

ALABAMA BOARD OF
HEATING, AIR CONDITIONING AND REFRIGERATION CONTRACTORS
ADMINISTRATIVE CODE

CHAPTER 440-X-6
DISCIPLINARY AND COMPLIANCE PROCEEDINGS

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440-X-6-.01 Violations Of State Law And The Rules Of The State Of Alabama Board Of Heating And Air Conditioning Contractors.

All certified contractors and every municipal, county, or state official charged with the responsibility of issuing building or similar permits shall report to the Board the name and address of any person who has violated the state law and/or rules and regulations applicable to the State of Alabama Board of Heating and Air Conditioning Contractors.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §34-31-24.

History: **New Rule:** Filed April 9, 2003; effective May 14, 2003.

440-X-6-.02 Initiation Of Compliance Investigation.

(1) The Board may initiate investigations, as it deems appropriate, to determine compliance with state law and the rules and regulations of the Board.

(2) The Board may also investigate any other actions reported to the Board by written or verbal complaint. The Board may request the personal appearance of the complaining person and may require the submission of a written complaint to the Board containing the factual allegations on which the complaint is based. The Board may also require the complaining person to submit to the Board a written and sworn statement containing the facts involved in the complaint.

(3) The Board shall retain the authority to pursue or discontinue investigations based on the information obtained in its investigation of a complaint, including the cooperation of all persons involved in the complaint to the Board.

(4) The Board may require a certified contractor to submit a written and sworn statement to the Board in response to any complaint or investigation by the Board.

(5) All reports of investigations of complaints shall be submitted to the Investigative Committee of the Board.

1. This Investigative Committee shall be comprised of: at least one Board member; the executive director of the Board; and the Board's attorney. The Investigative Committee shall review the investigation and complaint to determine whether probable cause exists for disciplinary or enforcement proceedings by the Board.

2. The Board member participating in the probable cause determination by the Investigative Committee shall not participate in any disciplinary proceedings of the Board arising from the investigation. The Board shall name the Board member to serve on the Investigative Committee on an annual basis.

(i) No Board members shall serve more than two (2) consecutive complete annual terms on the Investigative Committee. The Board shall have the power to replace or remove the designated Board member serving on the Investigative Committee due to any vacancy in the Board member position caused by any reason. This temporary appointment shall exist until the Board conducts its next required meeting, at which time a replacement Board member shall be named. This temporary Board member may serve the remainder of the existing term on the Investigative Committee and is eligible for appointment to full annual terms as described in these Rules.

(ii) The Board shall also have the power to name a Board member to serve as a substitute appointment to the Investigative Committee for any specific investigation or complaint in which the designated Board member serving an annual term has recused himself

or is disqualified from participating due to a conflict of interest, including involvement in the investigation as a possible witness to the facts involved in the investigation.

(6) The Board shall refer any and all investigations involving possible criminal violations of state law to the State Attorney General or other appropriate state or local law enforcement agency. The Board shall assist these state law and local law enforcement agencies as necessary to insure that state law and the rules of the Board are complied with by all certified contractors.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §34-31-32.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.03 Administrative Complaint Procedures.

(1) Upon a determination of probable cause by the Investigative Committee that disciplinary proceedings are necessary against a certified contractor, the Board's attorney shall prepare a summons and administrative complaint to be executed by the executive director on behalf of the Board.

(2) The Board shall serve a copy of the summons and administrative complaint on the certified contractor or other person against whom the administrative complaint has been filed. The method of service by the Board shall be either by certified mail, return receipt requested or personal service. In the event the Board is unable to obtain service of the summons and administrative complaint by certified mail or personal service, the Board or its attorney may serve the summons and administrative complaint by first class mail to the most recent address on file with the Board of the certified contractor or other person against whom the administrative complaint has been filed.

(3) The summons and administrative complaint shall give notice in substantial compliance with the Alabama Administrative Procedures Act, Section 12(b).¹

¹ Alabama Administrative Procedure Act, Section 12(b) reads as follows:

The notice shall include

- (1) A statement of the time, place, and nature of the hearing;
- (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) A reference to the particular sections of the statutes and rules involved; and
- (4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved.

Thereafter, upon application, a more definite and detailed statement shall be furnished.

Section 41-22-12(b), Code of Alabama 1975.

(4) Upon service of the administrative complaint, the Board shall schedule an administrative hearing to be held within four months of the date of service of the summons and administrative complaint by certified mail or personal service. If the method of service is by first class mail as described in these Rules, The Board shall schedule the administrative hearing to be held within five months of the date of mailing the summons and administrative complaint. The administrative hearing shall be held at the offices of the Board or other location designated by the Board.

