

OHIO CASINO CONTROL COMMISSION



ADMINISTRATIVE HEARING MANUAL

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Table of Contents

Preamble and Applicability.....	1
I. Commission Hearing Administrator – Role and Responsibilities.....	1
II. Scheduling and Confirming Hearings and Hearing Examiners.....	1
A. Scheduling Hearings.....	1
B. Hearing Examiner Appointment and Assignment.....	1
C. Notice of Hearing.....	2
D. Preliminary Hearing.....	2
E. Computation of Time.....	2
III. Stenographic Recording of All Hearings.....	3
A. General.....	3
B. Scheduling and Confirming Court Reporters.....	3
IV. The Hearing Record.....	3
A. Documents Comprising the Record.....	3
B. Filing/Submission of Documents.....	4
V. Conduct of Hearings.....	4
A. Motion Practice.....	4
B. Impartiality of Hearing Examiners.....	5
C. Continuances of Hearings.....	6
D. Subpoenas.....	6
E. Commencement of Hearing.....	7
F. Exhibits.....	8
G. Conclusion of Hearing.....	8
H. Settlement.....	8
I. Requests for Media Access.....	9
VI. Report and Recommendation.....	9
A. Independence of Hearing Examiners; Limits of Authority.....	9
B. Timing of Submission of the R&R.....	10
C. Form of the R&R Submission.....	10
D. Serving the R&R.....	10

E. Hearing Examiner Invoices.....	10
VII. Objections to the R&R.....	11
VIII. Final Agency Orders.....	11
IX. Motions for Attorney’s Fees.....	12

PREAMBLE AND APPLICABILITY

The following case 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. Chapters 119, 3772, and 3774 and the rules adopted thereunder.

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 pertaining to administrative matters;
- Scheduling hearing dates;
- Reserving court reporters and interpreters or translators;
- Ensuring a hearing room is reserved;
- Receiving, copying, and forwarding hearing requests, submissions, orders, and transcripts;
- Updating and maintaining a case database and hearing calendar;
- Providing hearing schedules;
- Maintaining and providing copies of hearing files and other documents; and
- Serving as a liaison for hearing statuses and reports.

II. SCHEDULING AND CONFIRMING HEARINGS AND HEARING EXAMINERS

A. Scheduling Hearings

- 2.1 The date, time, and place for all hearings will be scheduled by the Administrator within 15 days, but not sooner than seven days, after the party has requested a hearing.

B. Hearing Examiner Appointment and Assignment

- 2.2 The Executive Director will enter into a written agreement with each qualified individual, as described in R.C. 119.09, to appoint the individual as a hearing examiner.

- 2.3 Upon appointment, a hearing examiner will be eligible for assignment by the Administrator, which will occur on a rotating basis as long as more than one examiner is eligible. The Administrator will email the examiner and ask whether the examiner is available to hear a matter. In the event that examiner is unavailable, the matter will be assigned to the next available examiner in the 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 an examiner.

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

C. Notice of Hearing

- 2.5 Upon the scheduling of a hearing, the Administrator will 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 the parties and the assigned AAG, with a copy sent to the hearing examiner. Upon its own motion or at the request of the party, the Commission may continue the initial hearing date.

D. Preliminary Hearing

- 2.6 At any time prior to a scheduled hearing, the hearing examiner may, on their own order or upon granting the motion of the party or the Commission, direct participation in a preliminary conference. At the conference, the 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.

E. Computation of Time

- 2.7 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 the Commission is closed to the public for an entire day or before its usual closing time on that day, and that day constitutes the last day for an act required by law to be performed, 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 must 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 must ensure that an accurate record is kept of the full proceeding. Examiners must announce when recording of the proceedings is interrupted for a recess or due to a malfunction related to the recordation of the proceedings and will announce when proceedings resume. In all cases, examiners must 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 a signed, electronic version of the transcript, which 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 (e.g., the notice of opportunity for a hearing and proof of service by certified mail, the party’s hearing request, all notices of hearing date, etc.);
 - 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 (“R&R”);

- Objections filed and any responses thereto; and
 - All applicable Commission minutes and orders.
- 4.2 The Administrator is the Commission's official custodian of the adjudication hearing records. Only those documents constituting the official record of the adjudication hearing and any other writings, papers, or orders filed with the Administrator may be a part of the official record. Documents containing legally protected or impermissible information will be withheld or redacted from the record, as allowed by law.
- B. Filing/Submission of Documents
- 4.3 All motions, briefs, and writings, other than those presented at the hearing, should be submitted to the Administrator by email, unless the circumstances necessitate submission in paper form. Filings hereunder will be maintained by the Administrator as the original record document.
- 4.4 All motions, briefs, and writings, other than those presented at the hearing, submitted by the parties, the Commission, or their representatives must include a certificate of service attesting to the service, whether by electronic or other means, of a copy on the opposing side (or their representative). The Administrator is responsible for ensuring the hearing examiner is provided the filings, when applicable.

