

# ADMINISTRATOR'S MEMORANDUM

Miscellaneous Memo No. 21

**To:** IDWR Appointed Hearing Officers

**From:** Gary Spackman, Director *OK Gary 9/30/2021*  
Peter Anderson, Hearing Officer Coordinator *PA*

**Date:** September 30, 2021

**RE:** **CODE OF CONDUCT FOR IDWR HEARING OFFICERS**

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Employees of the Idaho Department of Water Resources (IDWR) appointed as hearing officers serve directly for the Director and are expected to conduct themselves in accordance with the following principles. These written expectations are internal guidance to IDWR hearing officers and do not create a right, entitlement or procedural expectation for any third-party, or provide the basis for any objection or relief in contested cases before IDWR.

Hearing officer conduct must follow these eleven principles:

## **1. Promote Public Confidence in the Integrity of the Hearing Process**

A hearing officer achieves this principle by always acting in a manner consistent with Idaho Code and IDWR's administrative rules, and in a manner that promotes public confidence in the independence, impartiality and efficiency of IDWR's hearing process. Beyond compliance with legal minimums, a hearing officer promotes public confidence by avoiding impropriety and the appearance of impropriety. A hearing officer's integrity rests on the expectation that they will never use their appointment to advance personal or economic interests of the hearing officer or their family, friends, or past or present business associates, or allow others to do so.

## **2. Diligently Attend and Apply Hearing Officer Training**

IDWR promotes continuous training opportunities for its hearing officers. Hearing officer training enhances:

- The ability to apply substantive and procedural law, including standards governing due process and evidence;
- The ability to properly weigh evidence and assess the credibility of witnesses;
- The ability to craft legally sound and readable documents, including appropriate citation to legal authority and the hearing record when necessary; and
- The ability to efficiently conduct hearings and clearly and competently communicate with parties.

Hearing officers are also expected to utilize their broad experience and expertise as IDWR staff in their assigned hearings. Only if a hearing officer firmly believes they lack the skills or knowledge needed to handle a case should an assignment be declined for lack of competence.

### **3. Perform Duties without Bias, Prejudice or Harassment**

A hearing officer appropriately performs their duties, including administrative duties, when their words and conduct show no bias or prejudice and they do not permit persons assisting in proceedings to do so. The hearing officer shall ensure that the provisions of [IDWR's harassment avoidance](#) policy are enforced during all proceedings before them.

### **4. Avoid Internal and External Influences and the Impression of Influence**

This principle is achieved when a hearing officer acts in such a way that no one could reasonably believe that any person could improperly influence them in the performance of their duties. Regardless of a hearing officer's employment with IDWR, the hearing officer exercises internal independence of action and judgment to protect the due process rights of parties and to achieve the most legally correct result in a case by maintaining decisional independence from agency management and programs. This independence does not preclude consultation between hearing officers, or between a non-lawyer hearing officer and a lawyer assigned to advise that hearing officer. A hearing officer, however, should never allow the substitution of another's judgment for their own. A hearing officer exercises external independence when they cannot be swayed by public opinion or fear of criticism, and does not allow family, social, political, financial, or other interests or relationships to influence their conduct or judgment. A hearing officer protects themselves from the impression of these types of influence by not conveying, or permitting others to convey, the impression that any person or organization is able to improperly influence them.

### **5. Ensure the Right to Be Heard**

A hearing officer must accord to every person who has a legal interest in a proceeding before IDWR, or that person's lawyer, the right to be heard according to law. A hearing officer may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

### **6. Maintain Order and Decorum**

IDWR proceedings should be conducted with order and decorum. A hearing officer exhibits this behavior by being patient, dignified, and courteous to parties, witnesses, lawyers, staff, and others with whom the hearing officer deals in an official capacity. IDWR expects similar conduct of lawyers, parties, staff, and others subject to the hearing officer's direction and control.

### **7. Avoid and Minimize Ex Parte Communications**

Even the perception of possibly improper ex parte communications with a hearing officer can be a source of controversy among parties to formal IDWR contested case proceedings. A hearing officer

must be familiar with Rule 417 of the Department's Rules of Procedure (IDAPA 37.01.01) regarding ex parte communications and be diligent in its application to avoid such controversies.

