

**Chapter 21: GENERAL HEARING PROCEDURES**

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**SUMMARY:** This chapter establishes hearing procedures which apply to appeal hearings, licensing hearings, race date assignment hearings, advisory rulings, petitions, and miscellaneous hearings conducted by the Commission.

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**Section 1. Definitions**

As used in this chapter, unless the context otherwise indicates, the following words shall have the following meanings:

1. **Appeal hearing.** "Appeal hearing" means an adjudicatory hearing held by the Commission pursuant to Title 5, chapter 9051, *et. seq.*, Maine Revised Statutes Annotated to consider whether a determination by racing judges or officials that a horseman violated any of the Commission's rules should be affirmed or reversed, and whether any fine or suspension imposed for the violation should be vacated, modified or increased.

Appeal hearings are de novo proceedings in which the racing judges or officials must prove the violation complained of by a preponderance of the evidence.

2. **Commission.** "Commission" means the Maine State Harness Racing Commission.
3. **Licensing hearing.** "Licensing hearing" means a hearing conducted by the Commission to determine whether or not a license previously issued by it should be renewed.
4. **Positive test hearing.** "Positive test hearing" means a hearing conducted to determine whether or not a violation of chapter 11 occurred and to order appropriate sanctions.
5. **Protest hearing.** "Protest hearing" means a hearing conducted by the Commission to determine if the disallowance of a protest by racing judges should be affirmed or reversed.

**Section 2. Scope**

Except as otherwise indicated the hearing procedures contained in this chapter shall apply to appeal hearings, and licensing hearings held by the Commission, and shall also apply to any miscellaneous hearings held by the Commission pursuant to Chapter 19, Section 3.1 and to positive test and other disciplinary hearings held by the Commission.

**Section 3. Notice of opportunity for hearing (licensing hearings only)**

Before refusing to renew a license, the Commission shall send the licensee by regular mail written notice of his or her opportunity for a hearing. The notice of opportunity for hearing shall inform the licensee of his or her right to prepare and submit evidence and argument as to why his or her license should be renewed without requesting a hearing, but shall make clear that if no hearing is requested the agency may in its discretion decide the matter without hearing. The notice shall also contain the information as applicable, set forth in Section 5. In any license renewal proceeding deemed by the Commission to involve the determination of issues of substantial public interest, notice of opportunity for hearing shall be given to the public in order to afford interested persons the opportunity to prepare and submit evidence and argument and to request a hearing if desired. Notice to the public, if given, shall be given in the manner specified in Section 6.

**Section 4. Notice of Hearing**

Upon scheduling a hearing subject to the requirements of this chapter, the Commission shall send by regular mail written notice of the hearing to the licensee and, in licensing hearings, to any person who has requested that a hearing be held. The notice of hearing shall contain the information, as applicable, set forth in Section 5 in any proceeding deemed by the Commission to involve the determination of issues of substantial public interest, notice of hearing shall also be given to the public in order to afford interested persons an opportunity to prepare and submit evidence and argument and to petition to intervene pursuant to Section 7. Notice to the public, if given, shall be given in the manner described in Section 6.

**Section 5. Contents of notice of opportunity for hearing and notice of hearing**

To the extent applicable, notices of opportunity for hearing and notices of hearing shall contain the following information:

1. A statement of the legal authority and jurisdiction under which the proceeding is being conducted;
2. A reference to the particular substantive statutory and rule provisions involved;

3. A short and plain statement of the nature and purpose of the proceeding and of the matters asserted;
4. A statement of the time and place of the hearing, or the time within which a hearing may be requested;
5. A statement of the manner and time within which evidence and argument may be submitted to the agency for consideration, whether or not a hearing has been set; and
6. When a hearing has been set, a statement of the manner and time within which applications for intervention under Section 7 may be filed.

## **Section 6. Notice to the public**

Notice to the public, when given by the Commission, shall be given as follows:

1. By publication, at least twice in a newspaper of general circulation in the area of the state affected;
2. By publication in any trade, industry, professional or interested group publication which the Commission deems effective in reaching persons who would be entitled to intervene under Section 7; and
3. In any manner deemed appropriate by the commission.

