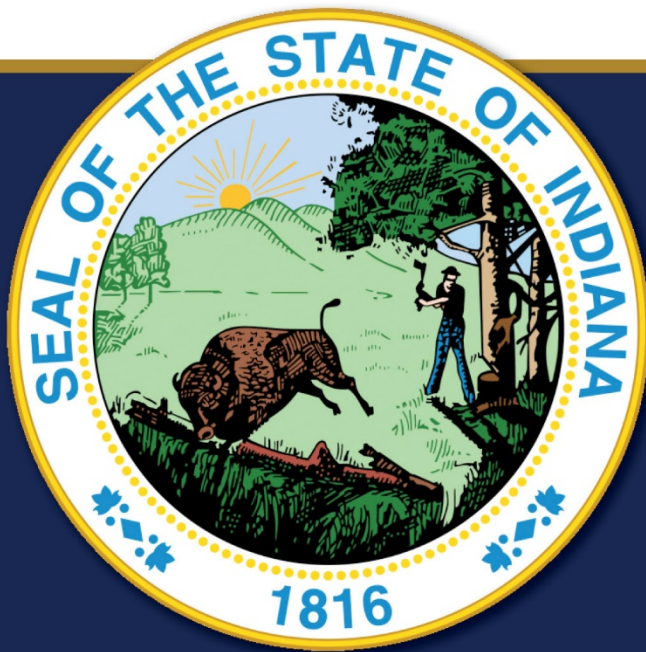


# GUIDE TO IDHS ADMINISTRATIVE APPEALS



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***Disclaimer:*** *This manual is intended to provide a high-level overview of the administrative appeals process within the Indiana Department of Homeland Security. Therefore, this manual does not cover every type of situation or issue that may arise in such an appeal. Furthermore, this guide should not be relied upon as a substitute for obtaining legal counsel or assistance.*

## I. WHAT IS AN ADMINISTRATIVE APPEAL?

### A. Administrative Orders and Procedures Act (AOPA)

The administrative appeals process for most Indiana executive branch agencies is governed by the Administrative Orders and Procedures Act (AOPA), found in [Ind. Code § 4-21.5](#). AOPA sets out the minimum rights available for individuals and/or agencies, as well as duties of an agency that may arise from an Indiana executive branch agency action; however, [some agencies](#) and [certain actions](#) are exempt. AOPA defines an agency action as “(1) The whole or part of an order. (2) The failure to issue an order. (3) An agency’s performance of, or failure to perform, any other duty, function, or activity under this article.” [Ind. Code § 4-21.5-1-4](#). It defines an order as “an agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” [Ind. Code § 4-21.5-1-9](#).

### B. Administrative Actions by IDHS and its Board and Commissions

An administrative appeal can, in theory, arise from all sorts of agency actions, but there are a few types of agency actions that are commonly appealed. (AOPA defines an agency as “any officer, board, commission department division, bureau, or committee of state government that is responsible for any stage of a proceeding under AOPA.) This manual primarily addresses the most common types of appeals, but is still generally applicable to all types of appeals that may be requested in response to an agency action. For the purposes of this manual, there are two main types of appeals; appeals that challenge sanctions arising from code violations and appeals that challenge a denial of an application for a variance, certification, or grant.

#### 1. Code Violations

Code violations typically result in an order being issued by the agency or a disciplinary sanction being imposed by a board or commission as a result of a violation of the Indiana Code, the Indiana Administrative Code, or some other statute or rule. In cases where an appeal is requested, it will be the responsibility of the agency, board, or commission to prove that the violation occurred and, if so, that the sanction it wishes to impose is appropriate. Examples of an appeal arising from a code violation include appeals of disciplinary action on a license or certification, or a sanction imposed as a result of a building code violation.

#### 2. Applications for Variances, Grants, and Certifications

Applications for variances, grants, and certifications are requests for the agency, board, or commission to take action in favor of the person submitting the application. In cases where a decision regarding an application is being appealed, it will be the responsibility of the party who submitted the application to demonstrate that it is entitled to what it is asking the agency, board, or commission for.

### C. Purpose and Goals of the Appeal

The purpose of an administrative appeal is to provide the party requesting the appeal an opportunity to have someone (the Administrative Law Judge) take a second look at the alleged violation or application.

