

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 12 ADJUDICATION

1.7.12.1 ISSUING AGENCY: State Personnel Board.
[1.7.12.1 NMAC - Rp, 1 NMAC 7.12.1, 07/07/01]

1.7.12.2 SCOPE: All state agencies in the classified service.
[1.7.12.2 NMAC - Rp, 1 NMAC 7.12.2, 07/07/01]

1.7.12.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(B), NMSA 1978, Section 10-9-13(E),(H), NMSA 1978, Section 10-9-18, NMSA 1978, Section 10-9-20, NMSA 1978, Section 10-15-1(H) and NMSA 1978, Section 52-5-2(B),(C).
[1.7.12.3 NMAC - Rp, 1 NMAC 7.12.3, 07/07/01; A, 11/14/02]

1.7.12.4 DURATION: Permanent.
[1.7.12.4 NMAC - Rp, 1 NMAC 7.12.4, 07/07/01]

1.7.12.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.12.5 NMAC - Rp, 1 NMAC 7.12.5, 07/07/01]

1.7.12.6 OBJECTIVE: The objective of Part 12 of Chapter 7 is: to provide a system for career status employees to appeal disciplinary actions to the personnel board and to provide a process for the personnel board to hear complaints against workers' compensation judges.
[1.7.12.6 NMAC - Rp, 1 NMAC 7.12.6, 07/07/01]

1.7.12.7 DEFINITIONS: For purposes of *1.7.12.24 NMAC*.

A. "Complaint" means a sworn statement of the alleged facts underlying the claim that a judge has violated one or more of the canons of the code of judicial conduct as adopted by the supreme court, except canon 21-900 of that code; and;

B. "Judge" means a workers' compensation judge appointed in accordance with the provisions of *NMSA 1978, Section 52-5-2(B)*.

[1.7.12.7 NMAC - Rp, 1 NMAC 7.12.7, 07/07/01; A, 11/14/02]

1.7.12.8 FILING AN APPEAL:

A. Employees who have completed the probationary period as required by *Subsection A of 1.7.2.8 NMAC* and have been demoted, dismissed, or suspended have the right to appeal to the board for a public hearing before a hearing officer designated by the board.

B. A notice of appeal must be in writing and filed with the director no later than 30 calendar days from the effective date of the dismissal, demotion, or suspension. A copy of the notice of final action and a statement of the grounds for the appeal must accompany the notice of appeal. Appeals not filed within 30 calendar days shall be dismissed by the hearing officer for lack of jurisdiction.

C. Within fifteen days from the date of dismissal, an appellant may request a hearing in which to present evidence challenging a dismissal for lack of jurisdiction. If a hearing on the dismissal is held, the hearing officer shall submit a recommended decision to the board which shall contain a summary of the evidence and findings of fact and conclusions of law. The board, at a regularly scheduled meeting, shall then issue a final decision.

D. Upon acceptance of a notice of appeal, the hearing officer shall send the agency a copy of the notice of appeal and issue a scheduling order directing the parties, in part, to submit to the hearing officer a stipulated pre-hearing order for his/her approval, which shall contain at least: a statement of any contested facts and issues; proposed stipulation of those facts not in dispute; the relief or remedy requested by the appellant; a deadline for disclosure of all probable witnesses with a brief summary of their anticipated testimony and documentary evidence; a list of exhibits; a deadline for the completion of discovery and filing of motions; a deadline for requesting subpoenas; and whether the parties agree to participate in voluntary alternative dispute resolution.

(1) The hearing officer may further revise the pre-hearing order.

(2) Any discussion concerning possible settlement of an appeal shall not be a part of the pre-hearing order and may not be introduced at the hearing.
[1.7.12.8 NMAC - Rp, 1 NMAC 7.12.8, 07/07/01; A, 7-15-05; A, 5/15/07]

1.7.12.9 AGENCY WITHDRAWAL OF DISCIPLINE:

A. An agency may withdraw a completed disciplinary action prior to commencement of a personnel board appeals hearing so long as the appellant is fully restored to pre-disciplinary status insofar as employment, back pay and benefits are concerned.

B. Upon agency withdrawal of a disciplinary action, the hearing officer may dismiss the appeal without prejudice to the agency, which may reinstate disciplinary action.

