

10-144 DEPARTMENT OF HEALTH AND HUMAN SERVICES

Chapter 1: ADMINISTRATIVE HEARINGS REGULATIONS

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I. PURPOSE AND SCOPE

The purpose of these regulations is to set forth procedures for the conduct of adjudicatory hearings by the Office of Administrative Hearings Maine Department of Health and Human Services. These include proceedings whereby dissatisfied applicants, recipients, institutions or other persons whose legal rights, duties, or privileges are at issue can obtain review of certain actions or inactions of the Maine Department of Health and Human Services where such legal rights, duties or privileges are required by constitutional law or statute to be determined after an opportunity for hearing. Also covered under these regulations are those hearings which are conducted by the Maine Department of Health and Human Services for other State agencies.

Where adjudicatory hearings are required to resolve disputes it is the Department's objective that the adjudicatory hearing process provide a meaningful opportunity for parties to present their grievances. It is the intention of the Department, in its conduct of adjudicatory hearings, to ensure that fundamental fairness is accorded to all parties in a manner consistent with carrying out the requirements of the law.

The procedures set out in these regulations supersede and replace any inconsistent or conflicting regulations governing hearings, except where such other regulations may in a particular program be required by state or federal statute or by governing federal regulations.

Nothing contained in these regulations shall be construed as expanding the jurisdiction of the Department or its hearing officers beyond that allowed for by law. Nothing in these regulations shall be construed as establishing a right to be heard on issues which have been previously litigated between the same parties or for which a party has legally forfeited its opportunity to litigate.

II. AUTHORITY

The authority for these regulations is set forth in 5 M.R.S.A. §§ 8051-10004, 22 M.R.S.A. §§ 3, 7, 42.

III. AVAILABILITY OF HEARINGS

The Department will provide an opportunity for hearing in every case in which such hearing is required to be provided under federal or state constitutional, statutory or regulatory provision.

IV. DEFINITIONS

- A. Adjudicatory Hearing** - Any proceeding before a Hearing Officer of the Department in which the legal rights, duties or privileges of claimants or others are required by law to be determined after an opportunity for hearing.
- B. Agency** - The Maine Department of Health and Human Services, or any other instrument of state government for which the Office of Administrative Hearings serves as independent administrative hearing authority.
- C. Applicant** - A person, household or family who has applied or attempted to apply for a benefit program administered by the Department of Health and Human Services or for license, certificate or a status regulated by the Maine Department of Health and Human Services.
- D. Assistance** - Any financial or medical assistance provided by the Department.
- E. Authorized Representative** - Any person, such as legal counsel, a relative, or a friend, who is authorized by a party to represent that party at a hearing. No party may have more than one authorized representative at any one time.
- F. Benefit Program** - Any program in which funds, services, or goods are provided or intended to be provided, at least in part, on the basis of limited financial resources of applicants or recipients. "Benefit Program" includes vocational rehabilitation programs.
- G. Chief Administrative Hearing Officer** - The person who is responsible for the operation and management of the Office of Administrative Hearings.
- H. Claimant** - Any person, institution, business organization, or other entity requesting an adjudicatory hearing regarding action or inaction of the Maine Department of Health and Human Services, or of any agency for which the Maine Department of Health and Human Services serves as independent hearing authority.
- I. Department** - The Department of Health and Human Services of the State of Maine.
- J. Hearing** - An adjudicatory hearing.
- K. Hearing Officer** - A person designated by the Department to conduct hearings.

- L. Hearing Record** - Those materials required by 5 M.R.S.A. § 9059 and these regulations to be compiled and prepared in the course of an adjudicatory hearing.
- M. Hearing Report** - A memorandum addressed to the Office of Administrative Hearings, prepared in response to a claimant's hearing request, consolidating information necessary for scheduling, and clarifying the responses to issues raised by the claimant. Hearing Reports shall be submitted on a form provided or approved by the staff of the Office of Administrative Hearings.
- N. OAH** - Office of Administrative Hearings.
- O. Order of Reference** - A document in which the Department's Commissioner gives specific instructions to the Office of Administrative Hearings regarding: the issues to be addressed at hearing and the handling of a hearing request. This may include, but is not limited to, an instruction that the hearing officer issue recommended findings and a recommended decision with the authority to make the final findings and decision reserved to the Commissioner.
- P. Party** - A claimant, a respondent, the Department, an intervenor, or other person or entity entitled or permitted by law to participate at a hearing.
- Q. Recipient** - A person, household, or family who is receiving or has received assistance under a benefit program.
- R. Regulation** - The term regulation means:
1. The whole or any part of a regulation, standard, code, rule, or other agency statement of general applicability to an agency's operation including the amendment, suspension, or repeal of any prior regulation, that is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency or describes the procedures or practices of the agency.
 2. Regulation does not include: Policies or memoranda concerning only the internal management of the agency or the State Government and are not judicially enforceable; advisory rulings; decisions rendered in adjudicatory proceedings; or any form or instruction or explanatory statement of policy that in itself is not judicially enforceable but is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties, or privileges.
- S. Respondent** - In the case of a hearing requested or initiated by an agency, any person whose legal rights, duties or privileges are at issue.

- T. Rules of Privilege** - Those legal doctrines which define what communication one can not be legally compelled to divulge.

V. THE HEARING OFFICER

A. Qualifications

The Department will appoint to preside at any hearing only an individual:

1. who is fair and unbiased, and who has no personal or financial interest, direct or indirect, in the hearing or its outcome, and
2. who has not been involved directly or indirectly in the action or failure to act which is the subject matter of the hearing.