## **Section 7. Intervention and public participation**

1. **Intervention as of right.** On timely application, the Commission shall allow any person showing that he or she is a member of a class which is or may be substantially and directly affected by the proceeding, or any other agency of federal, state or local government, to intervene as a party in the proceeding.
2. **Permissive intervention.** On timely application, the Commission may in its discretion permit any other person to intervene and participate as a full or limited party to the proceeding. This subsection shall not be construed to limit public participation in the proceeding in any other capacity.
3. **Participation limited or denied.** When participation of any person is limited or denied, the Commission shall include in the record an entry to that effect and the reasons therefor.
4. **Consolidation of presentations.** Where appropriate, the agency may require consolidations of presentations of evidence and argument by members of a class entitled to intervene under this Section.

**Section 8. Disposition without full hearing**

The Commission may make informal disposition of any proceeding by stipulation, agreed settlement or consent order. The Commission may also limit the issues to be heard in the proceeding, or may vary any procedure prescribed in this chapter or in the Maine Administrative Procedure Act, 5 Maine Revised Statutes. Sec. 8001 *et seq.*, if the parties and the Commission agree to such limitation or variation, or if no prejudice to any party will result.

**Section 9. *Ex parte* Communications; separation of functions**

1. **Communication prohibited.** In any proceeding subject to the requirements of this chapter, no Commission member shall communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.
2. **Communication permitted.** This section shall not prohibit Commission members from speaking with each other, or from having the advice of agency staff, counsel or consultants retained by the Commission who have not participated and will not participate in the proceeding in any advocate capacity.

**Section 10. Presiding officer for hearings**

The chair of the Commission shall serve as presiding officer, but, if the chair is not present those Commission members in attendance shall choose a presiding officer from among them. The presiding officer shall administer oaths and affirmations, conduct the hearing, set the time and place for continued hearings, determine the order of testimony, fix the time for filing of such additional evidence, briefs and other written submissions as he may allow or require, and take other action of a similar nature relating to the proceeding as may be necessary when the full Commission is unable to meet

Whenever a presiding officer is disqualified or it becomes impracticable for him or her to continue in that capacity, another presiding officer may be chosen to continue the hearing, provided that, if it is shown that the substitution will cause substantial prejudice to any party, the substitute presiding officer shall commence the hearing anew.

**Section 11. Hearings conducted before full Commission or Commission chair**

Hearings held subject to the requirements of this chapter shall be conducted before the full Commission or, as provided in this section, by the chair of the Commission.

The Chair of the Commission may conduct hearings as a sole member hearing board on the following matters:

1. Violations of the rules that could result in a level 3, 4, or 5 penalty and unclassified penalties involving failure to pay fines or purse distributions.
2. Violations of the rules involving first and second positive test violations involving a Class 3, 4, or 5 banned substance.
3. Violations of the rules by a racing association; and
4. Positive tests by a licensee.

All other hearings, including Licensing Hearings and Date Assignment Hearings must be conducted by a quorum of the full Commission.

The Commission, with reasonable notice to the chair, may require the full Commission to conduct a hearing normally held by the chair. The chair, with reasonable notice to the Commission, may schedule a full Commission hearing on any issue normally heard solely by the chair.

The Chair of the Commission may suspend a license in conformity with 5 M.R.S.A. §10004(5)(B), when in the course of any racing event directly regulated by the Commission, the Chair determines that a licensee has engaged in a use or administration of drugs, which is prohibited by the rules of the Commission.

## **Section 12. Adjournments**

Motions for adjournments must be made in writing and must state with particularity the reason for the request. These motions must be filed with the Chair of the Commission and simultaneously served upon any other parties to the proceeding no later than five working days before the scheduled hearing date. Except for good cause shown, motions filed past this deadline will not be considered. The Chair, following such investigation as he or she considers appropriate, shall consult with the Commission members and advise all parties of the disposition of the motion.

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**Section 13. Opportunity to be heard**

The opportunity for hearing shall be afforded without undue delay. Unless limited by stipulation under Section 8, or by Commission order under Section 7(D), or unless otherwise limited by the Commission to prevent repetition or unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to orally cross examine any person present and testifying.

