This is an amendment to 11.3.500 NMAC, Sections 1, 7 through 10, 12, and 13, effective 10/29/2019.

11.3.500.1 ISSUING AGENCY: New Mexico Department of Workforce Solutions, [~~Employment Security Division,~~] P.O. Box 1928, Albuquerque, NM 87103
[11.3.500.1 NMAC - Rp, 11 NMAC 3.500.1, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.500.7 DEFINITIONS:

A. "Adjudicatory body" means the appeal tribunal, the board of review or other commissions or body within the department holding an adjudicatory hearing.

B. "Adjudicatory hearing" means a judicial or quasi-judicial hearing upon either the law or the evidence or both which allows the parties to present evidence, objections to evidence, documents and witnesses as well as cross-examine opposing parties' witnesses and evidence.

C. "Administrative law judge or ALJ" means the individual who conducts appeal tribunal hearings and makes decisions on issues arising from determinations issued by the department. This term is synonymous with the term "hearing officer" as set forth in Section 51-1-8 NMSA 1978.

[~~C.~~] **D.** "Authorized representative" means an individual who, by virtue of his position within the department, is designated by the secretary to perform certain specific tasks on behalf of the department.

[~~D~~] **E.** "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by the party's failure to keep the department directly and promptly informed by written, signed statement of the claimant's, employer's or employing unit's correct mailing address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

[~~E~~] **F.** [~~"Precedent manual" means a compilation of decisions of the appeal tribunal and board of review designated significant by the secretary or the general counsel, but with the parties' names and identifying information redacted and removed.~~] "Practice manual" means a resource maintained by the department consisting of department procedures and guidelines based on federal and state statutes and regulations, Department of Labor directives and guidance, and decisions of the Board of Review or district court judges.

[~~F. "Administrative law judge" means the individual whose job it is to conduct appeal tribunal hearings and make decisions on unemployment insurance eligibility or employer charges. This term is synonymous with the term "hearing officer" as set forth in NMSA 1978, Section 51-1-8.~~]
[11.3.500.7 NMAC - N, 01-01-2003; A, 11-15-2012; A, 07-31-2013; A, 10/29/2019]

11.3.500.8 PRESENTATION OF APPEALS OF INITIAL DETERMINATIONS:

A. [~~Claims:~~] Any interested party aggrieved by a determination of the department [~~is entitled to~~] may file an appeal to the appeal tribunal within 15 days from the date of transmission of the determination. Any written communication clearly demonstrating a desire to appeal a determination of the department will be regarded as an appeal. [~~Any written communication intended as an~~] Appeals shall be transmitted to the department by U.S. mail, by fax or by electronic filing using the department's [~~claims processing website~~] online system. All appeals should be transmitted to the department in a format indicating the interested party's desire to appeal. For any issues of timeliness with regard to faxed appeals, the time and date affixed on the department's receiving device will be presumptively the date and time of submission. For any issues of timeliness with regard to appeals submitted via U.S. mail, the postmark date on the appeal envelope will presumptively be the date and time of submission. For any issues of timeliness with regard to appeals filed electronically through the department's [~~claims processing website~~] online system, the date and time that the department's [~~website~~] online system "electronically stamps" the appeal will be presumptively the date and time of submission.

B. [~~Tax: In any case where a party is dissatisfied with the decision of the department, the party may, within fifteen (15) calendar days from the date of transmission of the department's decision, file an appeal with the appeal tribunal for the department.~~] All interested parties will be given notice of any hearing or review before the appeal tribunal [~~or board of review~~] as provided for in 11.3.500.9 and 11.3.500.12 NMAC.

C. Unless otherwise provided by statute or a specific rule of the department, the time for the appeal of any determination from one level to another within the department is [~~fifteen (15)~~] 15 calendar days from the date of the transmission of the decision or determination, with the first day commencing on the calendar date after the date of transmission.

D. The time for filing any appeal within the department may be extended only upon a showing of good cause.

[11.3.500.8 NMAC - N, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.500.9 ADJUDICATORY PROCEEDINGS GENERALLY:

A. Right to representation: In any adjudicatory hearing before the department:

(1) Any party may [r~~epresent himself or~~] self-represent, be represented by an attorney at law or by any other person qualified to represent the party in the matters under consideration. The secretary may bar attorneys and authorized representatives from appearing on behalf of others in proceedings before the department if, the attorney or authorized representative's previous conduct has established to the department's satisfaction that the attorney or authorized representative is unlikely to provide competent representation in future proceedings.

