TITLE 22: COURTS
CHAPTER 600: ADMINISTRATIVE HEARINGS OFFICE
PART 3: HEARINGS UNDER THE TAX ADMINISTRATION ACT

22.600.3.1 ISSUING AGENCY: Administrative Hearings Office, Wendell Chino Building, 1220 South St. Francis Drive, P.O. Box 6400, Santa Fe, NM 87502.
[22.600.3.1 NMAC - N, 1/1/2018]

22.600.3.2 SCOPE: This part applies to the taxation and revenue department and all taxpayers, their agents and representatives protesting an action of the taxation and revenue department under Section 7-1-24 NMSA 1978 of the Tax Administration Act and seeking a hearing under Section 7-1B-8 NMSA 1978 of the Administrative Hearings Office Act.
[22.600.3.2 NMAC - N, 1/1/2018]

22.600.3.3 STATUTORY AUTHORITY: Paragraph (1) of Subsection A of 7-1.B-5 NMSA 1978.
[22.600.3.3 NMAC - N, 1/1/2018]

22.600.3.4 DURATION: Permanent.
[22.600.3.4 NMAC - N, 1/1/2018]

22.600.3.5 EFFECTIVE DATE: January 1, 2018, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[22.600.3.5 NMAC - N, 1/1/2018]

22.600.3.6 OBJECTIVE: The objective of this part is to provide procedural rules and guidance, about the tax protest hearing process before the administrative hearings office under the provisions of the Tax Administration Act and the Administrative Hearings Office Act.
[22.600.3.6 NMAC - N, 1/1/2018]

22.600.3.7 DEFINITIONS: As used in 22.600.3 NMAC:

A. "Administrative hearings office" is the agency established under Section 7-1B-1 NMSA 1978.

B. "Chief hearing officer" is the appointed head of the administrative hearings office under the Administrative Hearings Office Act, Section 7-1B-3 NMSA 1978, or the chief hearing officer's designee during the absence of the chief hearing officer, or the acting, interim chief hearing officer pending appointment of that position.

C. "Taxpayer" is any individual, person, entity association, business, corporation, partnership or other recognized entity that is a party to the tax protest process under the Tax Administration Act regardless of whether that person or entity is found to be liable for a tax.

D. "TRD" is the New Mexico taxation and revenue department.
[22.600.3.7 NMAC - N, 1/1/2018]

22.600.3.8 REQUESTS FOR HEARING, SCHEDULING OF MERITS HEARINGS, SCHEDULING HEARINGS, AND SCHEDULING ORDERS:

A. Pursuant to Subsection A of Section 7-1B-8 NMSA 1978, TRD shall file a request for hearing with the administrative hearings office within 45 days of its receipt and acknowledgement of a valid protest on a form and in a manner specified by the chief hearing officer. A taxpayer may also file a request for hearing with the administrative hearings office 45 days after submitting the protest to TRD if TRD has not yet submitted a request for hearing in the matter. A copy of the request for hearing shall be provided to the opposing party.

B. The request for hearing shall include (if available) at a minimum a copy of TRD's initiating document, action, or inaction that led to the protest, a copy of the taxpayer's protest letter, TRD's acknowledgement letter, any taxpayer information authorization filed with TRD allowing someone other than the named taxpayer (or bona fide employee of the taxpayer) to represent the taxpayer before TRD, the address of record of the taxpayer with TRD, and a statement indicating a preference for conducting a merits hearing or a scheduling hearing. The administrative hearings office may require additional information on any request for hearing or referral and may require the parties to submit such request on a form developed by the administrative hearings office.

C. The party requesting the hearing shall specify whether they believe the matter will be ripe for a merits hearing within 90-days of TRD's receipt of the protest or whether under Paragraph (2) of Subsection D of

Section 7-1B-6 NMSA 1978, the parties need additional time to complete discovery, prepare motions, and to ensure both sides have ample and fair opportunity to present their respective cases.

D. In the case of a taxpayer protest based on TRD's failure to grant or deny a claim for refund within the statutory period for consideration of the refund claim, any subsequent denial or partial denial of that same claim made by TRD during the pendency of the protest proceeding shall be incorporated and consolidated with the original protest referred to the administrative hearings office rather than submitted as new request for hearing.

E. Upon receipt of the hearing request, the chief hearing officer or designee thereof shall review the matter to assess the complexity of the case, the potential discovery required, the potential need for motions practice before conducting the merits hearing, the tax hearing docket, and the preference of the party that filed the hearing request to determine whether the matter should be set promptly for a merits hearing or set for a scheduling hearing within 90 days of the protest.

F. Absent a timely objection before or at the time of the scheduling hearing, conducting a scheduling hearing within 90 days of TRD's acknowledged receipt of a valid protest satisfies the 90 day hearing requirement contained under Subsection A of Section 7-1B-8 NMSA 1978 while allowing sufficient time to meet the statutory requirements contained under Paragraph (2) of Subsection D of Section 7-1B-6 NMSA 1978. Upon completion of the scheduling hearing, the hearing officer will issue a scheduling order and notice of administrative hearing or other form of notice or order as the circumstances require.

G. Upon objection to the conduct of the scheduling hearing, the administrative hearings office may set the matter for a merits hearing on expedited basis with a minimum of seven days notice unless the parties consent to a lesser period for notice. All other notices will be sent at least 14 days before the scheduled hearing unless the parties consent to a lesser period for notice.

