

TITLE 9 HUMAN RIGHTS
CHAPTER 2 AGE
PART 22 HEARINGS TO CHALLENGE CIVIL PENALTY ASSESSMENTS BY THE STATE
LONG-TERM CARE OMBUDSMAN

9.2.22.1 ISSUING AGENCY: Aging and Long-Term Services Department.
[9.2.22.1 NMAC - N, 4/1/2004]

9.2.22.2 SCOPE: This rule applies to the general public and governs the hearings conducted by the aging and long-term services department to address civil penalties that have been assessed on persons or entities by the state long-term care ombudsman. It does not govern other hearings conducted by the department.
[9.2.22.2 NMAC - N, 4/1/2004]

9.2.22.3 STATUTORY AUTHORITY: This rule is adopted pursuant to the terms of 42 U.S.C. Section 3058g(j), Sections 28-4-6(B), 28-17-5 and 28-17-19 NMSA 1978 and Laws 2004, Ch. 23, Sec. 6(E).
[9.2.22.3 NMAC - N, 4/1/2004]

9.2.22.4 DURATION: Permanent.
[9.2.22.4 NMAC - N, 4/1/2004]

9.2.22.5 EFFECTIVE DATE: April 1, 2004, unless a later date is cited in the history note at the end of a section.
[9.2.22.5 NMAC - N, 4/1/2004]

9.2.22.6 OBJECTIVE: This rule establishes a hearing procedure for a person or entity to challenge a civil penalty assessment that has been issued to it by the state long-term care ombudsman pursuant to the terms of Section 28-17-19 NMSA 1978 and applicable department regulations.
[9.2.22.6 NMAC - N, 4/1/2004]

9.2.22.7 DEFINITIONS: The following terms are used in this rule:

A. “assessed party” means a person or entity that has been issued a civil penalty assessment by the state long-term care ombudsman;

B. “civil penalty assessment” means a civil monetary penalty imposed on a person or entity by the state long-term care ombudsman pursuant to the terms of Section 28-17-19 NMSA 1978 and applicable department regulations;

C. “department” means the aging and long-term services department. It is the state department charged, among other things, with implementing the requirements of the federal Older Americans Act of 1965, as amended (42 U.S.C. Section 3001, et seq.);

D. “hearing officer” means an impartial person designated by the secretary to preside over proceedings under this rule. A hearing officer may be an employee of the department (except for an employee of the long-term care ombudsman program), a policy advisory committee member, or any other impartial person. A hearing officer may be, but is not required to be, an attorney at law;

E. “long-term care ombudsman program” means the program administered by the state long-term care ombudsman;

F. “parties” mean the assessed party and the state long-term care ombudsman;

G. “secretary” means the secretary of the department; and

H. “state long-term care ombudsman” means the office established pursuant to the terms of 42 U.S.C. Section 3058g and Section 28-17-4 NMSA 1978 to, among other things, identify, investigate and resolve complaints that are made by, or on behalf of, residents of long-term care facilities and that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents.

[9.2.22.7 NMAC - N, 4/1/2004]

9.2.22.8 REPRESENTATION:

A. A natural person may appear as a party on his or her own behalf or by an attorney licensed to practice law in New Mexico.

B. The state long-term care ombudsman, corporations and other legal entities may be represented by a duly authorized officer or employee of the entity or by an attorney licensed to practice law in New Mexico.

C. An attorney for a party must file an entry of appearance at least ten (10) working days before the commencement of any hearing. The attorney of record for a party shall be deemed to continue to be the attorney of record until written notice of withdrawal of representation is provided to the hearing officer and the parties.
[9.9.22.8 NMAC - N, 4/1/2004]

9.2.22.9 REQUEST FOR HEARING:

A. An assessed party may request a hearing before the department. The request for hearing shall be in writing and received by the secretary no later than ten (10) working days from the date that the assessed party receives the civil penalty assessment. The request for hearing shall include:

- (1) the name and address of the assessed party;
- (2) a copy of the civil penalty assessment;
- (3) a brief statement of the factual or legal bases upon which the assessed party challenges the civil penalty assessment; and
- (4) a statement of the relief requested.

