

**BEFORE THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE**

IN THE MATTER OF BUSINESS ENTITIES )  
 IN NONCOMPLIANCE WITH AFFILIATE )  
 REQUIREMENT, )  
 )  
 HEBER A. SPILSBURY, )  
 Respondent. )  
 \_\_\_\_\_ )

Docket No. 2022-0059

**NOTICE OF HEARING AND PRE-HEARING DEADLINES****Please read this Notice completely**

**THIS MATTER** comes before the New Mexico Office of Superintendent of Insurance (“OSI”) upon the request for hearing filed by Respondent on August 19, 2022, in response to a Notice of Contemplated Action issued by the New Mexico Superintendent of Insurance (“Superintendent”) on August 11, 2022; and

The Notice of Contemplated Action, which is incorporated in this Notice as if fully set forth herein, sets forth a statement of the legal authority and jurisdiction under which the hearing is to be held and sets forth a statement of the matters of fact and law which are asserted by OSI and are to be determined at the hearing requested by Respondent;

R. Alfred Walker is designated as the Hearing Officer in this matter. The Superintendent may designate a different Hearing Officer at any time before the hearing commences. The Hearing Officer will conduct the evidentiary hearing requested by Respondent, swear witnesses, take testimony, consider evidence, render a recommended decision based on the evidence presented, and submit that recommended decision to the Superintendent for his consideration;

Upon receipt of this Notice, Respondent shall provide a contact email address to Freya Tschantz, OSI Law Clerk, at [Freya.Tschantz2@state.nm.us](mailto:Freya.Tschantz2@state.nm.us), unless Respondent has already done so. Respondent will then be signed up for electronic service of documents filed to the OSI docket

in this matter. Electronic service at the email address provided by Respondent shall be considered proper notice to Respondent of all matters requiring notice;

By 5:00 p.m. on September 2, 2022, OSI shall provide to Respondent the names of witnesses it proposes to call at the hearing, together with the gist of testimony expected to be elicited from each witness, along with copies of any exhibits OSI anticipates using at the hearing;

By 5:00 p.m. on September 9, 2022, Respondent shall provide to OSI the names of witnesses it proposes to call at the hearing, together with the gist of testimony expected to be elicited from each witness, along with copies of any exhibits Respondent anticipates using at the hearing;

Witness and exhibit disclosures shall be filed to the docket for electronic service or emailed to Freya Tschantz, OSI Law Clerk, at [Freya.Tschantz2@state.nm.us](mailto:Freya.Tschantz2@state.nm.us) for filing and electronic service. OSI shall number its proposed exhibits beginning with OSI-1. Respondent shall number proposed exhibits beginning with R-1;

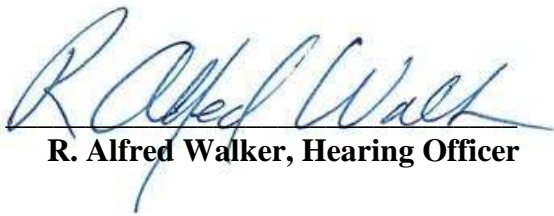
A video pre-hearing conference is scheduled for September 12, 2022, at 1:30 p.m. MDT. A videoconference link to that pre-hearing conference will be sent to the parties in advance of the hearing. The purpose of the pre-hearing videoconference is to consider simplifying, clarifying, narrowing, or resolving pending issues; stipulations and admissions of fact; discussing the contents and authenticity of documents; and such other matters as may aid in the orderly and expeditious disposition of this proceeding;

A video hearing to take evidence in this matter is scheduled for September 16, 2022, at 10:30 a.m. MDT. A videoconference link to that hearing will be sent to the parties in advance of the hearing; and

This matter shall be conducted in conformance with NMSA 1978, Sections 12-8-10 through 12-8-15 of the New Mexico Administrative Procedures Act. A copy of those sections is attached hereto.

