

# What is the Hearing All About?

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# Disclaimer

- Administrative hearings/Appeals based on Jurisdiction Law
- Procedures may vary from jurisdiction to jurisdiction
- Likely that Canadian and U.S. administrative laws vary



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# What IFTA requires

## **R1400 APPEAL PROCEDURES**

- The appeal process shall be conducted in accordance with the procedures established by the base jurisdiction. R1410, R1420, and R1430 only apply where a base jurisdiction does not have provisions in its administrative procedures laws for appeals of actions or audit findings.

## **R1390 AUDIT APPEALS**

- The base jurisdiction shall provide a licensee at least 30 calendar days from the date the licensee is notified of the findings of an audit or a re-examination to file a written appeal of the audit or reexamination with the base jurisdiction. Such an appeal shall proceed in accordance with the administrative and appellate procedures of the base jurisdiction. Upon the conclusion of the appeal process, the base jurisdiction shall notify all affected member jurisdictions of the results of the appeal.

## **R1450 FURTHER REQUESTS FOR APPEAL**

- **.100** Further appeal of any jurisdiction's finding will proceed in accordance with that jurisdiction's laws.
- **.200** In the case of an audit, if the licensee is still in disagreement with the original finding, the licensee may request any or every jurisdiction to audit the licensee's records. Each jurisdiction to whom a request is made may elect to accept or deny the request. Each jurisdiction electing to audit the licensee's records will audit only for its own portion of the licensee's operations. The licensee shall make records available at the office of the jurisdiction or at a place designated by the jurisdiction or pay reasonable per diem and travel expenses associated with conducting an audit at the licensee's place of business.



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# U.S. Government 101

- Three ‘separate but equal’ branches of government:
  - Legislative—makes law
  - Executive—carries out law
  - Judicial—decides law
- Separation of Powers
- Checks-and-Balances
- IFTA operates in executive branch, enforcing motor fuel use tax laws
- “Due Process”—notice and opportunity to be heard



# Administrative Law

- Constitution prohibits depriving person of property ‘due process’ of law
- Due process: notice and an opportunity to be heard
- Exhaust Administrative remedies before going to court
- Several levels of IFTA-related appeals available in Executive Branch
  - Audit
  - Redetermination (rede, rede, rede...)
  - IFTA Commissioner
  - Hearing
- Agency decision is audit report, includes notice of “hearing rights”



# Filing an Appeal

- Written appeal to Appeals Body that it disputes an audit
  - Summarizes agency action or decision
  - Summarizes basis for objection, generally including law relied on
  - Requests relief
- Two types of appeals:
  - *De Novo*—considers new evidence (typically, executive review of IFTA audits)
  - *Certiorari*—reviews only ‘the record’, considers only information the agency had (typically, court review after IFTA appeal)



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# Hearing Examiner

- Independent
- No knowledge of case—can only consider information presented when all parties present
- Cannot provide legal advice or strategy
- Examiner can ask questions at hearing, but does not perform independent investigation or find additional facts



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# Prehearing conference

- Identify parties
- Clarify any misunderstandings
- Agree on as many of the undisputed facts as possible
- Identify the real disagreements to be addressed
- Set a timetable to prepare for and schedule the hearing
  - Discovery
  - Witnesses and Exhibits (evidence to be presented at hearing)
  - Hearing date
- Settlement. May encourage parties to discuss possibility of settling



# Settlement

- Settlement discussions are usually not disclosed to the Examiner
- Content of settlement discussions cannot be mentioned at the hearing
- When parties settle the matter, they sign an agreement (called a "stipulation", "settlement agreement" or "compromise") setting forth the terms of settlement. Examiner may issue an Order, which is a command to the parties, accepting and implementing the stipulation.
- Available at any time!
- *Who has settlement authority--and what is the scope?!?*



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# Discovery And Documentary Evidence

- Each party has a right to know the other party's evidence prior to the hearing
- “Discovery” is the process of searching the other party for evidence
  - Requests for Admission
    - Establishes undisputed facts
    - Admitted if not denied
  - Interrogatories
    - Obtains collective information from opponent
    - Gets their own words
    - Must provide information obtainable by a reasonable inquiry
  - Requests for Documents
  - Depositions
  - Must produce evidence!



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# REQUEST FOR ADMISSIONS

- You are requested to admit the truth of the matters set forth below:
  - 1) Nebraska is a member of IFTA, Inc.
  - 2) Nebraska agreed to abide by all terms, conditions and requirements of the Articles of Agreement, Procedures manuals and bylaws of the association.
  - 3) Wisconsin provided competent and trained auditors to audit the Licensees for the period of January 1, 1992 through June 30, 1996.
  - 4) As part of its regular audit process, Wisconsin audited the Licensees.