[1.7.12.9 NMAC - Rp, 1 NMAC 7.12.9, 07/07/01; 1.7.12.9 NMAC - N, 7-15-05]

1.7.12.10 HEARING OFFICER:

A. The hearing officer shall not participate in any adjudicatory proceeding if, for any reason, the hearing officer cannot afford a fair and impartial hearing to either party. Either party may ask to disqualify the designated hearing officer for cause by filing an affidavit of disqualification within 14 calendar days of the order. The affidavit must state the particular grounds for disqualification. The designated hearing officer shall rule on motions for disqualification and an appeal of the ruling may be made to the board within 14 calendar days of the hearing officer's ruling.

B. If an appeal is filed by an employee of the office, or if for any other reason a designated hearing officer within the office cannot or does not hear an appeal, the personnel board may designate a qualified state employee to hear the appeal. The personnel board may also decline to designate a qualified state employee to hear the appeal and instead, designate a member or members of the personnel board to serve as hearing officer and prepare a recommended decision. The personnel board member or members hearing the appeal, if less than a quorum, shall not take part in discussion or deliberation which leads to a final decision by a quorum of the personnel board.

C. No person shall communicate concerning the merits of any pending adjudicatory proceeding with the designated hearing officer or member of the board unless both parties or their representatives are present.

D. The hearing officer may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the hearing officer or upon the filing of a motion to withdraw the appeal at any time.

E. The hearing officer may dismiss an appeal with prejudice upon the filing of a motion to withdraw the appeal after the deadline for the completion of discovery upon such terms and conditions as the hearing officer deems proper.

[1.7.12.10 NMAC - Rp, 1 NMAC 7.12.10, 07/07/01; 1.7.12.10 NMAC - Rn, 1.7.12.9 NMAC, 7-15-05; A, 10-15-08]

1.7.12.11 CONSOLIDATION AND JOINDER:

A. The hearing officer may consolidate cases in which two or more appellants have cases containing identical or similar issues.

B. The hearing officer may join the appeals of an appellant who has two or more appeals pending.

C. The hearing officer may consolidate or join cases if it would expedite final resolution of the cases and would not adversely affect the interests of the parties.

[1.7.12.11 NMAC - Rp, 1 NMAC 7.12.11, 07/07/01; 1.7.12.11 NMAC - Rn, 1.7.12.10 NMAC, 7-15-05]

1.7.12.12 DISCOVERY: The hearing officer has the power to compel, by subpoena or order, the production of written materials or other evidence the hearing officer may deem relevant or material. The parties shall have a right to discovery limited to depositions, interrogatories, requests for production, and requests for admission and witness interviews. All discovery shall be subject to the control of the hearing officer.

[1.7.12.12 NMAC - Rp, 1 NMAC 7.12.12, 07/07/01; 1.7.12.12 NMAC - Rn, 1.7.12.11 NMAC & A, 7-15-05]

1.7.12.13 MOTIONS:

A. Any defense, objection, or request that can be determined on the merits prior to a hearing may be raised by motion before the deadline set by the hearing officer unless good cause is shown for the delay.

B. Prior to filing the motion, the filing party shall determine whether the non-filing party concurs with the motion. If the non-filing party concurs, the filing party shall include a stipulated order with the motion. If

the non-filing party does not concur, the filing party shall indicate the non-concurrence in the motion and include a proposed order.

C. A response to a motion is due twelve (12) calendar days from the date of filing of the motion. A reply to a response is due seven (7) days from the date of filing the response. The response and reply schedule may also be set or modified by the hearing officer.

D. Responses to any motions shall be filed according to a schedule set by the hearing officer.

E. During the course of a hearing, motions may be renewed or made for the first time, if such a motion then becomes appropriate.

F. The hearing officer shall rule on all motions except for dispositive motions on the merits.
[1.7.12.13 NMAC - Rp, 1 NMAC 7.12.13, 07/07/01; 1.7.12.13 NMAC - Rn, 1.7.12.12 NMAC & A, 7-15-05]

1.7.12.14 ADDITIONAL WITNESSES: Witnesses who are not disclosed by the deadline contained in the pre-hearing order shall not be permitted to testify except for good cause shown and to prevent manifest injustice.
[1.7.12.14 NMAC - Rp, 1 NMAC 7.12.14, 07/07/01; 1.7.12.14 NMAC - Rn, 1.7.12.13 NMAC, 7-15-05]

1.7.12.15 SUBPOENAS:

A. The hearing officer has the power to subpoena witnesses.
B. The hearing officer has the power to subpoena documents or other tangible items.
C. Subpoenas shall be prepared in triplicate by the party requesting the subpoena and will be issued by the hearing officer. A copy of each subpoena shall be sent to the opposing party by the requesting party, together with a transmittal letter listing all persons subpoenaed.