**ISSUED at Santa Fe, New Mexico this 25th day of August, 2022.**

**HON. RUSSELL TOAL  
SUPERINTENDENT OF INSURANCE**

By:   
**R. Alfred Walker, Hearing Officer**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that, on this 25th day of August 2022, I filed the foregoing *Notice of Hearing and Pre-hearing Deadlines* through the OSI's e-filing system, which caused the parties to be served by electronic means, as more fully reflected on the eService recipients list for this case.

  
**LOUELLA PACHECO, Law Clerk  
Office of Legal Counsel  
Office of Superintendent of Insurance**

## 12-8-10. Adjudicatory proceedings.

A. In conducting adjudicatory proceedings, agencies shall afford all parties an opportunity for full and fair hearing. Unless otherwise provided by any law, agencies:

(1) may place on any party the responsibility of requesting a hearing if the agency notifies him in writing of his right to a hearing and of his responsibility to request the hearing;

(2) may make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement, consent order or default;

(3) may limit the issues to be heard or vary the procedures prescribed by Subsection B if the parties agree to the limitation or variation;

(4) shall allow any person showing that he will be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and may allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose the agency may order; and

(5) shall upon demand by any party require any or all parties, including the agency involved, to advise the names of witnesses it proposes to call at any adjudicatory hearing, together with the gist of testimony or type of testimony expected to be elicited from each witness. Any party shall likewise be required upon demand to advise of and produce for examination or copying any exhibits the party anticipates using. Such demanded information shall be made available at least ten days prior to the hearing. Other discovery or pre-trial conferences and procedures available in the district courts may also be utilized upon demand by any party.

B. In adjudicatory proceedings, all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall 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 so that all have sufficient notice of the issues involved to afford them reasonable opportunity to prepare. If the issues cannot be fully stated in advance of the hearing, they shall be fully 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 full statement or amendment to afford all parties reasonable opportunity to prepare; and

(4) in instances in which private parties are the moving parties, other parties to the proceedings shall give prompt notice of issues controverted in fact or law, and in other instances, agencies may by rule require responsive pleadings by the parties.

C. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

D. The record in adjudicatory proceedings 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 decision, opinion or report by the agency conducting the hearing.

E. The agency need not arrange to transcribe notes or sound recordings unless requested by a party. The cost of the transcript to parties shall not exceed the cost provided by law chargeable by official court reporters.

F. Findings of fact shall be based exclusively on the evidence presented and on matters officially noticed.

**History:** 1953 Comp., § 4-32-10, enacted by Laws 1969, ch. 252, § 10.

## 12-8-11. Procedures; evidence.

In adjudicatory proceedings:

A. irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence as applied in non-jury civil actions in the district courts shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. No greater exclusionary effect shall be given any rule or privilege than would obtain in an action in the district court. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

B. all evidence, including any records, investigation reports and documents in the possession of the agency, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in Subsections C and D of 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;

C. every party may call and examine witnesses, introduce exhibits, cross-examine witnesses who testify and submit rebuttal evidence;

D. 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 agency, but whenever any officer or agency takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, before or during the hearing, but before the final report or decision, and any party shall, on timely request, be afforded an opportunity to show the contrary;

E. the experience, technical competence and specialized knowledge of the agency and its staff may be utilized in the evaluation of the evidence;

F. any party may be represented by counsel licensed to practice law in the state or by any other person authorized by law;

G. if a person who has requested a hearing does not appear and no continuance has been granted, the agency may hear the evidence of witnesses who appear, and the agency may proceed to consider the matter and dispose of it on the basis of the evidence before it in the manner required by the Administrative Procedures Act. Where because of accident, sickness or other good cause, a person fails to request a hearing or fails to appear for a hearing which he has requested, the person may within a reasonable time apply to the agency to reopen the proceeding, and the agency, upon finding the cause sufficient, shall immediately fix a time and place for hearing and give the person notice as required by Section 10 [12-8-10 NMSA 1978] of the Administrative Procedures Act. At the time and place fixed, a hearing shall be held in the same manner as would have been employed if the person had appeared in response to the original notice of hearing;

H. in fixing the times and places for hearings, due regard shall be given to the convenience of the parties or their representatives;