H. Upon receipt of the notice of scheduling hearing, the parties may consult with each other and agree to a proposed scheduling order, in a format specified by the administrative hearings office, articulating discovery and motions deadlines, length of the potential hearing, a proposed month or months of merits hearing, and an express waiver of the 90-day hearing requirement of Subsection A of Section 7-1B-8 NMSA 1978. If the assigned hearing officer accepts or substantially adopts the proposed scheduling order, the scheduling hearing will be vacated.

I. At the sole discretion of the chief hearing officer, a series of cases involving similar substantive issues or involving small controversies may be scheduled to be heard individually as part of a trailing docket commencing at the beginning of the day, to be heard at some indefinite point during that day after the time of commencement of the docket. If the protest is to be heard as part of a trailing docket:

(1) All parties and their representatives in a case set on a trailing docket shall report at the time and place specified in the notice of hearing for commencement of the trailing docket in a method and manner specified by the administrative hearings office.

(2) Failure to report at the commencement of a trailing docket shall be deemed a non-appearance for the purposes of Section 7-1-16 NMSA 1978.

(3) After the reporting time for the trailing docket, the assigned hearing officer or hearing officers for the conduct of the trailing docket will determine the order of the cases to be heard that day, considering the appearance or nonappearance of the various parties on that day's docket, the complexity of the cases, the number and availability of witnesses, and if possible, accommodating any scheduling conflicts of the parties on that date.

(4) Upon receipt of notice of hearing set on a trailing docket, a party may file a written objection at least seven days before the scheduled hearing citing good cause as to why the matter should be given a unique setting rather than heard as part of a trailing docket, which the chief hearing officer or the assigned hearing officer may review and determine whether the case should be continued to a specific date with a firm time of commencement of the proceeding.

J. All notices of hearing, including notice of scheduling hearing, notice of administrative hearing, and scheduling order shall be mailed via regular, first class mail to the taxpayer's address of record or the address of taxpayer's representative of record, as well as TRD either through interdepartmental mail or first class mail. Additionally, if the parties provide an email address, a copy of the notice may be emailed to the party. Notice may be given orally on the record of any proceeding where all parties are present and all parties agree to the proposed hearing date.

[22.600.3.8 NMAC - N, 1/1/2018]

22.600.3.9 LOCATION OF HEARINGS: Formal hearings are held in Santa Fe. At the sole discretion of the chief hearing officer, and considering the location of the respective parties and the assigned hearing officer, the resources of the administrative hearings office, and the docket, a hearing may be set at the administrative hearings

office's Albuquerque office. If setting a hearing at the Albuquerque office would cause an unreasonable, undue burden to either party, the party may file a written objection to the hearing location within 10 days of issuance of the notice of hearing, articulating the reasons supporting the objection. The chief hearing officer or designee will promptly review the objection and upon a showing of an unreasonable, undue burden, will order the hearing to occur in Santa Fe. Such changes in hearing location may require the reassignment of the case to another hearing officer as determined necessary by the chief hearing officer.
[22.600.3.9 NMAC - N, 1/1/2018]

22.600.3.10 VIDEO-CONFERENCE HEARINGS, TELEPHONIC HEARINGS, AND TELEPHONIC TESTIMONY:

A. Scheduling hearings and other preliminary, preconference, or prehearing motions hearings may be conducted via telephone, or videoconference or equivalent electronic method.

B. If both TRD and the taxpayer agree, they may petition the assigned hearing officer at least seven days before the scheduled merits hearing to conduct the merits hearing via secure videoconference pursuant to Subsection B of Section 7-1B-8 NMSA 1978. The hearing officer may grant or deny the request after considering whether a complete and accurate record can be made and a fair hearing can be conducted in the matter via secure videoconference. Even if the initial request is granted, the hearing officer always retains the discretion at any point in the proceeding to order the personal appearance of the parties and witnesses if in the hearing officer's determination resolution of the disputed facts, evidence, credibility of a witness, question of law, or development of a complete and accurate record requires it.

C. If the request for a videoconference is approved by the hearing officer:

(1) all parties, witnesses, and the hearing officer will appear via videoconference service specified by the administrative hearings office. The administrative hearings office shall take reasonable precautions to ensure that the videoconference is secure and confidential. However, by requesting or consenting to a videoconference hearing, the parties shall be deemed to understand that the administrative hearings office may contract, license or utilize a third-party service provider to facilitate videoconferencing and that all electronic communications are vulnerable to security breaches beyond the reasonable control or knowledge of the administrative hearings office. If such electronic security breaches were to occur, they constitute unintentional, inadvertent disclosures and do not amount to a breach of statutory confidentiality requirements under relevant law by any party or the hearing officer appearing via videoconference. The parties shall also waive any claims against the administrative hearings office, its employees, agents or contractors, arising from any disclosure and shall be deemed to have assumed risk of disclosure by requesting or agreeing to appear via videoconference;

(2) the parties shall ensure that they have exchanged all exhibits with each other and provided the assigned hearing officer with an exhibit binder before commencement of the approved videoconference hearing;

(3) the parties also shall provide contact phone numbers where they will be available at the time of the hearing in case there are technical errors or other issues with conducting the videoconference;

(4) in the event that technical or other computer problems prevent the videoconference hearing from occurring or interfere with maintaining or developing a complete record at the hearing, the parties agree and consent upon their submission of a request to conduct the matter via videoconference that the assigned hearing officer at their discretion may continue the matter to a different time without regard to any other statutory deadline, may order the parties to appear for an in-person hearing, or may conduct the hearing via telephone;

(5) in the event of a videoconference hearing, the hearing record will only be the audio recording or transcription of the proceeding and will not include the video portion of the proceeding.