(2) A partnership may be represented by any of its employees, members, or duly authorized representative. A corporation or association may be represented by an officer, employee or any duly authorized representative. Any governmental entity may be represented by an officer, [~~or~~] employee, or any other authorized person.

(3) The presiding officer [~~, including~~] or the secretary may, for lack of qualifications or other sufficient cause, bar any person from representing any party, in such circumstances, the reasons for such bar shall be set out in the record of proceedings.

B. The unauthorized practice of law: Any party may be represented by an attorney at law licensed to practice in the courts of this state. A representative or agent other than licensed attorneys may represent any party only to the extent that such participation does not constitute unauthorized practice of law under the statute and rules of the courts of the state of New Mexico.

C. Copies: Consistent with the provisions of [~~NMSA, 1978~~] Section 51-1-32 NMSA 1978 and 11.3.100.[~~109~~] 106 NMAC, while any proceeding before the department is ongoing a party to such proceeding may request and receive from the department, without charge, one set of copies of the department files and records, including but not limited to investigation reports, statements, memoranda, correspondence, [~~tape~~] recordings or transcripts of hearings or other data pertaining to matters under consideration, [~~or~~] scheduled for hearing, or other proceeding before the department. Thereafter, copies shall be charged at the department's usual rate for copying.

D. Notice of hearing: Upon the scheduling of an adjudicatory hearing before the appeal tribunal on any appeal, a notice of the hearing shall be transmitted to all interested parties at least [~~ten (10)~~] 10 calendar days prior to the date of the adjudicatory hearing and shall include:

(1) a statement notifying the parties of their responsibilities and the requirements to participate in the hearing;

(2) a statement of the time, place and [~~nature~~] mode of the hearing;

[~~**(2)**~~] **(3)** a statement of the legal authority and jurisdiction under which the hearing is to be held;

[~~**(3)**~~] **(4)** a short and plain statement of the foreseeable issues [~~so that all parties have sufficient notice~~] to afford each party reasonable opportunity to prepare; if any issue cannot be stated in advance of the hearing, it shall be stated as soon as practicable; in all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after statement or amendment to afford all parties reasonable opportunity to prepare or the parties may waive notice of such issue on the record.

[~~**(4)**~~] **(5)** Any party to an appeal before the appeal tribunal may elect, using the self-service feature of the claims processing website, to have all notices of hearing for that appeal delivered electronically rather than by paper notice through the mail. Such electronic notification shall be deemed legally sufficient notice for all purposes and the party electing that electronic notification will be deemed to have acknowledged their responsibility to exercise due diligence in checking the website for notifications. For parties electing electronic notification, such notification shall continue until the party has taken all necessary steps change their notification preference using the self-service feature of the website. Until the party's notification preference has been changed, that party's obligation to exercise due diligence in checking the website for notifications will remain in effect.

[~~(5)~~] **(6)** If an adjudicatory hearing has been scheduled and a notice of hearing has already been issued to an interested party before that interested party's attorney or authorized representative has filed its entry of appearance in the matter, notice shall be deemed to be sufficient.

[~~**E.** Pre-hearing procedure generally:~~

~~(1) Stipulations: The parties to an appeal, with the consent of the appeal tribunal, may stipulate in writing to any or all facts involved. The appeal tribunal may decide the appeal on the basis of such stipulation, or, in its discretion, may set the appeal down for hearing and take such further evidence, as it deems necessary, to enable it to determine the appeal. Stipulations will only be accepted if executed on a form approved by the department. A stipulation by the employer is not a guarantee that a claimant will be eligible for payment. The claimant shall only be eligible if the facts to which the employer stipulates provide a sufficient basis under the Unemployment Compensation Law to approve a claim for payment and the claimant is otherwise eligible to receive payment, i.e., has no other basis for disqualification or denial.~~