I. where relief or procedure is not otherwise provided for, rules of practice and procedure applicable to civil actions in the district courts may be utilized by the parties at any stage of any proceeding, and if refused by the agency, then upon application to any district court having jurisdiction of the places of residence of a private party for the entry of an order providing for such relief or procedure; and

J. prior to each recommended initial or tentative decision, or decision upon agency review at any later stage of any agency proceeding, the parties shall be afforded a reasonable opportunity to submit, for the consideration of the agency member or employee participating in the decisions, briefs including:

(1) proposed findings of fact and law, together with supporting reasons therefor including citations to the record and of law; and

(2) in all cases where recommended initial decisions or tentative decision is subject to further agency review, exceptions to the decisions or recommended decisions and supporting reasons for such exceptions.

The record shall include all briefs, proposed findings and exceptions and shall show the ruling upon each finding, exception or conclusion presented. All decisions at any stage of any proceeding become a part of the record and shall include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion involved, together with the appropriate rule, order, sanction, relief or the denial thereof.

**History:** 1953 Comp., § 4-32-11, enacted by Laws 1969, ch. 252, § 11.

## 12-8-12. Decision.

No agency or member thereof shall:

A. participate in a final decision in an adjudicatory proceeding unless he has heard the evidence or read the record. A final decision or order in an adjudicatory proceeding shall be in writing or stated in the record. A final or tentative decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules or practice or as authorized by the Administrative Procedures Act, a party submits proposed findings of fact and conclusions of law, the agency shall rule upon each proposed finding and conclusion. Parties shall be notified either personally or by mail of any decision or order. A copy of the decision or order shall be delivered or mailed forthwith to each party or to his attorney of record; or

B. impose any sanction or substantive rule or order except within jurisdiction delegated to the agency and as authorized by law.

**History:** 1953 Comp., § 4-32-12, enacted by Laws 1969, ch. 252, § 12.



## **12-8-13. Ex-parte consultations.**

No party or representative of a party or any other person shall communicate off the record about the case with any agency member who participates in making the decision in any adjudicatory proceeding unless a copy of the communication is sent to all parties to the proceeding. No agency member or representative of the agency shall communicate off the record about the adjudicatory proceedings with any party or representative of a party or any other person unless a copy of the communication is sent to all parties in the proceeding.

**History:** 1953 Comp., § 4-32-13, enacted by Laws 1969, ch. 252, § 13.

## 12-8-14. Licenses.

A. Unless otherwise provided by law, no agency shall revoke, suspend or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with Sections 10, 11, 12, 13 and 15 [12-8-10 to 12-8-13 and 12-8-15 NMSA 1978] of the Administrative Procedures Act. Unless otherwise provided by law, if a licensee has, in accordance with any law and with agency regulations, made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend or revoke a license without first holding a hearing shall, upon exercising such authority, promptly afford the licensee an opportunity for hearing in conformity with Sections 10, 11, 12, 13 and 15 of the Administrative Procedures Act. The requirement of a hearing does not apply where the action taken by the agency is required by law and no discretion is vested in the agency.

B. Every applicant for a license, except applicants for reinstatement after revocation, shall be afforded an opportunity for hearing in conformity with Sections 10, 11, 12, 13 and 15 of the Administrative Procedures Act before any agency may take any action, the effect of which would be to deny:

- (1) permission to take an examination for licensing for which application has been made;
- (2) a license after examination for any cause other than failure to pass an examination; or
- (3) a license for which application has been made on the basis of reciprocity or endorsement or acceptance of a national certificate of qualification.

C. When an agency contemplates taking any action, contemplated in Subsection B of this section, it shall give to the applicant written notice as provided in Section 10 of the Administrative Procedures Act, which shall include a statement:

- (1) that the applicant has failed to satisfy the agency of his qualifications to be examined or to be issued a license, as the case may be;
- (2) that indicates in what respects the applicant has failed to satisfy the agency;
- (3) that the applicant may secure a hearing before the agency by depositing in the mail, within twenty days after service of the notice, a certified letter addressed to the agency and containing a request for a hearing; and
- (4) calling the applicant's attention to his rights under Sections 10 and 11 of the Administrative Procedures Act.