**Section 14. Evidence**

1. **Rules of privilege.** Unless otherwise provided by statute, the Commission need not observe the rules of evidence observed by court but shall observe the rules of privilege recognized by law.
2. **Evidence.** Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The Commission may exclude irrelevant or unduly repetitious evidence.
3. **Witnesses.** All witnesses shall be sworn.
4. **Written evidence, exception.** No sworn written evidence shall be admitted unless the author is available for cross examination or subject to subpoena, except for good cause shown.
5. **Order of testimony.** In appeal hearings, protest hearings, and miscellaneous hearings conducted pursuant to chapter 19, section 21, parties shall present their witnesses and other evidence in the following order racing judges, aggrieved horsemen, intervenors. In licensing hearings, parties shall present their witnesses and their evidence in the following order: Commission staff, licensee, intervenors.
6. **Videotape.** In any hearing in which a videotape of the race at issue was made and is relevant to the dispute, the racing judges shall be responsible for bringing the videotape to the hearing. If the Commission does not have access to compatible playback equipment the racing judges shall also be responsible for furnishing same. The videotape may be run at any time during the hearing at the request of any party or upon order of the Commission. Explanatory testimony may be given while the videotape is being run.
7. Any party may move to introduce into evidence all or any part of the audio tape of the judges' hearing, if one was held, in the matter under review. The racing judges shall be responsible for bringing the audio tape to the hearing if requested to do so by a party reasonably in advance of the hearing. If the Commission does not have access to compatible playback equipment the racing judges shall also be responsible for furnishing same.

8. The Commission may admit evidence gathered and offered by its staff.

## **Section 15. Official notice**

1. **Official notice.** The Commission may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, rules and non confidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.
2. **Facts.** Facts officially noticed shall be included and indicated as such in the record.
3. **Evaluation of evidence.** Notwithstanding the foregoing, the Commission may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

## **Section 16. Record**

1. **Generally.** In proceedings subject to this chapter, the Commission shall make a record consisting of
  - A. All applications, pleadings, motions, preliminary and interlocutory rulings and orders;
  - B. Evidence received or considered;
  - C. A statement of facts officially noticed;
  - D. Offers of proof objections and rulings thereon; and
  - E. The decision of the agency.
2. **Hearings recorded.** The Commission shall record all hearings in a form susceptible to transcription. Portions of the record as required and specified in subsection A may be included in the recording. The Commission shall transcribe the recording when necessary for the prosecution of an appeal.
3. **Record, copies.** The Commission shall make a copy of the record, including recordings made pursuant to subsection 2, available at its principal place of operation for inspection by any person during normal business hours-, and shall make copies of the record, copies of recordings or transcriptions of recordings

available to any person at actual cost. Notwithstanding the provisions of this subsection, the Commission shall withhold, obliterate or otherwise prevent the dissemination of any portions of the record which are made confidential by state or federal statute, but shall do so in the least restrictive manner feasible.

4. **Decision on the record.** All material, including records, reports and documents in the possession of the Commission, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record and no other factual information or evidence shall be considered in rendering a decision.
5. **Documentary evidence.** Documentary evidence may be incorporated in the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence.

**Section 17.** *[Reserved]*

**Section 18. Subpoenas**

1. **Generally.** The Commission may issue subpoenas at the request of any party to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the proceeding, provided that the issuance of the subpoena has been approved by the Attorney General or a Deputy Attorney General as set forth in 5 Maine Revised Statutes. Section 9060. Subpoenas may be signed on behalf of the Commission by any individual member or by the Executive Director.
2. The Commission may prescribe the form of subpoena, but it shall adhere, insofar as practicable, to the form used in civil cases before the courts. Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law. Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts. Such fees, as well as the costs of serving the subpoena, shall be paid by the party requesting the subpoena.
3. Any subpoena issued shall show on its face the name and address of the party at whose request it was issued.
4. Any witness subpoenaed may petition the Commission to vacate or modify a subpoena issued in its name. The Commission shall give prompt notice to the party who requested issuance of the subpoena. After such investigation as the Commission considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any manner in question, or that a subpoena for the attendance of a witness or the production of evidence is



unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested.