~~(2) Authority of authorized representatives regarding the gathering of evidence, issuing subpoenas, authorizing depositions, and administering oaths and affirmations: Authorized representatives of the department may issue subpoenas requiring, upon reasonable notice, the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, documents, papers or other objects necessary and relevant to any proceeding before it or its authorized representative. An authorized representative may administer oaths and affirmations, and certify to official acts. An authorized representative in any proceeding may authorize the taking of depositions of witnesses, including parties within or without the state, in the same manner as provided by law for the taking of depositions in civil actions in the district court, and the deposition may be used in the same manner and to the same extent as permitted in the district court.~~]

[~~**F**~~] **E**. Subpoenas: Authorized representatives of the department may issue subpoenas requiring, upon reasonable notice, the attendance and testimony of witnesses or the production of evidence, including books, records, correspondence, documents, papers or other objects necessary and relevant to any proceeding before the department. An authorized representative in any proceeding may authorize the taking of depositions of witnesses in the same manner and to the same extent as permitted in the district court.

(1) "Subpoena" means an official directive or order by an administrative law judge or quasi-judicial official directing the recipient to appear and testify as a witness. The subpoena may require witnesses to bring documents with them when they come to testify. Failure of a party to respond to a subpoena could result in the department filing a motion for compliance in the district court of the jurisdiction where the party is located.

(2) The department's authority to issue subpoenas is found at [~~NMSA, 1978 §51-1-8(L)~~] Subsection L of Section 51-1-8 NMSA 1978 and Section 51-1-28 NMSA 1978. Department subpoenas can be served personally at least five [~~(5)~~] days prior to the [~~appearance~~] hearing date or by certified mail posted at least [~~ten (10)~~] 10 days prior to the [~~appearance~~] hearing date.

(3) Issuance and challenges to subpoenas: The adjudicatory body or other authorized representative of the department may issue subpoenas to compel attendance of witnesses and production of records in connection with proceedings before the adjudicatory body or department. [~~NMSA 1978 Sections 51-1-28 & 29~~] Sections 51-1-28 & 29 NMSA 1978.

(a) Who may request: Any party to an adjudicatory proceeding may make written application to the applicable adjudicatory body for the issuance of a subpoena.

(b) Contents of requests for subpoena: The party seeking the subpoena must reasonably identify and specify the evidence or documents sought and show the relevance of such evidence or documents to the issue under consideration. The proposed subpoena shall show upon its face the name and address of the party at whose request the subpoena was issued.

(c) Decision regarding issuance of subpoena: The adjudicatory body, at its discretion, may issue the subpoena upon the written application or may schedule a hearing or conference on the application to hear argument and objections from interested parties for the purpose of determining whether the subpoena should issue. If such a hearing is held, the adjudicatory body may make a ruling on the record during the hearing, or may, in its discretion, issue a written decision, informing the parties of the decision and of their right to further appeal.

(d) Challenge to issued subpoena or a request to quash: Any witness summoned may petition the department to quash or modify a subpoena served on the witness. The department shall give prompt notice of such petition to all interested parties. After the investigation or hearing, whichever the department considers appropriate, it may grant the petition in whole or part, or it may deny the petition upon a finding that the testimony or the evidence required to be produced does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or

oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested, or for any other reason that justice requires.

(e) Appeal of disputes: The stated reason for the request for the subpoena and the stated reason for the opposition as well as the administrative law judge's decision in regard to the subpoena shall be part of the record on appeal.

(f) Order of protection: If the department denies the petition to quash the subpoena, the aggrieved party may petition the district court of either the county where he resides, or, in the case of a corporation, the county where it has its principal office, or the county where the hearing or proceeding will be held, for an order of protection.

[~~**(g)** Witness fees and mileage: If a written request to the secretary is made prior to appearing to testify or within five (5) days after testifying, witnesses, other than parties to a proceeding or the parties' designated agents or representatives, subpoenaed for any appeal tribunal hearing or other department proceeding may be paid witness and mileage fees by the department. Mileage and witness fees may be permitted as is deemed reasonable by the secretary based on the specific witness' situation but in no event will a witness be paid more than the statutory amount allowed witnesses appearing in the district courts of this state.~~]

[~~**(h)**~~] **(g)** Sanctions to compel compliance with subpoenas: In case of failure to comply with any subpoena issued and served under the department's statutory authority or for the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before an adjudicatory body of the department, the department may apply to the district court either in the county of the person's residence or in the county where the hearing or proceeding is being held, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. The prevailing party is entitled to costs of the enforcement proceeding.

