

# **OHIO CASINO CONTROL COMMISSION**



## **ADMINISTRATIVE HEARING MANUAL**

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# **OHIO CASINO CONTROL COMMISSION ADMINISTRATIVE HEARING MANUAL**

## **PREAMBLE AND APPLICABILITY**

The following case management procedures are internal management rules designed to govern the administrative hearing procedures of the Ohio Casino Control Commission (“Commission”), in accordance and consistent with R.C. 119.06 through 119.10 and R.C. Chapter 3772.

### **I. COMMISSION HEARING ADMINISTRATOR – ROLE AND RESPONSIBILITIES**

The Commission Hearing Administrator (“Administrator”) will serve as the primary point of contact for hearing examiners, assistant attorneys general (“AAG”), and any party to the hearing. The Administrator is responsible for the following:

- Responding to inquiries from hearing examiners pertaining to administrative matters.
- Scheduling new hearing dates for the Commission.
- Reserving court reporters and interpreters or translators, as needed.
- Ensuring hearing room is reserved.
- Receiving, copying and forwarding hearing submissions, orders and transcripts.
- Updating and maintaining a hearing examiner database for the Commission.
- Providing hearing schedules for the Commission, as needed.
- Providing copies of hearing files and other documents to hearing examiners.
- Serving as liaison to the Commission for hearing status and reports.

### **II. SCHEDULING AND CONFIRMING HEARINGS AND HEARING EXAMINERS**

#### **A. Assignment of Hearing Examiner**

- 2.1 The date, time and place for all hearings shall be scheduled by the Administrator within 15 days, but not sooner than seven days, after a party has requested a hearing.
- 2.2 If the Commission decides to use more than one hearing examiner, hearings will be assigned on a rotating basis to the next available hearing examiner in the Commission’s hearing examiner pool. The Administrator will email the hearing examiner, and ask whether the hearing examiner is available to hear a matter. In the event a hearing examiner is unavailable, the matter will be assigned to the next available hearing examiner in rotation. This rotation may be altered at any time to accommodate for scheduling conflicts, call-offs and no shows. Frequent call-offs, no shows, or failure to provide adequate notice to changes in availability can be a factor considered when assigning future hearings to a hearing examiner.

2.3 Prior to mailing the notice setting the hearing date, the Administrator will contact the AG's Office to verify that an AAG will be available on the selected hearing date.

B. Notice of Hearing

2.4 Upon the scheduling of a hearing, the Administrator shall ensure that a written Notice of Hearing, including the assigned Commission case number, and the date, time and place of the hearing, is delivered to all parties and the assigned AAG, with a copy sent to the hearing examiner. In cases where it is impracticable for the hearing to be scheduled within 15 days of the date of the request for a hearing, the Commission may continue the initial hearing date by its own motion.

C. Preliminary Hearing

2.5 At any time prior to a scheduled hearing, the hearing examiner may on his/her own order, or on the motion of any party, direct the parties to participate in a preliminary telephone conference. At the conference, the hearing examiner will discuss and take appropriate action to simplify or clarify the issues to be addressed at the hearing, obtain stipulations and admissions, order an exchange of witness and exhibit lists, and address other matters intended to expedite the proceedings. Procedural orders may be issued based upon information obtained at the preliminary conference.

D. Computation of Time

2.6 R.C. 1.14 controls the computing of time deadlines imposed by R.C. Chapter 119 and the procedures outlined in this manual. The time within which an act is required by law to be completed is computed by excluding the first day and including the last day. When the last day to perform an act falls on a Sunday or legal holiday, as defined in R.C. 1.14, the act may be completed on the next succeeding day that is not a Sunday or legal holiday.

When a public office in which an act, required by law, is to be performed is closed to the public for the entire day that constitutes the last day for doing the act or before its usual closing time on that day, the act may be performed on the next succeeding day that is not a Sunday or legal holiday, as defined in R.C. 1.14.

### III. STENOGRAPHIC RECORDING OF ALL HEARINGS

A. General

3.1 A stenographic record of all hearings conducted pursuant to R.C. Chapter 119 shall be conducted by written stenography prepared by a court reporter, consistent with the definition of "stenographic record" set forth in R.C. 119.09. In certain circumstances, a stenographic record may be conducted by means of an audio electronic recording.

3.2 Hearing examiners shall ensure that an accurate record is kept of the full proceeding. Hearing examiners must announce when recording of the proceedings is interrupted for a recess or due to malfunction of the recording system, and shall announce when proceedings resume. In all cases, hearing examiners shall strive to ensure that the final record of the proceedings is clear.

