



## CHAPTER 12: PUBLIC DEFENDER COMMISSION

### PART 12: ADJUDICATION

#### 10.12.12.1 ISSUING AGENCY:

Public Defender Commission

[[10.12.12.1](#) NMAC - N, 7/1/2015]

#### 10.12.12.2 SCOPE:

Applies to all employees in career status.

[[10.12.12.2](#) NMAC - N, 7/1/2015]

#### 10.12.12.3 STATUTORY AUTHORITY:

Section [10-15-1](#)(H) NMSA 1978; Section [31-15-2.4](#)(B)(6) NMSA 1978 and Section [31-15-7](#) NMSA 1978.

[[10.12.12.3](#) NMAC - N, 7/1/2015]

#### 10.12.12.4 DURATION:

Permanent.

[[10.12.12.4](#) NMAC - N, 7/1/2015]

#### 10.12.12.5 EFFECTIVE DATE:

7/1/2015 unless a later date is cited at the end of a section.

[[10.12.12.5](#) NMAC - N, 7/1/2015]

#### 10.12.12.6 OBJECTIVE:

The objective of Part 12 of Chapter 12 is: to provide a system for career status employees to appeal disciplinary actions.

[[10.12.12.6](#) NMAC - N, 7/1/2015]



#### **10.12.12.7 DEFINITIONS:**

- A.** "Discipline Review Board" or "board" means a three member board to hear disciplinary appeals composed of one district defender, one neutral hearing officer and one employee appointed by the chief from a pool of volunteers.
- B.** "Chairperson" means the district defender appointed to the board.
- C.** "Neutral hearing officer" means a hearing officer on contract with the department selected by the chief in consultation with the pool of volunteer employees.
- D.** "Pool" means employees selected by each district to serve as a volunteer on the disciplinary review board.

[[10.12.12.7](#) NMAC - N, 7/1/2015]

#### **10.12.12.8 FILING AN APPEAL:**

- A.** Employees who have completed the probationary period as required by Subsection A of [10.12.2.8](#) NMAC and have been demoted, dismissed, or suspended have the right to appeal to the discipline review board at a public hearing.
- B.** A notice of appeal must be in writing and filed with the human resource director no later than 30 calendar days from the effective date of the dismissal, demotion, or suspension. A copy of the notice of final action and a statement of the grounds for the appeal must accompany the notice of appeal. Appeals not filed within 30 calendar days shall be dismissed by the human resource director for lack of jurisdiction.
- C.** Within 15 days from the date of dismissal, an appellant may request a hearing in which to present evidence challenging a dismissal for lack of jurisdiction. If a hearing on the dismissal is held, human resource director shall submit a recommended decision to the deputy chief which shall contain a summary of the evidence and findings of fact and conclusions of law. The deputy chief shall then issue a final decision.
- D.** Upon acceptance of a notice of appeal, the chief shall appoint a district defender to serve as the chairperson of the disciplinary review board. The chairperson shall issue a scheduling order directing the parties, in part, to submit to the chairperson a stipulated pre-hearing order for his/her approval, which shall contain at least: a statement of any contested facts and issues; proposed stipulation of those facts not in dispute; the relief or remedy requested by the appellant; a deadline for disclosure of all probable witnesses with a brief summary of their anticipated testimony and documentary evidence; a list of exhibits; a deadline for the completion of discovery and filing of motions; a deadline for requesting subpoenas; and whether the parties agree to participate in voluntary alternative dispute resolution.



- 1) The chairperson may further revise the pre-hearing order.
- 2) Any discussion concerning possible settlement of an appeal shall not be a part of the pre-hearing order and may not be introduced at the hearing.

[[10.12.12.8](#) NMAC - N, 7/1/2015]

#### **10.12.12.9 AGENCY WITHDRAWAL OF DISCIPLINE:**

- A. The department may withdraw a completed disciplinary action prior to commencement of a disciplinary review board hearing so long as the appellant is fully restored to pre-disciplinary status insofar as employment, back pay and benefits are concerned.
- B. Upon department withdrawal of a disciplinary action, the chairperson may dismiss the appeal without prejudice to the department, which may reinitiate disciplinary action.

