

**CHAPTER XV**  
**APPEALS BOARD**

A. General.

The Labor and Industrial Relations Appeals Board is an independent adjudicatory agency whose three members are directly appointed by the Governor. The Board is statutorily given the power to decide appeals from decisions and orders of the Director of Labor and Industrial Relations issued under the Occupational Safety and Health Law and other labor laws.

B. Transmittal of Notice of Contest and Other Documents to the LIR Appeals Board.

1. Notice of Contest.

In accordance with chapter 43, Hawaii Administrative Rules, for the Labor and Industrial Relations Appeals Board, the original notice of contest, together with copies of all relevant documents (all contested Citations and Notifications of Penalty and Notifications of Failure to Abate Alleged Violation, and proposed additional penalty) shall be transmitted to the Labor and Industrial Relations Appeals Board by the administrator within seven days after receipt of the notice of contest.

- a. The transmittal to the LIR Appeals Board shall state the issues being contested and shall also include the names and addresses of employee representative groups, if any.
- b. If the letter of contest is untimely, the branch manager shall notify the employer by letter that it is untimely. The employer shall also be informed that the notification of untimeliness may be appealed by writing to the division stating why the contest should be considered timely. If there is an appeal of the notification of untimeliness, the original notice of contest with the envelope, if mailed, shall be forwarded to the LIR Appeals Board for determination whether the notice of contest is timely filed. The transmittal letter to the LIR Appeals Board shall state that the issue is the timeliness of the notice of contest.
- c. If the notice of contest is submitted to the administrator after the 20-day period, but the notice contests only the reasonableness of the abatement period, it shall be treated as a Petition for Modification of Abatement and handled in accordance with the instructions in chapter III, E.9.
- d. If written communication received from an employer is timely, contains objection, criticism, or other adverse comment regarding a citation or proposed penalty, and does not clearly appear to be a notice of contest, the branch manager shall call the employer as soon as possible and clarify whether or not the employer intends the document to be a notice of contest. If the branch manager leaves a message for the employer, the message shall state that if the employer does not respond by the specified date and time, the branch manager will assume that the document was not a notice of contest and that the employer will forfeit his contest rights after the 20-day period. The branch manager shall only clarify the employer's intent and shall not attempt to talk the employer out of the contest. The branch manager shall document the substance of this conversation in the case file diary. If the document is a notice of contest, the case file shall be transmitted to the LIR Appeals Board. If the document is not a notice of contest, an appropriate response shall be made to the employer. Both document and response, if any, shall be retained in the case file.

- e. If the written communication received from an employer is untimely and does not clearly appear to be a notice of contest, the branch manager shall call and notify the employer that if the document is a notice of contest, the contest is too late. The branch manager shall document the substance of this conversation in the case file diary. If the employer clarifies that the document is a notice of contest, the branch manager shall follow B.1.b. above.
- f. If the written communication contains both a request for an informal conference and a notice of contest, the employer shall be contacted and notified that the notice of contest shall take precedence, no informal conference shall be scheduled, and the case shall be transmitted to the LIR Appeals Board.
2. Parties Served Notice of Contest. Affected employees or authorized employee representatives shall be given an opportunity to participate as parties to HIOSH hearings. The LIR Appeals Board shall notify each employee representative group of any scheduled conferences or hearings.
3. Petitions for Modification of Abatement Dates (PMAs).

In accordance with section 11(c) of the Law, the director or his duly authorized agent shall have the authority to approve petitions for modification of abatement.

- a. The purpose of this transfer of responsibility is to facilitate the handling and to expedite the processing of PMAs to which neither the director nor any other affected party objects. The administrator is the authorized agent of the director and shall receive, process, approve, disapprove, or otherwise administer the petitions. In general, the administrator shall:
- (1) Assure that the following requirements of section 11(c) through (d) of the law are met;
  - (2) Approve or disapprove uncontested PMAs within 10 days from the date the petition was posted where all affected employees could have notice of the petition;
  - (3) Forward to the Appeals Board within 7 working days after the 20-day approval period all petitions objected to by the Branch Manager or affected employees; and
  - (4) File a response setting forth the reasons for opposing granting of the PMA within 10 working days after the receipt of the docketing by the Appeals Board.
- b. Only copies of relevant documents shall be transmitted to the Appeals Board. All originals shall be retained in the case file.

