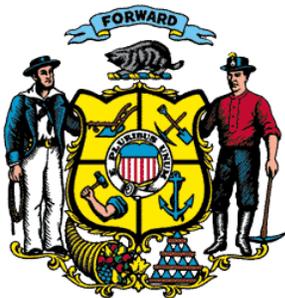


This brochure entitled *Information About Your Hearing, Class 1 – Application Denial* has been prepared by the Department of Safety and Professional Services (Department) to assist credential applicants who have requested a hearing in order to review a decision made by one of the credentialing authorities in the Department. It provides information to common questions regarding the Class 1 – Application Denial hearing process. **However, it is not intended to substitute for the legal advice and assistance of an attorney.**

Information About Your Hearing

Class 1 - Application Denial



Wisconsin Department of
Safety and Professional Services

Information About Your Hearing

Class 1 - Application Denial

You have requested a hearing to review a decision made by one of the credentialing authorities in the Department of Safety and Professional Services. This informational brochure has been prepared by the Department to assist you in answering some common questions. **It is not intended to substitute for the legal advice and assistance of an attorney.**

Topics

The Notice of Hearing
Your Right to be Represented
Prehearing Conference(s)
Discovery and Documentary Evidence
Witnesses and Subpoenas
An Interpreter or other Accommodation
The Hearing
Rescheduling, Continuing, Adjourning
The Decision
Chapter SPS 1
Map to 1400 E. Washington Ave., Madison, WI

The Notice of Hearing

The Notice of Hearing sets out the issues to be resolved in deciding your case. You are now a "party" to this proceeding, called the "applicant". An attorney from the Division of Legal Services and Compliance within the Department of Safety and Professional Services represents the other party, which is either a professional board or the Department itself, depending on your particular profession. A hearing is occasionally conducted directly by a board, but in most cases, the hearing will be conducted by an administrative law judge (ALJ) who presides as judge (ruling on procedure, evidence, and objections) and as fact-finder. The mailing addresses for both the Division of Legal Services and Compliance attorney and the ALJ are provided in the Notice of Hearing.

Your Right to be Represented

You may be represented prior to and at the hearing by an attorney, but you are not required to have one. You must make this decision, and if you decide to be represented in order to protect your legal rights, you must choose your own attorney. Neither the Division of Legal Services and Compliance attorney nor the ALJ is allowed to recommend an attorney. The State Bar of Wisconsin offers a lawyer referral service that you may call at 800-362-9082. The ALJ cannot help you prepare or present your case.

Prehearing Conference(s)

The ALJ may conduct at least one prehearing conference which may be held by telephone. The purposes are: (1) to clear away any misunderstandings, (2) to reach agreement on as many of the facts as possible, (3) to identify the real issues to be addressed, (4) to review the exchange of documents and the identification of witnesses, and (5) to set a realistic schedule for the hearing. If you have additional information that you have not already provided which might cause the credential-granting authority to reconsider its decision without a hearing, then you may be encouraged to provide that information to the Division of Legal Services and Compliance attorney.

Even though you may contact the ALJ in certain circumstances, you should avoid what is called an *ex parte* communication. As the person who must listen impartially to the evidence, the ALJ must only consider facts and arguments which are presented to him or her at a time when both sides are present. Therefore, you may contact the ALJ with a procedural question, but any discussion of the "merits" of the case can only occur during a conference in which both parties participate.

Discovery and Documentary Evidence

You may want to use documents or other physical evidence to support your position. Under the rules of procedure for cases like this, the parties do not have a right to see each other's evidence before the hearing. You may make a separate request to the Department for documents under the Public Records Law. However, if an exchange of information would make the hearing more efficient, the parties can agree (stipulate) to do so before the hearing. If you have questions about this, you may contact an attorney, or the ALJ who can arrange a prehearing conference.

