

**TITLE 22: COURTS**

**CHAPTER 600: ADMINISTRATIVE HEARINGS OFFICE**

**PART 6: IMPLIED CONSENT ACT LICENSE REVOCATION HEARINGS**

**22.600.6.1 ISSUING AGENCY:** Administrative hearings office, Wendell Chino Building, 1220 South St. Francis Drive, P.O. Box 6400, Santa Fe, NM 87502.  
[22.600.6.1 NMAC - N, 2/1/2018]

**22.600.6.2 SCOPE:** This part applies to all persons holding a New Mexico driver's license or driving on New Mexico roadways, their attorneys, MVD, and any person attending an Implied Consent Act violation hearing.  
[22.600.6.2 NMAC - N, 2/1/2018]

**22.600.6.3 STATUTORY AUTHORITY:** Paragraph (1) of Subsection A of 7-1.B-5 NMSA 1978.  
[22.600.6.3 NMAC - N, 2/1/2018]

**22.600.6.4 DURATION:** Permanent.  
[22.600.6.4 NMAC - N, 2/1/2018]

**22.600.6.5 EFFECTIVE DATE:** February 1, 2018, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[22.600.6.5 NMAC - N, 2/1/2018]

**22.600.6.6 OBJECTIVE:** The objective of this part is to interpret, exemplify, implement and enforce the hearing provisions under the Implied Consent Act and the Administrative Hearings Office Act.  
[22.600.6.6 NMAC - N, 2/1/2018]

**22.600.6.7 DEFINITIONS:** As used in 22.600.5 NMAC:

- A. "Administrative hearings office"** is the agency established under Section 7-1B-1 NMSA 1978.
  - B. "Administrative hearings office facility"** is an office facility owned or leased by the administrative hearings office.
  - C. "Chief hearing officer"** is the appointed head of the administrative hearings office under the Administrative Hearings Office Act, Section 7-1B-3 NMSA 1978, or the chief hearing officer's designee during the absence of the chief hearing officer, or the acting, interim chief hearing officer pending appointment of that position.
  - D. "Driver"** means the person challenging the proposed revocation of the person's driving privileges for an alleged Implied Consent Act violation.
  - E. "Hearing location"** means an administrative hearings office facility or another state, county, municipal, or private office location where the administrative hearings office has arranged space to conduct a scheduled hearing or hearings.
  - F. "Hearing officer"** is the attorney assigned by the chief hearing officer or designee of the chief hearing officer to serve as a neutral decision maker in any adjudicatory proceeding before the administrative hearings office. The person assigned as hearing officer must be licensed to practice law in New Mexico or eligible for temporary licensure to practice in New Mexico as determined by the New Mexico supreme court. The hearing officer may be a classified employee in the state personnel system with the administrative hearings office either as an attorney or administrative law judge, may be under contract with the administrative hearings office as a contract attorney, administrative law judge, or judge, or may be an attorney, administrative law judge, or judge serving in a voluntary capacity for the administrative hearings office.
  - G. "MVD"** is the motor vehicle division of the New Mexico taxation and revenue department.
  - H. "Revocation"** means the termination of a person's driver's license, permit or privilege to drive a motor vehicle upon a highway in New Mexico.
- [22.600.7.1 NMAC - N, 2/1/2018]

**22.600.6.8 REQUEST FOR IMPLIED CONSENT ACT HEARING AND SUBMISSION OF REFERRAL TO THE ADMINISTRATIVE HEARINGS OFFICE FOR CONDUCT OF A HEARING:**

**A.** Requests for hearing must be in writing, must be accompanied by the required fee or statement of indigency as required by MVD, must be made within ten days after receipt of notification of revocation as defined in Section 66-8-112 NMSA 1978, and must be submitted to MVD. Incomplete requests or requests received after this time will not be honored by MVD. Timeliness of the request shall be determined either by the date of actual delivery to MVD's headquarters in Santa Fe or, if mailed, by the postmark date of the envelope containing the request delivered through the U. S. postal service. The administrative hearings office, which is a separate and distinct agency from MVD, lacks authority under the statute to accept a request for hearing directly from a driver. While the administrative hearings office will make reasonable efforts to forward any hearing requests incorrectly submitted to it rather than MVD to MVD, the administrative hearings office will not be held liable for the driver's initial error in filing the request with the wrong entity in terms of timeliness of the request for hearing.