B. Scheduling and Confirming Court Reporters

3.3 For hearings in which a court reporter is used, the Administrator will schedule a court reporter each time a hearing date and time is set. The Administrator will also confirm the hearing assignment with the court reporting firm at least 24 hours prior to the hearing. Upon scheduling the court reporter, the reporter will be asked to supply both a typed and an electronic version of the transcript. The typed version will be the official transcript retained by the Commission.

**IV. THE HEARING RECORD**

A. Documents Comprising the Record

4.1 The following documents constitute the official record of the adjudication hearing of the Commission for purposes of R.C. 119.09:

- All jurisdictional documents (i.e., the notice of opportunity for a hearing and proof of service by certified mail, the party's hearing request, and all notices of hearing date);
- Transcript of the hearing;
- Exhibits admitted;
- Any evidence proffered;
- All motions submitted;
- All briefs submitted;
- All orders by the hearing examiner;
- The report and recommendation;
- Objections filed and any responses thereto, if any;
- All applicable Commission minutes and orders; and
- The final order of the Commission.

4.2 The Administrator is the official custodian of the adjudication hearing records of the Commission. Only those documents constituting the official record of the adjudication hearing and any other writings, papers or orders filed with the Administrator will be a part of the official record.

B. Filing/Submission of Documents

- 4.3 All motions, briefs and other writings, other than those presented at the hearing, are required to be submitted to the hearing examiner and Administrator by email, except where the hearing examiner has determined that extraordinary circumstances permit the submission of such motions, briefs or other writings in paper form. Documents initially submitted by email to the Commission shall be maintained by the Administrator as the original record document.
- 4.4 All motions, briefs and other writings shall include a certificate of service attesting to the service, whether by electronic or other means, of a copy of the filing on the hearing examiner, the AAG assigned to represent the Commission and/or the parties to the hearing, as applicable.

C. Hearing File Preparation and Distribution

- 4.5 Under no circumstances shall original files leave the Commission premises. In the event of an appeal from the Commission's final order to a court of competent jurisdiction, a certified copy of the entire original record shall be delivered by the Administrator to the appropriate clerk of court or to the AAG representing the Commission in the matter, who will file the certified copy of the record with the appropriate clerk of courts.

D. Transcript Distribution

- 4.6 Original files do not leave the Commission premises.
- 4.7 Hearing transcripts will be received by the Administrator from the assigned court reporter in hard copy and electronic form. Once received, the original hard-copy transcript shall be immediately date stamped and placed in the original hearing file. Electronic copies shall be emailed to the assigned hearing examiner, or delivered on other appropriate electronic media.

**V. CONDUCT OF HEARINGS**

A. Motion Practice

- 5.1 Since the Rules of Civil Procedure are not binding in adjudicatory proceedings before agencies, administrative hearings under R.C. Chapter 119 should be faster and less expensive than traditional civil litigation. Protracted motion practice and briefing schedules should be avoided in all but the most novel and complex of cases.

B. Impartiality of Hearing Examiners

5.2 The hearing examiner's conduct should be impartial with respect to the Commission and any parties to the adjudication hearing. The hearing examiner's knowledge of the facts and circumstances of the cases assigned to him/her must be limited to the record made at the hearing. Moreover, the Commission and each party must bear their own burden of proof (e.g., the initial burden of production is typically on the state), if any, and thus hearing examiners should avoid engaging in comments or lines of questioning which might give the appearance of favoring either party.

Except as otherwise provided by law, the burden of proof in administrative cases is proof by a preponderance of the evidence.

In application cases, an applicant seeking licensure under R.C. Chapter 3772 and the rules adopted thereunder must establish the applicant's suitability by clear and convincing evidence. Because the applicant has the burden to produce evidence of qualification for licensure, if contested, the applicant must present such evidence first.

5.3 Evidentiary matters should be ruled on in a fair and consistent manner. It is improper to relax evidentiary rules for the Commission or a party while demanding strict adherence for the other.

5.4 The parties, including their counsel or any other representatives, the Commission, including its investigators and legal staff, and the AAGs assigned to represent the Commission are prohibited from engaging or participating in any *ex parte* communications regarding the case with the hearing examiners involved in the cases before them, except upon notice and opportunity for both the party and the Commission to participate. Communications with hearing examiners involving scheduling or uncontested procedural matters do not require notice or the opportunity for either the party or the Commission to participate.