(5) If the person against whom the administrative complaint has been filed is a member of the Board, that Board members shall be notified in writing of the administrative charges by the Board's executive director and shall not participate in any proceedings or meetings related to the complaint.

(6) The Board's attorney shall serve as the prosecuting attorney for the Board in all administrative charges issued by the Board. The Board's attorney shall present evidence in support of the administrative complaint at the administrative hearing conducted by the Board or its Hearing Officer.

(7) If, following its investigation, the Investigative Committee determines that no probable cause exists, the investigative proceedings shall be terminated and that particular investigation closed.

(8) At all times during the investigation process, including the period of time that the Investigative Committee has begun its investigation, the Board may enter into informal settlement agreements, provided that the informal settlement is ratified and approved by the Board.

(9) The Board retains the discretionary authority to invoke the administrative complaint procedures set forth in these Rules against any unlicensed contractor in lieu of instituting criminal proceedings against the unlicensed person. This provision does not restrict in any manner the authority of other state or local law enforcement agencies to pursue criminal penalties as otherwise provided by state law.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §34-31-32.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.04 Informal Settlement Proceedings.

(1) The Board or other party to an administrative proceeding may initiate informal settlement negotiations to resolve the administrative complaint or investigation by the Board.

(2) Neither the Board nor any other party is obligated or required to use informal settlement procedures or to participate in informal settlement negotiations.

(3) Any informal settlement shall be to terms that are negotiated to be in the best interest of the Board and the public and shall not become final until ratified and approved by the Board. All informal settlement agreements ratified and approved by the Board shall be incorporated by reference in the official minutes of the Board.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §34-31-32.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.05 Consolidation Of Administrative Proceedings.

(1) The Board or its Hearing Officer may order the consolidation, in whole or in part, of two or more administrative proceedings whenever it appears that the matters are substantially related and that such consolidation would expedite or simplify consideration of the issues and no party would be prejudiced thereby. This consolidation may involve multiple cases involving the same parties or may involve multiple cases involving different parties provided that the other requirements of consolidation have been met.

(2) Any party may request that the Board or its Hearing Officer sever any part of an administrative proceeding that has been consolidated when it appears the consolidation will not expedite or simplify consideration of the issues or that any party will be prejudiced by the continued consolidation of proceedings.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.06 Motions.

(1) All motions, except those made orally on the record during an administrative hearing, shall be in writing and

state the grounds in support of said motion. All motions shall describe the relief sought and include any legal authority relied upon for said relief. A copy of each motion filed with the Board shall be served on all other parties accompanied by a certificate of service describing the method of service of the motion on the other parties.

(2) The Board or its Hearing Officer may permit the non-moving party to file a response to any motion. Any response filed shall be served on the other parties in the same manner as required for the filing of motions.

(3) Any party may submit affidavits or other legal evidence in support of a motion or response; provided that said evidence is served on the other parties as an attachment to the motion or response filed with the Board.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.07 Prehearing Procedures.

(1) The time requirements for conducting an administrative hearing may be waived by the filing of a written joint motion of the parties indicating an agreement to delay the proceedings and including a brief statement of the reasons for the requested delay. The Board or its Hearing Officer shall retain the discretionary authority to grant or deny the request to delay the proceedings.

(2) The Board or its Hearing Officer may require the parties to appear at a specified time and place in advance of the hearing for one or more prehearing conferences to consider: the settlement of the case; the identification and/or clarification of the contested issues; the submission of admissions or stipulations to facts; the stipulation to the genuineness of documents that avoid unnecessary witnesses or proof; the identification of any facts of which official notice is proposed to be taken; the identification of any expert witnesses expected to testify and the substance of any opinion to which the expert witness may testify; and any other such matters that may be necessary or relevant to the determination of the issues involved in the administrative hearing.

(3) The Board or its Hearing Officer shall issue a written prehearing order reciting the actions taken at any prehearing conference, including any stipulations or agreements

by the parties regarding the issues to be resolved at the administrative hearing.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.08 Prehearing Discovery.

(1) Prehearing discovery shall be permitted only upon a determination by the Board or its Hearing Officer that: the discovery will not unreasonably delay the proceedings; the discovery sought has significant probative value to the issues involved in the administrative hearing, that the discovery sought will prevent fraud; the discovery sought will prevent undue surprise at the administrative hearing; and/or the discovery sought will otherwise provide fundamental fairness to the parties to the administrative hearing. All discovery sought must relate to the charges contained in the administrative complaint or the defenses to those charges.