B. *Ex parte* Communications

1. **Communication prohibited.** In any adjudicatory proceedings, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate. When sending documents to the hearing officer, a party to a hearing must also send copies of the documents to all other parties.
2. **Communication permitted.** This section shall not prohibit the Commissioner or Chief Administrative Hearing Officer or any designated hearing officer from:
 - a. Communicating in any respect with other members of the agency or other presiding officers; or
 - b. Having the aid or advice of those members of his own agency staff, counsel or consultants retained by the agency who have not participated and will not participate in the adjudicatory proceeding in an advocate capacity.
 - c. requesting from the agency any relevant rules, regulations, policy or procedure that are available upon request to any member of the public.
 - d. handling of pre-hearing motions where staff in the Office of Administrative Hearings receive pre-hearing motions, and contact the parties:

- i) to ascertain their position regarding the motion filed by the other party, if the party who filed the motion has been unable or has failed to do so and
- (ii) to schedule or reschedule hearings or conferences.

C. Recusal of the Hearing Officer

- 1. If a party files a timely charge of bias, prejudice or personal or financial interest, either direct or indirect, the hearing officer shall promptly determine whether it would be appropriate to recuse himself/herself from the hearing, said determination to be made a part of the record.
- 2. A hearing officer may also decide to recuse himself/herself absent a charge from a party if the hearing officer determines that he/she cannot under the circumstances be fair, impartial and unbiased; said determination and its basis shall be made upon the record or following consultation with the Chief Administrative Hearing Officer.

D. Role of the Hearing Officer

- 1. The hearing officer shall have the following duties:
 - a. To administer oaths or affirmations to all witnesses in all hearings;
 - b. To rule on the admissibility of evidence;
 - c. To regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing evidence, briefs or other submissions;
 - d. To assist all those present in making a full and free statement of the facts in order to discover all issues which may govern the outcome of the case, and to ascertain the rights of the parties;
 - e. To ensure an orderly presentation of the evidence;
 - f. To ensure that all parties have a full opportunity to present their claims orally or in writing and to secure witnesses and evidence to establish their claims;
 - g. To ensure that a complete record is made of the hearing;
 - h. To render a fair, independent and impartial decision (or recommendation if such is required) resolving all material issues, based upon the evidence presented at the hearing

and in accordance with law, and where necessary to determine what is needed to bring the parties into compliance with the law.

2. The hearing officer shall have the following powers:
 - a. To limit attendance at the hearing to the extent required to comply with law, including sequestration of witnesses;
 - b. To change the date, time or place of the hearing on his or her own motion or at the request of any party, upon due notice to the parties;
 - c. To require parties to specify issues;
 - d. To regulate the presentation of evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensive record of the proceedings;
 - e. To examine witnesses and ensure that relevant evidence is secured and introduced;
 - f. To continue the hearing to a subsequent time to permit either party to produce additional relevant evidence, witnesses, or other materials or undertake other activities pursuant to these regulations;
 - g. To rule on any requests that may be made during the hearing;
 - h. At his or her discretion, to request written briefs to be submitted;
 - i. To take official notice of facts pursuant to Regulation VII (A) (9);
 - j. To determine the credibility of witnesses and to decide what weight is to be given to their testimony;
 - k. To order, where relevant and useful, and authorized by federal or state statutes or regulations, an independent medical assessment or professional evaluation from a source mutually satisfactory to the applicant or recipient and the Department;
 - l. Correct or amend the record in accordance with VI. J;
 - m. Reopen the hearing in accordance with VI. K.

VI. HEARING PROCESS

A. Introduction

Hearings may be initiated by either a “claimant” or by the Department. Hearings initiated by a claimant are done so pursuant to a claim (sometimes referred to as a “request”) for a hearing. Hearings initiated by the Department are done so pursuant to a “notice” of hearing which is sent to the person whose rights are at stake (“respondent”). When the Department initiates a hearing, material concerning the hearing appears in a “notice” prepared by the Departmental division involved. This notice is sent to the other parties and the Office of Administrative Hearings.

When a claimant initiates a hearing the claim for the hearing is referred to the Departmental division or other entity involved. The Departmental division or other entity will then process the claim by preparing a “Hearing Report”. Generally, the Hearing Report together with the claim for hearing will be sent directly to the Office of Administrative Hearings. In certain instances the “Hearing Report” and claim for hearing will be sent to the Commissioner. In the latter instance the Commissioner may elect to refer the matter to the Office of Administrative Hearings with special instructions, usually reserving for the Commissioner final decision-making authority with respect to that particular matter. In such cases the Commissioner will refer the claim to the Office of Administrative Hearings under an “Order of Reference”, see generally section VI(B)(5), below.

B. Claimant Request for Hearing

1. **Communications Treated as Hearing Requests.** Unless otherwise provided by law or agency regulation, the Department will process as a hearing request any clear expression, oral or written made by a claimant or person lawfully acting on a claimant’s behalf, to the effect that the claimant wants a hearing.
2. **Requests Forwarded to Appropriate Division.** Any agency employee who receives a hearing request will commit the request to writing if oral, and immediately will forward the request to the appropriate Departmental division. This section does not permit oral requests for hearings where a Department regulation requires a written request pursuant to the terms of Regulation VI (B)(1).
3. **Hearing Report.** The division or entity involved will complete a report on the case, which will include all information called for on the Hearing Report form. The Hearing Report will then be sent to the Office of Administrative Hearings, unless it should be sent to the Office of the Commissioner pursuant to section VI (B)(5) below. The Office of Administrative Hearings may send back hearing reports to the division or other entity from which they

came for necessary clarification of issues and supplementation of material.