D. Subpoenas shall be hand delivered unless otherwise agreed to.

E. In order to compel attendance at a hearing, the subpoena shall be received by the witness at least 72 hours prior to the time the witness is to appear. The hearing officer may waive this rule for good cause shown.

F. Employees under subpoena shall be granted administrative leave as required by the provisions of *Subsection D of 1.7.7.14 NMAC*.

[1.7.12.15 NMAC - Rp, 1 NMAC 7.12.15, 07/07/01; 1.7.12.15 NMAC - Rn, 1.7.12.14 NMAC & A, 7-15-05]

1.7.12.16 SANCTIONS:

A. The hearing officer may impose sanctions upon the parties as necessary to serve the cause of justice including, but not limited to the instances set forth below.

(1) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, a request for admission, and/or production of witnesses, the hearing officer may:

(a) draw an inference in favor of the requesting party with regard to the information sought;
(b) prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought;

(c) permit the requesting party to introduce secondary evidence concerning the information sought; or

(d) strike any part of the pleadings or other submissions of the party failing to comply with such request.

(2) The hearing officer may refuse to consider any motion or other action which is not filed in a timely fashion.

B. The hearing officer may issue an order to show cause why an appeal should not be dismissed for failure to prosecute, or rule either for the appellant or the appellee, so long as the merits of the case are not concerned. If the order is uncontested, the hearing officer may dismiss the appeal or rule for the appellant. If the order is contested and the hearing officer dismisses the appeal or rules for the appellant, such decision is appealable to the board within 14 calendar days of the order.

C. The board may prohibit a representative from appearing before the board or one of its hearing officers for a period of time set by the board for good cause shown.

[1.7.12.16 NMAC - Rp, 1 NMAC 7.12.16, 07/07/01; 1.7.12.16 NMAC - Rn, 1.7.12.15 NMAC & A, 7-15-05]

1.7.12.17 NOTICE OF HEARING: Notice of hearing shall be made by certified mail with return receipt requested at least 14 calendar days prior to the hearing, unless otherwise agreed to by the parties and the hearing officer.

[1.7.12.17 NMAC - Rp, 1 NMAC 7.12.17, 07/07/01; A, 11/14/02; 1.7.12.17 NMAC - Rn, 1.7.12.16 NMAC, 7-15-05]

1.7.12.18 HEARINGS:

- A.** The hearing shall be open to the public unless the parties agree that it shall be closed.
- B.** A party may appear through a representative at any and all times during the adjudication process, provided such representative has filed a written entry of appearance.
- C.** The hearing officer may clear the room of witnesses not under examination, if either party so requests, and of any person who is disruptive. The agency is entitled to have a person, in addition to its representative, in the hearing room during the course of the hearing, even if the person will testify in the hearing.
- D.** The agency shall present its evidence first.
- E.** Oral evidence shall be taken only under oath or affirmation.
- F.** Each party shall have the right to:
 - (1) make opening and closing statements;
 - (2) call and examine witnesses and introduce exhibits;
 - (3) cross-examine witnesses;
 - (4) impeach any witness;
 - (5) rebut any relevant evidence; and
 - (6) introduce evidence relevant to the choice of discipline if it was raised as an issue in the pre-hearing order.
- G.** The hearing shall be conducted in an orderly and informal manner without strict adherence to the rules of evidence that govern proceedings in the courts of the state of New Mexico. However, in order to support the board's decisions, there must be a residuum of legally competent evidence to support a verdict in a court of law.
- H.** The hearing officer shall admit all evidence, including affidavits, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs. The hearing officer shall exclude immaterial, irrelevant, or unduly cumulative testimony.
- I.** If scientific, technical, or other specialized knowledge will assist the hearing officer to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. In the case of evidence relating to polygraph examinations, the proponent must have followed all the provisions of rule *11-707 NMRA*.
- J.** The hearing officer may take administrative notice of those matters in which courts of this state may take judicial notice.
- K.** The rules of privilege shall be effective to the extent that they are required to be recognized in civil actions in the district courts of the state of New Mexico.
- L.** The hearing officer shall admit evidence relevant only to those allegations against the appellant included in both the notice of contemplated action and the notice of final action or which are contested issues as set forth in the pre-hearing order.
- M.** The hearing shall be recorded by a video and/or audio-recording device under the supervision of the hearing officer. No other recording of the hearing, by whatever means, shall be permitted without the approval of the hearing officer.
- N.** The board shall provide for and require that the hearing officer:
 - (1) appoint a signed language interpreter pursuant to the Signed Language Interpreting Practices Act [*NMSA 1978, Section 61-34-1 to 61-34-17*] to appellants whose hearing is so impaired that they cannot understand voice communication; appellant must provide proof of disability; and
 - (2) appoint a language interpreter pursuant to the Court Interpreter Act [*NMSA 1978, Section 38-10-1 to 38-10-8*] for hearing participants who do not understand English well enough to understand the proceedings.