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# INTERROGATORIES

- **Interrogatory No. 1.:** Referring to Wisconsin's first set of requests for admissions, for each request for admissions that you denied, either in whole or in part, state all factual bases for your denial.
- **Interrogatory No. 2.:** Referring to Plaintiff's first set of requests for admissions, for each request for admissions for which you claimed lack of information or knowledge, identify specifically each step taken to attempt to answer the request for admissions and identify each person contacted in attempting to answer the request for admissions.



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# PRODUCTION OF DOCUMENTS

- You are requested to produce, on behalf of the Respondent Department of Transportation in the above-entitled action, true and correct copies of the following documents:
  1. All documents created to date by any Nebraska auditor relating to the Wisconsin IFTA audits for the period of January 1, 1992 through June 30, 1996 of the Licensees.
  2. All documents created to date by you related to the Wisconsin IFTA audits for the period of January 1, 1992 through June 30, 1996 of the Licensees.
  3. Any documents to or from third parties to date related to the Wisconsin IFTA audits of the Licensees.



# Depositions

- Find out what the witness knows and preserve testimony
- Understanding the case better and not solely about getting favorable testimony
- A deposition is not unlike the trial, but it is not conducted in a court room with a judge.
- Information obtained through the deposition may be used at trial or cited in briefs submitted to the court by either side.



# Depositions - Protocol

- When you walk in there will be stenographer, counsel, perhaps the Carrier, and perhaps the IFTA Commissioner; don't be intimidated.
- Ignore the stenographer. He or she is concentrating on taking notes and may occasionally stare at you – it's nothing personal.
- You will be sworn in.
- Avoid using sounds (uh-huh), nods, or anything other than specific words to respond.
- Ask for a break whenever you need one. Once an hour is reasonable, or more frequently if you have a health issue.

# Depositions - Documents

- You WILL have documents put in front of you. Thoroughly read every document put in front of you for discussion. Even though you are familiar with a particular document, skim it to be sure it is what you think it is.
- Don't bring any documents to the deposition unless specifically asked to do so.
- Beware of missing email attachments; depending on how someone saved an email, the attachment could be lost.
- Beware of documents that appear to be altered and express your concerns if appropriate. Your lawyer should be given a copy and should object as well.





# Depositions - The Questioning

- *BE HONEST AT ALL TIMES*
- There are no wrong answers; answer what you remember
- Think about the question you are asked before answering.
- Always pause a second before answering to give your attorney a chance to object if needed.
- Answer only the question asked

# Hearing process

- All parties must appear
- Conduct similar to a trial but without a jury
- Examiner oversees the hearing; ruling on procedure and objections, weighing and deciding the evidence presented.
- Examiner offers opening summary, cites its legal authority to hear the case, identifies type of case, and burden of proof.
- Each party may make an opening statement, briefly summarizing their side of the story and the points of law relied upon.
- Each party may then present evidence. Generally, agency presents evidence first. That party presents all of his or her witnesses and other evidence and then the other party may do the same. Each witness can be questioned by both parties: first the party who called the witness (direct examination), then the other party (cross examination). Each party then gets a second opportunity to ask follow-up questions (re-direct and re-cross examination).
- Evidence. Oral testimony from witnesses, or Documents. Witnesses will be sworn to tell the truth. A party may testify for itself and they may be called as a witness by another party. Refusal to answer questions is permitted only if the testimony might subject the witness to criminal prosecution ('taking the fifth').
- Generally, witnesses testify only about matters of which they have personal knowledge.
- Closing Statement. Each party may summarize or comment on the evidence that has been presented. They may also argue how the case should be decided.
- Hearing is recorded on audiotape, on videotape, or by a court reporter; 'the record' of evidence
- A "brief" is a written statement after the hearing sets forth the facts and laws the party believes are relevant. It may also argue for a particular outcome and against the other party's position.



# Evidence for 'absence of records' --Documents

- Documents required:
  - Law authorizing agency to join IFTA and implement IFTA
  - Application for Carrier's IFTA license (agree to follow IFTA procedures)
  - Copies of IFTA record-keeping requirements
  - Copies of Audit Notice and Findings



# Evidence for ‘absence of records’ --Witness

- Auditor as witness
  - What is required under IFTA
  - What was missing from carrier’s records
  - What was done to help Carrier get records or use alternative sources of info
  - “Used 4.0 mpg because it’s required under IFTA where records not kept”
- Auditor is the smartest person in the room
  - Relax
  - Tell the truth
  - OK to review documents
  - OK to ask for clarification