4. **Requirement of Hearing Disputed.** In any matter in which the involved division believes that an adjudicatory hearing is not required by law, the division shall forward its written reasons in support of its position, together with a hearing report, to the Chief Administrative Hearing Officer and the claimant. The claimant shall be informed on his or her right to provide written reasons to the involved division as to why in the claimant's opinion a hearing is appropriate. The Chief Administrative Hearing Officer or designee shall make a final determination as to whether or not a hearing is required. Provided, however, should it appear to the Chief Administrative Hearing Officer that a determination as to whether or not a hearing is required is dependent upon the finding of additional facts, the Chief Administrative Hearing Officer may refer the issue to a hearing officer for the purpose of holding a hearing to determine such facts.
5. **Order of Reference**
 - a. Issuance of an Order of Reference:
 - (i) All hearing reports prepared by the Maine Center for Disease Control and Prevention, the Office of MaineCare Services, and the Office of Child and Family Services, or their successor units, shall be sent to the Chief Administrative Hearing Officer who will consult with the Office of the Commissioner to determine whether an Order of Reference will be issued unless otherwise provided by law or agency rule or by direction of the Commissioner.
 - (ii) Hearings involving other Bureaus and Divisions: The Chief Administrative Hearing Officer or the director of any Departmental unit, may request the Office of the Commissioner, or the Commissioner's designee, to issue an Order of Reference for a particular matter. In determining whether to issue an Order of Reference, the Commissioner or the Commissioner's designee may consider the following: the complexity of the matter, whether a substantial public interest in the subject matter of the hearing exists, whether the matter to be reviewed is novel or unusual, and any other consideration deemed relevant.

- b. Referring the Hearing Request to the Office of Administrative Hearings:

When the Commissioner has determined whether to issue an Order of Reference, he or she will refer the hearing request to the Office of Administrative Hearings for processing.

- (1) If the Commissioner chooses to issue an Order of Reference the Office of Administrative Hearings shall assign a presiding officer who will prepare written findings and recommended decision as directed by the Order of Reference.
- (2) If the Commissioner chooses not to issue an Order of Reference, the Office of Administrative Hearings shall assign a presiding officer who will make the final decision for the agency.

- c. Delegation

Any matter handled by the Commissioner under this section may be delegated to the Chief Administrative Hearing Officer by the Commissioner.

- 6. **Requests Received at the Office of Administrative Hearings.** Upon receipt of a Hearing Report or an Order of Reference, the Office of Administrative Hearings will assign a hearing officer to preside, and will notify all parties of the time and place of hearing.

Provided, however, that where it appears that the matter should be treated pursuant to an Order of Reference, the Office of Administrative Hearings may first forward the case to the Office of the Commissioner for processing pursuant to section VI (B)(5) above.

Nothing in this section shall be construed as diminishing the authority of a Departmental division to schedule hearings itself pursuant to Regulation VI (D)(1).

- 7. **Notice of Hearing.** The notice of hearing shall be in a form complying with all requirements of the Departmental program involved and will contain at least the following information:
 - a. The statutory or regulatory basis for the hearing;
 - b. The purpose of the hearing;
 - c. The issues to be considered at the hearing;

- d. The rights of the parties, including the rights to present evidence and arguments, subpoena witnesses, to cross-examine opposing witnesses, be represented by legal counsel, and to have the hearing rescheduled or continued for cause; and
- e. The address and telephone of the Office of Administrative Hearings.

C. Department Initiation of Hearing

1. **Notice Requirements.** For certain categories of matters such as Food Stamp Disqualifications and initial Administrative Child Support Hearings, the Department may elect to initiate a hearing without requiring that a person file a claim. In such instances, the Department will initiate the hearing by completing a “Notice” which will be sent to all parties and the Office of Administrative Hearings. The person receiving the notice is referred to as the “respondent”. In the above examples the “respondent” may be a “household” in Food Stamp Disqualification hearings or a “responsible parent” in an initial administrative child support hearing. The notice will be in a form complying with all requirements of the Departmental program involved and will contain at least the following information:
 - a. The statutory or regulatory basis for the hearing;
 - b. The purpose of the hearing;
 - c. The issues to be considered at the hearing;
 - d. The rights of the parties, including the rights to present evidence and argument, subpoena witnesses, to cross-examine opposing witnesses, be represented by legal counsel; and to have the hearing rescheduled or continued for good cause; and
 - e. The name, address and telephone number of the Office of Administrative Hearings.
2. **Receipt of a Request at the Office of Administrative Hearings.** Upon receipt of a notice of hearing, the Office of Administrative Hearings will assign a hearing officer to preside, and will notify all parties of the time and place of hearing. For certain categories of hearings pursuant to Regulation VI (D)(1) below, the time and place of hearing will already have been set by the Departmental division involved and re-notification pursuant to this section will not be required.

D. Hearings Scheduled Before Referral to Office of Administrative Hearings

1. **Prior Agreement.** Upon prior agreement between the Office of Administrative Hearings and a Departmental division, a division may initially schedule the time and place of a hearing or group of hearings, before submitting a request and written notice of hearing to the Office of Administrative Hearings. The division involved will give all parties notice of the hearing in conformance with Section C. above. Upon receipt of a copy of the notice, the Office of Administrative Hearings will appoint a hearing officer for each hearing or group of hearings so scheduled.
2. **Hearing Officer's Authority and Duties.** Upon appointment, a hearing officer will have full authority and duties in a hearing scheduled pursuant to Section D.1., including limited authority to reschedule or continue a hearing. Continuances and rescheduling of matters must be approved by the Chief Administrative Hearing Officer.

E. Continuances and Rescheduling of Hearings

Any party may request a rescheduling or a continuance of a hearing. The Office of Administrative Hearings may reschedule or continue a hearing.