[~~**(i)**~~] **(h)** Sanctions against parties for witnesses' failure to comply with subpoenas: When a subpoenaed witness fails to attend or testify, if a party exercises substantial control or influence over the witness, such as an employee, relative of a party employer or a relative of a party claimant, the adjudicatory body can deem that, if the witness had appeared and testified, the testimony would have been unfavorable to the party controlling or influencing the witness.

[~~**(j)**~~] **(i)** If a party or a subpoenaed witness fails or refuses to produce records or documentary evidence pursuant to an order or subpoena of the adjudicatory body, the adjudicatory body can deem that, if the records or documentary evidence had been produced, the evidence would have been unfavorable to the party failing or refusing to produce the records or documentary evidence or to the party controlling or influencing the witness who failed or refused to produce the records or documentary evidence.

[~~**G**~~] **F.** Disqualification of board of review members and appeal tribunal administrative law judges: An appeal tribunal administrative law judge or board of review member shall withdraw from any proceeding in which the appeal tribunal administrative law judge or board of review member cannot accord a fair and impartial hearing or consideration and from any proceeding in which the appeal tribunal administrative law judge or board of review member has an interest. Any party may request a disqualification of an appeal tribunal administrative law judge or board of review member on the grounds of the person's inability to be fair and impartial, by filing an affidavit or written statement or making a statement on the record with the appeal tribunal or board of review promptly upon the discovery of the alleged grounds for disqualification, stating with particularity the grounds upon which it is claimed that the person cannot be fair and impartial. The disqualification shall be mandatory if sufficient factual basis is set forth in the affidavit of disqualification. If a board of review member is disqualified pursuant to this regulation, the remaining board of review members may appoint an appeal tribunal administrative law judge or other qualified department representative to sit on the board of review for the proceeding involved. The grant or denial of a requested disqualification can be considered in an appeal on the merits.

[~~**H**~~] **G**. Attorneys at law and authorized representatives: Prior to or at the commencement of any adjudicatory hearing, all attorneys at law or other authorized representatives shall file a written entry of appearance which shall be made a part of the record and a copy shall be furnished by the attorney or representative to the opposing party. The entry of appearance shall be signed by the attorney at law or authorized representative, whose mailing address, telephone number and other contact addresses shall be provided. An attorney or representative who has provided notice of representation will be deemed to continue such representation until a written notification of the withdrawal of such representation is provided to all parties, the administrative law judge or the board of review. Even if an attorney or authorized representative has entered his appearance on behalf of a party, the party may appear on his own behalf without the attorney or authorized representative.

[~~**I**~~] **H.** Ex parte communications: No party or representative of a party or any other person shall communicate off the record about the merits of the case with the cabinet secretary, any administrative law judge or

board of review member who participates in making the decision for any adjudicatory hearing, unless the communication is written and a copy of the communication is transmitted to all interested parties to the proceeding. The cabinet secretary, any administrative law judge, board of review member or their representatives shall not communicate off the record about the merits of an adjudicatory hearing with any party or representative of a party or any other person, unless a copy of the communication is sent to all interested parties in the proceeding.

[~~J~~] **I.** Requirements for hearing evidence or reviewing record: The cabinet secretary, board of review member or appeal tribunal administrative law judge shall not participate in any decision for any adjudicatory hearing unless the cabinet secretary, board of review member or appeal tribunal administrative law judge has heard the evidence or reviewed the record.

[11.3.500.9 NMAC - N, 01-01-2003; A, 11-15-2012; A, 07-31-2013; A, 10/29/2019]

11.3.500.10 HEARING PROCEDURE BEFORE THE APPEAL TRIBUNAL:

A. Conduct of adjudicatory hearings:

(1) Adjudicatory hearings before the appeal tribunal shall be conducted in such a manner that all parties are afforded basic rights of due process and that all pertinent facts necessary to the determination of the rights of the parties are obtained. All hearings and proceedings will be conducted informally in such a manner as to ascertain the substantial rights of the parties and will not be governed by common law or statutory rules as to the admissibility of evidence or by technical rules of procedure, but the procedures shall afford the parties equally and impartially the right to:

(a) call and examine witnesses and to cross examine the opposing party's witnesses;

(b) introduce exhibits and offer rebuttal evidence;

(c) object to questions and to the introduction of improper or irrelevant testimony or evidence; and

(d) submit written expositions of the case, within the discretion of the administrative law judge.