D. The administrative hearings office may also schedule the matter as a videoconference hearing with consent of the parties, which shall be deemed to have been granted absent either party filing a written objection within 14 days of notice a videoconference hearing.

E. Telephonic appearances by the parties (or their representatives) are not generally permitted and will only be considered in the event of a genuine medical emergency/hardship, in cases where there is no genuine dispute of fact and parties intend to simply make legal argument, or when a technical problem prevents the conduct of a scheduled videoconference hearing.

F. Telephonic testimony from third-party witnesses may only be permitted in the event that in person or videoconference testimony would create an undue hardship or expense to the third-party witness. In addition to potential undue hardship, the assigned hearing officer in deciding whether to permit the telephonic testimony will consider the nature and purpose of the purported testimony, potential credibility issues regarding the testimony, the

potential weight of the testimony as it relates to the particular issues at protest, and whether the testimony is being offered in rebuttal.
[22.600.3.10 NMAC - N, 1/1/2018]

22.600.3.11 APPEARANCES BY AUTHORIZED REPRESENTATIVES:

A. Taxpayers may appear at a hearing for themselves or may be represented by a bona fide employee if taxpayer is an entity or business, or by an attorney licensed to practice in New Mexico, a certified public accountant, or a registered public accountant. Where specifically allowed by the Tax Administration Act, taxpayers may also be represented by enrolled agents. Any attorney, including those employed as in-house counsel, representing taxpayers in any merits hearing must be licensed in good standing to practice law in New Mexico or in compliance with the pro hac vice requirements found under Rule 24-106 NMRA.

B. A taxpayer must file a written authorization for any representative who is not a licensed attorney. The protest shall be considered to be written authorization of representation. The term "bona fide employee" shall include any employee, owner, or member of any board of directors or other governing body of an entity. When the taxpayer is two individuals who have been jointly assessed, such as a married couple, either individual may serve as the taxpayer's representative.

C. Any party listed on the protest, who signs on behalf of the taxpayer on the protest, or has submitted a Taxpayer Information Authorization form in compliance with 3.1.3.13 NMAC shall be deemed to be an authorized representative of the taxpayer for purposes of any initial scheduling hearing before the administrative hearings office. At the initial hearing, the taxpayer will be advised of the statutory right to and limitations of representation. If the taxpayer's representative is not a person who is properly authorized to represent the taxpayer under the statute, the taxpayer shall be granted additional time to arrange for appropriate representation. Any delay of hearing for this reason will be attributed to the taxpayer.

D. Any party not listed on the protest who subsequently begins to represent the taxpayer must file a written authorization. An entry of appearance filed by a licensed attorney shall be deemed to be a written authorization. For non-attorney representatives, the taxpayer must sign the subsequent entry of appearance. The taxpayer's signature on any such entry shall be deemed to be written authorization. When the taxpayer is an entity, the signature of any bona fide employee of the taxpayer shall be deemed to be the taxpayer's signature. All entries of appearance should include the name, mailing address, phone number, and electronic mail address of the authorized representative.

E. The taxpayer and any representative who has entered an appearance or written authorization to appear has an ongoing duty to inform administrative hearings office and the opposing party of any change of mailing address, contact phone number, or contact email address.

F. Any person expressly authorized under Section 7-1B-8 NMSA 1978 to represent a taxpayer at a tax protest hearing may provide legal and factual advocacy on behalf of the taxpayer at all stages of the hearing protest process before the administrative hearings office.

G. All parties shall have a responsibility of candor to the administrative hearings office and shall not knowingly make false statements to the hearing officer. The administrative hearings office is a tribunal for purposes of Rule 16-303 NMRA. An attorney, a certified public accountant, or an enrolled agent, or any other statutorily permitted representative of a taxpayer in a protest hearing shall abide by their respective controlling professional or ethical standards of conduct at all stages of the administrative proceeding before the administrative hearings office. In the event of an apparent breach of applicable standards of ethics or professionalism, in addition to reporting the breach to the appropriate disciplinary board, the assigned hearing officer may take other reasonable and appropriate measures within the hearing officer's statutory and regulatory authority necessary to maintain order and ensure a fair hearing process for all parties.
[22.600.3.11 NMAC - N, 1/1/2018]

22.600.3.12 TAX PROTEST HEARINGS CLOSED TO PUBLIC, FILE IS CONFIDENTIAL, AND SEALING OF RECORDS IN THE PROCEEDING:

A. Hearings are not open to the public except upon request of the taxpayer.

B. Pursuant to Section 7-1-8.3 NMSA 1978, all documents, exhibits, pleadings and materials contained in the administrative tax file and the record of the administrative hearing are confidential and may not be released to the public, except that the final decision and order without redaction and any evidentiary or procedural ruling made by the hearing officer with redaction of identifiable taxpayer information may be revealed.