**B.** Upon receipt of a timely, complete request for hearing and review of a notice of revocation demonstrating a prima facie showing of an Implied Consent Act violation, MVD shall promptly transmit, submit or file a referral for hearing to the administrative hearings office in a method and manner required by the administrative hearings office. At a minimum, any referral for hearing by MVD should include the driver's request for hearing, the notice of revocation and any supporting documentation attached thereto by the law enforcement officer, any proof of mailing or service of the notice of revocation if issued by MVD rather than the law enforcement officer, a list of witnesses that MVD wishes to have subpoenaed to the hearing, an entry of appearance if any of an attorney or officer or agent appearing on behalf of MVD, the driver's address of record with MVD if different than what was listed on the driver's request for hearing, and any entry of appearance filed by an attorney on behalf of the driver. Administrative hearings office staff may reject any hearing referral received from MVD that does not include the minimum requested information until MVD provides the required information.

**C.** After initial submission of a referral for hearing with the administrative hearings office, MVD shall have a continuing duty to forward any additional information received on the case to the administrative hearings office for inclusion in the case file, including but not limited to, any subsequent entry of appearance received from an attorney on behalf of a driver, any supplemental evidence received such as the results of a chemical test from the scientific laboratory division or foundational information related to such results, and any requests for discovery filed by a driver or the driver's representative.

**D.** Upon receipt of a complete referral for hearing, the chief hearing officer or staff designated by the chief hearing officer will promptly assign the matter to a hearing officer to be promptly heard at the appropriate place before expiration of any mandatory statutory deadline.

[22.600.6.8 NMAC - N, 2/1/2018]

#### **22.600.6.9 REPRESENTATION AT HEARING, FORMAL ENTRY OF APPEARANCE/SUBSTITUTION OF COUNSEL, AND WITHDRAWAL FROM REPRESENTATION:**

**A.** Unless otherwise expressly authorized by law, only the driver, or in the case of a minor under the age of 18 the driver's legal parent(s) or guardian(s), or an attorney licensed or authorized to practice law in New Mexico may represent the driver at hearing. Any attorney not licensed to practice law in New Mexico must comply with applicable New Mexico supreme court pro hac vice rules in order to represent the person at the hearing.

**B.** Any attorney wishing to represent a party shall file a formal written entry of appearance directly with the administrative hearings office listing that attorney's mailing address, fax number (if any), and a valid email address. Any attorney wishing to substitute in for a previous attorney must file a substitution of counsel containing the same information required in the initial entry of appearance. Upon filing a withdrawal of representation with the administrative hearings office, consistent with the Rules of Professional Conduct, the attorney shall give reasonable notice of the date and time of the scheduled hearing to the party and allow time for the party to retain other counsel, if needed.

**C.** If an attorney attempts to withdraw from the case at the scheduled hearing, a hearing officer may deny a request for withdrawal of representation if such request would necessitate a continuance or otherwise have a clear, materially adverse effect on the party's interests and impede the conduct of a full, fair, and efficient hearing.

[22.600.6.9 NMAC - N, 2/1/2018]

#### **22.600.6.10 TIME AND PLACE OF IMPLIED CONSENT ACT HEARING - HEARINGS IN PERSON OR BY TELEPHONIC, VIDEOCONFERENCE, AND ELECTRONIC HEARINGS:**

**A.** The administrative hearings office will notify the driver or driver's counsel by certified mail of the date, time and place scheduled for the hearing. This notice will be directed to the address listed on the request for a hearing or, if no return address is indicated, to the address last given by the driver to MVD pursuant to Section 66-5-22 NMSA 1978 or to the address provided by driver's counsel in the entry of appearance. Such notice of hearing

will be sent a minimum of seven calendar days before the scheduled hearing consistent with Section 66-2-11 NMSA 1978. A driver, or their representative, has a continuing, ongoing obligation through final issuance of a decision and order resolving the case to provide the administrative hearings office with any change of address information.

**B.** The hearing shall be held in the county in which the offense for which the person was arrested took place unless driver or driver's designated representative either consents to or requests to appear by telephone, videoconference or other equivalent electronic method.

**C.** The hearing officer may conduct the hearing in person or with consent by telephone, videoconference or other equivalent electronic method. If the hearing is to be conducted by telephone, videoconference or other equivalent electronic method, the notice shall so inform the driver or the driver's representative and provide no less than ten days for the driver or the driver's representative to object to the hearing being conducted in that manner. Failure to timely object to the conduct of a telephone, videoconference, or other equivalent electronic method hearing within the time frame specified by the notice shall be deemed consent to the hearing proceeding in that manner and waiver of any other applicable statutory in county hearing requirement.