(2) The appeal tribunal, on its own initiative:

(a) may examine parties and witnesses;

(b) require additional evidence as it finds necessary to the determination of the issues before it;

(c) may exclude testimony and evidence which it finds to be incompetent, irrelevant or otherwise improper by standards of common reasonableness: and

(d) if it deems appropriate, the appeal tribunal may permit opening and closing statements.

B. Opportunity for fair hearing: In conducting adjudicatory hearings, the appeal tribunal shall afford all parties an opportunity for a full and fair hearing including an opportunity to respond and present evidence and argument on all issues involved; provided that the term "adjudicatory hearing" [~~"~~]as used in this rule does not apply to fact-finding interviews conducted by the department representative for purposes of making an initial determination of eligibility for benefits or liability for contributions, payments in lieu of contributions, interest or penalties under the Unemployment Compensation Law.

C. Continuance, adjournment and reopening of adjudicatory hearings:

(1) An adjudicatory hearing before an appeal tribunal administrative law judge, for good cause shown, may be continued or adjourned upon the request of a party or upon the appeal tribunal's own motion, at any time before the hearing is concluded. A claimant's right to a prompt determination of claimant's eligibility and payment of benefits shall not be impaired by undue delay of proceedings.

(2) If [~~the party appealing or any other~~] any party fails to appear at [~~any~~] a scheduled adjudicatory hearing, the appeal tribunal may, in its best judgment, either adjourn the hearing until a later date or proceed to render its decision on the record and the evidence then before it. Any decision shall be subject to reopening before the appeal tribunal upon a showing [~~within fifteen (15)~~] of good cause for the party's failure to appear as long as the request to reopen is received no later than 15 days [~~after~~] from the date of the decision [~~that there was good cause for the party's failure to appear~~].

(3) A reopening of any adjudicatory hearing shall be granted upon showing of good cause, including good cause for not appearing at the scheduled hearing, or may be ordered on the appeal tribunal's, the board of review's or the secretary's own motion for good cause. A request for reopening shall be made as soon as reasonably possible but in no event later than [~~fifteen (15)~~] 15 days after the decision of the appeal tribunal was mailed.

(4) A request for a continuance, adjournment or reopening shall be made to the appeal

tribunal administrative law judge as identified on the notice of hearing. If the administrative law judge finds good cause for failing to appear, the merits of the appeal shall be set for hearing. Notice of the date, time and place of a reopened, postponed or adjourned hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard. The administrative law judge shall issue a decision approving or denying a request for a continuance adjournment or reopening.

(5) A request for reopening made later than [~~fifteen (15)~~] 15 days after the decision of the appeal tribunal was [~~mailed~~] issued shall be heard by the secretary or the board of review on the reason for the untimely request for the reopening. If the secretary or the board of review finds good cause for the late request, the merits of the appeal shall be set for hearing before the appeal tribunal. Notice of the date, time and place of a reopened hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard.

D. Authority over conduct of adjudicatory hearings. The appeal tribunal shall have and shall exercise full authority over the conduct and behavior of parties and witnesses appearing before it to insure a fair, orderly adjudicatory hearing and an expeditious conclusion of the proceedings.

E. Mode of hearings:

(1) The appeal tribunal may conduct the adjudicatory hearing by telephone or in person at the discretion of the appeal tribunal. The mode of conducting the hearing will be as indicated in the notice setting the hearing.

(2) Notice of telephone hearing: If the hearing is to be by telephone, the notice shall so inform the parties and will include instructions for informing the administrative law judge of the necessary telephone numbers. If the hearing is a telephonic hearing, no party or representative will be permitted to attend in person. If the hearing is an in-person hearing, at the discretion of the administrative law judge, a party, witness or representative will be permitted to appear telephonically.

F. Exhibits:

(1) Exchange of exhibits prior to hearings: [~~At least 48 hours prior to any hearing, a party seeking to introduce exhibits shall submit to the administrative law judge the documents or copies thereof that the party may seek to introduce.~~]

(a) A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the other party. The copies shall be transmitted by the offering party in a manner to insure their receipt by the other party at least 48 hours prior to the date and time of the scheduled hearing.