V. CONDUCT OF HEARINGS

- A. Motion Practice
- 5.1 Since the Rules of Civil Procedure are not binding in adjudicatory proceedings before agencies, *Reminderville v. Schregardus*, 10th Dist. Franklin No. 98AP-246, 1998 WL 869619 (Dec. 8, 1998), 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.
- 5.2 Whenever a motion is filed or otherwise placed on the record by a party, the Commission, or their representatives, the hearing examiner must consider and issue a decision thereupon, regardless of whether the opposing side files or otherwise places a response on the record. The examiner may do so either by stating the decision on the record at the hearing or by written order, in the manner provided in § 4.3.

B. Impartiality of Hearing Examiners

- 5.3 The hearing examiner's conduct should be impartial with respect to the Commission and any parties to the adjudication. The assigned examiner's knowledge of the facts and circumstances 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) and thus examiners should avoid engaging in comments or lines of questioning that might give the appearance of favoring either the Commission or the party.

Except as otherwise provided by law, the burden of proof in administrative cases is proof by a preponderance of the evidence. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 697 N.E.2d 655 (1998); *Trotters, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 05AP-880, 2006-Ohio-2448.

In application cases, though, applicants seeking licensure under R.C. Chapter 3772 and the rules adopted thereunder must establish their suitability by clear and convincing evidence. Because of this, if contested, the applicants must present such evidence first. *St. Augustine Catholic Church v. Attorney General*, 67 Ohio St.2d 133, 423 N.E.2d 180 (1981); *In re Application of Gram*, 53 Ohio Law Abs. 470, 86 N.E.2d 48 (C.P.1948).

- 5.4 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.
- 5.5 The parties (or their 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 assigned hearing examiner, except upon notice and opportunity for both the party and the Commission to participate. Communications with examiners involving scheduling or uncontested procedural matters do not require notice or the opportunity for either the party or the Commission to participate.
- 5.6 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.
- 5.7 Hearing examiners must comply with the hearing procedures adopted by the Commission and will not permit the parties, the Commission, or their representatives to use the hearing process to discuss, raise, or otherwise address issues that are

outside the scope of the hearing. Nothing in these procedures is to be construed as granting an examiner the authority to dismiss any hearing.

C. Continuances of Hearings

5.8 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 are grounds for denial.

5.9 Motions for continuance 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 requestor (or their representative) to the non-requesting party (or their representative) and the Administrator. Motions for continuance should not be granted before the Commission, the party, or their representatives are given an opportunity to respond to the request. The examiner may grant or deny these motions in their sole discretion. The parties and the Commission are strongly encouraged to discuss the issue of a continuance prior to submitting a motion to the examiner.

5.10 Motions for continuance will only be granted upon a written order signed by the hearing examiner, served on the party, the Commission, or their representatives, and filed with the Administrator. The examiner must do so within two business days of signing the order, in the manner provided in § 4.3. The order must specify the party who requested the continuance and the reason(s) for the continuance. For every continuance order granted, the examiner should specify the new hearing date, time, and place. Should the party and the Commission need additional time to find a new hearing date, the examiner may state in the continuance order that the matter is continued and will be set for a date, time, and place to be determined by the party and the Commission.

5.11 Prior to scheduling a new hearing date, time, and place, the hearing examiner should coordinate with the Administrator to ensure that an equipped room is available for the proposed new hearing date.

5.12 The Administrator will notify the court reporter and update the hearing calendar and room assignment accordingly.

D. Subpoenas

5.13 Requests for subpoenas pursuant to R.C. 119.09 and 3772.04 and the rules adopted thereunder must be filed with the Administrator at least eight days prior to the

hearing. Upon request, the Administrator will issue blank subpoena forms to the party, the Commission, or their representatives. Each subpoena must be completed and filed with the Administrator, a copy of which must also be served on the party, the Commission, or their representative, as applicable.

- 5.14 The subpoena must be served and returned, and witness and mileage fees must be paid, in accordance with applicable law.
- 5.15 Every subpoena will 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.
- 5.16 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

- 5.17 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.
- 5.18 All witnesses are required to testify under oath or affirmation, which will 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.
- 5.19 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.
- 5.20 All attorneys who appear on behalf of a party must enter a written notice of appearance with the Administrator, in accordance with the rules adopted by the Commission and in the manner provided in § 4.3, even if a verbal notice of appearance is placed on the record at the hearing.