[1.7.12.18 NMAC - Rp, 1 NMAC 7.12.18, 07/07/01; 1.7.12.18 NMAC - Rn, 1.7.12.17 NMAC, 7-15-05; A, 5/15/07; A, 12/1/10]

1.7.12.19 POST-HEARING BRIEFS: The hearing officer may require or permit written closing arguments, post-hearing briefs and proposed findings of fact and conclusions of law according to a scheduling order issued by the hearing officer. If case law is cited, a copy of the case shall be provided to the hearing officer.

[1.7.12.19 NMAC - Rp, 1 NMAC 7.12.19, 07/07/01; 1.7.12.19 NMAC - Rn, 1.7.12.18 NMAC, 7-15-05]

1.7.12.20 RECOMMENDED DECISION: The hearing officer shall recommend a decision to the board as soon as practicable upon conclusion of the hearing. The hearing officer shall provide a copy of the recommended decision to the parties by certified mail with return receipt requested.

[1.7.12.20 NMAC - Rp, 1 NMAC 7.12.20, 07/07/01; 1.7.12.20 NMAC - Rn, 1.7.12.19 NMAC, 7-15-05]

1.7.12.21 EXCEPTIONS TO RECOMMENDED DECISION:

A. The parties to a proceeding may file exceptions with supporting briefs to a hearing officer's recommended decision according to a scheduling order issued by the hearing officer.

B. Copies of such exceptions and any briefs shall be served simultaneously on all parties, and a statement of such service shall be furnished to the board's hearing officer.

C. Exceptions to a hearing officer's recommended decision shall cite the precise substantive or procedural issue to which exceptions are taken.

D. Any exception not specifically made shall be considered waived. Any exception that fails to comply with the foregoing requirements may be disregarded. Any brief in support of exceptions shall not contain matters not related to or within the scope of the exceptions.

[1.7.12.21 NMAC - Rp, 1 NMAC 7.12.21, 07/07/01; 1.7.12.21 NMAC - Rn, 1.7.12.20 NMAC, 7-15-05]

1.7.12.22 DECISIONS OF THE BOARD:

A. As a general rule, the board shall only consider post-hearing briefs, and proposed findings of fact and conclusions of law, the hearing officer's recommended decision, and exceptions to the recommended decision. Where circumstances warrant, the board may review all or a portion of the record before the hearing officer.

B. The board shall not consider any additional evidence or affidavits not in the record before the hearing officer or pleadings not filed in accordance with the hearing officer's scheduling order.

C. The board may consider the record in executive session. Should the board have questions of the hearing officer, the questions shall be put to the hearing officer in open session.

D. Unless otherwise ordered by the board in advance of its consideration of the appeal, the board shall not permit any oral arguments.

E. If the board determines that the credibility of a witness is at issue, it shall review at least as much of the record as is necessary to support its decision.

[1.7.12.22 NMAC - Rp, 1 NMAC 7.12.22, 07/07/01; 1.7.12.22 NMAC - Rn, 1.7.12.21 NMAC, 7-15-05]

1.7.12.23 REINSTATEMENT:

A. The board may order agencies to reinstate appellants with back pay and benefits. Such appellants shall be reinstated to their former position, or to a position of like status and pay, that they occupied at the time of the disciplinary actions.

B. In the event the board's order includes any back pay, the appellant shall provide the agency with a sworn statement of gross earnings, unemployment compensation, and any other earnings, including but not limited to disability benefits received by the appellant since the effective date of the disciplinary action. The agency shall be entitled to offset earnings, unemployment compensation and any other earnings received during the period covered by the back pay award against the back pay due. The hearing officer shall retain jurisdiction of the case for the purpose of resolving any disputes regarding back pay.