B. The assessed party shall send a copy of the request for hearing to the state long-term care ombudsman.

C. The department shall dismiss any request for hearing that is untimely or fails to substantially comply with the terms of this rule.
[9.2.22.9 NMAC - N, 4/1/2004]

9.2.22.10 APPOINTMENT OF HEARING OFFICER: Within five (5) working days of receipt of a timely request for hearing, the secretary will appoint a hearing officer and will send written notice of the appointment to the parties.
[9.2.22.10 NMAC - N, 4/1/2004]

9.2.22.11 NOTICE OF HEARING AND TIME LIMITS FOR HOLDING HEARING:

A. Within ten (10) working days of appointment, the hearing officer will establish the date, time and place of the hearing. The hearing will be no more than one hundred twenty (120) calendar days from the date of the civil penalty assessment unless the parties agree otherwise.

B. The hearing officer will issue a notice of hearing at least thirty (30) calendar days before the hearing date, unless the parties agree to a shorter timeframe. The notice will be served on the parties by certified mail, return receipt requested. At the discretion of the hearing officer, the notice may be served by regular mail or other appropriate means on any other persons or entities that may have an interest in the proceedings.

C. The notice of hearing shall include:

- (1) the name of the assessed party;
- (2) the name and address of the state long-term care ombudsman;
- (3) the time, date, place, and nature of the hearing; and
- (4) a statement of the legal authority under which the hearing is to be held.

[9.2.22.11 NMAC - N, 4/1/2004]

9.2.22.12 VENUE: Unless the parties agree otherwise, the hearing will be held in the county where the events allegedly occurred that gave rise to the civil penalty assessment or where the long-term care facility in question is located.
[9.2.22.12 NMAC - N, 4/1/2004]

9.2.22.13 POWERS AND DUTIES OF THE HEARING OFFICER: The hearing officer shall have the authority to:

- A.** preside over hearings;
- B.** assure that hearings are properly recorded;
- C.** administer oaths and affirmations to the witnesses;
- D.** issue subpoenas and subpoenas *duces tecum*;
- E.** establish procedural schedules;
- F.** rule on motions and procedural requests;
- G.** require parties to attend hearings, pre-hearing conferences and settlement conferences;

- H. require parties to produce for examination information or witnesses under their control;
- I. require parties to express their positions on any issues in the proceedings;
- J. require parties to submit legal briefs on any issues in the proceedings;
- K. examine witnesses, and permit parties to examine witnesses;
- L. determine the admissibility of evidence;
- M. take official notice of any matter that is among the traditional matters of official or administrative notice in accordance with the terms of this rule;
- N. recess any hearing from time to time;
- O. regulate the course of the proceedings and the conduct of any participants;
- P. take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses;
- Q. issue a recommended decision on the merits of a case, including findings of fact and conclusions of law;
- R. approve settlements or other pre-hearing or post-hearing dispositions of cases by the parties, subject to final approval by the secretary; and
- S. take any other action reasonably necessary to conclude the proceedings in a timely and fair manner.

[9.2.22.13 NMAC - N, 4/1/2004]

9.2.22.14 APPLICABILITY OF RULES OF CIVIL PROCEDURE AND RULES OF EVIDENCE:

Although formal rules of civil procedure and evidence do not apply, the hearing officer may look to the New Mexico rules of civil procedure and the New Mexico rules of evidence for guidance during the course of the proceedings. In addition, the hearing officer's recommended decision and the secretary's final decision must be supported by a residuum of legally competent evidence as would support a verdict in a court of law.

[9.2.22.14 NMAC - N, 4/1/2004]

9.2.22.15 COMMUNICATIONS WITH SECRETARY AND HEARING OFFICER:

A. No party, representative of a party, or other person shall communicate off the record about the merits of a case with the secretary or the hearing officer unless the communication is in writing and a copy is provided to all parties to the proceedings.

