

TITLE 15 GAMBLING AND LIQUOR CONTROL
CHAPTER 1 GAMES AND GAMING GENERAL PROVISIONS
PART 15 ADMINISTRATIVE APPEAL OF GAMING CONTROL BOARD ACTION

15.1.15.1 ISSUING AGENCY: New Mexico Gaming Control Board.
[12/31/98; 15.1.15.1 NMAC - Rn, 15 NMAC 1.15.1, 5/31/00]

15.1.15.2 SCOPE: This rule applies to all licensees, applicants for licensure, and persons aggrieved by an action of the Gaming Control Board or its agents under the Gaming Control Act.
[12/31/98; 15.1.15.2 NMAC - Rn, 15 NMAC 1.15.2, 5/31/00]

15.1.15.3 STATUTORY AUTHORITY: Section 60-2E-7(B)(3) of the Gaming Control Act authorizes the board to develop, adopt and promulgate all regulations necessary to implement and administer the provisions of the Gaming Control Act. Section 60-2E-59(B) authorizes the board to adopt procedural regulations to govern the procedures to be followed in administrative appeal hearings conducted pursuant to the Gaming Control Act.
[12/31/98; 15.1.15.3 NMAC - Rn, 15 NMAC 1.15.3, 5/31/00]

15.1.15.4 DURATION: Permanent.
[12/31/98; 15.1.15.4 NMAC - Rn, 15 NMAC 1.15.4, 5/31/00]

15.1.15.5 EFFECTIVE DATE: December 31, 1998, unless a later date is cited at the end of a section.
[12/31/98; 15.1.15.5 NMAC - Rn, 15 NMAC 1.15.5, 5/31/00; A, 2/14/02]

15.1.15.6 OBJECTIVE: The objective of this rule is to establish guidelines and procedures for the conduct of hearings under the Gaming Control Act when the hearing is initiated by a person aggrieved by an action of the board or its agent.
[12/31/98; 15.1.15.6 NMAC - Rn, 15 NMAC 1.15.6, 5/31/00]

15.1.15.7 DEFINITIONS: Unless otherwise defined below, terms used in this rule have the same meanings as set forth in the Gaming Control Act:

- A. “act”** means the Gaming Control Act.
- B. “agent”** means any member or employee of the board or any other person authorized to act on the board’s behalf.
- C. “party”** means each person named or admitted as a party to a proceeding before the board or its duly appointed hearing examiner.
- D. “person”** means a legal entity or individual.
- E. “appellant”** means a person aggrieved by an action of the board, who files a request for hearing before the board.
- F. “appellee”** means the board, an agent of the board or the board’s representative.
- G. “state”** means the state of New Mexico.

[12/31/98; 15.1.15.7 NMAC - Rn, 15 NMAC 1.15.7, 5/31/00; A, 5/14/04]

15.1.15.8 PUBLIC HEARINGS; LOCATION; HEARING EXAMINER:

- A. All** hearings held pursuant to Section 60-2E-59 of the act shall be conducted by a hearing examiner duly appointed by the board.
- B. Except** for telephonic hearings, hearings shall be conducted in Albuquerque except that the hearing examiner may, upon motion of either party, grant a change of venue for good cause shown.
- C. All** hearings held pursuant to Section 60-2E-59 of the act shall be open to the public.
- D. The** hearing shall be recorded on audiotape or other means of sound reproduction, or by a certified court reporter.
- E. Any** hearing provided for in this rule may be held telephonically, in the interest of a speedy resolution.

[12/31/98; 15.1.15.8 NMAC - Rn & A, 15 NMAC 1.15.8, 5/31/00; A, 7/31/02; A, 5/14/04; A, 10/15/15]

15.1.15.9 REQUEST FOR REVIEW OF BOARD ACTION:

A. Any person aggrieved by an action of the board or one of its agents may request a hearing for the purpose of review of such action. The appellant shall file the request for hearing within 30 days of the date the action is taken. The request shall include the following:

- (1) a statement of the facts relevant to the review of the action;
- (2) a statement of the provision of the act and the rules promulgated under the act that are relevant to the review of the action;
- (3) a statement of the arguments that the appellant considers relevant to the review of the action; and
- (4) any other evidence considered relevant.

B. The board will schedule the hearing as soon as practicable but in any event no later than 60 days from the date it receives the appellant's request for hearing. The hearing examiner may extend the 60 day time upon motion for good cause shown, or the parties may extend the 60 day time period by mutual agreement. The board will issue notice of the hearing, which will include:

- (1) a statement of the time, place and nature of the hearing;
- (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) a short and plain statement of the matters of fact and law asserted;
- (4) notice to any other parties to give prompt notice of issues controverted in fact or law; and
- (5) all necessary telephone numbers if a telephonic hearing will be conducted.