Witnesses and Subpoenas

You may want to call one or more witnesses to offer testimony to support your position or to identify and explain other documents. If so, you are responsible for having the witnesses appear. You may arrange for such witnesses to appear voluntarily at the hearing, or if a person will not agree to appear voluntarily, you may order him or her to appear for you by a subpoena. An attorney who you have hired to represent you can prepare a subpoena on your behalf, or you may contact the ALJ. If the ALJ issues a subpoena on your behalf, you will then have to arrange to have the subpoena served on the witness; you can do this yourself as long as you prepare an affidavit of service, or you can have it done by the sheriff's office or a private process-server. In addition to the subpoena, you must include payment to the witness of \$5/day and 20¢/mile round trip for appearing. A witness may be allowed to testify by phone; ask the ALJ about this well before the hearing date.

An Interpreter or other Accommodation

If you need an interpreter to help you understand the English language, or if some accommodation would assist you to deal with a disability, please contact the ALJ, and he or she will attempt to arrange the hearing so that you can participate fully.

The Hearing

Unless your case settles or is rescheduled, it will be heard on the date specified in the notice of hearing. You are not required to appear at the hearing or set during a prehearing conference. However, if you do not appear, the hearing will proceed without you, and you may lose your right to appeal the decision.

Assuming you appear, the hearing will be conducted much like a trial without a jury. Just as in a trial, each side gets a chance to start with an opening statement (a short summary explaining what its general position is) and then to present evidence. Generally, you will present your case first, and then the Division of Legal Services and Compliance attorney will be given the opportunity to respond. Each witness can be questioned by both parties: first the party who calls the witness asks questions (direct examination), then the other party asks questions (cross examination), and next each party gets an opportunity to ask follow-up questions (re-direct and re-cross examination).

The evidence may be in documents or in testimony from witnesses. You may testify for yourself, and you may be called as a witness by the attorney for the Division of Legal Services and Compliance. Some rules of evidence may limit what can be introduced, however no attempt will be made to explain all the rules in this brochure. If you anticipate any problem, such as whether a certain document will be admitted or certain testimony allowed, you or your attorney should contact the ALJ so that the issue can be discussed in a prehearing conference.

After all the evidence has been presented, each side may make a closing argument, which is an opportunity to comment on the evidence that has been presented, such as explaining how much credit should be given to certain testimony, or explaining otherwise confusing evidence. It is also each side's opportunity to argue what the decision should be.

The burden will be on you to establish that you qualify for licensure or to prove that a mistake of fact or law was made in denying your application unless the Department claims that you cheated on an exam or breached exam security, in which case the burden is on the Department to prove its case. The hearing will be recorded, and you will be able to purchase a copy of the transcript from the court reporting service if you wish.

Rescheduling, Continuing, Adjourning

If a good reason is shown by either party, the ALJ can reschedule the hearing, and a telephone conference may be held to set a new date.

Once a hearing has started, the ALJ may continue it on another day if more time is necessary.

If your case settles, the ALJ will usually adjourn the hearing, not canceling it entirely, but taking it off the calendar until the settlement is approved by the Department or board.

The Decision

The final decision-maker in your case is the Department or board (depending on the profession). Once the hearing is completed, the ALJ is responsible for preparing a Proposed Decision which sets out all of the facts of the case, recites the laws (statutes and administrative rules) that govern the case, and applies those laws to the facts.

The proposed decision must be in writing for the Department or board to review, and the ALJ often waits until the transcript of the hearing is prepared before writing it. This means that the proposed decision may not be completed until a month or more after the hearing.

Once the proposed decision is filed, it will be sent to you, and you will be notified of a time (not less than ten days) in which you may file written objections to be considered by the Department or board before it makes its final decision. You will then receive a copy of the Final Decision, and you will have the right to appeal through the court system any decision that goes against you.

CHAPTER SPS 1

PROCEDURES TO REVIEW DENIAL OF AN APPLICATION

- SPS 1.01 Authority and scope.
- SPS 1.03 Definitions.
- SPS 1.04 Examination failure: retake and hearing, consequences of cheating on an examination or breach of examination security.
- SPS 1.05 Notice of intent to deny, notice of denial and notice of cheating on an examination or breach of examination security.
- SPS 1.06 Parties to a denial review proceeding.
- SPS 1.07 Request for hearing.
- SPS 1.08 Procedure.
- SPS 1.09 Conduct of hearing.
- SPS 1.10 Service.
- SPS 1.11 Failure to appear.
- SPS 1.12 Withdrawal of request.
- SPS 1.13 Transcription fees.