F. Exhibits

- 5.21 Exhibits must be pre-marked by the parties and the Commission for introduction into the record. The Commission's exhibits and the parties' exhibits should be differentiated with unique, sequential identifiers.
- 5.22 The parties and the Commission 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 introduced at the hearing.
- 5.23 The hearing examiner must maintain a log of all exhibits introduced and admitted, not admitted, or proffered into evidence. The examiner must incorporate the exhibits, and the record of their disposition, within the R&R.

G. Conclusion of Hearing

- 5.24 In the event a hearing requires more time than originally anticipated, the hearing examiner will issue a written order that includes the date, time, and place the hearing is to resume, even if this information is stated on the record at the hearing. The order must be submitted to the Administrator, in the manner provided in § 4.3, for delivery to the party, the Commission, or their representatives.
- 5.25 Generally, the record will be closed at the conclusion of the hearing. If, however, the hearing examiner orders the record to remain open for a specific period of time after the hearing has concluded, the examiner must memorialize this order in an entry filed with the Administrator. A copy of the order will be sent to the party (or their representative) by the Administrator. All post-hearing submissions should be filed with the Administrator, with a copy to the opposing side (or their representative). Orders, entries, and post-hearing submissions and briefs must be filed in the manner provided in § 4.3.

H. Settlement

- 5.26 The party, the Commission, or their representatives must 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 hearing and should not be permitted to unduly delay the commencement of the hearing to discuss either.

I. Requests for Media Access

- 5.27 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. See R.C. 119.01(E); *TBC Westlake, Inc. v. Hamilton Cty. Bd. Of Revision*, 81 Ohio St.3d 58, 689 N.E.2d 32 (1998). 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, the Commission, or their representatives. If a request for media access is granted, the examiner must set forth in a written order the scope of and limitations to such media access. The order must be submitted in the manner provided in § 4.3. The 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 examiner for media access, the examiner may revoke the permission to broadcast, televise, record, 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 R&Rs. There will be no review of draft R&Rs by the party, the Commission, or their representatives prior to being issued in final form. Once issued, R&Rs become public records, subject to redaction when supported by law, which may be reviewed by the Commission or its representatives for evaluation, record keeping, and such other purposes that the Commission's Executive Director determines 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 examiner will issue findings of fact and conclusions of law only on the non-constitutional issues. However, to enable later judicial review, the examiner should permit the parties, the Commission, or their representatives to establish or proffer any factual or legal context related to any constitutional challenge.

B. Timing of Submission of the R&R

6.3 The hearing examiner must issue an 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 examiner assignments.

6.4 The hearing examiner's deliberations and conclusions should be kept confidential until release of the R&R. Personal notes, drafts, and other documents created by a examiner solely for 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. *See TBC Westlake; State ex rel. Steffan v. Kraft*, 67 Ohio St.3d 439, 619 N.E.2d 688 (1993).

C. Form of the R&R Submission

6.5 The hearing examiner must submit a signed R&R to the Administrator, in the manner provided in § 4.3. All copies of the case file and transcript must either be destroyed by the examiner or returned to the Administrator with the examiner's R&R.

6.6 The R&R should follow an organized format and include: (1) an opening description of the participants and the nature of the case, with reference to the applicable law; (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) the recommendation of action to be taken by the Commission.

6.7 The R&R should reflect the impartiality of the hearing examiner in both tone and substance. Any recommendation 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, in accordance with the Writing Manual adopted by the Supreme Court of Ohio, Office of the Reporter.

D. Serving the R&R

6.8 The Administrator must serve the R&R within five days of its receipt upon the party (or their representative), in the manner provided under R.C. 119.09.

E. Hearing Examiner Invoices

6.9 The hearing examiner will submit an invoice for payment to the Administrator with the signed R&R, or for matters that 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 must comply with, the terms and conditions set forth in the 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 will be considered by the Commission before approving, modifying or disapproving the R&R.
- 7.2 The Commission may grant to a party an extension of time within which to file such objections.
- 7.3 The Commission may, through its assigned AAG, file with the Administrator a response to the R&R or to a party's objections.

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 at a public meeting.
- 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 must include in its final order the reasons for such modification or disapproval.
- 8.3 No recommendation of the hearing examiner can 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 party 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 will be served by the Administrator upon the party by certified mail, return receipt requested. A courtesy copy will be provided to the party's representative, too. 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 must comply with R.C. 119.092 and must 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 must be assigned to and reviewed by the hearing examiner who conducted the underlying hearing on the matter, or if that examiner is no longer available, a new examiner will be assigned to the matter and be responsible for issuing a determination on the motion.
- 9.3 The hearing examiner must issue a determination, in writing, on the motion of the prevailing eligible party, which must 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 is governed by R.C. 119.092.
- 9.4 The determination must 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 will prepare and certify to the Franklin County Court of Common Pleas a complete record of the case.