B. The secretary and the hearing officer shall not communicate off the record about the merits of a case with any party, representative of a party, or other person unless the communication is in writing and a copy is sent to all parties to the proceedings.

[9.2.22.15 NMAC - N, 4/1/2004]

9.2.22.16 PRE-HEARING DISCLOSURES AND DISCOVERY:

A. Upon written request of any party, the hearing officer may require parties to comply with reasonable discovery requests. Oral and written depositions are prohibited except to preserve the testimony of persons who are sick or elderly, or persons who will not be able to attend the hearing.

B. At least fifteen (15) calendar days before the hearing, each party shall file the following information with the hearing officer and send copies to the other parties:

- (1) the name of each witness that the party will or may call at the hearing;
- (2) a summary of the anticipated direct testimony of each witness and, if the testimony includes expert opinions, a list of documents or other information that provides the bases for those opinions;
- (3) an estimate of the length of time for the direct testimony of each witness; and
- (4) a list of exhibits that will or may be offered into evidence at the hearing. In addition, each party shall provide the other parties, but not the hearing officer, with copies of all exhibits that are identified on the exhibit list but have not been provided previously.

C. Parties are encouraged to enter into stipulations of fact to expedite the hearing process. Any stipulations must be filed jointly with the hearing officer at least ten (10) working days before the hearing.

[9.2.22.16 NMAC - N, 4/1/2004]

9.2.22.17 SUBPOENAS:

A. Pursuant to Section 28-17-19(C) NMSA 1978, upon the written request of a party, the hearing officer may issue subpoenas to compel attendance of witnesses or production of records in connection with proceedings before the department.

B. In order to subpoena a person who is not a party to the proceedings, or an agent or representative of a party, the party requesting the subpoena shall tender witness fees and mileage to the person subpoenaed in accordance with the terms of Rule 1-045 NMRA.

C. The hearing officer may condition a subpoena to permit the inspection and copying of records upon the party requesting the subpoena paying the person subpoenaed the reasonable cost of inspection and copying in advance.

[9.2.22.17 NMAC - N, 4/1/2004]

9.2.22.18 EVIDENCE AND CONDUCT OF HEARING:

A. Hearings will be conducted as follows:

(1) all hearings will be open to the public, unless closing a hearing is necessary to protect the privacy of any person who is entitled to privacy protection under federal or state law;

(2) only relevant and material evidence is admissible at hearings. Evidence will be allowed if it is of a type commonly relied upon by reasonably prudent persons in the conduct of serious affairs;

(3) redundant evidence will be excluded;

(4) witnesses shall be examined orally, under oath or affirmation. The parties and the hearing officer shall have the right to cross-examine witnesses; and

(5) the hearing officer may take official notice of any matter that is among the traditional matters of official or administrative notice, and may take official notice of any matter that is within the department's specialized knowledge. The hearing officer shall inform the parties of any matters officially noticed, and shall afford the parties an opportunity to contest any such matters.

B. The burden of persuasion at the hearing shall be on the state long-term care ombudsman, which must prove its case by a preponderance of the evidence unless the case involves allegations of fraud. In cases involving allegations of fraud, the state long-term care ombudsman must prove its case by clear and convincing evidence.

C. At the hearing, the state long-term care ombudsman shall present its evidence first. If the assessed party wishes to present evidence, it shall proceed second. Thereafter, only the state long-term care ombudsman may present rebuttal evidence. Rebuttal evidence shall be confined to the issues raised in the assessed party's presentation of evidence. Each party will be given an opportunity to offer a final oral or written argument without additional presentation of evidence.

[9.2.22.18 NMAC - N, 4/1/2004]

9.2.22.19 RECORD OF HEARING:

A. Unless a hearing is stenographically recorded and the hearing officer orders otherwise, all hearings shall be recorded electronically by audio or audio-video. Any party desiring a copy of the audio or audio-video shall make a written request to the hearing officer and shall pay the cost of preparing a copy.