AOPA provides that administrative appeals are *de novo*. This means that the Administrative Law Judge (ALJ) is not reviewing what the agency, board, or commission did; rather, *de novo* means the ALJ will review the laws, policies, and procedures that govern the particular issue on appeal and will apply the applicable law to the facts of the appeal to determine what the outcome should be.

#### D. Roadmap of IDHS Appeals Process

Generally speaking, after an agency action occurs, a party wishing to appeal the action would have a certain time period during which it may submit a request for review. Next, the agency, board, or commission would review the request to make sure it is timely, and if so, the appeal would be assigned to an ALJ. The ALJ would then issue initial orders and schedule a meeting with the parties to discuss the case.

The ALJ will give the parties time to resolve the matter informally, without input by the ALJ, if they believe that is possible. The ALJ will schedule status conferences along the way to ensure that the parties are communicating and the case is moving. If the parties are not able to informally resolve the appeal, the ALJ will schedule an evidentiary hearing or, in the alternative, set a briefing schedule. After the hearing (or briefs are submitted), which will be discussed in further detail below, the ALJ will issue a Findings of Fact, Conclusions of Law, and Non-Final Order (NFO). The ALJ will provide the NFO to the ultimate authority for its review and consideration. The ultimate authority can accept, reject, or modify the NFO and the decision regarding the NFO may then be appealed for judicial review.

## II. GETTING STARTED

The first step in the process of appealing an agency action is submitting a “request” or “petition” for review to the IDHS. This can be done by visiting the IDHS appeals webpage and filling out the [online form](#). Instructions for mailing in the request should also be included in the “Appeal Rights” section of the order the aggrieved party would have received. **An agency order will be final within 15 days of issuance if the order is properly hand-delivered to you (and within 18 days of issuance if it is mailed) if a petition for review is not filed in accordance with the instructions provided on the order. If a petition for review is filed within the time frame explained above, the order will still become effective within 15 days (or 18 if mailed). However, the effectiveness of the order may be stayed if the petition for review is accompanied by a request for a stay of effectiveness (stay), per [Ind. Code § 4-21.5-3-3](#), in which case a hearing would be held to determine whether a stay is appropriate.**

## III. KEY PLAYERS

#### A. The Petitioner

The party requesting the administrative review is the Petitioner. The Petitioner has a right to be represented and advised, at its own expense, by an attorney. The attorney must be licensed to practice law in the State of Indiana or otherwise comply with the requirements of the [Indiana Rules for Admission to the Bar and the Discipline of Attorneys](#).

## B. The Respondent

The Respondent is the party who took the action/issued the order (i.e. agency, board, or commission). The Respondent will (generally) be represented by an IDHS staff attorney; however, in cases where the Respondent is a local entity (i.e. city fire department), the local entity will provide its own representation and will not be represented by an IDHS attorney. Because the IDHS attorney represents the agency, board, or commission that took the action, he or she may not provide advice to the Petitioner. However, the parties are encouraged to engage in informal discussions aimed at settlement prior to and during the appeal.

## C. The Administrative Law Judge (ALJ)

The ALJ presides over the administrative appeal process. He or she should be both neutral and detached regarding the proceedings. He or she may not express bias, prejudice, or interest in the outcome of the case and he or she is required to dispose of the subject of a proceeding in an orderly and reasonably prompt manner. [Ind. Code § 4-21.5-3-10](#). The ALJ may not provide legal advice to either party, but may provide the parties general guidance regarding the process of the appeal.

The ALJ may not discuss any issue in the case outside of the presence of the other parties to the appeal, per [Ind. Code § 4-21.5-3-11](#). Therefore, all questions related to the case should be emailed to the ALJ with all other parties copied on the email OR a status conference should be requested to discuss the matter.

# IV. DURING THE APPEAL

Throughout the appeal, the ALJ will ensure the case is moving forward by scheduling an initial prehearing conference, status conferences, and, when needed, order a hearing or set a briefing schedule. The initial prehearing conference and status conferences will be held telephonically and will be initiated by the ALJ. Petitioners should therefore include a phone number when submitting a request for administrative review.