(2) The following methods of discovery are available, pursuant to the discretion of the Board or the Board's Hearing Officer:

1. Depositions upon oral examinations of expert witnesses;
2. Interrogatories to the Respondent;
3. Production and copying of documents and things;
4. Request for admissions to the Respondent;
5. Requests for entry upon land for inspection and other purposes against any person;

(3) All discovery should be conducted in accordance with any terms and conditions imposed by the Board or its Hearing Officer. These terms and conditions may be imposed to protect the parties or other persons from annoyance, embarrassment, oppression, or undue burden and expense. Court reporter's fees and reasonable copying costs shall be borne by the party requesting discovery.

(4) Depositions of all parties and their employees, agents, and other persons under their control shall be conducted

at the Board's offices in Montgomery, Alabama, unless another location is agreed upon by all parties.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.09 Subpoenas.

(1) The attendance of witnesses may be required by subpoena. The Chairman of the Board or the Board's Hearing Officer may grant a request for a subpoena upon a showing that the evidence sought is necessary, relevant, and material to the administrative hearing or investigation by the Board. The subpoena may be issued by the Chairman of the Board, the Board's Hearing Officer, or other person designated by the Board.

(2) The production of documentary evidence may also be required by subpoena. These subpoenas may be issued according to the same requirements and conditions for those subpoenas to compel the attendance of witnesses.

(3) Subpoenas shall be served in accordance with the Alabama Rules of Civil Procedures.

(4) Witnesses summoned to appear shall be paid the same as state court fees and mileage expenses that are paid to witnesses appearing in the courts of Alabama. These witness fees and mileage expenses shall be paid by the party seeking the appearance of the witness.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.10 Failure Of A Party To Appear. If a party fails to appear at a hearing after being given notice of the hearing as required by these Rules, the Board or the Board's Hearing Officer may proceed with the hearing in the absence of the party.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.11 Administrative Hearing Procedures.

(1) The Board may appoint a person to act on its behalf as Hearing Officer at its administrative hearings. The Hearing Officer shall preside at administrative hearings and shall rule on all questions of evidence and procedure. The Hearing Officer shall admit all evidence that is relevant, material, and which has probative value to the issues under consideration by the Board. Offers of settlement and compromise are not admissible. The Hearing Officer shall consider the evidence presented and submit a recommendation to the Board, including: a procedural summary of the case; findings of fact; conclusions of law; and a recommended decision on the issues included in the administrative complaint including, if necessary, suggested administrative punishment pursuant to the charges in the administrative complaint. The Hearing Officer's recommendations shall be considered by the Board but is not binding on the Board. The Board shall issue an appropriate administrative order modifying, approving, or rejecting the Hearing Officer's recommendation. The Board shall issue its orders within sixty (60) days after receipt of the hearing Officer's recommendation. If the hearing was conducted by the Board itself, the Board shall issue its order within sixty (60) days after receipt of the court reporter's transcript of the administrative hearing. The Board's order in all instances shall include a procedural history of the case, findings of fact, conclusions of law, and its decision regarding the issues contained within the administrative complaint including, if necessary, the appropriate administrative punishment.

(2) Prior to the taking of witness testimony at the administrative hearing, the Respondent or Respondents shall enter a plea of "guilty" or "not guilty" to each charge contained in the administrative complaint.

(3) All parties shall be allowed to make a concise opening statement regarding the charges in the administrative complaint, defenses to the administrative complaint, expected testimony and evidence, and any proposed administrative punishment.

(4) The parties shall be allowed to present evidence by direct and cross-examination. The executive director, or a designee acting on behalf of the Investigative Committee, shall present its evidence first followed by the other parties in the order determined by the Board or its Hearing Officer. Examination of witnesses shall not be unduly repetitious. The testimony of all parties and witnesses shall be made under oath administered by the Board or the Board's Hearing Officer.

(5) The Board or the Board's Hearing Officer may examine and question any party or witness regarding the administrative complaint and defenses thereto.

(6) All parties shall be allowed to make a brief closing statement summarizing the evidence presented and regarding the applicability or relevant state law and/or Board rules and regulations.

(7) All testimony and statements given in the administrative hearing shall be electronically or stenographically recorded. Any party wishing to obtain a transcript of the hearing shall make arrangements with the court reporter to receive a copy of the transcript at their own expense.

(8) The parties shall not be bound by the strict rules of evidence prevailing in the courts. Evidence shall be admitted in accordance with the Alabama Administrative Procedures Act, Section 13.² The administrative complaint and all attachments thereto shall be made a part of the administrative record for consideration by the Board without further authentication.