[[10.12.12.9](#) NMAC - N, 7/1/2015]

#### **10.12.12.10 CHAIRPERSON:**

- A. The chairperson shall not participate in any adjudicatory proceeding if, for any reason, the hearing officer cannot afford a fair and impartial hearing to either party. Either party may ask the chief public defender to disqualify the designated chairperson for cause by filing an affidavit of disqualification within 14 calendar days of the order. The affidavit must state the particular grounds for disqualification. The designated chairperson shall rule on motions for disqualification and an appeal of the ruling may be made to the deputy chief within 14 calendar days of the hearing officer's ruling.
- B. No person shall communicate concerning the merits of any pending adjudicatory proceeding with the designated chairperson or member of the disciplinary review board unless both parties or their representatives are present.
- C. The chairperson may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the chairperson or upon the filing of a motion to withdraw the appeal at any time.
- D. The chairperson may dismiss an appeal with prejudice upon the filing of a motion to withdraw the appeal after the deadline for the completion of discovery upon such terms and conditions as the chairperson deems proper.

[[10.12.12.10](#) NMAC - N, 7/1/2015]



#### **10.12.12.11 CONSOLIDATION AND JOINDER:**

- A.** The chairperson may consolidate cases in which two or more appellants have cases containing identical or similar issues.
- B.** The chairperson may join the appeals of an appellant who has two or more appeals pending.
- C.** The chairperson may consolidate or join cases if it would expedite final resolution of the cases and would not adversely affect the interests of the parties.

[[10.12.12.11](#) NMAC - N, 7/1/2015]

#### **10.12.12.12 DISCOVERY:**

The chairperson has the power to compel, by subpoena or order, the production of written materials or other evidence the chairperson may deem relevant or material. The parties shall have a right to discovery limited to depositions, interrogatories, requests for production, and requests for admission and witness interviews. All discovery shall be subject to the control of the chairperson.

[[10.12.12.12](#) NMAC - N, 7/1/2015]

#### **10.12.12.13 MOTIONS:**

- A.** Any defense, objection, or request that can be determined on the merits prior to a hearing may be raised by motion before the deadline set by the chairperson unless good cause is shown for the delay.
- B.** Prior to filing the motion, the filing party shall determine whether the non-filing party concurs with the motion. If the non-filing party concurs, the filing party shall include a stipulated order with the motion. If the non-filing party does not concur, the filing party shall indicate the non-concurrence in the motion and include a proposed order.
- C.** A response to a motion is due 12 calendar days from the date of filing of the motion. A reply to a response is due seven days from the date of filing the response. The response and reply schedule may also be set or modified by the chairperson.
- D.** Responses to any motions shall be filed according to a schedule set by the chairperson.
- E.** During the course of a hearing, motions may be renewed or made for the first time, if such a motion then becomes appropriate.
- F.** The chairperson shall rule on all motions except for dispositive motions on the merits.

[[10.12.12.13](#) NMAC - N, 7/1/2015]



#### **10.12.12.14 ADDITIONAL WITNESSES:**

Witnesses who are not disclosed by the deadline contained in the pre-hearing order shall not be permitted to testify except for good cause shown and to prevent manifest injustice.

[[10.12.12.14](#) NMAC - N, 7/1/2015]

#### **10.12.12.15 SUBPOENAS:**

- A.** The chairperson has the power to subpoena witnesses.
- B.** The chairperson has the power to subpoena documents or other tangible items.
- C.** Subpoenas shall be prepared in triplicate by the party requesting the subpoena and will be issued by the hearing officer. A copy of each subpoena shall be sent to the opposing party by the requesting party, together with a transmittal letter listing all persons subpoenaed.
- D.** Subpoenas shall be hand delivered unless otherwise agreed to.
- E.** In order to compel attendance at a hearing, the subpoena shall be received by the witness at least 72 hours prior to the time the witness is to appear. The chairperson may waive this rule for good cause shown.
- F.** Employees under subpoena shall be granted administrative leave as required by the provisions of Subsection D of [10.12.7.14](#) NMAC.