C. Either party may ask for, and submit, a proposed order sealing particular records that may contain confidential third-party taxpayer information or as is required by relevant internal revenue service information

sharing agreements. Upon issuance of an order sealing such documents of exhibits, those records will remain under seal throughout the proceeding and shall be returned to the submitting party at the conclusion of the appeal period or the appeal. The opposing party shall be entitled to promptly review those documents in preparing for the hearing, and may rely on those documents during the hearing as necessary to ensure a fair hearing process, but shall not maintain its own copy of the sealed document after conclusion of the hearing nor reveal, discuss, or disclose the contents of those sealed documents to any other party outside of the hearing process.

D. In the event of an appeal, the complete record of the proceeding, including any sealed records, will be provided to the relevant judicial body, as required under Section 7-1-8.4 NMSA 1978.

E. The hearing officer's notes taken during the course of the hearing, any written discussions with another hearing officer related to the deliberative process, and any draft orders or draft decisions are confidential as part of the deliberative process and are not subject to public disclosure under any recognized exception contained under Section 7-1-8.3 NMSA 1978. Only the hearing officer's final decision and order and other final procedural or evidentiary orders (with appropriate taxpayer information redacted) may be revealed to the public under Section 7-1-8.3 NMSA 1978.

[22.600.3.12 NMAC - N, 1/1/2018]

22.600.3.13 WITHDRAWAL OF PROTESTS:

A. A taxpayer electing to withdraw a protest pending before the administrative hearings office shall execute a withdrawal of protest. The written withdrawal must include the taxpayer's signature or the signature of a bona fide employee of the taxpayer, even when the taxpayer has an authorized representative. The written withdrawal need not include the taxpayer's reasons for withdrawing the protest. The written withdrawal must include adequate information to properly identify the taxpayer and the file at protest, such as the assessment letter i.d. number or the date the protest was filed. A written withdrawal form provided and approved by TRD is sufficient to adequately identify the taxpayer and the protest.

B. Upon receipt of a withdrawal of protest which does not satisfy the requirement stated herein, which appears irregular on its face, which fails to adequately address all issues pending in a protest, or which is indefinite, uncertain, or ambiguous, the administrative hearings office shall notify the parties, attorneys, or authorized representatives of the identified deficiency. The hearing officer may leave the matter on the calendar as scheduled, set a status conference to address the issues, or order the parties to submit a new withdrawal, if they are able to, addressing the issues.

C. A properly executed withdrawal of protest satisfying the requirements of this section shall result in the closing of the protest and the administrative file as of the date of filing. If a withdrawal of protest is insufficient for any reason, the hearing officer may enter an order closing a protest after notice and opportunity to be heard regarding any deficiencies in the withdrawal.

[22.600.3.13 NMAC - N, 1/1/2018]

22.600.3.14 SUMMARY DISPOSITIONS OF DISPUTES:

A. In protests with less than $1000.00 in dispute, where there is well-settled law addressing the issue identified on the face of the pleadings, or when it appears from the face of the pleadings in the administrative file that there is no genuine issue as to any material fact, the hearing officer may propose a summary disposition of the protest under the following procedure:

(1) the hearing officer shall provide to the parties, their attorneys, or authorized representatives a written proposed summary disposition based on a review of the administrative file;

(2) the parties, their attorneys, or authorized representatives shall be provided with no less than 15 days in which to respond to the proposed summary disposition;

(3) a response to a proposed summary disposition shall include the factual or legal basis in support of or in opposition to the proposed summary disposition;

(4) no reply to a response shall be allowed;

(5) the failure to respond to a proposed summary disposition may be deemed as concurrence in the proposed summary disposition;

(6) upon review of a response to a proposed summary disposition, the hearing officer shall withdraw the proposed summary disposition and schedule the matter to be heard if either party makes a bona fide objection and argument, or enter a decision and order consistent with the proposed summary disposition if the parties consent, concede, fail to object or otherwise meaningfully address the proposed summary disposition.

B. In protests with less than $1000.00 in dispute, TRD's designated taxpayer advocate may submit to the chief hearing officer a short report summarizing that taxpayer advocate's investigation into a taxpayer complaint

or protest they investigated, including any recommendation for a partial or full abatement of an assessment, granting of a refund or credit, or granting other requested relief in the taxpayer's protest or complaint. Upon submission of such a report, TRD and Taxpayer may agree with or dispute the taxpayer advocate's report and recommendations within 14 days by submitting their own written responses to the administrative hearings office detailing why they accede to or reject the report and recommendation. Upon receipt and review of the report and any responses of the parties, the hearing officer may adopt the taxpayer advocate's report and recommendation by issuing a short dispositive decision and order to that end, or decline to do so and set the matter for a scheduling hearing of a formal merits hearing.

C. Pursuant to assessment dollar limitation specified by Subsection A of Section 7-1-17 NMSA 1978, if TRD refers a case with total assessment less than the statutorily-identified minimum amount and the taxpayer prevails in the matter, there shall be a rebuttable presumption that TRD's position was not a reasonable application of the law to the facts for the purposes of Section 7-1-29.1 NMSA 1978.

[22.600.3.14 NMAC - N, 1/1/2018]

22.600.3.15 FILING METHODS:

A. Parties may file pleadings by mail, third party or personal delivery, facsimile, or email, at addresses and locations specified by the administrative hearings office.

B. A filing by facsimile shall include a cover sheet indicating the name of the matter, the name of the individual submitting the filing, the number of pages contained in the transmission, and a telephone number to contact in the event there are any errors with the transmission.