**D.** Provided that the driver or driver's representative has not previously demanded an in-person hearing or otherwise objected to conducting the matter via telephone, videoconference, or other equivalent electronic method, a driver, a driver's representative, MVD's attorney, or any MVD witness may request to appear via telephone, videoconference, or alternative electronic means by filing a request at least three business days before the scheduled hearing, absent an extraordinary, unforeseen circumstance. The driver's or driver's representative filing of a request to appear via telephone, videoconference, or other alternative electronic method shall be deemed as a total and complete waiver of the in-person, in-county hearing requirement and further deemed as consent for all parties, all witnesses, and the hearing officer to appear at the hearing via telephone, videoconference, or other equivalent electronic methods or no such request will be granted. The assigned hearing officer, the chief hearing officer, or designated scheduling unit employee may grant or deny the request after considering whether a complete and accurate record can be made and a fair hearing can be conducted in the matter via telephone, videoconference or other equivalent electronic method. Even if the initial request is granted, the assigned hearing officer always retains the discretion at any point in the proceeding to order the appearance of the parties or witnesses in person if, in the hearing officer's determination, resolution of the disputed facts, evidence, credibility of a witness, law, and or development of a complete and accurate record requires it.

**E.** All parties appearing via telephone, videoconference, or other electronic method shall provide the administrative hearings office with a working email address or facsimile number for the exchange of all documentary evidence before or during the hearing. Any other tangible exhibit introduced into the record at a remote hearing will be submitted for the record in accord with the order of the presiding hearing officer.

**F.** Failure to follow the administrative hearings office's instructions for participating in the hearing via telephone, videoconference, or other equivalent electronic method will be treated as a non-appearance at the hearing.

**G.** Any technical issues shall be promptly reported to the administrative hearings officer in accord with the instructions included on the notice of hearing.

**H.** In the event that technical or other equipment problems prevent the telephone or videoconference hearing from occurring or otherwise interferes with maintaining or developing a complete record at the hearing, the parties agree and consent that the assigned hearing officer at their discretion may continue the matter to a different time before expiration of the statutory deadline, may order the parties to appear for an in-person hearing, or may conduct the hearing via another equivalent electronic method.

[22.600.6.10 NMAC - N, 2/1/2018]

**22.600.6.11 CONTINUANCES:** At the request of the driver or the driver's representative, MVD or MVD's agent, any law enforcement officers subpoenaed as witnesses, or upon the hearing officer's own motion, the hearing officer may for good cause continue the hearing. Continuance requests shall be submitted to the administrative hearings office in writing prior to the scheduled hearing or on the record at the scheduled hearing. The hearing officer shall consider only those requests made in writing at least three working days prior to the scheduled hearing absent extraordinary circumstances that the requesting party could not have known earlier. Employees of the administrative hearings office scheduling unit or the chief hearing officer may grant or deny the request on behalf of the hearing officer. An order to grant or deny the request may be issued prior to the scheduled hearing or if there is insufficient time to issue an order prior to the scheduled hearing, the hearing officer may grant or deny the request on the record at the hearing. Regardless of the cited good cause or emergency circumstance supporting the continuance, no continuance request may be granted unless there is adequate time to provide notice to the parties, subpoena witnesses and conduct the rescheduled hearing within 90 days of the notice of revocation.

[22.600.6.11 NMAC - N, 2/1/2018]

**22.600.6.12 IMPLIED CONSENT HEARINGS - SUBPOENAS FOR WITNESSES AND DOCUMENTS -ISSUANCE - COSTS:**

**A.** With at least 10 days written notice, the administrative hearings office will subpoena any witness for testimony at the hearing that MVD has identified in its referral of the case including all law enforcement personnel identified on the notice of revocation, or any subsequent submission by MVD, and any relevant witness requested by driver or driver's representative in writing. Such subpoenas shall be served by personal service as provided by NMRA 1-045(c), by email, by mail, or by certified mail.