5.5 The hearing examiner's powers derive solely from the delegation by the Commission, and are limited to the factual questions and issues of law pertaining to the matter referred for hearing. Hearing examiners will not permit any of the parties or the Commission to use the hearing to delve into issues that are outside the scope of the hearing. Nothing in these procedures is to be construed as granting a hearing examiner the authority to dismiss any hearing. Hearing examiners may:

- Rule on objections made by the parties;
- Determine the admissibility of evidence presented;
- Rule on motions made by the parties;
- Permit opening statements and closing arguments;

- Examine witnesses or ask questions of the parties; and
- Make any other necessary determinations or rulings.

C. Continuances of Hearings

- 5.6 Administrative hearings under R.C. Chapter 119 should be faster and less expensive than traditional civil litigation. Hearings should be scheduled and completed as promptly as possible. Unjustified requests for continuances will be denied.
- 5.7 Except as provided in §2.5, all requests for continuance of the hearing should be submitted to the hearing examiner in writing at least five days prior to the date set for the hearing. Written notice should also be provided by the requesting party to other party representatives and the Administrator. Continuances should not be granted before the AAG assigned to represent the Commission, opposing counsel and/or the party, as applicable, is given an opportunity to respond to the request. The hearing examiner may grant or deny the motion in his/her sole discretion. The parties and the Commission are strongly encouraged to discuss the issue of a continuance prior to submitting a request for a continuance from the hearing examiner.
- 5.8 Continuances will only be granted upon a written order signed by the assigned hearing examiner, served on the parties, and filed with the Administrator.
- 5.9 The hearing examiner should coordinate a new hearing date and time with the Administrator before scheduling a new hearing date to ensure that an equipped room is available for the proposed new hearing date.
- 5.10 For every continuance order granted, the hearing examiner shall, within two business days, email a continuance order to the party, the AAG assigned to represent the Commission, and to the Administrator, specifying who requested the continuance, the reason for the continuance, and the new hearing date and location. The Administrator will notify the court reporter, if any, and update the hearing officer database and room assignment accordingly.

D. Subpoenas

- 5.11 Requests for subpoenas pursuant to R.C. 119.09 shall be filed with the Administrator at least eight days prior to the hearing. The Administrator will issue subpoena forms in blank (see attached) to a party requesting it. The requesting party shall complete the subpoena form and file it with the Administrator, and shall provide a copy of the subpoena to all parties and the AAG assigned to represent the Commission. Subpoenas may be made available electronically, and the assigned hearing examiner may authorize electronic submission of a completed subpoena to the Administrator.
- 5.12 The subpoena shall be served and returned, and witness and mileage fees shall be paid, in accordance with applicable law.

- 5.13 Every subpoena shall command each person to whom it is directed to attend and give testimony at a time and place therein specified, or to produce books, papers, documents or other objects designated therein.
- 5.14 In the event of the refusal of a person to comply with the terms of a subpoena issued by the Commission, the Commission may petition the prosecuting attorney of the county where the person resides to bring a contempt proceeding against the person in the court of common pleas of that county.

E. Commencement of Hearing

- 5.15 All hearings should start promptly at the specified time. The parties and the Commission are strongly encouraged to discuss settlement or stipulations prior to the hearing, and should not be permitted to delay the commencement of the hearing to discuss settlement.
- 5.16 All witnesses shall be required to testify under oath or affirmation, which shall be administered by the hearing examiner or the court reporter. At the hearing, each party and the Commission may present evidence and examine witnesses appearing for and against the party or the Commission.
- 5.17 Parties may appear in person, be represented by their attorneys or by such other representatives as are permitted to practice before the Commission or they may present their positions, arguments, or contentions in writing. If the Commission needs the testimony of the party to present its case, the AAG representing the Commission should anticipate that the party will not voluntarily appear and instead request that the Commission issue a subpoena to compel the party's attendance.
- 5.18 All attorneys who appear on behalf of a party must file with the Commission a written notice of appearance setting forth 1) the attorney's name, address, telephone number and bar number; and 2) the name and address of the party represented. An attorney who has not filed an appearance may not address the hearing examiner or sign any briefs, motions or other writings filed with the Commission in the matter.

F. Exhibits

- 5.19 Exhibits shall be pre-marked by the parties and the Commission for introduction into the record. The Commission's exhibits shall be lettered, and the parties' exhibits shall be numbered.
- 5.20 The parties should provide at least three copies (which comprise courtesy copies for the hearing examiner, for the opposing side, and the official record copy to be used by the witness) of all exhibits they introduce at the hearing.