C. All parties shall be given the opportunity to respond and present evidence and argument on all relevant issues.

[12/31/98; 15.1.15.9 NMAC - Rn & A, 15 NMAC 1.15.9, 5/31/00; A, 5/14/04]

15.1.15.10 RECORD OF PROCEEDING:

A. The record of the proceeding shall include:

- (1) all pleadings, motions, and intermediate rulings;
- (2) evidence received or considered;
- (3) a statement of matters officially noticed;
- (4) questions and offers of proof, objections and rulings thereon;
- (5) proposed findings and conclusions; and
- (6) any action recommended by the hearing examiner.

B. A party may request a transcription of the proceedings. The party requesting the transcript shall bear the cost of transcription.

[12/31/98; 15.1.15.10 NMAC - Rn, 15 NMAC 1.15.10, 5/31/00; A, 5/14/04]

15.1.15.11 DISCOVERY; SUBPOENAS:

A. The board may, subject to the rules of privilege and confidentiality recognized by law, require the furnishing of information, the attendance of witnesses, and the production of books, records, papers or other objects necessary and proper for the purposes before it, and may take the deposition of witnesses, including parties.

B. The board may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. Subpoenas to compel any person to appear at a deposition or at a hearing on the merits of the matter shall be served no later than 10 calendar days before the deposition or hearing unless good cause is shown by the party requesting the subpoena.

C. The subpoena shall state with reasonable specificity the nature of the evidence required to be produced, the time and place of the hearing or deposition, the nature of the inquiry or investigation, and the consequences of failure to obey the subpoena. The subpoena shall be signed and attested to by the board or its designee.

D. Witnesses summoned shall be paid the same fees for attendance and travel as in civil actions in the district court unless otherwise provided for by law.

E. Any party to the proceeding may request issuance of a subpoena by the board in connection with the proceeding. The board shall issue the subpoena upon written application to the board. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

F. Any witness summoned may petition the board to vacate or modify the subpoena served on the witness. The board shall give prompt notice to the party, if any, who requested service of the subpoena. The board may grant the petition in whole or in part if, after the investigation it deems appropriate, the board determines that:

- question;
- (1) the testimony or evidence to be produced does not reasonably relate to any matter in question;
 - (2) the testimony or evidence to be produced is unreasonable or oppressive;
 - (3) the subpoena was not issued a reasonable period of time in advance of the time when evidence is requested; or
 - (4) any other reason justifies vacating or modifying the subpoena.

G. In any administrative appeal, the appellant and the board may conduct discovery in accordance with the New Mexico rules of civil procedure for the district courts, except that interrogatories shall be limited in number to 20, including all subparts, unless, upon motion and for good cause shown, the hearing examiner grants a party leave to file additional interrogatories.

[12/31/98; 15.1.15.11 NMAC - Rn, 15 NMAC 1.15.11, 5/31/00; A, 5/14/04]

15.1.15.12 PROCEDURES; EVIDENCE:

A. Any party may be represented by a person licensed to practice law in the state. An individual appellant may represent himself.

B. The rules of evidence as applied in the courts do not apply in these proceedings. Any relevant evidence may be admitted, and such evidence shall be sufficient in itself to support a finding if it is reliable, regardless of the existence of any statutory or common law rule that might make admission of such evidence improper in a civil action. Irrelevant, immaterial, or unduly repetitious evidence may be excluded at a party's request or on the hearing examiner's own initiative.

C. Documentary evidence may be received in evidence in the form of true copies of the original.

D. Documentary and other physical evidence may be authenticated or identified by any reasonable means that shows that the matter in question is what its proponent claims it to be.

E. The experience, technical competence and specialized knowledge of the hearing examiner, the board, or its staff may be used in the evaluation of evidence.

F. Evidence on which the board may base its decision is limited to the following:

(1) all evidence, including any records, investigation reports, and documents in the board's possession, of which it desires to avail itself as evidence in making a decision, that is offered and made a part of the record of the proceeding;

(2) testimony and exhibits introduced by the parties; and

(3) official notice of any fact of which judicial notice may be taken and other facts within the board's specialized knowledge. Whenever the hearing examiner takes official notice of any fact, the noticed fact and its source must be stated at the earliest possible time before or during the hearing, and any party must be given, on timely request, an opportunity to show the contrary.

G. The record will include all briefs, proposed findings and exceptions and must show the ruling on each finding, exception or conclusion presented.

H. A party to a hearing shall submit to the hearing examiner and to all other parties to the hearing all documents to be introduced at the hearing no later than five days from the scheduled hearing date to insure that the hearing examiner and other parties receive the documents before the hearing.

[12/31/98; 15.1.15.12 NMAC - Rn & A, 15 NMAC 1.15.12, 5/31/00; A, 5/14/04]

15.1.15.13 CONDUCT OF PROCEEDING:

A. Unless the hearing examiner reasonably determines that a different procedure is appropriate, the hearing shall be conducted in accordance with the procedures set forth in this rule.