SPS 1.01 Authority and scope. Rules in this chapter are adopted under authority in s. 440.03 (1), Stats., for the purpose of governing review of a decision to deny an application. Rules in this chapter do not apply to denial of an application for renewal of a credential. Rules in this chapter shall apply to applications received on or after July 1, 1996.

Note: Procedures used for denial of an application for renewal of a credential are found in Ch. SPS 2, Wis. Admin. Code and s. 227.01 (3) (b), Stats.

SPS 1.03 Definitions. In this chapter:

(1) "Applicant" means any person who applies for a credential from the applicable credentialing authority.

"Person" in this subsection includes a business entity.

(1g) "Breach of examination security" means any of the following:

- (a) Removing from the examination room any examination materials without authorization.
- (b) Reproducing, or assisting a person in reproducing, any portion of the credentialing examination by any means and without authorization.
- (c) Paying a person to take the credentialing examination to discover the content of any portion of the credentialing examination.
- (d) Obtaining examination questions or other examination materials, except by specific authorization before, during, or after an examination.
- (e) Using, or purporting to use, improperly obtained examination questions or materials to instruct or prepare an applicant for the credentialing examination.
- (f) Selling, distributing, buying, receiving or having unauthorized possession of any portion of a future, current, or previously administered credentialing examination.

(1r) "Cheating on an examination" includes:

- (a) Communicating with other persons inside or outside of the examination room concerning examination content using any means of communication while the examination is being administered.
- (b) Copying the answers of another applicant, or permitting answers to be copied by another applicant.
- (c) Substituting another person to write one or more of the examination answers or papers in the place of the applicant.
- (d) Referring to "notes," textbooks or other unauthorized information sources inside or outside the examination room while the examination is being administered.
- (e) Disclosing the nature or content of any examination question or answer to another person prior to, during, or subsequent to the conclusion of the examination.
- (f) Removing or attempting to remove any examination materials, notes or facsimiles

of examination content such as photo, audiovisual, or electronic records from the examination room.

- (g) Violating rules of conduct of the examination.
- (2) "Credential" means a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480, Stats.
- (3) "Credentialing authority" means the department or an attached examining board, affiliated credentialing board or board having authority to issue or deny a credential.
- (4) "Denial review proceeding" means a class 1 proceeding as defined in s. 227.01 (3) (a), Stats., in which a credentialing authority reviews either a decision to deny a completed application for a credential or a determination of cheating on an examination or breach of examination security.
- (5) "Department" means the Department of Safety and Professional Services.
- (6) "Division" means the division of enforcement in the department.
- (7) "Office of examinations" means the office of examinations in the department.

SPS 1.04 Examination failure: retake and hearing, consequences of cheating on an examination or breach of examination security.

- (1) An applicant may request a hearing to challenge the validity, scoring or administration of an examination if the applicant has exhausted other available administrative remedies, including, but not limited to, internal examination review and regrading, and if either:
 - (a) The applicant is no longer eligible to retake a qualifying examination.
 - (b) Reexamination is not available within 6 months from the date of the applicant's last examination.
- (2) A failing score on an examination does not give rise to the right to a hearing if the applicant is eligible to retake the examination and reexamination is available within 6 months from the date of the applicant's last examination.

Note: An applicant is not eligible for a license until his or her application is complete. An application is not complete until an applicant has submitted proof of having successfully passed any required qualifying examination. If an applicant fails the qualifying examination, but has the right to retake it within 6 months, the applicant is not entitled to a hearing under this chapter.