C. Documents filed by email or other electronic means shall not be submitted in an editable format unless specifically requested by the hearing officer. Absent specific instructions to do so, pleadings, motions or other papers shall not be submitted directly to the assigned hearing officer.

D. If the facsimile or electronic transmission of a pleading or paper is successfully completed before 5 p.m. on a business day of the administrative hearings office, it will be considered filed on that date. If the facsimile or electronic transmission is successfully completed after 5 p.m. on a business day, or on a Saturday, Sunday, or state-recognized holiday, the pleading or paper will be considered filed on the next business day. For any questions of timeliness, the time and date affixed on the cover page by the administrative hearings office facsimile machine or as indicated in the electronic transmission will be determinative.

E. If the pleading or paper is filed in person, by third-party delivery service, or through the United States Postal Service, it will be considered to be filed on the date of actual delivery if actual delivery is completed before 5 p.m. on a business day of the administrative hearings office. If actual delivery occurs after 5 p.m. or on a non-business day, the pleading or paper will be considered filed on the next business day.

[22.600.3.15 NMAC - N, 1/1/2018]

22.600.3.16 MOTIONS:

A. All pleadings, motions or other papers shall be addressed to the administrative hearings office with duplicates provided concurrently to the opposing parties, attorneys, or authorized representatives.

B. All pleadings, motions or other papers must bear a certificate of service or for non-attorneys, a comparable declaration signed by the party or other authorized representative indicating the date it was provided to the opposing party, the name of the individual to whom the item was addressed, the method by which it was delivered, and depending on the delivery method utilized, the facsimile number, email address, mailing address, or street address to which it was delivered.

C. All written motions shall state the particular relief requested and the grounds therefor. No motion shall be considered without a statement from the moving party, attorney, or authorized representative indicating that there has been a good faith effort to confer with the opposing party with respect to the relief sought in the motion in order to resolve differences or to secure concurrence in the motion. This requirement shall not apply to potentially dispositive motions which by their very nature are deemed opposed.

D. An unopposed motion shall be accompanied by a stipulated order indicating approval by the parties, attorneys, or authorized representatives. Approval may be indicated by an original, photocopy, facsimile, or electronic signature of the individual providing approval, or by a statement indicating approval by other means such as by email or telephone. The hearing officer retains the authority to deny the relief requested in an unopposed motion and may adopt, modify, or reject any stipulated order accompanying an unopposed motion.

E. Within 10 calendar days after service of a written motion by personal delivery, email, or facsimile, or within 13 calendar days after the motion is mailed, unless otherwise provided by the hearing officer in a scheduling order or other notice or order, the opposing party shall answer the motion or the hearing officer may

deem that the opposing party consented to the granting of the relief requested in the motion. When a party fails to timely file a response, the hearing officer is not compelled to grant the requested relief if the ruling would be contrary to the hearing officer's view of the facts or the law. The moving party shall have no right to reply, except as expressly permitted by the hearing officer. A motion seeking permission to file a reply shall not include a proposed reply.

F. A party attaching one or more exhibits to a pleading, motion, or other paper shall designate the exhibit in a manner to specifically associate it with the pleading, motion, or other paper which it is intended to accompany. An appropriate designation for an exhibit to a motion will include an abbreviation for the type of motion, and an identifying letter for TRD or a number for the taxpayer. For example only, an exhibit to a motion for summary judgment presented by a taxpayer may be designated as "Taxpayer MSJ #1". An exhibit to a response to the motion filed by TRD may be designated as "Dept. Resp. MSJ A".

[22.600.3.16 NMAC - N, 1/1/2018]

22.600.3.17 DISCOVERY: New Mexico is a liberal discovery state and to that end the parties are expected to cooperate in good faith to accomplish adequate discovery by the time the formal hearing is held without a specific order or intervention of the hearing officer. This discovery is to be achieved by informal consultation, stipulation, deposition, requests for admissions and production of documents and written interrogatories. If adequate discovery is not achieved within a reasonable time prior to the time a formal hearing is scheduled, any party may apply to the hearing officer for an order to require depositions, production of records or answers to interrogatories. The parties shall file only certificates of service regarding discovery requests and productions unless the hearing officer requires otherwise, such as when there is a motion to compel. Depositions may be taken orally or by written interrogatories and cross-interrogatories. Unless ordered otherwise by the hearing officer, responses to interrogatories, requests for production of documents and requests for admission shall be due thirty days after service of same on a party. Unless ordered otherwise by the hearing officer, any notice of deposition shall be served on all opposing parties at least 14 days prior to the date of the deposition. The parties have an obligation to cooperate in the scheduling of depositions to avoid unnecessary expense to the parties and inconvenience to witnesses.

[22.600.3.17 NMAC - N, 1/1/2018]

22.600.3.18 CONSEQUENCES OF FAILURE TO COMPLY WITH ORDERS:

A. If a party or an officer or agent of a party fails to comply with an order of the hearing officer, the hearing officer may, for the purpose of resolving issues and disposing of the proceeding without unnecessary delay despite such failure, take such action in regard thereto as is just, including but not limited to the following:

(1) infer that the admission, testimony, documents or other evidence sought by discovery would have been adverse to the party failing to comply;

(2) issue an order to show cause;

(3) rule that, for the purposes of the proceeding, the matter or matters concerning which the order was issued be taken as established adversely to the party failing to comply;

(4) rule that the noncomplying party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer or agent or upon the documents or other evidence discovery of which has been denied;

(5) rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents or other evidence would have shown;

(6) disregard the content of any document filed after the deadline for filing said document has passed;

(7) disregard the content of any document filed after the merits hearing has been conducted, unless the hearing officer has granted permission to file such document; or

(8) dismiss the protest or order that the protest be granted.

B. Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in the decision of the hearing officer. It shall be the duty of parties to seek and the hearing officer to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to remedy the failure to comply with the order or withheld testimony, documents or other evidence.

C. The failure to comply in good faith with the orders of the hearing officer may be taken into consideration regarding the reasonableness of administrative costs or the reasonableness of a party's position when there is a motion for costs and fees under Section 7-1-29.1 NMSA 1978.

D. In the event a third-party refuses to comply with a valid subpoena, the hearing officer may allow the party who requested the subpoena to make a proffer of evidence that the party believes would have been

obtained had the third-party complied with the subpoena. The opposing party shall have the opportunity to refute the proffer, including by making a proffer of its own as to what it believes would have been shown if the third-party complied with the subpoena. The hearing officer may give the proffers whatever weight she/he deems reasonable in light of all of the evidence presented and with due consideration of the statutory presumption of correctness.
[22.600.3.18 NMAC - N, 1/1/2018]

22.600.3.19 PREHEARING CONFERENCES, STATUS CONFERENCES, AND STATUS CHECKS:

A. The hearing officer may direct representatives for all parties to meet together or with the hearing officer present for a prehearing conference to consider any or all of the following:

(1) simplify, clarify, narrow or resolve the pending issues;

(2) stipulations and admissions of fact and of the contents and authenticity of documents;

(3) expedition in the discovery and presentation of evidence, including, but not limited to, restriction of the number of expert, economic or technical witnesses;

(4) matters of which administrative notice will be taken; and

(5) such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and the identity of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.

B. Prehearing conferences conducted by the hearing officer will be recorded.

C. The hearing officer may enter in the record an order that recites the results of the conference conducted by the hearing officer. Such order shall include the hearing officer's rulings upon matters considered at the conference, together with appropriate directions to the parties. The hearing officer's order shall control the subsequent course of the proceeding, unless modified to prevent manifest injustice.

D. The hearing officer may require the parties to submit a written report of any conference ordered to be conducted between the parties updating the status of the proceeding in light of the conference.

E. The hearing officer may conduct a status conference upon the request of either party or on the hearing officer’s own initiative, at which time the hearing officer may require the parties, attorneys, or authorized representatives, to provide information regarding the status of a protest in order that the administrative hearings office may arrange its docket to expedite the disposition of cases.

F. As part of basic docket management and to ensure efficient use of staff resources, the chief hearing officer, or a designee of the chief hearing officer other than the assigned hearing officer on the case, at any point in the proceeding may contact the parties and inquire about the status of any scheduled or pending case or cases.
[22.600.3.19 NMAC - N, 1/1/2018]

22.600.3.20 SUBPOENAS: Any request for issuance of subpoenas in matters before the administrative hearings office shall be guided by Rule 45 of the Rules of Civil Procedure for the district courts of New Mexico, except where provisions of that rule conflict with the limited powers of the administrative hearings office. Any subpoena issued shall be in the name of the chief hearing officer of the administrative hearings office. The party requesting the subpoena has the duty to prepare a proposed subpoena using a form approved by the administrative hearings office, submit the proposed subpoena to the administrative hearings office for approval and to the opposing party, and to timely and reasonably serve the subpoena on the person or entity subject to the subpoena. All returned subpoenas shall be filed with the administrative hearings office, copied to the opposing party, and shall be made part of the record of the proceeding. Unless good cause is shown for a shorter period, a subpoena shall provide at least 14 days notice before compelled attendance or 14 days to produce materials. Any action to seek contempt for failure to comply with a subpoena or to enforce a subpoena beyond the power of the administrative hearings office must be done in accordance with Subsection D of Section 7-1-4 NMSA 1978.
[22.600.3.20 NMAC - N, 1/1/2018]

22.600.3.21 REQUESTS FOR CONTINUANCES:

A. Either party may request that a scheduled hearing be continued until a different date and time by filing a written request for continuance. The request for continuance should include a description of the reason why the requesting party would like the matter rescheduled, the opposing party’s position on the request unless the opposing party does not respond after reasonable efforts were made to contact them, how much additional time the moving party seeks before the matter is rescheduled, and any dates where the parties are unavailable for rescheduling the matter.

B. The hearing officer will generally only consider requests for a continuance made in writing at least seven days before the scheduled hearing and supported by good cause, absent extraordinary, unforeseen circumstances which the requesting party could not have known earlier than seven days before the hearing. Within seven days of the scheduled hearing, the hearing officer may reject a continuance request even if the opposing party has stipulated or does not oppose the request. Unless and until the parties are affirmatively informed by order or other communication of an administrative hearings office employee that the continuance request has been granted, the scheduled hearing remains on the calendar and the parties must appear at the hearing. Failure to appear at the scheduled time of the hearing shall be deemed a non-appearance for the purposes of Section 7-1-16 NMSA 1978.