1. Grounds for granting a request for continuance or rescheduling include but are not limited to the following:
 - a. To accommodate the appearance of a witness;
 - b. To implement a party's rights regarding choice of representation at hearing;
 - c. To assure that a party has adequate opportunity for preparation and presentation of evidence and argument;
 - d. To assure that a party has adequate opportunity to review, evaluate, and respond to new evidence; or where appropriate, to require that a party review, evaluate, and respond to new evidence;
 - e. To permit a party to reconsider a previous action or decision;
 - f. To permit or require performance of actions not previously taken;
 - g. To secure additional time or permit or require additional activity by a party as justice may require.

2. Procedure for a party to a hearing to request continuances or rescheduling:
 - a. All requests for continuances or rescheduling should be directed to the Office of Administrative Hearings. Any employee of the Department who receives a communication from a party indicating that the party needs or desires a continuance, will immediately relay the communication to the Office of Administrative Hearings.
 - b. A request for a continuance or rescheduling may be made in writing or orally.
 - c. Before contacting the Office of Administrative Hearings, the party requesting the continuance must first make reasonable attempts to contact the other party(ies) or the party(ies') representative and to obtain an agreement on the request to continue the hearing.
 - (i) When the parties agree to the continuance or rescheduling, the hearing officer may grant the motion.
 - (ii) Where there is no agreement, or where the parties cannot be reached for comment, the hearing officer may delay ruling on the motion until the day the hearing is scheduled; schedule a proceeding to address the request (e.g., a conference call with the parties or their representatives) or rule on the motion.
 - d. Where a request for a continuance is made in writing, the party requesting the continuance must send a copy of the request to the other party(ies) or the other party(ies') representative. The request shall indicate whether the parties have agreed to the request.
 - e. Except for good cause (as defined in subsection VI (F)(3) below), all requests for continuances and rescheduling must be made no later than 3 working days before the scheduled date of the hearing.
 - f. The hearing officer may condition the granting of a continuance upon the waiver by a party of applicable time frames.
 - g. A hearing officer shall inform all parties of all continuances or reschedulings or denials of requests for continuances or reschedulings in a timely manner.

- h. Continuances shall not be granted when the hearing officer finds delay is the sole purpose for the request.

F. Default; Failure to Appear

1. The Effect of Failing to Appear

- a. If a party who requests a hearing fails to appear at the hearing, the Office of Administrative Hearings will notify the party that the request for a hearing will be dismissed because of the failure to appear, that the decision of the action being appealed shall take effect or remain in effect and shall advise the party of the process to reopen the hearing (see Section 2 below).
- b. If the Department has initiated the hearing, and the party notified to appear fails to appear, the hearing officer may issue a decision on the basis of the evidence presented at the hearing.
- c. If within 10 days of receipt of the notice (referred to in [1][a] above) or a decision (referred to in [1][b] above), a party submits information demonstrating good cause for failure to appear, the request for hearing will be reinstated and a hearing scheduled.

- 2. **Good Cause Hearing.** A party whose request for hearing has been dismissed because of failure to appear and whose claim of good cause has been found insufficient to support reinstatement of the request, will be notified of this conclusion and informed of the right to a hearing on the issue of good cause. The hearing must be requested within 30 days of receipt of the notice that reinstatement is denied.

In any good cause hearing, the Office of Administrative Hearings shall notify the requesting party in advance of the advantage of bringing documentation and witnesses in support of the good cause claim and of the possible consequences if the hearing officer finds against the party on this issue.

- 3. **Good Cause.** The following circumstances constitute good cause for the purposes of Section F:
 - a. A death or serious illness in the family;
 - b. A personal injury or illness which reasonably prevents the party from attending the hearing;
 - c. An emergency or unforeseen event which reasonably prevents the party from attending the hearing;

- d. An obligation or responsibility which a reasonable person in the conduct of his or her affairs could reasonably conclude takes precedence over attendance at the hearing;
 - e. Lack of receipt of adequate or timely notice;
 - f. Excusable neglect, excusable inadvertence, or excusable mistake.
4. **Hearings held in the absence of parties.** For parties other than the Department, any Departmental division may establish regulations, consistent with Maine's Administrative Procedure Act, which allow for conducting a hearing in the absence of a party as an alternative to defaulting such party.

G. Pre-Hearing Conference

1. Prior to any hearing the hearing officer may at the request of a party or upon the officer's own motion confer with the parties. All parties will be notified and given an opportunity to participate. Conferences may be held by telephone or in person or may be conducted in writing. Pre-hearing conferences are not necessary in the vast majority of cases and will be utilized only when necessary in the interests of justice. Pre-hearing conferences may be scheduled at the time and place of the hearing where such scheduling is adequate to meet the purposes of the pre-hearing conference.
2. Purposes of a pre-hearing conference may include:
 - a. The parties' estimation of the time required for the hearing;
 - b. The identification of the legal issues likely to arise at the hearing;
 - c. The development of stipulations and admissions;
 - d. The identification and, if possible, agreement as to admissibility of any evidence;
 - e. Clarification of the issues;
 - f. The resolution of disputes as to evidence requested to be produced by subpoena or otherwise;
 - g. Any other action which will aid in the proper and fair functioning of the hearing.