- (3)
 - (a) Consequences imposed for cheating on an examination or for committing a breach of examination security shall be related to the seriousness of the offense and may include: denial of grades; entering of a failing grade on all examinations in which cheating occurred; restrictions on reexamination; or denial of licensure. If more than one applicant are involved in a connected offense of cheating on an examination or breach of examination security, each applicant knowingly involved is subject to the consequences in this section.
 - (b) Restrictions on reexamination may include denying the applicant the right to retake the examination for a specified period of time or the imposition of a permanent bar on reexamination.
 - (c) The department may provide information on the consequences imposed upon an applicant to other jurisdictions where the applicant may apply for credentialing or examination.
 - (d) If an approved or credentialed school or instructor is found to have facilitated actions constituting cheating on an examination or breach of examination security, the school or instructor may be subject to disciplinary action or revocation of approval.

SPS 1.05 Notice of intent to deny, notice of denial and notice of cheating on an examination or breach of examination security.

- (1) NOTICE OF INTENT TO DENY.
 - (a) A notice of intent to deny may be issued upon an initial determination that the applicant does not meet the eligibility requirements for a credential. A notice of intent to deny shall contain a short statement in plain language of the basis for the anticipated denial, specify the statute, rule or other standard upon which the denial will be based and state that the application shall be denied unless, within 45 calendar days from the date of the mailing of the notice, the credentialing

authority receives additional information which shows that the applicant meets the requirements for a credential. The notice shall be substantially in the form shown in Appendix I.

- (b) If the credentialing authority does not receive additional information within the 45 day period, the notice of intent to deny shall operate as a notice of denial and the 45 day period for requesting a hearing described in s. SPS 1.07 shall commence on the date of mailing of the notice of intent to deny.
- (c) If the credentialing authority receives additional information within the 45 day period which fails to show that the applicant meets the requirements for a credential, a notice of denial shall be issued under sub. (2).

(2) **NOTICE OF DENIAL.** If the credentialing authority determines that an applicant does not meet the requirements for a credential, the credentialing authority shall issue a notice of denial in the form shown in Appendix II. The notice shall contain a short statement in plain language of the basis for denial, specify the statute, rule or other standard upon which the denial is based, and be substantially in the form shown in Appendix II.

(3) **NOTICE OF CHEATING ON AN EXAMINATION OR BREACH OF EXAMINATION SECURITY.** If after an investigation the office of examinations determines there is probable cause to believe that an applicant has cheated on an examination or breached examination security and the office of examinations and the applicant cannot agree upon a consequence acceptable to the credentialing authority, the office of examinations shall issue a notice of cheating on an examination or breach of examination security. The notice shall:

- (a) Include the name and address of the applicant, the examination involved, and a statement identifying with reasonable particularity the grounds for the conclusion that the applicant has cheated on an examination or breached examination security.
- (b) Be mailed to the applicant at the address provided in the materials submitted by the applicant when applying to take the examination. Notice is effective upon mailing.

SPS 1.06 Parties to a denial review proceeding. Parties to a denial review proceeding are the applicant, the credentialing authority and any person admitted to appear under s. 227.44 (2m), Stats.

SPS 1.07 Request for hearing. An applicant may request a hearing within 45 calendar days after the mailing of a notice of denial by the credentialing authority or notice of cheating on an examination or breach of examination security by the office of examinations. The request shall be in writing and set forth all of the following:

- (1) The applicant's name and address.
- (2) The type of credential for which the applicant has applied.
- (3) A specific description of the mistake in fact or law which constitutes reasonable grounds for reversing the decision to deny the application for a credential or for reversing a determination of cheating on an examination or a determination of breach of examination security. If the applicant asserts that a mistake in fact was made, the request shall include a concise statement of the essential facts which the applicant intends to prove at the hearing. If the applicant asserts a mistake in law was made, the request shall include a statement of the law upon which the applicant relies.

SPS 1.08 Procedure. The procedures for a denial review proceeding are:

- (1) **REVIEW OF REQUEST FOR HEARING.** Within 45 calendar days of receipt of a request for hearing, the credentialing authority or its designee shall grant or deny the request for a hearing on a denial of a credential or on a determination of cheating on an examination or a determination of breach of examination security. A request shall be granted if requirements in s. SPS 1.07 are met, and the credentialing authority or its designee shall notify the applicant of the time, place and

nature of the hearing. If the requirements in s. SPS 1.07 are not met, a hearing shall be denied, and the credentialing authority or its designee shall inform the applicant in writing of the reason for denial. For purposes of a petition for review under s. 227.52, Stats., a request is denied if a response to a request for hearing is not issued within 45 calendar days of its receipt by the credentialing authority.