B. No later than five (5) working days before a hearing, a party may request that the hearing be stenographically recorded at the cost of the requesting party. The request shall be in writing to the hearing officer and shall certify that the party has hired a certified court reporter and made all necessary arrangements for the court reporter to perform his or her job. In addition, the requesting party shall arrange for the court reporter to deliver two (2) copies of the completed hearing transcript to the hearing officer. A court reporter's transcription becomes official when certified by the hearing officer. The requesting party shall pay the court reporter's fees, including any costs associated with providing the copies of the completed hearing transcript to the hearing officer.

C. Record. The record in a hearing shall consist of the following:

(1) the civil penalty assessment;

(2) the assessed party's request for hearing;

(3) the notice of appointment of the hearing officer;

(4) the notice of hearing;

(5) all pleadings and orders;

(6) any written information requested by the hearing officer and provided to him or her by the parties

before the hearing;

(7) all exhibits;

(8) all stipulations;

(9) all statement of matters officially noticed by the hearing officer;

(10) the electronic audio or audio-video recording, or the court reporter's written transcription of the hearing prepared in accordance with this rule;

- (11) the hearing officer's recommended decision;
- (12) any motions for reconsideration and rulings thereon; and
- (13) the secretary's final decision.

[9.2.22.19 NMAC - N, 4/1/2004]

9.2.22.20 HEARING OFFICER'S RECOMMENDED DECISION:

A. The hearing officer shall present a written recommended decision to the secretary after the close of the hearing, and shall send copies to the parties. The recommended decision shall be based solely on the record and shall include proposed findings of fact and conclusions of law.

B. Any motions for reconsideration shall be submitted to the hearing officer within five (5) working days from the date of service of the hearing officer's recommended decision. Such motions shall be decided without a hearing unless the hearing officer orders otherwise.

[9.2.22.20 NMAC - N, 4/1/2004]

9.2.22.21 SECRETARY'S FINAL DECISION:

A. The secretary shall issue a final written decision within ten (10) working days of the receipt of the hearing officer's recommended decision or ruling on a motion for reconsideration. Based upon the evidence in the record, the secretary may affirm, reverse or modify the hearing officer's recommended decision as modified by any subsequent rulings of the hearing officer. The secretary's final decision shall inform the parties of their right to seek judicial review.

B. The secretary shall send copies of the final decision to the parties by certified mail, return receipt requested.

C. When the secretary's final decision affirms a civil penalty assessment by the state long-term care ombudsman, the assessed party shall pay the civil penalty to the department within thirty (30) calendar days from the date of the decision. Payment shall be in the form of cash, cashier's check or money order.

[9.2.22.21 NMAC - N, 4/1/2004]

9.2.22.22 APPEAL: A person who is aggrieved by the secretary's final decision may appeal to the district court in accordance with the provisions of Section 39-3-1.1 NMSA 1978 and Rule 1-074 NMRA. The date of filing of the secretary's final decision starts the time limit for appeal.

[9.2.22.22 NMAC - N, 4/1/2004]

9.2.22.23 NO AUTOMATIC STAY PENDING JUDICIAL REVIEW: The filing of a notice of appeal shall not stay the enforcement of the secretary's final decision. Upon a showing of substantial hardship and irreparable harm, the secretary may grant a stay of the final decision pending appeal. The district court may also grant a stay in accordance with the provisions of Rule 1-074 NMRA.

[9.2.22.23 NMAC - N, 4/1/2004]

9.2.22.24 ENFORCEMENT OF ORDERS AND PAYMENT IN DEFAULT: Whenever an assessed party is in default of a civil penalty assessment, the state long-term care ombudsman may file an action in district court solely for the purpose of entry of judgment and enforcement of the civil penalty. The district court shall accept the civil penalty assessment without reviewing the basis for it and shall enter an appropriate judgment or order to enforce the civil penalty assessment.

[9.2.22.24 NMAC - N, 4/1/2004]

History of 9.2.22 NMAC: [RESERVED]