(b) A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the administrative law judge at least 48 hours prior to any hearing. [~~The copies shall be transmitted by the offering party in a manner to insure their receipt by the other party at least 48 hours prior to the date and time of the scheduled hearing.~~] In no event shall the administrative law judge be provided copies of exhibits not previously transmitted by the offering party to the opposing party.

(c) Documents not submitted in accordance with this subsection shall be denied admission and denied consideration by the department:

(i) unless it is apparent that the particular document was previously seen by the party whose interest is affected, that party acknowledges having seen the document and has no objection to its admission; or

(ii) the administrative law judge, in the judge's discretion, determines that fundamental fairness and the proper administration of the Unemployment Compensation Law requires the admission of the document.

(d) In any case where the administrative law judge determines that documentary evidence will be admitted over the objection of a party that the party has not had an opportunity to review and consider the evidence, a reasonable continuance shall be granted by the administrative law judge to give the objecting party an opportunity to review the evidence.

(2) Marking exhibits: All exhibits tendered to the administrative law judge shall be separately marked for identification. The employer's exhibits shall be denoted E-1, E-2, E-3 and so forth; the claimant's exhibits shall be denoted C-1, C-2, C-3 and so forth. A file, such as a personnel file, containing voluminous documents need not be separately marked, but the pages shall be individually numbered by the offering party prior to admission. Failure to sequentially number the pages of a voluminous exhibit will be grounds to deny the admission of the exhibit.

(3) Exhibits admitted and considered by the administrative law judge shall be individually identified on the record.

(4) Exhibits denied admission: The reason for the denial of admission of tendered exhibits

shall be clearly stated on the record. Typical, but not exclusive, reasons for the denial of admission of an exhibit is lack of relevancy, immateriality, redundancy and voluminous unnumbered pages or documents. Exhibits offered and denied admission shall be retained in the record, but shall not form the basis for the decision of the administrative law judge. The written decision shall reiterate the statement of exhibits denied admission and the basis for the denial.

G. Record of hearings:

(1) Proper record: The appeal tribunal shall ensure that all of the testimony, objections and motions or other matters in connection therewith are fully and accurately recorded, in such a manner that a complete and accurate transcript can be rendered therefrom as needed.

(2) The record in an adjudicatory hearing shall include:

(a) all documents in the department's files, pleadings, motions and previous rulings;

(b) documentary evidence received or considered;

(c) a statement of matters officially noticed;

(d) questions, tenders of evidence, offers of proof, objections and rulings thereon in the form of a tape recording or transcript;

(e) findings and conclusions; and

(f) any decision, opinion or report by the cabinet secretary, board of review members or appeal tribunal administrative law judge conducting the hearing.

(3) [~~Tape or digital recordings:~~] The department deems that [~~a tape or digital~~] the recording of a proceeding made [~~on~~] by the department[~~'s system~~] is the official recording of the record.

(a) Inaudible recording: If the tape or digital recording or a significant portion of it is demonstrated as inaudible or otherwise unusable, if the parties do not stipulate as to the matters which would have appeared on the recording if usable, the appeal tribunal may order a rehearing de novo of all matters or of only the matters which were on the unusable portions of recording.

(b) Official transcript: The department or either party, at the party's expense, may prepare a typed transcript of any such tape recording for the use of the parties. Any typed transcript prepared by the department or under its supervision may be designated by the appeal tribunal as the official transcript. Typed transcripts prepared by a party shall not be deemed official transcripts unless such transcript was transcribed with the department's consent and prepared either in-person or from a department tape or digital recording by an individual approved by the department. A copy of the typed transcript of an appeal hearing may be made available without charge to parties of an appeal pending before district court.

(c) Availability of [~~tapes~~] recordings: Upon written application, for good cause shown, a duplicate copy of the recording of all testimony, objections and motions or other matters will be supplied to any party to the proceeding. Unless the applicant is entitled to [~~the~~] a copy of the recording without charge or otherwise shows good cause as to why the party should not be charged as provided in 11.3.100.106 NMAC, the applicant may be required to pay for a copy of the recording.

H. Factual information to be considered: All evidence, including any records, investigation reports and documents in the possession of the adjudicatory body which the department desires to avail itself as evidence in making a decision, shall be made a part of the record in the proceedings, and no other factual information or evidence shall be considered, except as provided in this section. Documentary evidence may be received in evidence in the form of copies or excerpts or by specific citation to page numbers in published documents.