C. As part of the continuance request, the moving party must waive the 90-day hearing requirement. In the absence of such express waiver, as a condition of granting the request, the hearing officer may deem that the 90-day hearing requirement was met and attribute any delay in the conduct of the hearing to the moving party.

D. The assigned hearing officer and the chief hearing officer or designee may continue or reschedule a scheduled hearing, or reassign a scheduled hearing to another hearing officer, as necessary to manage the tax docket in an efficient manner and account for changes in office staffing.

[22.600.3.21 NMAC - N, 1/1/2018]

22.600.1.22 FAILURE TO APPEAR:

A. Failure to appear at the scheduled time of the noticed protest hearing shall be deemed a non-appearance for the purposes of Section 7-1-16 NMSA 1978.

B. If a taxpayer has appeared but a representative of TRD fails to appear at a noticed hearing, the hearing officer may issue an order to show cause as to why the protest shall not be granted, may allow the taxpayer to present their case and rule upon the protest, or take other appropriate actions within the hearing officer's power.

C. In considering the non-appearance and whether the person received appropriate notice, the hearing officer may consider the contents of the administrative file, information conveyed to or known by administrative hearings office staff, information related to mailing, including mail tracking, returned receipt information, and notes written on returned envelopes of the United States postal service or other mail tracking services, and arguments offered by the present party, all of which shall be addressed on the record of the hearing or in any subsequent order.

D. Oral rulings based on failure to appear are not final until reduced to writing. Such rulings may be changed in the written order as new information arises after the hearing related to whether the notice of hearing was properly sent to the correct address or otherwise properly served.

[22.600.3.22 NMAC - N, 1/1/2018]

22.600.3.23 HEARING OFFICER POWERS AND RESPONSIBILITIES:

A. Hearings in adjudicative proceedings shall be presided over by a hearing officer designated by the chief hearing officer of the administrative hearings office.

B. The hearing officer shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the proceedings and to maintain order. The hearing officer shall have the powers necessary to carry out these duties, including the following:

(1) to administer or have administered oaths and affirmations;

(2) to cause depositions to be taken;

(3) to require the production or inspection of documents and other items;

(4) to require the answering of interrogatories and requests for admissions;

(5) to rule upon offers of proof and receive evidence;

(6) to regulate the course of hearings and the conduct of the parties and their representatives therein;

(7) to issue a scheduling order, schedule a prehearing conference for simplification of the issues, or any other proper purpose;

(8) to schedule, continue and reschedule formal hearings;

(9) to consider and rule upon all procedural and other motions appropriate in proceeding;

(10) to require the filing of briefs on specific legal issues prior to or after the formal hearing;

(11) to cause a complete record of proceedings in formal hearings to be made;

(12) to make and issue decisions and orders; and

(13) to reprimand, or, with warning in extreme instances exclude from the hearing, any person for engaging in a continuing pattern of indecorous, obstinate, recalcitrant, obstreperous, unethical, unprofessional or improper conduct that interferes with the conduct of a fair and orderly hearing or development of a complete record.

C. In the performance of these functions, the hearing officer shall not be responsible to or subject to the direction of any officer, employee or agent of the taxation and revenue department or the department of finance and administration.

D. In the performance of these adjudicative functions, the hearing officer is prohibited from engaging in any prohibited ex parte communications about the substantive issues with any party on any matter, as addressed in regulation 22.600.2.16 NMAC. A prohibited ex parte communication occurs when the hearing officer discusses the substance of a case without the opposing party being present, except that it is not a prohibited ex parte communication for the hearing officer to go on the record with only one party when the other party has failed to appear at a scheduled hearing.

[22.600.3.23 NMAC - N, 1/1/2018]

22.600.3.24 EVIDENCE AT HEARING:

A. Every party shall have the right of notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing, including the right to discovery as provided in these rules.

B. The taxpayer shall have the burden of proof, except as otherwise provided by law. Because the taxpayer must overcome the presumption of correctness or otherwise establish entitlement to the claim or relief sought during the protest, the taxpayer will ordinarily present their case first, followed by TRD, except as otherwise provided by law or unless the hearing officer makes reasonable, good cause exceptions related to the availability of the witnesses or other scheduling concerns.

C. The New Mexico rules of evidence and New Mexico rules of civil procedure shall not apply in any matter before the administrative hearings office unless otherwise expressly and specifically prescribed by statute, regulation, or order of the hearing officer. Relevant and material evidence shall be admissible. Irrelevant, immaterial, unreliable, or unduly repetitious evidence may be excluded. Immaterial or irrelevant portions of an otherwise admissible document shall be segregated or redacted and excluded so far as is practicable. The hearing officer shall consider and give appropriate weight to all relevant and material evidence admitted in rendering a final decision on the merits of a matter.

D. Hearsay evidence is admissible during the protest proceeding.

E. An adverse party, or an officer, agent or employee thereof, and any witness who appears to be hostile, unwilling or evasive may be interrogated by leading questions and may also be contradicted and impeached by the party calling that person.

F. The parties may agree to, and the hearing officer may accept, the joint submission of stipulated facts relevant to the issue or issues. The hearing officer may order the parties to stipulate, subject to objections as to relevance or materiality, to uncontested facts and to exhibits. The hearing officer may also order the parties to stipulate to basic documents concerning the controversy, such as audit reports of TRD, assessments issued by TRD, returns and payments filed by taxpayer, correspondence between the parties, and to basic facts concerning the identity and business of a taxpayer, such as the taxpayer's business locations in New Mexico and elsewhere, the location of its business headquarters and, if applicable, the state of its incorporation or registration.