B. In addition to any procedures described by the act, the following procedures shall apply:

(1) the appellant may present an opening statement on the merits and the appellee may make a statement of the defense or reserve the statement until presentation of its case;

(2) after the opening statements, if made, the appellant shall present its case in chief in support of its petition;

(3) upon conclusion of appellant's case in chief, the appellee may move for dismissal of the petition. The hearing examiner may suspend the hearing and refer the motion to the board, which shall grant, deny, or reserve decision on the motion, with or without argument, as soon as practicable but in no event later than its next regularly scheduled board meeting;

(4) if no motion to dismiss is made, or if the board denies or reserves decision on the motion, the appellee shall present its case in defense;

(5) upon conclusion of the appellee's case, the appellant may present rebuttal evidence;

(6) after presentation of the evidence by the parties, the appellant may present a closing argument. The appellee then may present its closing argument, and the appellant may present a rebuttal argument; and

(7) thereafter, the matter shall be submitted for recommendation by the hearing examiner. [12/31/98; 15.1.15.13 NMAC - Rn, 15 NMAC 1.15.13, 5/31/00; A, 5/14/04]

15.1.15.14 BURDEN OF PROOF: The appellant bears the burden of showing by a preponderance of the evidence that the decision made by the board or an agent of the board should be reversed or modified. [12/31/98; 15.1.15.14 NMAC - Rn, 15 NMAC 1.15.14, 5/31/00; A, 5/14/04]

15.1.15.15 CONTINUANCES: The hearing examiner shall not grant a continuance except for good cause shown. A motion to continue a hearing shall be made at least 10 calendar days before the hearing date. [12/31/98; 15.1.15.15 NMAC - Rn, 15 NMAC 1.15.15, 5/31/00; A, 5/14/04]

15.1.15.16 DEFAULT; PROCEDURE FOR RECOMMENDATION OF DEFAULT:

A. Failure of the appellee to schedule a hearing within 60 days, unless the 60 day time period is extended, or of any party to appear at the hearing on the merits personally or by telephone, without having obtained a continuance may constitute a default and an admission on all matters and facts alleged by the opposing party and shall be deemed a waiver of the right to an evidentiary hearing on the matter. The hearing examiner may proceed to consider the matter, and the board may dispose of it, on the basis of the evidence before it.

B. If the appellee fails to schedule a hearing within 60 days, the appellant shall file a motion requesting the hearing examiner to recommend to the board that default judgment be entered against the appellee.

(1) The appellee shall file a response to the motion and shall request a hearing on the motion to recommend default judgment within 10 calendar days of the date the motion is served. Failure of the appellee to file a response and to request a hearing shall constitute consent to the granting of the motion.

(2) If the appellee timely files a response to the motion, the hearing examiner shall hear the matter. The hearing examiner may deny the motion and allow the appellee additional time to schedule a hearing on the merits if an accident, illness or other good cause prevented the appellee from timely scheduling a hearing.

C. If a party fails to appear at a hearing on the merits personally or by telephone the hearing examiner may hear the evidence of witnesses who appear, and make a recommendation to the board based upon such evidence. Upon recommendation of the hearing examiner the board may proceed to consider the matter and dispose of it on the basis of the record before it.

D. If an accident, illness, or other good cause prevents any party from requesting a continuance or appearing at the hearing, the party may, within 15 days after the date of the hearing, apply to the board to reopen the proceeding. Upon finding sufficient cause, the board shall immediately fix a time and place for the hearing and give the opposing party notice as required under this rule.

[12/31/98; 15.1.15.16 NMAC - Rn & A, 15 NMAC 1.15.16, 5/31/00; A, 5/14/04]

15.1.15.17 RECOMMENDED ACTION; FINAL DECISION:

A. At the request of the hearing examiner or upon motion by either party granted by the hearing examiner, and before the hearing examiner recommends action by the board, the parties may submit briefs including findings of fact and conclusions of law for consideration by the hearing examiner. The hearing examiner has the discretion to request briefs or grant a motion to submit briefs on any point of law deemed appropriate by the hearing examiner. Briefs submitted shall include supporting reasons for any findings or legal conclusions and citations to the record and to relevant law. Should the hearing examiner request briefs or grant a party's motion to submit briefs, the hearing shall be continued until the hearing examiner has given the briefs sufficient consideration and brings the hearing to a close. The hearing, however, shall be completed no later than forty five (45) days from the date of continuance.

B. Not more than thirty (30) days after completion of the hearing, the hearing examiner shall prepare a written decision containing his or her recommendation of action to be taken by the board. The recommendation may propose to sustain, modify, or reverse the initial decision of the board or its agent.