3. The hearing officer shall ensure that the pre-hearing conference is recorded and/or summarized in writing.

H. Access to Information and Subpoenas

1. **Access to the Files.** A party shall have an adequate opportunity prior to the hearing and at the hearing itself to examine the contents of his/her case file and all documents and records to be used by the agency at the hearing. The Department shall provide copies of relevant portions of the case file and applicable regulations to the party or his/her representative free of charge as provided below:
 - a. Except where provided by law or regulation, the above subsection does not require the Department to provide copies of all materials in a case file;
 - b. Upon the request of a party made to the representative of the Division involved in the hearing at least 10 days prior the hearing, the Department shall provide, at least 72 hours prior the hearing copies of: all relevant regulations; exhibits which the agency plans to submit into the record; and relevant portions of the claimant's case file.
2. **Subpoenas**
 - a. **Requesting Subpoena.** Any party shall be entitled as a matter of right to request a subpoena be issued in the name of the agency to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the proceeding subject to the following requirements:
 - (i) The party requesting the subpoena shall file a written request for the subpoena with the Chief Administrative Hearing Officer or the Office of Administrative Hearings. The request shall contain:
 - (a) The name and address of the requesting party;
 - (b) The name and address of the person being subpoenaed, or other place where that person may be found, and;
 - (c) A brief statement as to why the testimony or evidence of the person being subpoenaed is relevant to an issue of fact in the proceeding.
 - (ii) The Chief Administrative Hearing Officer or hearing officer shall submit for approval the subpoena

request to an assistant attorney general who is not involved as an advocate in the proceeding.

b. **Issuance of Subpoena**

The request shall be approved if the evidence or testimony sought reasonably appears to be relevant to any issue of fact in the proceeding.

c. **Witness Fees**

- (i) Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts. Such fees shall be paid by the party requesting the subpoena except for the following:

Applicants for and recipients of “means tested” benefit programs (such as but not limited to, Aid to Families With Dependent Children, Medical Assistance, Food Stamp, General Assistance, Emergency Assistance applicants for and recipients of programs funded by the Department under Title XX Social Services block grants) when applicants and recipients of means tested benefits programs are appealing Departmental actions affecting those benefits; recipients of child support enforcement services from the Division of Support Enforcement and Recovery.

When a party is exempt from paying witness fees, the Department of Health and Human Services shall be responsible for the payment of witness fees.

- (ii) This provision does not require the Department to pay for any additional fees of expert witnesses.

d. **Service of the Subpoena**

The party requesting the subpoena is responsible for service of the subpoena unless the party is one of those described in the section (c)(i) above. In such cases the Departmental Division involved in the hearing shall be responsible for expense of service of the subpoena.

- (i) Service of the subpoena may be made by a sheriff or a deputy within the sheriff’s county or another person authorized by applicable law or regulation;
- (ii) Service of the subpoena may be made by registered or certified mail, with restricted delivery and return

receipt requested. Service of the subpoena may also be made by first class mail. The person requesting the subpoena shall send a copy of the subpoena, plus the witness fee check by first class mail to the individual subpoenaed. Service by registered or certified mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused, provided that the party seeking to complete service shall file with the hearing officer either the return receipt, or if acceptance was refused, an affidavit that upon notice of such refusal a copy of the subpoena was sent to the witness by ordinary mail.

- e. **Limit of Subpoena.** Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts unless another territory or manner is provided by law.
- f. **Petition to Vacate Subpoena.** Any witness subpoenaed may petition for the hearing officer of the Office of Administrative Hearings to vacate or modify a subpoena.
 - (i) The hearing officer shall, in an informal manner, give the party who requested the issuance of the subpoena notice of such petition orally or in writing. The notice shall quote the contents of the petition and shall indicate that the party may oppose the petition orally or, if time permits, in writing to the hearing officer. If time does not permit a party to respond to the request to vacate, the hearing shall be postponed long enough to permit the party to respond to the petition. This procedure shall not be construed to require a hearing.
 - (ii) After such inquiry as the hearing officer considers appropriate, the hearing officer may grant the petition in whole or in part upon a finding that:
 - (a) The testimony or the evidence whose production is requested does not relate with reasonable directness to any matter in question, or
 - (b) The subpoena is unreasonable or oppressive, or
 - (c) The subpoena has not been issued a reasonable period in advance of the time when the evidence is requested.

- (d) The testimony or other evidence sought is unduly repetitious. Unless the hearing officer finds that at least one of the above conditions exists, the hearing officer shall deny the petition to vacate or modify the subpoena.
- g. **Failure to Comply with Subpoena.** If any person fails to comply with a properly issued and served subpoena, the Office of Administrative Hearings (or the party who requested the subpoena) may petition the Superior Court for an order requiring compliance with the terms of the subpoena. If the Superior Court issues such an order and any person who is subject to it does not comply with it, (s)he will be subject to the contempt powers of the Court.

Continuances of hearings shall be liberally granted in cases where a witness fails to attend in response to a subpoena.

I. Participation at the Hearing

1. Rights of the Claimant, Respondent and Intervenor

The claimant, respondent, and intervenor shall have the right to:

- a. Be assisted by a representative, of his or her choice;
- b. Present witnesses;
- c. Examine and introduce evidence from his or her case record, and examine and introduce any other pertinent Department documents;
- d. Present and establish all relevant facts and circumstances by oral testimony and documentary evidence;
- e. Advance any pertinent arguments without undue interference;
- f. Question or refute any testimony, and confront and cross-examine adverse witnesses.

2. Department's Rights and Responsibilities

The Department shall designate a single staff person who may be represented by an Assistant Attorney General. The Department's representative shall:

- a. Organize the presentation of the Department's case;

- b. Submit at the hearing a complete account of the circumstances under which it acted or failed to act;
- c. Present witnesses when appropriate and, when necessary, subpoena witnesses;
- d. Ensure that the case record is present at the hearing and that the other parties have adequate opportunity to examine it prior to and during the hearing;
- e. Introduce into evidence material from the case record and other Department documents which pertain to the issues raised during the hearing;
- f. Present and establish all relevant facts and circumstances by oral testimony and documentary evidence;
- g. Have the right to advance any pertinent arguments without undue interference;
- h. Have the right to question and refute any testimony and confront and cross-examine adverse witnesses;
- i. Arrange for the appearance at the hearing of representatives of other programs, if appropriate.