- (2) **DESIGNATION OF PRESIDING OFFICER.** An administrative law judge employed by the department shall preside over denial hearings, unless the credentialing authority designates otherwise. The administrative law judge shall be an attorney in the department designated by the department general counsel, an employee borrowed from another agency pursuant to s. 20.901, Stats., or a person employed as a special project or limited term employee by the department, except that the administrative law judge may not be an employee in the division.
- (3) **DISCOVERY.** Unless the parties otherwise agree, no discovery is permitted, except for the taking and preservation of evidence as provided in ch. 804, Stats., with respect to witnesses described in s. 227.45 (7) (a) to (d), Stats. An applicant may inspect records under s. 19.35, Stats., the public records law.
- (4) **BURDEN OF PROOF.** The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential. The office of examinations has the burden of proof to show by a preponderance of the evidence that the applicant cheated on an examination or breached examination security.

SPS 1.09 Conduct of hearing.

- (1) **RECORD.** A stenographic, electronic or other record shall be made of all hearings in which the testimony of witnesses is offered as evidence, and of other oral proceedings when requested by a party.
- (2) **ADJOURNMENTS.** The presiding officer may, for good cause, grant continuances, adjournments and extensions of time.
- (3) **SUBPOENAS.**
 - (a) Subpoenas for the attendance of any witness at a hearing in the proceeding may be issued in accordance with s. 227.45 (6m), Stats.
 - (b) A presiding officer may issue protective orders according to the provisions of s. 805.07, Stats.
- (4) **MOTIONS.** All motions, except those made at hearing, shall be in writing, filed with the presiding officer and a copy served upon the opposing party not later than 5 days before the time specified for hearing the motion.
- (5) **EVIDENCE.** The credentialing authority, the office of examinations and the applicant shall have the right to appear in person or by counsel, to call, examine and cross-examine witnesses and to introduce evidence into the record. If the applicant submits evidence of eligibility for a credential which was not submitted to the credentialing authority prior to denial of the application, the presiding officer may request the credentialing authority to reconsider the application and the evidence of eligibility not previously considered.
- (5m) **CONFIDENTIALITY OF EXAMINATION RECORDS.** The presiding officer shall take appropriate precautions to preserve examination security in conjunction with the conduct of a hearing held pursuant to this section.
- (6) **BRIEFS.** The presiding officer may require the filing of briefs.
- (7) **LOCATION OF HEARING.** All hearings shall be held at the offices of the department in Madison unless the presiding officer determines that the health or safety of a witness or of a party or an emergency requires that a hearing be held elsewhere.

SPS 1.10 Service. Service of any document on an applicant may be made by mail addressed to the applicant at the last address filed in writing by the applicant with the credentialing authority. Service by mail is complete on the date of mailing.

SPS 1.11 Failure to appear. In the event that neither the applicant nor his or her representative appears at the time and place designated for the hearing, the credentialing authority may take action based upon the record as submitted. By failing to appear, an applicant waives any right to appeal the

