she is successfully pursuing in good faith a program of recovery.

S. Final Order

The division will serve on the respondent a written order that reflects the action taken by the division. The order will include a recitation of facts found based on testimony and other evidence presented and reasonable inferences derived from the evidence pertinent to the issues of the case. It will also state conclusions of law and directives or other disposition entered against or in favor of the respondent.

The order will be served personally or by mail on the respondent. If counsel represents respondent, service of the order on respondent's counsel shall be deemed service on the respondent.