J. Correction or Amendment of Hearing Decision

- 1. Correction of the hearing decision. The hearing officer or the Commissioner, upon their own, or at the request of a party, may at any time amend a decision or recommended decision or an Order of Reference to correct a ministerial or typographical error. All parties shall be notified in writing of the correction or revision.
- 2. Amendment of the hearing record. The hearing officer or the Commissioner, upon their own, or at the request of a party, may amend a hearing decision, recommended decision or an Order or Reference in order to clarify or correct the decision or Order or to rule upon any issue that was heard but not ruled upon, provided all parties are notified of the proposed revision and given an opportunity to comment.

K. Reopening of Hearings

- 1. The hearing officer or Commissioner, upon their own or the request of the party, and upon notice to all parties may reopen the record of any hearing under the following circumstances:
 - a. A party to the original hearing has discovered new evidence which could reasonably have affected the outcome of the

proceeding but could not have been discovered by the use of due diligence in time to present during the original proceeding, or;

- b. There was fraud, or misrepresentation regarding an issue of material fact to the original proceeding, which could reasonably be determined to have affected the outcome of the proceeding, if known at the time, or;
- c. All parties to the hearing agree to reopen the hearing.

The reopening of the hearing shall not expand upon the issues that were the subject matter of the original hearing.

2. **Time for Motion**

A motion to reopen the hearing for the grounds set forth in K (1) above shall be made by a party in the original proceeding to the Commissioner or the Office of Administrative Hearings and other parties to the hearing not later than 6 months from the date of final agency decision.

3. **Effect of Reopening**

The reopening of a hearing shall not constitute a waiver of the sovereign immunity of the state agency nor shall it provide an individual with retrospective relief in the form of recoupment of monies paid to the state agency.

VII. EVIDENCE

A. Evidence, General Rules

- 1. **Admissibility** - Generally, evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.
- 2. **Irrelevant or Repetitious Evidence** - Evidence which is irrelevant or unduly repetitious may be excluded.
- 3. **No Formal Rules of Evidence** - Formal rules of evidence shall not be observed.
- 4. **Admission of Evidence** - Evidence which may reasonably be construed as relevant and which is not otherwise unduly repetitious shall be admitted. The fact that evidence is admitted, however, shall not limit the authority of the hearing officer in determining the appropriate weight to be given such evidence.

5. **Hearsay** - Hearsay evidence shall not be excluded because of its hearsay nature. Rather, it shall be admitted or excluded based upon the standards and requirements of Section VII (A). [For a discussion of hearsay evidence, see Note at the end of Section VII.]
6. **Rules of Privilege** - Rules of privilege shall be observed. Privileges recognized shall be those outlined in the Maine Rules of Evidence, Article V.
7. **Sworn Written Evidence**
 - a. As used in this section the following words shall have the following meaning:
 - (i) Affidavit means sworn written evidence;
 - (ii) Affiant means the person swearing to such written evidence, the term “author” is synonymous with “affiant”;
 - (iii) Offering party means the party attempting to introduce into evidence an affidavit;
 - (iv) Opposing party means the party against whom an affidavit is offered.
 - b. No sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown.
 - c.
 - (i) The offering party shall mail the affidavit, a statement of intention to introduce the affidavit, and all information necessary to subpoena the affiant to the opposing party at least twelve (12) days before the scheduled hearing date. If the offering party believes the affiant is not subject to subpoena the notice shall so state.
 - (ii) If the opposing party wishes to cross-examine an affiant who is subject to subpoena, that party shall attempt in good faith to subpoena the affiant in accordance with the provisions of these rules and prior to the hearing. Failure to attempt to subpoena the affiant shall constitute a waiver of any objection to the affidavit based upon the absence of the affiant at the hearing. If the affiant is subpoenaed, the affidavit shall be admitted only if the affiant is present at the hearing and available for cross-examination, unless the offering party shows good

cause as to why the affidavit should be admitted anyway.

- (iii) The following procedure may replace the advance notice procedure of sub-sections (i) and (ii) only when the affiant is actually subject to subpoena. If the offering party does not follow the procedure outlined in sub-sections (i) and (ii) above, and offers an affidavit of an affiant who is not present, and the opposing party objects to its introduction based upon the unavailability of the affiant for cross-examination, the offering party shall provide the opposing party with all information necessary to subpoena the affiant or, in the alternative, agree to produce themselves the affiant for cross-examination; in either instance, the hearing shall be continued to accommodate production of the affiant. Only if the affiant actually appears and is therefore subject to cross-examination shall the affidavit be admitted into evidence, unless the offering party shows good cause as to why the affidavit should be admitted anyway.

- d. The twelve (12) day notice period of sub-section c (i) may be modified prospectively or retrospectively by the hearing officer for good cause shown.

- 8. **Stipulation of Facts** - When all parties stipulate to a fact, the hearing officer may make a finding of fact on the basis of the stipulation. Signed statements by the parties or on-the-record oral statements by the parties are sufficient as stipulations.

- 9. **Official Notice of Facts** - The hearing officer can take official notice of a fact upon the hearing officer's own initiative or at the request of a party. The hearing officer may take official notice of any fact of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and non-confidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

10. **Pre-filing of Direct Testimony**

a. **Who may request**

Any party or hearing officer may request the pre-filing of direct testimony in a particular matter. A hearing officer may grant such a request if it will expedite the hearing process and it imposes no prejudice on any party.

b. **Scheduling**

A hearing officer shall issue a scheduling order indicating the dates by which pre-filed testimony shall be submitted, the dates such witnesses shall be available for cross-examination, and other dates relevant to the hearing process. The hearing officer shall hold a conference (which may be held by telephone conference) prior to issuing such an order.

c. **Limitation**

Nothing in this subsection limits the right of any party to subpoena witnesses or to exercise the right of cross-examination.

