# OHIO CASINO CONTROL COMMISSION

# ADMINISTRATIVE HEARING MANUAL

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**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. Chapter 119, as well as the Commission's governing statutes and the rules adopted thereunder (*see, e.g.,* R.C. Chapters 3772 and 3774, and Ohio Adm.Code Agency 3772).

## I. COMMISSION HEARING ADMINISTRATOR – ROLE AND RESPONSIBILITIES

The Commission Hearing Administrator ("Administrator") will serve as the primary point of contact for court reporters, hearing examiners, assistant attorneys general ("AAG"), and the parties as well as their representatives. 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 and continuance requests, submissions, orders, transcripts, and report and recommendations;
- Updating and maintaining a case database and hearing calendar;
- Providing hearing schedules and tracking case deadlines;
- 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 a requested hearing will be initially scheduled by the Administrator in the manner prescribed by R.C. 119.07. The hearing may then be continued consistent with the law and the procedures outlined in this Manual.

B. Hearing Examiner Appointment and Assignment

2.2 The Executive Director will enter into a written agreement with qualified individuals, as described in R.C. 119.09, to appoint hearing examiners.

2.3 Upon appointment, a hearing examiner will be eligible for assignment by the Administrator. If the Executive Director appoints more than one examiner, the Administrator will assign cases on a rotating basis. The Administrator will start by contacting an examiner and asking whether that examiner is available to hear a matter. If that examiner is unavailable, the matter will be assigned to another

available examiner. Scheduling may be altered at any time to accommodate for conflicts and availability (e.g., scheduling or legal 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, the Administrator will contact the Attorney General's Office to verify that an AAG will be available at the time and on the date selected.

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, their representatives, and the assigned AAG, with a copy sent to the hearing examiner. Upon the Commission's own motion or at the request of a party, the hearing may be continued in a manner consistent with the law and this Manual.

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.

## 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. 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 Commission's official adjudication hearing record for purposes of R.C. 119.09:

- All jurisdictional documents (e.g., the notice of opportunity for a hearing and proof of service, 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 electronically, 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 of this Manual.

B. Impartiality of Hearing Examiners

5.3 The hearing examiner's conduct should be impartial with respect to the Commission, any parties to the adjudication, and their representatives. 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 burdens of proof (see § 5.22 of this Manual for more on burdens of proof) and thus examiners should avoid engaging in comments or lines of questioning that might give the appearance of favoring the Commission, the party, or their representatives.

5.4 Evidentiary matters should be ruled on in accordance with the law and in a 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, the Commission, and their representatives 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 all involved 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 or repeated requests for continuances are grounds for denial.

5.9 Motions for continuance should be made as soon as practicable. Undue delay in seeking a continuance may be grounds for denial. Unless the motion is made on the hearing record, written notice should also be provided by the requestor (or their representative) to the non-requesting party (or their representative) and the Administrator. Hearing examiners should not grant motions for continuance 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 Hearing examiners may only grant motions for continuance by a written, signed order, 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 of this Manual. 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 schedule the continued hearing, the examiner may state in the 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. Should the party and the Commission not be able to determine a date, time, or place in a reasonable amount of time, the hearing examiner will set a date, time, and place, subject only to § 5.11 of this Manual.

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 continued hearing.

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, 3772.04, Ohio Adm.Code 3772-2-06, and 3772-21-01 must be filed with the Administrator at least ten days prior to the hearing, unless the Commission's Executive Director approves a shorter period. 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 Commission-issued subpoena, the Commission may petition the prosecuting attorney of the county where the person resides to bring a contempt proceeding against the person in that county's common pleas court.

E. Commencement of Hearing

5.17 All hearings should start promptly at the specified time. The parties, the Commission, and their representatives are strongly encouraged to discuss settlement or stipulations prior to the hearing to avoid delaying commencement of the hearing.

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 and to the extent permitted by law, each party, the Commission, and their representatives may present evidence and examine witnesses appearing for and against the party or the Commission.