[1.7.12.23 NMAC - Rp, 1 NMAC 7.12.23, 07/07/01; 1.7.12.23 NMAC - Rn, 1.7.12.22 NMAC, 7/15/05; A, 10/15/08; A, 12/1/10]

1.7.12.24 REPORT OF DECISIONS: When the board renders a final decision in an appeal, the board's decision including the hearing officer's recommended decision will be available to the public pursuant to the Inspection of Public Records Act, NMSA 1978, Section 14-2-1 (as amended through 2003). Copies of the board's final order and the hearing officer's recommended decision shall be stored at the state personnel office, separate from case files, and will be available to the public when provided to the parties. The director will redact any privileged and confidential information pursuant to state and federal law.

[1.7.12.24 NMAC - Rp, 1 NMAC 7.12.24, 07/07/01; A, 11/14/02; 1.7.12.24 NMAC - Rn, 1.7.12.23 NMAC, 7-15-05; A, 5/15/07]

1.7.12.25 WORKERS' COMPENSATION JUDGES:

A. The board's duly appointed hearing officer shall hear all complaints filed in accordance with the provisions of *NMSA 1978, Section 52-5-2(C)*.

B. Whenever some action is required to be taken within a certain number of calendar days, the hearing officer may extend the time for a reasonable period.

C. Upon receipt of a complaint, the hearing officer shall serve a copy of the complaint on the judge by certified mail.

D. Within 14 calendar days after service of a complaint, the judge shall file an answer with the hearing officer. The facts alleged in the complaint may be deemed admitted if not specifically denied by answer or if no answer is filed within the prescribed time.

E. Upon the filing of an answer or upon the expiration of the time for its filing, the hearing officer shall issue an order directing the parties to submit a stipulated pre-hearing order for the hearing officer's approval and signature, which shall contain at least: a statement of any contested facts and issues; stipulation of those matters not in dispute; the identity of all witnesses to be called and a brief summary of their testimony; a list of exhibits; and requests for subpoenas.

F. The hearing officer has the power to subpoena witnesses, compel their attendance, and require the production of any books, records, documents or other evidence the hearing officer may deem relevant or material.

G. The Hearing:

(1) The hearing officer shall receive evidence admissible under the rules of evidence, that govern proceedings in the courts of the state of New Mexico and oral evidence shall be taken only under oath or affirmation.

(2) The hearing officer shall make procedural rulings.

(3) The formal hearing shall be open unless the hearing officer, for compelling reasons, determines otherwise. Reasons for closing the hearing shall be stated in the record.

(4) A judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel and to examine and cross-examine witnesses.

(5) The hearing shall be recorded by a sound recording device under the supervision of the hearing officer.

H. The hearing officer may require post-hearing briefs and proposed findings.

I. The hearing officer shall, within a reasonable time, prepare and submit to the parties a report which shall contain a brief statement of the proceedings and the answer thereto, if any; a summary of the evidence; and findings with respect to the allegations.

J. Within 14 calendar days of receipt of the hearing officer's report, the parties may file objections to the hearing officer's report, setting forth all objections to the report and all reasons in opposition to the findings.

K. The board shall consider the report of the hearing officer and the record made before the hearing officer and in connection therewith make its findings as to whether there was a violation of the code of judicial conduct and transmit its findings to the director of the workers' compensation administration.

[1.7.12.25 NMAC - Rn, 1.7.12.24 NMAC, 7-15-05]

HISTORY OF 1.7.12 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 15, Appeals and Hearings, filed 05-22-80;

SPB Rule 15, Appeals and Hearings, filed 10-21-82;

SPB Rule-19, Hearings, filed 04-04-90;

SPB Rule-19, Hearings, filed 12-24-91;

SPB 18, Adjudication, filed 12-15-92;

SPB 18, Adjudication, filed 12-29-94;

SPB 18, Adjudication, filed 11-17-95.

History of Repealed Material:

1 NMAC 7.12, Adjudication, filed 06-13-97.

Other History:

1 NMAC 7.17, Adjudication, filed 01-12-96 replaced SPB 18, filed 11-17-95;

1 NMAC 7.17, Adjudication, filed 05-02-96;

1 NMAC 7.12, Adjudication, filed 06-13-97 replaced 1 NMAC 7.17, filed 05-02-96;

1 NMAC 7.12, Adjudication, filed 06-13-97 replaced by 1.7.11 NMAC, Discipline, effective 07/07/01.