**B.** The driver or the driver's representative may make written application to MVD requesting that a subpoena be issued to compel the production of specific books, papers or other records. Such written application shall set forth reasons supporting the issuance of the subpoena, including establishing the relevancy of the proposed testimony or documents sought. MVD shall issue a discovery order to its witnesses in the matter, which the administrative hearings office may subsequently enforce. The driver or the driver's representative shall be responsible for the service of any such subpoenas on MVD's witness, and following up with MVD in the event of noncompliance with the subpoena. Unless a request for continuance is made at least three working days prior to the scheduled date for the hearing, inability to serve such subpoenas shall not be grounds for continuance. Failure to comply with a diligently served subpoena, and subsequent follow up letter from MVD about the necessity for compliance with the subpoena, may be grounds to rescind the proposed revocation regardless of the merits of the case.

**C.** Other than crafting a remedy in the particular case before it appropriate for the failure to comply with a valid and reasonably executed subpoena, the administrative hearings office has no other subpoena enforcement powers.

[22.600.6.12 NMAC - N, 2/1/2018]

**22.600.6.13 IMPLIED CONSENT HEARINGS - POWERS AND DUTIES OF HEARING OFFICER:**

**A.** The hearing officer shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the proceedings and to maintain order. The hearing officer shall have the powers necessary to carry out these duties, including the following:

- (1) to administer or have administered oaths and affirmations;
- (2) to schedule, continue and reschedule hearings;
- (3) to rule upon offers of proof and receive evidence;
- (4) to require the filings of briefs on specific legal issues prior to or after the hearing;
- (5) to consider and rule upon procedural and other motions and objections appropriate in proceeding;
- (6) to insure that all, and only, relevant and material issues are considered during the hearing;
- (7) to require the production or inspection of relevant documents and other items;
- (8) to participate, when appropriate, in the examination of witnesses;
- (9) to maintain a complete administrative hearing record;
- (10) to issue orders and a written decision based on the record; or
- (11) to take such other action as may be necessary and appropriate, consistent with legal authority vested in the administrative hearings office, and with the rules, regulations, standing orders, and policies of the administrative hearings office.

**B.** The hearing officer shall have full power to regulate the course, conduct, and decorum of the hearing, including of the parties, their representatives, and the witnesses therein. This power includes the authority to reprimand, or with warning in extreme instances exclude from the hearing, any person engaging in a continuing pattern of indecorous, obstinate, recalcitrant, obstreperous, unethical, unprofessional or improper conduct that interferes with the conduct of a fair and orderly hearing or development of a complete record.

**C.** In the performance of these functions, the hearing officer shall not be responsible to or subject to the direction of any officer, employee or agent of the taxation and revenue department or the department of finance and administration.

**D.** In the performance of these adjudicative functions, the hearing officer is prohibited from engaging in any improper ex parte communications about the substantive issues with any party on any matter, as addressed in regulation 22.600.2.16 NMAC. An improper ex parte communication occurs when the hearing officer discusses the substance of a case without the opposing party being present, except that it is not an improper ex parte communication for the hearing officer to go on the record with only one party when the other party has failed to

appear at a scheduled hearing.  
[22.600.6.13 NMAC - N, 2/1/2018]

**22.600.6.14 IMPLIED CONSENT HEARINGS - PARTIES TO THE HEARING - PARTIES' RIGHTS:**

The parties to the hearing shall be MVD and the driver. The driver may be represented by an authorized attorney at their own expense, who can appear on the driver's behalf. MVD may also be represented by an attorney that has entered an appearance on its behalf. MVD may also designate the law enforcement officer that served the notice of revocation as its case agent for the purposes of the exclusionary rule and for the limited purposes of presenting testimony, exhibits, and making basic evidentiary objections regarding relevancy by filing a written designation before the scheduled hearing. The parties directly, or through an authorized attorney, shall be entitled to call and examine witnesses, to introduce exhibits, to cross-examine witnesses, and to make closing arguments. Rebuttal evidence and argument may only be allowed at the discretion of the hearing officer.

[22.600.6.14 NMAC - N, 2/1/2018]

**22.600.6.15 IMPLIED CONSENT HEARINGS - EVIDENCE:**

**A.** The technical rules of evidence shall not apply to the conduct of any hearing held under the provisions of Section 66-8-112 NMSA 1978. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The hearing officer may give probative effect to evidence that is of a kind commonly relied upon by reasonably prudent people in the conduct of serious affairs.

**B.** Hearsay evidence may be admitted in the proceeding.

**C.** The hearing officer may take notice of judicially or administrative cognizable facts and of general technical or scientific facts and of other facts within the hearing officer's specialized knowledge and experience in conducting Implied Consent Act hearings and in the workings of the administrative hearings office.