B. Decision Making

1. **Burden of Persuasion** - The burden of persuasion shall be governed by state and federal law and regulations applicable to the subject matter of the hearing. If such law and regulations are silent, the party who asserts the truth of a claim is under a burden to persuade the hearing officer that the claim is true.
2. **Finding of Fact to be Based Upon a Preponderance of Evidence.** After Opposing parties have produced evidence and counter- evidence, the hearing officer will consider and compare all the evidence on every relevant allegation of fact. Each finding of fact made by the hearing officer shall be supported by a preponderance of the evidence unless a different standard is required under regulations applicable to a particular program. Preponderance of the evidence is that evidence which, in light of the record as a whole, leads the hearing officer to believe that the finding is more likely to be true than not true.
3. **Applicable Law**
 - a. The decision must be based on the agency's regulations and the evidence which is a matter of hearing record.
 - b. Where the agency's regulations are ambiguous or silent on a point critical to a determination, reference to other sources of law for guidance in interpreting the agency's regulations is appropriate. Such other sources of law may include, but are not necessarily limited to, State and Federal statutes, Federal regulations and State and Federal case law. When a hearing officer relies upon sources of law other than the agency's regulations, the written decision

shall indicate the source of the law upon which the hearing officer relied and the reasons for that reliance.

4. **Content of Hearing Decision**

- a. The decision of the hearing officer shall contain at least the following:
 - i. A clear and precise statement of the issues: the dispute under consideration and the specific points which must be resolved to decide the case;
 - ii. A listing of the date and place of hearing and participants at the hearing;
 - iii. A listing of all the material, including records, reports and other documents placed into evidence at the hearing, upon which the hearing decision is based;
 - iv. The findings of fact, based upon the entire hearing record, including testimony, exhibits, etc. The findings must be sufficient to apprise the parties and any interested member of the public of the basis for the decision. If evidence is in conflict on an issue necessary to resolution of a case, the hearing officer must set forth the reasoning employed in resolving the dispute;
 - v. A clear and precise statement of decision, resolving the dispute (s) under consideration;
 - vi. A clear explanation of the reasoning underlying the decision, including references to applicable law; and
 - vii. Written notice of a party's right to review or appeal of a decision within the agency or review of a decision by the courts, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right of review or appeal.
- b. In cases where the parties have mutually agreed to the outcome of a hearing ('consent decisions') the content of a consent decision need not include all of the information required by subsection 5(a) above. Any consent decision, however, shall state with clarity the following: The identity of the parties involved; the subject matter of the decision; the results of the consent decision; and a determination that the result is in accordance with applicable law.

5. **Recommended Findings and Decision**

In any case in which law or regulation or special instructions from the Commissioner dictate that an individual other than the hearing officer will make a final hearing decision, the hearing officer will prepare a recommended hearing decision rather than a final hearing decision. A recommended decision will be made on the same basis and in the same form as a final decision. Copies of recommended decisions will be provided to all parties, who will have an opportunity to submit responses and exceptions to the final decision maker.

a. **Exceptions and Responses**

In any case in which final decision making authority is reserved to the Commissioner or the Commissioner's designee, the parties may file exceptions or responses to the recommended decision.

- i. **Time for filing.** For MaineCare cases, the exceptions or responses must be received by the Office of Administrative Hearings within 15 calendar days after the date the recommended decision was mailed to the parties. For all other cases, the exceptions or responses must be received by the Office of Administrative Hearings within 20 calendar days after the date the recommended decision was mailed to the parties. The date of mailing will be stamped on the upper right-hand corner of the recommended decision.
- ii. **Content.** The written exceptions and responses filed with the Office of Administrative Hearings shall contain:
 - (aa.) A clear statement of the party's position and the reason for it;
 - (bb.) A listing of any errors or omissions made by the hearing officer during the decision making process;
 - (cc.) Any relevant legal arguments the party wishes to offer.

If additional factual information which could have been presented and considered during the decision making process, including the administrative hearing, is made part of the exceptions and

responses, it need not be considered by the final decision maker.

- iii. **Method of filing.** Exceptions or responses must be sent to the Office of Administrative Hearings by mail, fax or e-mail. Copies of written exceptions and responses must be provided to all parties.
- iv. **Extensions.** A reasonable extension of time for the filing of exceptions and responses may be granted by the Chief Administrative Hearing Officer for good cause shown or if all parties are in agreement.

6. **Constitutional Issues and Estoppel Issues**

If a claimant raises constitutional or estoppel issues, these issues shall be addressed in accordance with these rules, provided that the hearing officer shall consult with the Chief Administrative Hearing Officer prior to rendering a final or recommended decision.

SECTION VII Note: (This note is not a regulation. It is intended to solely to provide background information regarding hearsay evidence.)

HEARSAY EVIDENCE SECTION VII (A)(5) - Admissibility and Weight

Generally, evidence is admissible if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. (5 M.R.S.A. §9057(2)). Once evidence has been admitted, it is still necessary for the hearing officer to decide what “weight” should be given to the evidence. Evidence, although admissible, may be found to be not very persuasive relevant to other evidence. On the other hand, that same evidence might not be very “weighty” by itself but may corroborate other evidence on a particular point and make the evidence on that point, collectively, highly persuasive. It is not necessary to separately assign value to each item of evidence, but rather such evidence must be considered in the context of all evidence received.