² Alabama Administrative Procedures Act, Section 13 reads as follows:

In contested cases:

- (1) The rules of evidence as applied in nonjury civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Except as hereinafter provided, objections to evidentiary offers may be made and shall be noted in the record. Whenever any evidence is excluded as inadmissible, all such evidence existing in written form shall remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded. All rulings on the admissibility of evidence shall be final and shall appear in the record. Subject to these requirements, when a hearing will be expedited and interests of the parties will not be prejudiced substantially, any part of the evidence may be received or may be required to be submitted in verified form; provided, the adversary party shall not be denied the right of cross-examination of the witness. The testimony of parties and witnesses shall be made under oath. Provided, however, in the hearing of a contested case where judicial review of the case is by trial de novo, the agency may announce that it shall not be necessary that objections be made during the hearing and upon such announcement, it shall not be required or necessary that objection to be made to any testimony or evidence which may be offered by either party, and on the consideration of such cases the agency shall consider only such testimony and evidence as is relevant, material, competent and legal, and shall not consider any testimony or evidence which is irrelevant, immaterial, incompetent or illegal, whether objection shall have been made thereto or not, and whether such testimony be brought on direct, cross or re-direct examination, or is hearsay. The agency shall not be required to point out what testimony or evidence should be excluded or not considered. Either party, on submission, shall have the privilege of calling attention to any testimony or evidence which is deemed objectionable. If specific objection be made to any evidence and a ruling made thereon by the agency, this exception shall not apply to such evidence.
- (2) Documentary evidence otherwise admissible may be received in the form of copies of excerpts, or by incorporation by reference to material already on file with the agency. Upon request, parties shall be given an opportunity to compare the copy with the original.
- (3) A party may conduct cross-examination required for a full and true disclosure of the facts, except as may otherwise be limited by law.
- (4) Official notice may be taken of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as party of the record of decision that fairness to the parties does not require an opportunity to contest such facts.
- (5) The experience, technical competence, and specialized knowledge of the agency may be utilized in the evaluation of evidence.

Section 41-22-13, *Code of Alabama 1975*.

(9) The Board or its Hearing Officer may admit into evidence the deposition of any witness who is not subject to the subpoena power of the Board or who is unable to be present to testify at the hearing because of death, physical or mental illness, or other good reason at the discretion of the Board or its Hearing Officer.

(10) All exhibits that are offered into evidence, whether admitted or not, shall be made a part of the administrative record in the case and be included as part of the court reporter's original transcript of the hearing. The party who offers each exhibit shall be permitted to substitute a true copy of the exhibit for the original exhibit upon request to and permission by the Board or its Hearing Officer.

(11) All objections concerning the conduct of the hearing or the admission of evidence may be stated orally or filed in writing during the hearing. The objections and responses thereto shall include a statement of the grounds for the objection and legal authority relied upon. The ruling on the objection by the Board or the Board's Hearing Officer shall be made a part of the administrative record of the hearing. Any party may make an offer of proof regarding evidence that is not admitted and may describe the general nature of the evidence offered and not admitted as part of the administrative record of the hearing.

(12) The Board or the Board's Hearing Officer may allow the parties to submit for consideration a proposed order or recommendation which includes a procedural history, proposed findings of fact, conclusions of law, and any suggested administrative punishment. The parties shall cite the appropriate pages of the hearing transcript for any proposed findings of fact.

(13) The administrative hearing shall be otherwise conducted in compliance with the provisions and in accordance with the Alabama Administrative Procedures Act, Section 41-22-12, et. seq., Code of Ala. 1975.

Author: Mark Montiel

Statutory Authority: Code of Ala. 1975, §§34-31-32; 34-31-33.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

440-X-6-.12 Penalties.

(1) The Board may, in its discretion, issue a written public or private reprimand or remove, revoke, or suspend the

certification of any certified contractor who provides substandard or dangerous service, repair, or installation, or who otherwise violates state law or the rules and regulations of the Board.

(2) The issuance of two or more written letters of public reprimand to a certified contractor may serve as probable cause for the Investigative Committee to proceed with administrative charges to seek the revocation or suspension of the contractor's certification by the Board, pursuant to an administrative hearing described in these rules.

(3) The Board may, in addition to or in lieu of other penalties, levy and collect administrative fines for serious violations of state law or the rules and regulations of the Board of not more than \$2,000.00 for each violation.

Authors: Mark Montiel, Kathy LeCroix

Statutory Authority: Code of Ala. 1975, §34-31-32.

History: New Rule: Filed April 9, 2003; effective May 14, 2003.

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