C. Notice of the hearing examiner's recommended action shall be served on the parties as promptly as possible but in no event later than fifteen (15) days after the date of the hearing on the matter. Service shall be made by registered or certified mail.

D. The board shall accept, reject or modify the hearing examiner's recommendation by majority vote. The final decision or order shall be issued in writing and shall include a statement of findings and conclusions and

the reasons therefor, on all material issues of fact, law or discretion involved, together with the specific action taken to sustain, modify, or reverse the initial decision of the board or its agent.

E. The board may dismiss an administrative appeal without recommendation of the hearing examiner upon request of the appellant.

F. The final decision or order will be public and shall become a part of the record.
[12/31/98; 15.1.15.17 NMAC - Rn, 15 NMAC 1.15.17, 5/31/00; A, 7/31/02; A, 5/14/04; A, 10/15/15]

15.1.15.18 EX PARTE COMMUNICATIONS:

A. No party or representative of any other person shall communicate off the record, orally or in writing, with the hearing examiner or any board member except upon notice and opportunity to all parties to participate.

B. Neither the hearing examiner nor any member of the board shall communicate off the record, orally or in writing, with any party or representative of any party in connection with any issue of fact or law related to a proceeding under this rule except upon notice and opportunity to all parties to communicate.

C. Notwithstanding the provisions of Subsections A and B of 15.1.15.18 NMAC, a party may submit information to the board in confidence when such information is required by law or the rules of the board or required by a subpoena issued by the board to be made or transmitted to the board. However, information ruled by the board as nonconfidential or information described as nonconfidential in Subsection B of 15.1.2.8 NMAC is subject to the prohibition on ex parte communications.

D. Notwithstanding the provisions of paragraphs Subsections A and B of 15.1.15.18 NMAC, ex parte communications are permitted, where circumstances require, for procedural or administrative purposes or emergencies that do not deal with substantive matters or issues on the merits if the board member or hearing examiner reasonably believes that no party will gain an advantage as a result of the ex parte communication.

E. Upon receipt of a communication knowingly made or caused to be made by a party to a board member or hearing examiner in violation of this section, the board member or hearing officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of the violation of this section.

F. This section does not preclude:
(1) the hearing examiner or any member of the board from consulting with board counsel concerning any matter before the board, except any matter relating to a proceeding in which board counsel is representing the state; or

(2) any party from conferring with the hearing examiner or board counsel concerning procedural matters that do not involve issues of fact or law related to the proceeding.

[12/31/98; 15.1.15.18 NMAC - Rn, 15 NMAC 1.15.18, 5/31/00; A, 2/14/02; A, 5/14/04]

15.1.15.19 TELEPHONIC HEARINGS:

A. Any party requesting a telephonic hearing shall do so within 10 working days of the date of the notice. When the parties agree to conduct the hearing by telephone, notice of the telephonic hearing shall be made to all parties and shall include all necessary telephone numbers.

B. Any party that has agreed to a telephonic hearing but subsequently requests an in-person hearing shall do so in writing to the hearing examiner no later than 10 days before the scheduled date of the hearing. The request shall specifically state the reasons the requesting party believes an in-person hearing is necessary, including, at a minimum, the issues in question, the expected conflicting testimony, and how an in-person hearing would significantly advance the hearing examiner's fact-finding ability. The hearing examiner's decision to grant or deny the hearing shall be issued in writing and shall include the specific reasons for granting or denying the request. If the hearing examiner grants the request, the hearing shall be rescheduled to a time convenient for all parties. If the hearing examiner denies the request, the telephonic hearing shall proceed as scheduled.

C. The location or locations of the parties during the hearing shall have a speaker telephone and facsimile machine available so that all may hear the proceedings and documents may be transmitted between witnesses and the hearing examiner.

D. The appellee shall initiate the telephone call. The appellant is responsible for ensuring that the telephone number to the appellant's location for the telephonic hearing is accurate and that the appellant is available at that telephone number at the time the hearing is to commence. Failure to provide the correct telephone number or failure to be available at the commencement of the hearing shall be treated as a failure to appear and will subject the petitioner to a default judgment.

E. The in-person presence of some parties or witnesses at the hearing does not prevent the participation of other parties or witnesses by telephone with prior approval of the hearing examiner.
[15.1.15.19 NMAC - N, 5/31/00; A, 5/14/04]

HISTORY OF 15.1.15 NMAC:

Pre NMAC History: None.

History of Repealed Material: [Reserved]

Other History:

15 NMAC 1.15, Administrative Appeal of Gaming Control Board Action, effective 12/31/98.

15 NMAC 1.15, Administrative Appeal of Gaming Control Board Action (filed 12/14/98) reformatted, renumbered, amended and replaced by 15.1.15 NMAC, Administrative Appeal of Gaming Control Board Action, effective, 5/31/2000.