5.21 The hearing examiner shall maintain a log of all exhibits introduced and admitted or not admitted/proffered into evidence. The hearing examiner shall incorporate the exhibits, and the record of their disposition, within his/her report and recommendation.

G. Conclusion of Hearing

5.22 Hearing examiners will email the Administrator to confirm when a hearing has concluded. In the event a hearing requires multiple days that were not anticipated when originally scheduled, the hearing examiner will include the date(s) when, and location where, the hearing is scheduled to resume in a written order, submitted to the Administrator for delivery to the party and the AAG assigned to represent the Commission.

H. Post Hearing Submissions or Briefs

5.23 Generally, the record will be closed at the conclusion of the oral hearing. If, however, the hearing examiner orders the records to remain open for a specific designated period of time after the hearing has concluded, then the hearing examiner shall memorialize this order in an entry filed with the Administrator, with a copy delivered to the Commission and all parties. All post-hearing submissions should be filed with the Commission, with a copy to the hearing examiner, the AAG assigned to represent the Commission and/or the parties to the hearing, as applicable.

I. Settlement

5.24 The party and the Commission or their counsel shall notify the assigned hearing examiner and the Administrator immediately, and in writing, upon reaching a settlement. Parties are strongly encouraged to discuss settlement or stipulations prior to the morning of the hearing, and should not be permitted to delay the commencement of the hearing to discuss settlement.

J. Requests for Media Access

5.25 The administrative hearings governed by these procedures are quasi-judicial proceedings open to the public, but to which Ohio's Open Meetings Act does not apply. Hearing examiners may permit the broadcasting, televising, recording and taking of photographs in the hearing room only upon the specific written request of a media organization for permission to do so, and only after notice to and consultation with the party and the AAG assigned to represent the Commission. If a request for media access is granted, the hearing examiner shall set forth in a written order the scope of and limitations to such media access. The written order is made part of the record. The hearing examiner's discretion in this regard should be guided by the provisions of Rule 12 of the Rules of Superintendence for the Courts of Ohio. Upon the failure of any

media representative to comply with the conditions prescribed by the hearing examiner for media access, the hearing examiner may revoke the permission to broadcast or photograph the hearing.

## **VI. REPORT AND RECOMMENDATION**

### **A. Independence of Hearing Examiners; Limits of Authority**

- 6.1 Hearing examiners will be given complete independence in presiding over hearings and in issuing their report and recommendations (“R&R”). There will be no review of draft R&Rs by Commission legal staff or any other Commission employee prior to being issued in final form by the hearing examiner. Once issued in final form by the hearing examiner, R&Rs become public records, which may be reviewed by Commission legal staff or others for evaluation, record keeping, and such other purposes of the Commission as the Executive Director may determine reasonable.
- 6.2 The hearing examiner does not have the authority to declare a statute or rule unconstitutional, nor does it have the authority to declare in an adjudicatory proceeding that a rule or regulation of the agency exceeds statutory authority. When an appeal raises both constitutional and non-constitutional issues, the hearing examiner will issue findings of fact and conclusions of law only on the non-constitutional issues. However, the hearing examiner should permit the parties to establish any factual context for their constitutional challenges, to enable later judicial review of the constitutional issue(s).

### **B. Timing of Submission of the R&R**

- 6.3 The hearing examiner shall issue a R&R within 30 business days of the closing date of the hearing. Failure to produce timely R&Rs can be a factor considered when making future hearing examiner assignments.
- 6.4 The hearing examiner should keep his/her deliberations and conclusions confidential until the date of the release of the R&R. Personal notes, drafts and other documents created by a hearing examiner solely for his/her own convenience in deliberation, and not provided to others are not part of the administrative record and are not public records for purposes of R.C. 149.43.

### **C. Form of the R&R Submission**

- 6.5 The hearing examiner shall submit an original signed copy of the examiner’s R&R to the Administrator. All copies of the case file and transcript shall either be destroyed by the hearing examiner or returned to the Administrator with the hearing examiner’s R&R.