In any agency proceeding involving the denial of an application to take an examination or for a license on the basis of reciprocity or endorsement or a national certificate of qualification, or refusal to issue a license after an applicant has taken and passed an examination, the burden of satisfying the agency of the applicant's qualifications is upon the applicant.

**History:** 1953 Comp., § 4-32-14, enacted by Laws 1969, ch. 252, § 14.

## 12-8-15. Depositions; subpoenas; inspection of agency files; disqualifications.

A. The agency conducting proceedings under the Administrative Procedures Act may, subject to rules of privilege and confidentiality recognized by law, requiring [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 of the proceeding. The agency, in any proceeding, or any party to an adjudicatory proceeding before it, may take the 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 they may be used in the same manner and to the same extent as permitted in the district court.

B. In furtherance of the powers granted by Subsection A of this section, agencies may issue subpoenas requiring, upon reasonable notice, 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. Agencies may administer oaths and affirmations, examine witnesses and receive evidence. The power to issue subpoenas may be exercised by any member of the agency or by any person or persons designated by the agency for the purpose.

C. The agency may prescribe the form of subpoena, but it shall adhere, insofar as practicable, to the form used in civil actions in the district court unless another manner is provided by any law. Witnesses summoned shall be paid the same fees for attendance and travel as in civil actions in the district court unless otherwise provided by any law.

D. Any party to an adjudicatory proceeding is entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. Upon written application to the agency, it shall forthwith issue the subpoenas requested. However issued, the subpoena shall show upon its face the name and address of the party at whose request the subpoena was issued. Unless otherwise provided by any law, the agency need not pay fees for attendance and travel to witnesses summoned by a party.

E. Any witness summoned may petition the agency or the district court of the county where he resides or, in the case of a corporation, the county where it has its principal office, to vacate or modify a subpoena served on the witness. The agency shall give prompt notice to the party, if any, who requested issuance of the subpoena. After investigation the agency considers appropriate, it may grant the petition in whole or part upon a finding that the testimony or the evidence whose production is required 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.

F. In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or for the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before an agency, the agency may apply to the district court in the county of the person's residence for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. Forthwith, the district court shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, the district court shall enter an order requiring compliance in full or as modified. Disobedience of the court order shall be punished as contempt of the district court in the same manner and by the same procedure as provided for like conduct committed in the course of judicial proceedings

G. Agency files and records, including but not limited to investigation reports, statements, memoranda, correspondence or other data pertaining to the matter under consideration scheduled for hearing or other agency action, shall be available for inspection and copying by any party of interest or other person affected by the pending matter, at all reasonable times prior to, during or after any hearing, proceeding or other proposed agency action. If the agency or any party asserts that any such information contained in the agency files and records should not be made available for any reason of confidentiality or privilege recognized by law, the question shall be determined by the district court of the county in which the requesting party resides, upon application by the party requesting the information and after hearing thereon following reasonable notice to the party asserting confidentiality or privilege.

H. No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review except as a witness or counsel in a public proceeding. Additionally, any hearing examiner, member of a review board or agency member shall withdraw from any proceedings in which he cannot accord a fair and impartial hearing or consideration. Any party may request a disqualification of any hearing examiner, member of a review board or agency member on the grounds of the person's inability to be fair and impartial by filing an affidavit 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. The agency shall, by rule, provide for the appointment of a fair and impartial replacement for the person disqualified. If the replacement is disqualified, or in any case not otherwise provided for, a replacement shall be appointed by a justice of the supreme court.

**History:** 1953 Comp., § 4-32-15, enacted by Laws 1969, ch. 252, § 15.

## 12-8-16. Petition for judicial review.

Any party who has exhausted all administrative remedies available within the agency and who is adversely affected by a final order or decision in an adjudicatory proceeding may appeal pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History:** 1953 Comp., § 4-32-16, enacted by Laws 1969, ch. 252, § 16; 1998, ch. 55, § 23; 1999, ch. 265, § 23.