I. Briefs or memoranda of law, requested findings of fact and conclusions of law: At any time during an adjudicatory hearing and prior to a decision, the parties may be afforded a reasonable opportunity to submit briefs or memoranda of law, proposed findings of fact and conclusions of law, together with supporting reasons including citations to the record and copies of case law, for the consideration of the adjudicatory body.

J. Official notice: Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the board of review or appeal tribunal administrative law judge, but whenever any such member or officer takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, before or during the adjudicatory hearing, but before the final decision, and any party shall, on timely request, be afforded an opportunity to show the contrary.

K. Specialized knowledge of department: The experience, technical competence and specialized knowledge of the department and its staff may be utilized in the evaluation of the evidence by the adjudicatory bodies of the department.

L. Decision of the appeal tribunal:

(1) Decision in writing: Following the conclusion of an adjudicatory hearing on an appeal, the appeal tribunal shall promptly announce its decision on the case. The decision shall be in writing, shall include

findings of fact and conclusions of law, and shall be signed by the administrative law judge who heard the appeal.

(2) Findings of fact shall be based exclusively on the record, the evidence presented at the tribunal hearing and matters officially noted.

(3) The residuum rule shall apply in the issuance of all decisions. This rule requires that the decision of the department's appeal tribunal be supported by "substantial evidence", that is evidence which would be admissible in a court of law. A decision of the appeal tribunal cannot be made on the basis of controverted hearsay evidence alone; there must be a residuum of legal evidence which would be admissible in a court of law.

(4) Where an appeal was not filed within the statutory appeal period, the appeal tribunal shall, after review of the record conduct an evidentiary hearing with notice to all interested parties to determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that grants a request for reopening or finds good cause for failure to timely appeal from an initial determination cannot be appealed. Any decision that denies a request for reopening shall include the appeal tribunal's findings and conclusions for the denial. Either party if aggrieved may file an appeal on the merits of any written decision issued by the administrative law judge to [~~the secretary~~] higher authority.

(5) Publication of decision: Copies of any decision issued by the appeal tribunal shall be promptly transmitted to all interested parties to the appeal.

M. Remand by appeal tribunal: The appeal tribunal may, in its discretion, remand any issue developed from evidence presented at the hearing or apparent from the existing record to the department with an order directing that a determination be made with regard to that issue or that additional procedures be taken to perfect a determination already issued or to make other disposition in the matter.

[11.3.500.10 NMAC - N, 01-01-2003; A, 11-15-2012; A, 07-31-2013; A, 10/29/2019]

11.3.500.12 PRESENTATION OF FURTHER APPEALS:

A. An interested party aggrieved by a decision of the appeal tribunal is entitled to appeal to [~~the cabinet secretary~~] higher authority. A written communication clearly demonstrating a desire to appeal a determination to [~~the cabinet secretary~~] higher authority shall be filed with the department. The information submitted with the appeal shall include a clear statement of the relevant facts and a clear statement of the party's basis for appeal.

B. Secretary decision: The secretary shall review the application and shall, within [~~fifteen (15)~~] 15 days after receipt of the application for appeal, either affirm the decision of the administrative law judge, remand the matter to the appeal tribunal for an additional hearing or new decision, remand to the department for further investigation and determination, or refer the decision to the board of review for further review and decision on the merits of the appeal. Issues of timeliness shall be decided by the secretary, who may refer the decision to the board of review.

(1) Decision in writing: Following the conclusion of a review on an appeal, the cabinet secretary shall issue a decision. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by cabinet secretary.

(2) Findings of fact shall be based exclusively on the record and matters officially noted.

(3) Publication of decision: Copies of any decision issued by the secretary shall be promptly transmitted to all interested parties to the appeal.

C. If the secretary takes no action within [~~fifteen (15)~~] 15 days of receipt of the application for appeal and review, the decision will be promptly scheduled for review by the board of review as though it had been referred by the secretary.

D. All appeals from a decision of the appeal tribunal filed more than [~~fifteen (15)~~] 15 days from the date of the appeal tribunal's decision shall be referred to the secretary, who may refer the decision to the board of review. In addition to the information required by Subsection A of 11.3.500.12 NMAC, all late appeals shall contain a concise statement setting forth the reasons for the late appeal. The secretary, or the board of review if the case has been referred to the board, may extend the time for filing any appeal from a decision of the appeal tribunal only upon showing of good cause.