## A. Initial Prehearing Conference

The ALJ will schedule a prehearing conference in its initial orders. During the initial prehearing conference, the parties will discuss the issues in the case, determine whether there is a possibility for informal resolution, and discuss a potential timeline for resolution or next steps in the appeal. The parties may also ask questions regarding procedure and any of the other matters set out in [Ind. Code § 4-21.5-3-19](#) at this time.

If a stay is requested, a hearing on the stay will usually be scheduled to take place during (or sometimes before) the initial prehearing conference. Note regarding a request for a stay: the party requesting the stay will be responsible for showing that it is entitled to a stay. The burden of proof for the stay may vary depending upon the type of appeal and what type of sanction is being sought. The specific burden will therefore be addressed in the ALJ's order scheduling the stay hearing.

## B. Informal Resolution/Dismissal

As stated above, the parties will discuss any potential for informal resolution at the outset of the case and are strongly encouraged to have that discussion **prior to the initial prehearing**

**conference.** Parties may contact each other directly and should not include the ALJ in these informal discussions. If the parties wish to pursue informal resolution, the ALJ will likely schedule a status conference to help monitor the parties' progress toward informal resolution. If the parties indicate that it is not possible to resolve the appeal informally, the ALJ will schedule a hearing or set a briefing schedule.

Regardless of what is decided at the beginning of the case, the parties may continue to attempt to resolve the matter informally throughout the appeal. That would include discussions outside of the presence of the ALJ regarding ways to resolve the case without having the ALJ issue an opinion. If informal resolution is reached, the parties may request a dismissal of the appeal from the ALJ. That request should be submitted to the ALJ in writing (i.e. written motion, letter, or email) and should include a description of the nature or terms of the informal resolution.

### **C. Status Conferences**

The ALJ will periodically schedule status conferences throughout the case to ensure that the parties are working towards informal resolution or, if they are not, to ensure that the case is scheduled for a hearing or briefs. This helps the ALJ keep the case moving so it will be disposed of in an orderly and reasonably prompt manner, as required by AOPA.

### **D. Discovery**

Throughout the course of the appeal, the parties are permitted to engage in discovery. Discovery is the exchange of evidence and information that may be relevant to the appeal. The parties may request evidence/information by submitting Requests for Admission, Interrogatories, or Requests for Production, in accordance with the Indiana Rules of Trial Procedure.

The ALJ has statutory authority to issue subpoenas, discovery orders, and protective orders in accordance with the Indiana Rules of Trial Procedure. Ind. Code § 4-21.5-3-22. Enforcement of those orders is governed by Ind. Code § 4-21.5-6.

### **E. Evidentiary Hearing**

If the parties do not believe informal resolution is possible, then the Petitioner will have the opportunity to decide whether it wishes to have an evidentiary hearing or to submit its evidence and arguments through written briefs. Evidentiary hearings are held in person at the Indiana Department of Homeland Security, 302 W. Washington Street, Indianapolis, IN 46204. The hearing usually takes a full day, depending on how many witnesses each party plans to call. This type of hearing can be beneficial in situations when relying heavily on witness testimony for evidence.

#### **1. Burden of Proof**

Ind. Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, "the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense." This means that, in cases where the Petitioner is requesting that the agency, board, or commission do something (i.e. approve its grant application, grant its variance request, etc.), the Petitioner will be responsible for proving it is entitled to whatever it is asking for. However, that burden rests upon the

agency, board, or commission, when it is, in essence, prosecuting a petitioner for a regulatory violation (i.e. imposing a sanction for a building code violation, revoking a license or certificate, etc.).

At a minimum, the ALJ's findings in the appeal must be based upon the kind of evidence that is substantial and reliable. Ind. Code § 4-21.5-3-27(d). "[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision." *St. Charles Tower, Inc. v. Bd. of Zoning Appeals*, 873 N.E.2d 598, 601 (Ind. 2007). It is "something more than a scintilla, but something less than a preponderance of the evidence." *State ex rel. Dep't of Natural Res. v. Lehman*, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978).

In certain cases, the burden may be higher. However, the ALJ will discuss the burden of proof with the parties prior to the evidentiary hearing or submission of briefs, either during a prehearing conference or in the order setting the briefing schedule/notice of hearing.