- 6.6 In all cases, the R&R should follow an organized format and include: (1) an opening description of the parties and the nature of the case, with reference to applicable statute and regulations; (2) a statement of all material findings of fact; (3) a statement of all conclusions of law, including recitation of the applicable standard of proof; and (4) where applicable, the recommendation of action to be taken by the Commission. All major issues and arguments presented in the case must be addressed by the R&R.
- 6.7 The R&R should reflect the impartiality of the hearing examiner in both tone and substance. The recommendations set forth in the R&R must flow logically from the findings of fact and conclusions of law. The R&R should be written in a clear and concise manner free of typographical and grammatical error. The R&R should include transcript/record cites when applicable and, citations to controlling law (statutes, rules and case law) in accordance with the Writing Manual adopted by the Supreme Court of Ohio, Office of the Reporter. The Writing Manual is available online at [www.sconet.state.oh.us/ROD](http://www.sconet.state.oh.us/ROD).

D. Service of the R&R on the Party and the Commission

- 6.8 The Administrator shall serve the R&R within five days of its receipt upon the party, the party's counsel, and the AAG assigned to represent the Commission. The R&R shall be served upon the party by certified mail, return receipt requested.

E. Hearing Examiner Invoices

- 6.9 The hearing examiner will submit an invoice for payment to the Administrator with the final, signed R&R, or for matters which terminate prior to the completion of the R&R, within ten days after the date of the order terminating the matter. The invoice will be submitted according to, and shall comply with, the terms and conditions set forth in the hearing examiner's contract with the Commission.

## VII. OBJECTIONS TO THE R&R

- 7.1 A party may, within 30 days of receipt of the R&R, file written objections to the R&R with the Administrator. Such objections shall be considered by the Commission before approving, modifying or disapproving the R&R.
- 7.2 The Commission may grant to a party extensions of time within which to file such objections.
- 7.3 The Commission may, through its assigned AAG, file with the Administrator a motion for leave to file a response to the R&R or to a party's objections to the R & R. The granting of the motion is committed to the sound discretion of the hearing examiner. A copy of the motion shall be served on the party and the hearing examiner.

## **VIII. FINAL AGENCY ORDERS**

- 8.1 The recommendation in the R&R or a proposed settlement agreement is not final until confirmed and approved by the Commission in its final order, and such order is entered on the record of its proceedings.
- 8.2 In its final order, the Commission may approve, disapprove, or modify the recommendation contained in the R&R. If the recommendation of the hearing examiner is disapproved or modified, the Commission shall include in its final order the reasons for such modification or disapproval.
- 8.3 No recommendation of the hearing examiner shall be approved, modified, or disapproved by the agency until 30 days after service of the R&R.
- 8.4 The Commission may order additional testimony to be taken or permit the introduction of further documentary evidence, prior to issuing its final order. The Commission may adopt or incorporate all, or a portion of, the findings of fact and conclusions of law contained in the R&R. The Commission may reject findings and conclusions if it states in writing the reason, and the Commission may also make additional findings and conclusions if supported by the record of the hearing.
- 8.5 If the Respondent filed objections, the Commission must state in its final order that it received and considered them.
- 8.6 Once entered on its journal, a certified copy of the Commission's final order shall be served by the Administrator upon the party, the party's counsel of record, as applicable, and the AAG assigned to the Commission by certified mail, return receipt requested. The final order must contain a statement of the time and method by which an appeal may be perfected.

## **IX. MOTIONS FOR ATTORNEY'S FEES**

- 9.1 All motions for recovery of attorney's fees by a prevailing eligible party shall comply with R.C. 119.092 and shall be filed with the Administrator within 30 days after the date the Commission enters its final order in its journal.
- 9.2 A motion for recovery of attorney's fees shall be assigned to and reviewed by the hearing examiner who conducted the underlying hearing on the matter.
- 9.3 The hearing examiner or Commission shall issue a determination, in writing, on the motion of the prevailing eligible party, which shall include a statement indicating whether an award has been granted, the findings and conclusions underlying it, the

reasons or bases for the findings and conclusions and, if an award has been granted, its amount. The determination shall be governed by the provisions of R.C. 119.092(B)(2) and (3).

- 9.4 The determination shall be entered in the record of the prevailing eligible party's case, and a copy of it mailed by certified mail, return receipt requested, to the prevailing eligible party.
- 9.5 The determination of the hearing examiner concerning attorney's fees constitutes a final determination of the Commission for purposes of appeal pursuant to R.C. 119.12, and is not subject to review and approval by the Commission.
- 9.6 Upon the filing of an appeal pursuant to R.C. 119.12 by either the party or the Commission from the determination of the hearing examiner concerning attorney's fees, the Administrator shall prepare and certify to the court involved a complete record of the case, in accordance with R.C. 119.12.