

Item 15

SD One Call Hearing Process

a. Can all hearings appear in front of the Office of Hearing Examiners instead of the Board?

Yes, I do believe all hearings can appear in front of the Office of Hearing examiners. Generally, statute requires hearings shall be conducted before the Board:

§ 49-7A-27 requires that “if a hearing is held, the hearing shall be conducted before the board as a contested case under chapter 1-26. Following the hearing, the board shall either render a decision dismissing the complaint for insufficient evidence or shall impose a penalty pursuant to the provisions of § 49-7A-18 or 49-7A-19.”

The only explicit mention of the Office of Hearing Examiners provided in § 1-26:

§ 1-26-18.3 provides that “if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued.”

There is no limitation on when the Board can use OHE to preside over hearings. If the Board acts as a type of jury for the hearing, every hearing could probably be presided over by OHE.

b. Can the Board charge litigants for hearings? What is a pathway to doing this?

Neither 49-7A nor 1-26 explicitly grant or prohibit the Board charging litigants for hearing.

Cody Honeywell plans to speak with the Office of Hearing Examiners and inquire whether any other agencies are doing this. Cody left a message with the office on the 10th of February and will update this accordingly.

1-26 does explicitly allow agencies that are regulated under Title 36 (including surgeons, dentists, veterinarians, and other license professionals) to recover costs and may assess all or part of its actual expenses for the proceeding against the licensee or applicant. The Board doesn't fall under Title 36 and this is the only mention of allowing costs to be assessed to parties.

Because 1-26 grants the abilities for some entities to charge for hearings, but it doesn't grant the SD One Call Board that ability, the Board probably lacks the authority to charge for the

hearings. If the Board would want to recover costs from a hearing, it probably should seek legislation.

c. Can the Board increase the penalty amount after a hearing?

There is no restriction in statute to increase penalties during the hearing process. The Board already makes Offers of Resolution as a form of resolution before the Enforcement Panel makes recommendations. The escalation of penalties through the process is not prohibited by statute.

d. Can the board order that we hold complaints back from the enforcement panels until the complainant meets with the excavator?

The Board has always encouraged parties involved to discuss and resolve as many issues as possible without the utilization of the penalty process. When resolution cannot be obtained, the complaint process is available to either party.¹ There are no restrictions by statute that would prohibit the Board from requiring the complainant to attempt to meet with and discuss the issue with a respondent.

e. Can the Board require anyone requesting a hearing to tell us detailed reasons why the enforcement panel was wrong?

Yes, the Board can probably require this. Pursuant to 49-7A-27, the board shall accept the recommendations of the panel unless either party requests a hearing. A party requests a hearing by rejecting the panel's recommendation within twenty days from the date of service of the notice. Currently, the party rejecting the recommendations of the panel are not required to explain, deny, or respond to the panel's recommendation. There are no restrictions on this type of requirement in 1-26, 49-7A, or the administrative rules for the Board.

I have attached an edited Panel Recommendation Cover Letter that requests that the party requesting a hearing provide a detailed explanation of why they are rejecting the Panel's Resolution, including possible defenses or factual disputes.

Draft Motions

¹ <https://www.sdonecall.com/complaints/process-and-procedures/>

I move [this motion is] to require complainants, prior to having their complaint forwarded to an enforcement panel, to attempt to meet with and discuss the incident with the excavator/operator, in good faith.

I move [this motion is] to require a party rejecting the enforcement panel's recommendation to provide, in the written notice of rejection, a detailed explanation of why they are rejecting the enforcement panel's recommendation. This detailed written explanation should include possible defenses, factual disputes, and other detailed information relevant to the reason of rejection, as the case may be.