G. The hearing officer may take administrative notice of facts not subject to reasonable dispute that are generally known within the community, capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably disputed, or as provided by an applicable statute. Administrative notice may be taken at any stage in the proceeding whether or not requested by the parties. A party is entitled to respond as to the propriety of taking administrative notice which shall include the opportunity to refute a noticed fact.

H. Parties objecting to evidence shall timely and briefly state the grounds for the objection. Rulings on evidentiary objections may be addressed on the record at the time of the objection, or reserved for ruling in a subsequent written order.

I. Formal exception to an adverse ruling is not required.

J. When an objection to admission of an exhibit or to a question propounded to a witness is sustained, the proponent may make a specific offer of what the representative expects to prove by introduction of the exhibit or by the answer of the witness, or the hearing officer may, with discretion, receive and have reported the evidence in full. Excluded exhibits, adequately marked for identification, may be retained in the record so as to be available for consideration by any reviewing authority.

K. In general, documentary evidence should be no larger than 8.5 inches by 11 inches unless expressly allowed by the hearing officer. The hearing officer may allow documentary exhibits presented at hearing which exceeds 8.5 inches by 11 inches or which cannot be folded may be admitted, provided the proponent of such exhibit provide the administrative hearings office a copy of the exhibit reduced to 8.5 inches by 11 inches. After the

hearing at which the exhibit was admitted, the reduced copy shall be substituted for the larger exhibit and made part of the record of the hearing. The administrative hearings office may permit the proponent of a large exhibit to make arrangements to obtain a reduced copy, provided that a failure by the proponent to provide a reduced copy shall be construed as a withdrawal of the exhibit.

L. Objects introduced as exhibits shall be returned to the proponent at the conclusion of the hearing unless otherwise ordered by the hearing officer. In lieu of the object itself, the hearing officer may require the moving party to submit a photograph, video, or other appropriate substitute such as verbal description of the pertinent characteristics of the object for the record. If an object is retained for the record, it may be returned to the proponent no less than 45 days after a final decision and order is rendered on the merits of a protest provided that a party has not filed a notice of appeal.

[22.600.3.24 NMAC - N, 1/1/2018]

22.600.3.25 RECORD: Hearings shall be electronically recorded unless the hearing officer allows recording by any alternative means approved by the New Mexico supreme court for the recording of judicial proceedings. Any party may request that a hearing be recorded by such an alternative in writing at least seven days before the scheduled hearing. Unless otherwise ordered by the hearing officer, the party requesting recording by an alternate means will be responsible for the full cost thereof, including the provision of the original transcript to the hearing officer and copies to opposing parties. In the event of a videoconference hearing, only the audio portion of the recording shall be maintained as part of the record.

[22.600.3.25 NMAC - N, 1/1/2018]

22.600.3.26 PROPOSED FINDINGS, CONCLUSIONS AND BRIEFS: At the close of the reception of evidence, or within a reasonable time thereafter fixed by the hearing officer, the hearing officer may require or allow any party to file with the hearing officer proposed orders, proposed findings of fact, and proposed conclusions of law, together with reasons therefore and briefs in support thereof. The hearing officer may adopt the proposed findings in part, in whole, or may make his/her own findings. The period for preparing the final decision and order shall not commence until after the final pleadings, including any ordered briefings, findings of fact, or conclusions of law, are filed.

[22.600.3.26 NMAC - N, 1/1/2018]

22.600.3.27 DATE OF MAILING OR DELIVERY:

A. Use of the phrase “date of mailing or delivery” in Subsection 7-1-25A NMSA 1978 authorizes administrative hearings office to choose between mailing and hand-delivering the written decision and order of the hearing officer.

B. “Date of mailing” means the time that the hearing officer's decision and order enclosed in properly addressed envelope or wrapper was postmarked by the U.S. postal service. “Delivery” means time of hand delivery of the written decision and order to the party’s business residence.

[22.600.3.27 NMAC - N, 1/1/2018]

22.600.3.28 APPEALS:

A. Only issues raised before the hearing officer may be heard on appeal. A party may appeal from a decision only on the same theory as presented to the hearing officer.

B. Appeals of a final tax decision and order of the administrative hearings office are taken by filing a timely notice of appeal directly with the New Mexico court of appeals in accord with the New Mexico rules of appellate procedure. Writing or otherwise communicating to the administrative hearings office to express an intent to appeal a final decision is insufficient to perfect an appeal of the case.

C. Upon filing the required docketing statement with the New Mexico court of appeals, the appellant shall serve a copy of the docketing statement with the administrative hearings office. The administrative hearings office will then prepare and file the record proper with the New Mexico court of appeals in accord with the New Mexico rules of appellate procedure, providing a copy to the appellant and the other party.

D. Unless otherwise ordered by a controlling appellate court or unless an error or omission in the record proper requires further action, upon filing of the record proper, the administrative hearings office has no further role in the matter pending the outcome of the appeal. The administrative hearings office is not a party to the appeal and all requests for positions related to motions in the appeal should be addressed to the opposing party or where appropriate, to the relevant appellate court.

[22.600.3.28 NMAC - N, 1/1/2018]

HISTORY of 22.600.3 NMAC: [RESERVED]