As with all other evidence, hearsay evidence must be viewed with respect to its admissibility and, once admitted into evidence, its appropriate weight must be determined. Unlike judicial proceedings in which certain classes of hearsay evidence are automatically excluded due to concerns over the hearsay’s reliability, no class of hearsay evidence is automatically excluded in administrative proceedings. Caution must be exercised, however, in both the decision to admit hearsay and as to determining the weight accorded to such evidence. There can be great variation among different hearsay evidence. For example, a medical conclusion found in a well-known medical treatise is likely to be more reliable than a second or third-hand “rumor” as to a given fact.

In certain circumstances, placing great reliance on hearsay evidence may be legally impermissible. In Heal v. Maine Employment Security Commission, 447 A.2d 1223 (1982), the Supreme Judicial Court of Maine reviewed an Employment Security Commission's denial of unemployment benefits. In that case, the Commission denied benefits upon a finding of employee misconduct. "Proof" of misconduct consisted solely of two "reports" entered into evidence. The reports, apparently, were statements of the employer given over the telephone to a Commission Deputy who signed the reports on behalf of the employer. The Court found the reports to be inadmissible because the record of the case did not indicate that these reports were the kind of evidence upon which "reasonable persons are accustomed to rely in the conduct of serious affairs". Among the problems involved, the Court cited the following: (1) There was no evidence in the record describing the circumstances under which the statements were obtained. (2) The documents on their face did not supply any assurance of reliability. (3) At best, each document constituted a second or third hand hearsay account of the crucial fact in litigation. (4) The statements were unsworn. (5) The identity of the hearsay informant was uncertain, and (6) The extent of the informant's personal knowledge was unknown. Hearsay may involve fewer problems than the hearsay involved in the Heal case and therefore may be admissible because it qualifies as the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs, however, even when submitted as evidence, it is still incumbent upon the hearing officer to accord such hearsay evidence its appropriate weight.

C. Facts To Be Determined Anew

1. **General Principles.** The hearing officer is to determine anew the relevant facts and apply the law to those facts. Therefore no presumptions are to be made for or against the Department concerning the validity of the factual or legal basis for the action or inaction which is the subject matter of the hearing.
2. **Application to New Information.** The provisions of VII(C)(3) shall apply to new information. New information is information which was not available to, or was not considered by, or was not shared with, one or more of the parties prior to its being introduced as evidence at the hearing.
 - (a) The hearing officer shall not exclude otherwise admissible evidence on the grounds that it is new information.
 - (b) If new information is offered as evidence, the party against whom it is offered is entitled to a reasonable opportunity to review it and to prepare responses. When necessary, a hearing will be continued for this purpose.
3. **Effect of New Information in Matters Involving Benefit Program.** The effective date of any adjustments to an applicant's or

recipient's grant level or eligibility status shall be the date on which all eligibility conditions were met, regardless of when the supporting information was submitted, except to the extent that a different eligibility date is required pursuant to state or federal law.

4. **Limitations.** Nothing in this subsection shall be interpreted as allowing for the introduction of additional evidence where a review is being taken which is based solely upon review of a written record.
5. **Absent the consent of the parties,** new information may be excluded if its admission would result in an expansion of issues or the subject of the hearing.

VIII. MISCELLANEOUS

A. Confidentiality

These regulations shall be interpreted and implemented in a manner which insures that confidential information is not disclosed to unauthorized persons.

B. Computation of Time

In computing any period of time provided for by these regulations, the following shall apply:

1. The date of the act or non-act which begins the period of time shall not be counted.
2. The last day of the period shall be counted unless it is a Saturday, Sunday, or legal holiday, in which case the period of time shall run until the next day which is not a Saturday, Sunday, or legal holiday.
3. If the period of time provided for is less than seven days, Saturdays, Sundays, or legal holidays, shall not be counted.

C. Settlements and Consent Decisions

Settlements. Nothing in these regulations shall be construed as preventing the Department from settling any dispute, without the necessity of a hearing.

Consent decisions. Where parties agree to an outcome of a dispute which they wish to be memorialized in the form of a decision (i.e. "consent decision"), the hearing officer shall approve such consent decision only if it is consistent with applicable law. However, strict

compliance with the requirement of these regulations shall not be required in order to approve a consent decision.

D. Access to Hearing Records

1. Access by a party to the hearing

Any party to a hearing shall have an adequate opportunity to review all material in the hearing record, including the opportunity to listen to the recording of the hearing.

- a. All requests for access to records maintained by the Office of Administrative Hearings must be in writing and must include sufficient information for the identification of the hearing record.
- b. Such review shall take place during normal business hours at the Office of Administrative Hearings in Augusta and must be arranged in advance.
- c. During such a review, copies of documents in the record and copies of the recording of the hearing (or a transcript of that recording) may be made available to a party at the actual cost to the requesting party.
- d. The Office of Administrative Hearings need not provide the party with copies of any recordings of hearings. The Office of Administrative Hearings may arrange to obtain a transcript of the recording on request. The requesting party may be required to pre pay the Office of Administrative Hearings for the cost of that transcript.

E. Certification of Hearing Records

1. With the following exceptions, the party filing an appeal (80B or 80C) of a decision rendered pursuant to the regulations in this manual, shall be required to pay the costs to the Office of Administrative Hearings for providing the Court with a certified hearing record. This includes costs related to the provision of a transcript of the hearing recording.
2. The following parties are exempt from such payment: Applicants for and recipients of Departmental “means tested” benefit programs (such as but not limited to Aid to Families with Dependent Children, Medical Assistance, Food Stamp, General Assistance, Emergency Assistance, applicants for and recipients of programs funded by the Department under the Title XX Social Services block grants) applicants for and recipients of benefits under “means tested” benefit programs operated by any other

Department for which the Office of Administrative Hearings holds
administrative hearings.

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