**D.** The experience, technical competence, and specialized knowledge of the hearing officer may be utilized in the evaluation of the evidence.

**E.** Parties objecting to evidence shall timely and briefly state the grounds for the objection. Rulings on evidentiary objections may be addressed on the record at the time of the objection, reserved for ruling in a subsequent written order or decision, or noted as a continuing, ongoing objection for which ruling is reserved to later in the proceeding.

**F.** Any party wishing to submit a video or audio recording into the record must provide a complete tangible, playable copy that can be retained by the administrative hearings office as part of the administrative record.

**G.** Documentary evidence may be received in evidence in the form of copies or excerpts. In general, documentary evidence should be no larger than 8.5 inches by 11 inches unless expressly allowed by the hearing officer.

**H.** In lieu of the introduction of tangible objects as exhibits, the hearing officer may require the moving party to submit a photograph, video, or other appropriate substitute such as verbal description of the pertinent characteristics of the object for the record.

[22.600.6.15 NMAC - N, 2/1/2018]

**22.600.6.16 IMPLIED CONSENT HEARINGS - FAILURE TO APPEAR:** If a driver who has requested a hearing fails to appear at the scheduled time and place, either in person or through an authorized representative attorney, and notice was given to the driver or to the driver's representative of the date, time, and place of the hearing, and no continuance has been granted, the right to a hearing shall be forfeited and the revocation shall be sustained. In considering the non-appearance and whether the person received appropriate notice, the hearing officer may consider the contents of the administrative file, information conveyed to or known by administrative hearings office staff, information related to mailing, including mail tracking, returned receipt information, and notes written on returned envelopes of the United States postal service or other mail tracking services, and arguments offered by the present party, all of which shall be addressed on the record of the hearing or in any subsequent order. Oral rulings of default for failure to appear are not final until reduced to writing. Such rulings may be changed by written order as new information arises after the hearing related to whether the notice of hearing was properly sent to the correct address, such as but not limited to a returned envelope from the postal service received after the hearing date. If a driver waives the right to a hearing or withdraws the request for hearing, the right to a hearing shall be forfeited and the revocation shall be sustained.

[22.600.6.16 NMAC - N, 2/1/2018]

**22.600.6.17 IMPLIED CONSENT HEARINGS - ISSUES TO BE CONSIDERED AT THE HEARING:**

The hearing shall be strictly limited to those issues set out in Subsection E of Section 66-8-112 NMSA 1978, as interpreted by case law. Whether or not the person had a previous revocation under the Implied Consent Act is an issue determined by MVD, by its own review of its official records.

[22.600.6.17 NMAC - N, 2/1/2018]

**22.600.6.18 IMPLIED CONSENT HEARINGS - HEARINGS OPEN TO PUBLIC:** The hearing, including any continuations, shall be open to the public, except that the assigned hearing officer may take any actions within the hearing officer's power necessary to ensure a fair and orderly hearing process, including ordering any person, group of people, or member of the media who interferes with the conduct of a fair and orderly hearing process to leave the proceeding.

[22.600.6.18 NMAC - N, 2/1/2018]

**22.600.6.19 IMPLIED CONSENT HEARINGS - DECISION AND ORDER:** The hearing officer shall enter a written order either sustaining or rescinding the revocation of the driver's license, permit or privilege to drive. The written order sustaining the revocation shall contain the findings required by Subsection F of Section 66-8-112 NMSA 1978 except where the driver has withdrawn the driver's request for hearing or waived the driver's right to a hearing by failing to appear at the hearing.

[22.600.6.19 NMAC - N, 2/1/2018]

**22.600.6.20 IMPLIED CONSENT HEARINGS - RECORD OF THE HEARING:** Hearings shall be electronically recorded unless the hearing officer requires recording by stenographic, mechanical or other means. Any party is permitted to make their own recording of the proceeding by providing notice to the tribunal and opposing party at beginning of the hearing of their intent to do so. However, unless designated to the contrary by the presiding hearing officer, the recording of the administrative hearings office is the official record of the proceeding. In the event of a videoconference hearing, only the audio recording portion of the proceeding shall be maintained as part of the record.

[22.600.6.20 NMAC - N, 2/1/2018]

**22.600.6.21 IMPLIED CONSENT HEARING - TIME FRAMES:** In computing any period of time under this section, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

[22.600.6.21 NMAC - N, 2/1/2018]

**HISTORY of 22.600.6 NMAC: [RESERVED]**