E. Notice of review before the board of review shall be mailed to all interested parties informing them that, unless a hearing is granted pursuant to the Subsection A of 11.3.500.13 NMAC, no additional evidence shall be taken and all parties will have the opportunity to submit written statements, briefs or memorandum of law explaining why the decision of the appeal tribunal should be affirmed or reversed.

F. Applications for leave to participate or intervene in an appeal: An interested party, if aggrieved by a decision of the appeal tribunal, but not a party to the proceeding before the appeal tribunal, may apply for leave to participate or intervene in an appeal before the board of review. The party applying for leave to participate or

intervene in an appeal before the board of review shall file with the board of review an application for leave to join an appeal setting forth his interest in the matter appealed. The board of review shall have the discretionary power to approve or reject any such application.
[11.3.500.12 NMAC - N, 01-01-2003, A, 02-14-2011; A, 11-15-2012; A, 10/29/2019]

11.3.500.13 THE BOARD OF REVIEW:

A. The board of review's authority: In every case referred to the board of review by the secretary from an appeal tribunal decision the board of review may, in its discretion, hear and decide the case upon the record; it may entertain written arguments, or, after notice to all parties and in accordance with 11.3.500.9 NMAC it may conduct a hearing and take additional evidence before it.

B. Review of the record as an appellate or reviewing body: As a general practice and unless the board of review gives specific notice to the contrary, the board sits in its capacity as an appellate or reviewing body. As such, it reviews the record; it does not receive new evidence.

C. Remand by board of review to the appeal tribunal or the department: With an order directing that a determination or decision be made with regard to that issue, or that additional procedures be taken to perfect a determination or decision already issued, or to make other disposition in the matter, as the board of review, in its discretion, may deem necessary, the board of review may remand any claim or an issue involved in a claim; any issue developed from evidence presented at the hearing or apparent from the existing record:

(1) To the appeal tribunal for the taking of additional evidence or a hearing de novo. Hearings conducted by the appeal tribunal pursuant to a remand by the board of review shall be conducted after notice to all parties and in accordance with 11.3.500 NMAC. Unless directed otherwise by the board of review, the appeal tribunal shall issue a decision based upon the entire record before it, including the record of all the prior hearings. Parties to any additional hearing shall have the right to review the appeal tribunal recording made at any prior evidentiary hearing.

(2) To the department for fact-finding and issuance of an initial determination or redetermination.

D. Appeals by the secretary: Within [~~fifteen (15)~~] 15 days from the date of issuance of any decision by the appeal tribunal, the secretary, on the secretary's motion, may request the board of review to [~~review~~] reconsider a decision of an appeal tribunal administrative law judge, which the secretary believes to be inconsistent with law or the applicable rules of interpretation or which is not supported by the evidence. In such situations the board of review may, in its discretion, take additional evidence, review the matter on the record or remand the matter to the appeal tribunal for an additional evidentiary hearing.

E. Where an appeal was not filed within the statutory appeal period, the cabinet secretary shall, after review of the record and appeal, determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that denies a request to extend the time frame for the appeal shall include findings and conclusions for the denial of the reopening.

[~~E~~] **F.** Decision by the board of review:

(1) Decision in writing: [~~Following the conclusion of a review on an appeal,~~] The board of review may take the appeal under advisement, may order a transcript of proceedings for review may afford the parties an opportunity to file memorandum briefs and proposed findings of fact and conclusions of law; or the board may issue [~~its~~] a decision. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by the members of the board who heard or reviewed the appeal. If a decision of the board of review is not unanimous, the decision of the majority shall control. The minority may file a dissent from such decision.

(2) Findings of fact shall be based exclusively on the record, the evidence presented at the tribunal hearing and matters officially noted.

[~~**(3)** Where an appeal was not filed within the statutory appeal period, the board of review shall, after review of the record, determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that denies a request for reopening shall include the board of review's findings and conclusions for the denial of the reopening.~~]

[~~**(4)**~~] **(3)** Publication of decision: Copies of any decision issued by the board of review shall be promptly transmitted to all interested parties to the appeal.
[11.3.500.13 NMAC - N, 01-01-2003; A, 11-15-2012; A, 10/29/2019]