5.19 As allowed by law, 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. Business entities may be required by law to be represented by an attorney to engage in certain aspects of the hearing (e.g., making opening statements, closing arguments, and motions; examining witnesses; objecting; etc.). *Compare* *Worthington City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 85 Ohio St.3d 156, 160 (1999) *with* *Dayton Supply & Tool Company, Inc. v. Montgomery County Board of Revisions*, 111 Ohio St.3d 367, 2006-Ohio-5852. For advice or guidance on this, businesses, owners, officers, managers, and employees are encouraged to seek private legal counsel.

5.20 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.

5.21 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 of this Manual, even if a verbal notice of appearance is placed on the record at the hearing. To the extent practicable, notices of appearance should be filed prior to the scheduled hearing.

F. Burdens of Proof

5.22 Generally, the Commission has the burden of proof in administrative cases. In license application cases, however, the party has the initial burden of producing facts sufficient to demonstrate satisfaction of the minimum requirements for issuance of the license. *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). Nonetheless, per R.C. 9.79(F), if the Commission is seeking denial of an individual's initial occupational license based, solely or in part, on a criminal conviction, the Commission bears the burden of proof on the question of whether the individual's conviction of, judicial finding of guilt of, or plea of guilty to an offense directly relates to the licensed occupation.

G. Standards of Proof

5.23 Except as otherwise provided by law, the standard of proof in administrative cases is 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. This standard applies in all Commission cases except those in which the parties are required to prove their suitability by clear and convincing evidence. *See*, *e.g.*, R.C. 3772.10(B); R.C. 3774.02(C); *Smith v. Ohio Casino Control Comm'n*, 2019-Ohio-4870, 149 N.E.3d 981).

H. Exhibits

5.24 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.

5.25 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.

5.26 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.

I. Conclusion of Hearing

5.27 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, subject only to § 5.11 of this Manual. The order must be submitted to the Administrator, in the manner provided in § 4.3 of this Manual, for delivery to the party, the Commission, or their representatives.

5.28 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, even if this information is stated on the record at the hearing, for delivery to the party, the Commission, or their representatives. All post-hearing submissions should be filed with the examiner and 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 of this Manual.

J. Settlement

5.29 The party, the Commission, or their representatives must notify the assigned hearing examiner and the Administrator immediately, and in writing, upon reaching a settlement.

K. Requests for Media Access

5.30 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 of this Manual. 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 Hearing examiners do not have the authority to declare a statute or rule unconstitutional, nor do they have the authority to declare in an adjudicatory proceeding that a rule or regulation of the agency exceeds statutory authority. When constitutional, statutory-authority, and non-constitutional issues are raised, 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 challenge on the record.

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 an 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 of this Manual. 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 burden and 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 errors. The R&R should include transcript/record cites when applicable and citations to controlling law, in accordance with the Supreme Court of Ohio Writing Manual.

D. Serving the R&R

6.8 The Administrator must serve the R&R 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 file written objections to the R&R with the Administrator in the manner prescribed by law. *See*, *e.g.*, R.C. 119.09 and 3772.04. If timely filed, 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. If the Commission files a response to the R&R, the party will be given the opportunity to file a reply. Any timely filing made hereunder will be considered by the Commission before approving, modifying, or disapproving the R&R.

## 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 No recommendation of the hearing examiner can be approved, modified, or disapproved by the agency until the time period required by law has elapsed. *See*, *e.g.*, R.C. 119.09 and 3772.04.

8.3 In its final order, the Commission may approve, disapprove, or modify the recommendation contained in the R&R. If the recommendation is disapproved or modified, the Commission must include in its final order the reasons for such disapproval or modification.

8.4 The Commission may order additional testimony 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(s) for doing so, and the Commission may also make additional findings and conclusions if supported by the record.

8.5 If the party timely 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 and a courtesy copy will be provided to the party's representative. 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. If that examiner is no longer available, a new examiner will be assigned to the matter.

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 hearing examiner must submit a signed determination to the Administrator, in the manner provided in § 4.3 of this Manual. The Administrator must enter the determination in the record of the prevailing eligible party's case and mail a copy of the determination 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 a complete record of the case to the applicable court of common pleas.