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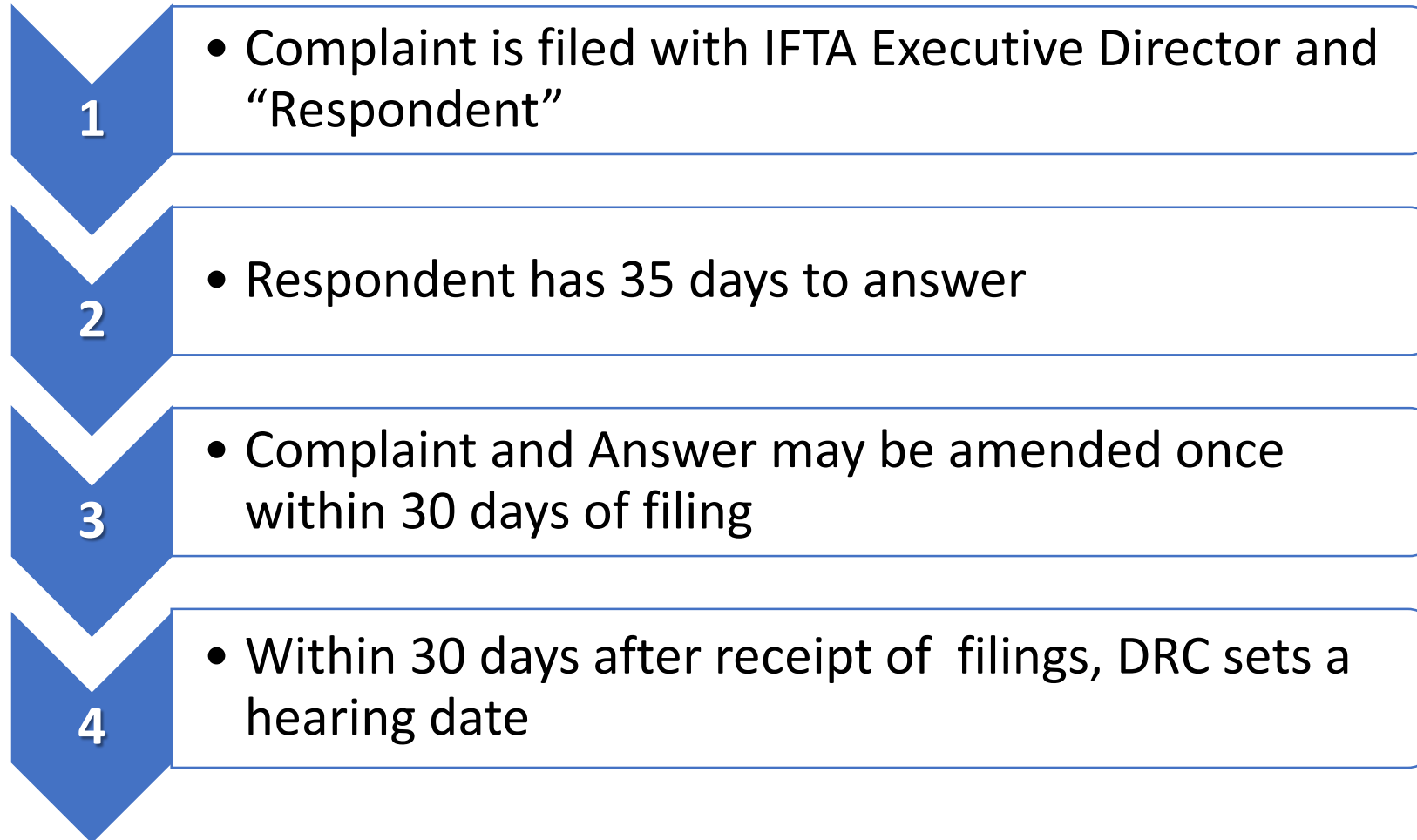
# Decision

- Final decision-maker--could be the Examiner, the Examiner's Agency, or the Agency
- Proposed decision--all parties given opportunity and time limit for making comments or objections that will be considered by the final decision-maker. The final decision may be changed from the proposed decision, based upon review of the evidence and the parties' objections.
- Final Decision sets out all the facts of the case, recites the law that governs the case, and applies the law to the facts. Decides who has won on each disagreement and what the final outcome should be. Written.

# Conclusion

- The hearing is all about completing an independent review of the agency action, within the executive branch
  - Did agency act within its authority
  - Did agency find the right facts
  - Did agency apply the law correctly
- If yes: affirm the assessment
- If no: correct the agency, either by making correct assessment or by returning for correction

# IFTA Dispute Resolution Committee Filing of Complaint



# IFTA Dispute Resolution Committee Briefs and/or Hearing

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- At least one party required to request hearing

6

- Briefs submitted if no hearing

7

- If hearing scheduled, discovery may be requested





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# IFTA Dispute Resolution Committee Day of the Hearing

8

- Witness lists and other documentation to be provided by each party (pre-hearing)

9

- Burden of proof is on Complainant; burden is preponderance of the evidence

10

- Complainant argues first, respondent may cross-examine

# IFTA Dispute Resolution Committee Day of the Hearing

11

- Respondent presents, Complainant may cross-examine

12

- DRC may ask questions or request clarifications at any time

13

- After both parties complete arguments and responses, floor is open to anyone else wishing to be heard

# IFTA Dispute Resolution Committee The Decision

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- Upon conclusion of hearing, DRC members discuss among themselves

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- Industry advisors have discretion to issue an opinion to the DRC

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- DRC issues a decision in 60 days

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