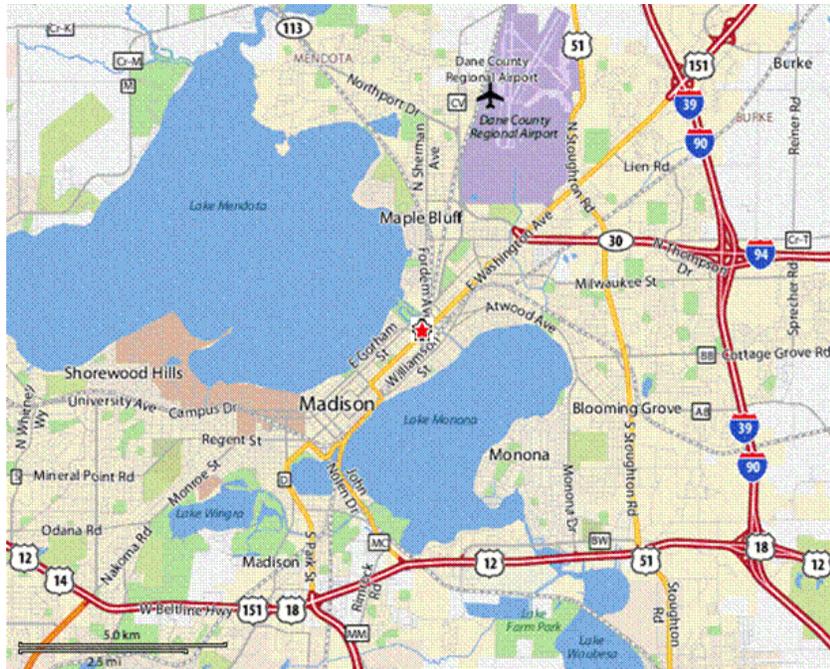
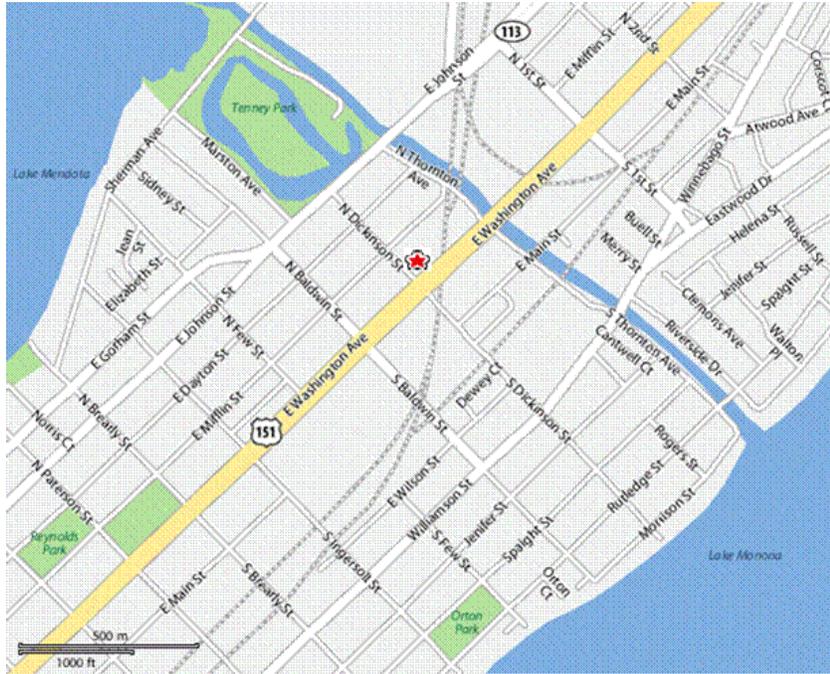
action taken by the credentialing authority.

SPS 1.12 Withdrawal of request. A request for hearing may be withdrawn at any time. Upon receipt of a request for withdrawal, the credentialing authority shall issue an order affirming the withdrawal of a request for hearing on the denial or on the determination of cheating on an examination or determination of breach of examination security.

SPS 1.13 Transcription fees.

- (1) The fee charged for a transcript of a proceeding under this chapter shall be computed by the person or reporting service preparing the transcript on the following basis:
 - (a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount identified in the state operational purchasing bulletin which identifies the reporting service and its fees.
 - (b) If a transcript is prepared by the department, the department shall charge a transcription fee of \$1.75 per page and a copying charge of \$.25 per page. If 2 or more persons request a transcript, the department shall charge each requester a copying fee of \$.25 per page, but may divide the transcript fee equitably among the requesters. If the department has prepared a written transcript for its own use prior to the time a request is made, the department shall assume the transcription fee, but shall charge a copying fee of \$.25 per page.
- (2) A person who is without means and who requires a transcript for appeal or other reasonable purposes shall be furnished with a transcript without charge upon the filing of a petition of indigency signed under oath. For purposes of this section, a determination of indigency shall be based on the standards used for making a determination of indigency under s. 977.07, Stats.

MAPS



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