[[10.12.12.15](#) NMAC - N, 7/1/2015]

#### **10.12.12.16 SANCTIONS:**

- A.** The chairperson may impose sanctions upon the parties as necessary to serve the cause of justice including, but not limited to the instances set forth below.
  - 1)** When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, a request for admission, and/or production of witnesses, the chairperson may:
    - (a)** draw an inference in favor of the requesting party with regard to the information sought;
    - (b)** prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought;
    - (c)** permit the requesting party to introduce secondary evidence concerning the information sought; or



(d) strike any part of the pleadings or other submissions of the party failing to comply with such request.

- 2) The chairperson may refuse to consider any motion or other action which is not filed in a timely fashion.
- A. The chairperson may issue an order to show cause why an appeal should not be dismissed for failure to prosecute, or rule either for the appellant or the appellee, so long as the merits of the case are not concerned. If the order is uncontested, the chairperson may dismiss the appeal or rule for the appellant. If the order is contested and the chairperson dismisses the appeal or rules for the appellant, such decision is appealable to the deputy chief within 14 calendar days of the order.
- B. The chief may prohibit a representative from appearing before its disciplinary review board for a period of time set by the chief for good cause shown.

[[10.12.12.16](#) NMAC - N, 7/1/2015]

#### **10.12.12.17 NOTICE OF HEARING:**

Notice of hearing shall be made by certified mail with return receipt requested at least 14 calendar days prior to the hearing, unless otherwise agreed to by the parties and the hearing officer.

[[10.12.12.17](#) NMAC - N, 7/1/2015]

#### **10.12.12.18 HEARINGS:**

- A. All members of the board shall be present in person to conduct the hearing.
- B. The hearing shall be open to the public unless the parties agree that it shall be closed.
- C. A party may appear through a representative at any and all times during the adjudication process, provided such representative has filed a written entry of appearance.
- D. The chairperson may clear the room of witnesses not under examination, if either party so requests, and of any person who is disruptive. The department is entitled to have a person, in addition to its representative, in the hearing room during the course of the hearing, even if the person will testify in the hearing.
- E. The department shall present its evidence first.
- F. Oral evidence shall be taken only under oath or affirmation.
- G. Each party shall have the right to:



- 1) make opening and closing statements;
  - 2) call and examine witnesses and introduce exhibits;
  - 3) cross-examine witnesses;
  - 4) impeach any witness;
  - 5) rebut any relevant evidence; and
  - 6) introduce evidence relevant to the choice of discipline if it was raised as an issue in the pre-hearing order.
- B.** The hearing shall be conducted in an orderly and informal manner without strict adherence to the rules of evidence that govern proceedings in the courts of the state of New Mexico. However, in order to support the board's decisions, there must be a residuum of legally competent evidence to support a verdict in a court of law.
- C.** The chairperson shall admit all evidence, including affidavits, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs. The chairperson shall exclude immaterial, irrelevant, or unduly cumulative testimony.
- D.** If scientific, technical, or other specialized knowledge will assist the disciplinary review board to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. In the case of evidence relating to polygraph examinations, the proponent must have followed all the provisions of rule **11-707** NMRA.
- E.** The chairperson may take administrative notice of those matters in which courts of this state may take judicial notice.
- F.** The rules of privilege shall be effective to the extent that they are required to be recognized in civil actions in the district courts of the state of New Mexico.
- G.** The chairperson shall admit evidence relevant only to those allegations against the appellant include in both the notice of contemplated action and the notice of final action or which are contested issues as set forth in the pre-hearing order.
- H.** The hearing shall be recorded by a video and/or audio-recording device under the supervision of the chairperson. No other recording of the hearing, by whatever means, shall be permitted without the approval of the chairperson.
- I.** The chief shall provide for and require that the chairperson to



- 1) appoint a signed language interpreter pursuant to the Signed Language Interpreting Practices Act, Section **61-34-1** to **61-34-17** NMSA 1978 to appellants whose hearing is so impaired that they cannot understand voice communication; appellant must provide proof of disability; and
- 2) appoint a language interpreter pursuant to the Court Interpreter Act, Section 38-10-1 to **38-10-8** NMSA 1978 for hearing participants who do not understand English well enough to understand the proceedings.