C. Transmittal of File to the Attorney General.

1. Notification of the Attorney General. The department of the attorney general, labor division shall be notified via transmittal memo of any contested issue before the LIR Appeals Board. In order that they may adequately prepare for the case, the transmittal and all relevant documents shall be transmitted at the same time, the LIR Appeals Board is notified.

- a. Accordingly, when a notice of contest is received, it shall immediately be date stamped and the time of receipt entered.
- b. A copy of the case file including photographs shall be promptly forwarded to the attorney general's office via courier.

NOTE: A copy of the transmittal memo and all related correspondence forwarded to the attorney general shall be retained in the division office case file.

2. Information Required in Case File.

- a. What provision of the Law, Standard, regulation, rule, or order was violated and the item and citation number in which the alleged violation is set forth.
- b. The factual basis for each allegation to establish that the standard, regulation, or rule applies, and what scope or application provision governs its applicability.
- c. The factual basis for each allegation necessary to establish that the cited circumstances, conditions, practices, or operations violated the cited provisions of the Law, standard, regulation, rule, or order.
- d. Where pertinent, the factual basis for the allegation that employees had access or, were exposed to the cited circumstances, conditions, practices, or operations.
- e. Evidence that the employer knew or could have known with the exercise of reasonable diligence of the cited circumstances, conditions, practices, or operations.
- f. Any allegation that the alleged violation is serious, or that the employer willfully committed the alleged violation.
- g. Any allegation that the employer repeatedly committed the alleged violation, each prior citation and item number that serves as the basis for the classification, and the date that each became a final order of the Appeals Board.
- h. Evidence that the proposed penalty is appropriate, specifying the amount.
- i. Evidence that the proposed abatement date is reasonable, specifying the date.

3. Other Legal Documents. All other legal documents filed by the employer, affected employees, or representatives of affected employees shall be transmitted promptly to the attorney general. In the event the administrator or any other HIOSH personnel are served with any pleading after the filing of a notice of contest, the pleading shall not be transmitted to the Appeals Board, but rather shall be transmitted to the attorney general in accordance with the procedures noted in C.1., of this chapter.

4. Subpoena. HIOSH personnel may be subpoenaed to participate in non-third-party HIOSH actions. The attorney general will move to revoke the subpoena on HIOSH personnel. Therefore, when any such subpoena is served on HIOSH personnel, the attorney general shall immediately be notified by telephone.

D. Communications with Appeals Board Employees. There shall be no ex parte communication, with respect to the merits of any case not concluded, between the Appeals Board, including any member, officer, employee, or agent of the Appeals Board who is employed in the decisional process, and any of the parties or interveners. Thus, compliance officers, branch managers and the administrator, or other field personnel shall refrain from any direct or indirect communication

relevant to the merits of the case with any members or employees of the Appeals Board. All inquiries and communications should be handled through the attorney general.

E. Dealings With Parties While Proceedings Are Pending Before the Appeals Board.

1. Clearance With Attorney General. After the notice of contest is filed and the case is within the jurisdiction of the Appeals Board, there should be no investigations of, or conferences with, the employer without clearance with the attorney general. These requests shall promptly be referred to the attorney general for a determination of the advisability, scope, and timing of any investigation, and the advisability of, and participation in, any conference. To the maximum extent possible, there shall be consultation with the attorney general on questions of this nature, so as to assure no procedural or legal improprieties.
2. Inquiries. Once a notice of contest has been filed, all inquiries relating to the general subject matter of the citation and notification of penalty raised by any of the parties of the proceedings, including the employer and affected employees or authorized employee representative, shall promptly be referred to the attorney general. Similarly, all other inquiries, such as from prospective witnesses, insurance carriers, other government agencies, attorneys, etc. shall be referred to the attorney general.

NOTE: Cooperation with the attorney general in this area is important. There are practical advantages to having an attorney participate in these conferences. Moreover, serious questions of legal propriety could be raised about meetings with parties involved in hearings and litigation without the presence of counsel and about the discussion or disclosure to non-parties of any aspect of pending cases.