#### **8. Take Care in Making Public Statements on Pending Matters**

A hearing officer's impartial performance of their adjudicatory duties can be undermined by public statements, promises, or commitments that appear inconsistent with that impartiality. A hearing officer should avoid public statements about pending matters before them, except to explain hearing procedures. A hearing officer should direct IDWR staff assisting in a contested case hearing to also refrain from making public statements about pending contested case hearings. Hearing officers and staff should follow [IDWR policy regarding media contacts](#).

#### **9. Do Not Disclose or Make Personal Use of Nonpublic Information**

A hearing officer must not intentionally disclose or use nonpublic information acquired by virtue of appointment as hearing officer for purposes unrelated to hearing officer duties or in violation of the law. A hearing officer is required to comply with the laws and regulations governing confidentiality of information before IDWR and should consult with a Deputy Attorney General if they have any questions about the confidentiality of specific information.

#### **10. Do Not Accept Things of Value**

A hearing officer must not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to undermine the hearing officer's integrity or impartiality, or if the source is a party or other person, including a lawyer, who has, or is likely to, come before the hearing officer.

#### **11. Thoughtfully Consider Any Potential Grounds for Disqualification**

Hearing officers protect the rights of parties and preserve public confidence in the independence, integrity, and impartiality of IDWR's contested case process by familiarity with and thoughtful application of Idaho Code § 67-5252 and Rule 412 of the Department's Rules of Procedure (IDAPA 37.01.01) regarding disqualification. A hearing officer should evaluate whether they are qualified to hear or decide a matter regardless of whether a motion to disqualify is filed. A hearing officer should also disclose on the record, information that the hearing officer believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the hearing officer believes there is no basis for disqualification. If there are no factors that would support disqualification, a hearing officer should not use disqualification to avoid contested cases that present difficult, controversial, or unpopular issues. Attachment 1 to these principles is a non-exhaustive list of questions meant to assist a hearing officer in the application of Rule 412 when considering acceptance of a hearing assignment.

## Attachment 1

The following list of questions are meant to assist a hearing officer in assessing whether there are grounds for disqualification from a hearing assignment:

- Would I, or any person or business associated with me, financially benefit from or be detrimentally affected now or in the future by my decision?
- Do I have a current or previous personal, professional or financial relationship or association of any significance with an interested party?
- Would my reputation or that of a relative, friend or associate stand to be enhanced or damaged because of the proposed decision or action?
- Do I, or a relative, friend or associate stand to gain or lose financially in some covert or unexpected way?
- Do I hold any personal or professional views or biases that may lead others to reasonably conclude that I am not an appropriate person to deal with the matter?
- Do I have a personal grudge of any significance with a party to the matter or other interested party?
- Have I made any promises or commitments in relation to the matter?
- Have I received a benefit or hospitality from someone who stands to gain or lose from my proposed decision or action?
- Am I a member of an association, club or professional organization or do I have ties and affiliations with organizations or individuals who stand to gain or lose by my proposed decision or action?
- Could this situation have an influence on any future employment opportunities outside my current official duties?
- Am I willing to listen to the evidence offered in this matter with an open mind?
- Am I willing to apply existing law in this matter?
- Did I have substantial prior involvement in the case other than as a hearing officer?
- Have I predetermined the outcome of the hearing?
- Do I lack the requisite professional knowledge in the subject matter of the contested case?
- Could there be any other benefits or factors that could cast doubts on my objectivity and competence to hear this matter?

- What perceptions could others have?
- What assessment would a fair-minded member of the public make regarding you being the person to conduct this hearing?
- Could my involvement in this matter cast doubt on my integrity or on IDWR's integrity?
- Is the matter or issue one of great public interest or controversy where my proposed decision or action could attract greater scrutiny by others?
- Am I confident of my ability to act impartially and in the public interest?

Any concerns raised by these questions or other disqualifying questions you may have, at any time prior to or during a hearing assignment, should be discussed with the hearing officer coordinator or a Deputy Attorney General.