[[10.12.12.18](#) NMAC - N, 7/1/2015]

#### **10.12.12.19 POST-HEARING BRIEFS:**

The chairperson may require or permit written closing arguments, post-hearing briefs and proposed findings of fact and conclusions of law according to a scheduling order issued by the chairperson. If case law is cited, a copy of the case shall be provided to the hearing officer.

[[10.12.12.19](#) NMAC - N, 7/1/2015]

#### **10.12.12.20 BOARD'S DECISION:**

The disciplinary review board shall make a decision as soon as practicable upon conclusion of the hearing. The chairperson shall provide a copy of the recommended decision to the parties by certified mail with return receipt requested.

[[10.12.12.20](#) NMAC - N, 7/1/2015]

#### **10.12.12.21 EXCEPTIONS TO A DECISION:**

- A. The parties to a proceeding may file a request for reconsideration of a decision by citing specific exceptions with supporting briefs to a disciplinary review board's decision according to a scheduling order issued by the chairperson.
- B. Copies of such exceptions and any briefs shall be served simultaneously on all parties, and a statement of such service shall be furnished to the chairperson.
- C. Exceptions to a board's decision shall cite the precise substantive or procedural issue to which exceptions are taken.
- D. Any exception not specifically made shall be considered waived. Any exception that fails to comply with the foregoing requirements may be disregarded. Any brief in support of exceptions shall not contain matters not related to or within the scope of the exceptions.

[[10.12.12.21](#) NMAC - N, 7/1/2015]





#### **10.12.12.22 DECISIONS OF THE DISCIPLINARY REVIEW BOARD:**

- A.** As a general rule, the board shall only consider post-hearing briefs, and proposed findings of fact and conclusions of law, the board's decision, and exceptions to the decision. Where circumstances warrant, the board may review all or a portion of the record.
- B.** The board shall not consider any additional evidence or affidavits not in the record or pleadings not filed in accordance with the chairperson's scheduling order.
- C.** The board may consider the record in executive session.
- D.** If the board determines that the credibility of a witness is at issue, it shall review at least as much of the record as is necessary to support its decision.

[[10.12.12.22](#) NMAC - N, 7/1/2015]

#### **10.12.12.23 REINSTATEMENT**

- A.** The board may order the department to reinstate appellants with back pay and benefits. Such appellants shall be reinstated to their former position, or to a position of like status and pay, that they occupied at the time of the disciplinary actions.
- B.** In the event the board's order includes any back pay, the appellant shall provide the department
- C.** with a sworn statement of gross earnings, unemployment compensation, and any other earnings, including but not limited to disability benefits received by the appellant since the effective date of the disciplinary action. The department shall be entitled to offset earnings, unemployment compensation and any other earnings received during the period covered by the back pay award against the back pay due. The chairperson shall retain jurisdiction of the case for the purpose of resolving any disputes regarding back pay.

[[10.12.12.23](#) NMAC - N, 7/1/2015]

#### **10.12.12.24 REPORT OF DECISIONS:**

When the board renders a final decision in an appeal, the board's decision will be available to the public pursuant to the Inspection of Public Records Act, Section [14-2-1](#) NMSA 1978 (as amended through 2003). Copies of the board's final order and the recommended decision shall be stored in the office, separate from personnel files, and will be available to the public when provided to the parties. The human resource director will redact any privileged and confidential information pursuant to state and federal law.

[[10.12.12.24](#) NMAC - N, 7/1/2015]