## 2. Briefs in Lieu of Hearing

As an alternative to an evidentiary hearing, the Petitioner may elect to proceed with written briefs and submission of documentary evidence. If the Petitioner chooses to submit briefs in lieu of a hearing, the parties may still submit witness testimony but it must be done through sworn statements. The ALJ will try to accommodate the parties regarding a timeline for preparing briefs, but typically the party with the burden of proof will have thirty (30) days from the issuance of the Order Setting Briefing Schedule to submit its brief, then the other party will have thirty (30) days to submit a response. The parties may agree to a shorter timeline if they wish to do so.

## 3. Presentation of Evidence

If the appeal proceeds to a hearing or the parties submit briefs in lieu of a hearing, the ALJ will issue an Order explaining how any discovery and resulting evidence should be presented, depending on the format. Typically, the parties will provide exhibits containing documentary evidence or sworn statements, particularly when utilizing briefs in lieu of a hearing. If the parties intend to proceed with an evidentiary hearing, the parties will provide witness and exhibit lists prior to the date of the hearing.

Per Ind. Code § 4-21.5-3-26(a), the ALJ may exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds. Hearsay evidence may be admitted. However, if it is properly objected to and does not fall within a recognized exception to the hearsay rule, that evidence may not form the sole basis for the ALJ's Non-Final Order.

## F. Issuance of ALJ's Decision

Following the evidentiary hearing or submission of briefs, the ALJ must issue Findings of Fact, Conclusions of Law, and a Non-Final Order within ninety (90) days. [Ind. Code § 4-21.5-3-27](#). This will go to the ultimate authority for review.



### G. Review by Ultimate Authority

The ultimate authority will review all non-final orders issued by the ALJ, and will issue a final order affirming, modifying, or dissolving the ALJ's order. The ultimate authority may also remand the case back to the ALJ for additional proceedings. However, if no objection is filed regarding the ALJ's order, then the ultimate authority shall affirm the order. If an objection is not filed, the ultimate authority may review any issue related to the order, but must provide notice if it wishes to do so, per [Ind. Code § 4-21.5-3-29\(e\)](#). The ultimate authority will have sixty (60) days to issue a final order or remand the case.

## V. AFTER THE APPEAL – JUDICIAL REVIEW

After the ultimate authority issues a final order, that order may be appealed in accordance with the provisions of [Ind. Code § 4-21.5-5](#). Judicial review is a review of the administrative proceedings by a trial court.

## VI. CONTACT INFORMATION

If you have questions regarding a specific appeal (and you are a party to the appeal), you may contact the ALJ directly via email. **You must copy the opposing party on your email.** If you wish to discuss a specific issue related to the appeal over the phone, you may submit a request via email and the ALJ will schedule a telephonic conference so that all parties may be present for the discussion.

Hon. Chelsea E. Smith  
Administrative Law Judge  
Indiana Department of Homeland Security  
302 West Washington Street, Room E-208  
Indianapolis, IN 46204  
Tel: (317) 234-8917  
Email: [Chesmith2@dhs.in.gov](mailto:Chesmith2@dhs.in.gov)

For questions regarding **new appeals** (i.e. timeliness, asking whether it was received), you may submit your question to the IDHS appeals inbox: [legalappeals@dhs.in.gov](mailto:legalappeals@dhs.in.gov).

If you are considering pursuing an appeal, but wish to first speak with a representative of the agency, board, or commission who took the action, please utilize the contact list below. If the agency, board, or commission that took action is not listed, please request contact information through the appeals email address listed above.

### **Indiana Department of Homeland Security**

Justin Guedel – [jguedel@dhs.in.gov](mailto:jguedel@dhs.in.gov) (State Disaster Relief Fund)

### **Fire Prevention and Building Safety Commission**

Justin Guedel – [jguedel@dhs.in.gov](mailto:jguedel@dhs.in.gov) (building code violations)

Douglas Boyle – [doboyle@dhs.in.gov](mailto:doboyle@dhs.in.gov) (variances)

### **Emergency Medical Services Commission**

Kraig Kinney – [kkinney@dhs.in.gov](mailto:kkinney@dhs.in.gov) (EMS licenses and certifications)

### **Board of Firefighting Personnel Standards and Education**

Michelle Allen – [miallen@dhs.in.gov](mailto:miallen@dhs.in.gov) (firefighter licenses and certifications)