5. Failure to comply with a subpoena lawfully issued in the name of the Commission and not revoked or modified by the Commission as provided in this section shall be punishable as for contempt of court.

#### **Section 19. Conclusion of hearing; reopening of record; further proceedings**

Upon the conclusion of the hearing, no other evidence or testimony shall be permitted unless the record is held open by the Commission for the receipt of additional material specifically designated. The Commission may reopen the record for further proceedings at any time prior to decision upon provision of appropriate notice to parties and other interested persons. In a hearing involving a proposed modification or amendment of a license which was the subject of an earlier hearing, the Commission shall give notice thereof to all parties to the earlier proceeding and to the public as well if the determination of issues of substantial public interest is involved.

#### **Section 20. Decisions**

Every decision made at the conclusion of a hearing subject to this chapter shall be in writing or stated in the record and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's right to review of the decision by the courts, and of the action required and the time within which such action must be taken in order to exercise the right of review, shall be given to each party with the decision.

The Commission shall maintain a record of the vote of each Commission member with respect to the decision.

#### **Section 21. Service of written materials**

Copies of all pleadings, briefs, motions or documentary evidence filed by a party with the Commission shall also be served, by first-class mail or by hand, upon all other parties to the proceeding. For violation of this rule the presiding officer may refuse to accept the material filed in the record.

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**Section 22. Requests for reconsideration**

A person aggrieved by a decision of the Commission may petition the Commission once to reconsider that decision. A petition for reconsideration must be made in writing within 10 days after the Commission's decision and may be made for:

1. Correction of any part of the decision that the petitioner believes to be in error and not intended-by the Commission, or
2. An opportunity to present new or additional evidence that was not readily available at any prior time in the proceedings,

The petition must set forth in detail the findings or conclusions to which the petitioner objects, the basis of the objections, the nature of any new or additional evidence to be offered and the nature of the relief requested. Within 30 days of receiving a complete reconsideration petition, the Commission shall decide whether to reconsider its decision. The Commission may hold a hearing if it desires to reconsider its decision.

In considering the petition, the Commission may grant the petition in full or in part, or dismiss the petition. The Commission shall provide reasonable notice to the petitioner and other parties in the proceedings.

The Commission may allow the record to be supplemented when it finds that the evidence offered is relevant and material and that an interested party seeking to supplement the record has shown due diligence in bringing the evidence to the process at the earliest possible time and the evidence could not, by the exercise of diligence, have been discovered in time to be presented earlier in the process.

**Section 23. Advisory Rulings**

1. **Authority and Scope.** The Maine State Harness Racing Commission may issue advisory rulings pursuant to Maine Revised Statutes, Title 5, Sec. 9001 concerning the applicability of any statute or rule it administers to an existing factual situation. Advisory rulings will be issued at the Commission's discretion and only upon request. Each request will be individually reviewed to determine whether an advisory ruling is appropriate. The Commission may decline to issue an advisory ruling if the question is hypothetical, if there is insufficient experience upon which to base a ruling, or for any other reason the Commission deems proper.
2. **Submission.** Requests for advisory rulings shall be in writing and shall set forth in detail all facts pertinent to the question. Requests may be submitted without the names of the actual parties so as to preserve confidentiality. The Commission may require additional information as necessary to complete the factual background for its ruling.

3. **Form of Rulings.** All advisory rulings shall be in writing and shall be numbered in an appropriate serial manner. They shall state all facts and assumptions on which they are based in sufficient detail so as to allow understanding without reference to other documents.
4. **Issuance, Recommendation.** Each completed advisory ruling shall be mailed to the requesting party and a copy shall be kept by the Commission in a file or binder established for this purpose. Advisory opinions shall be issued within 60 days of the Commission's acceptance of a request. All completed advisory rulings are public documents and shall be available for public inspection during the Department's normal working hours. In addition, the Commission may otherwise publish or circulate any advisory ruling as it deems appropriate.

## **Section 24. Petition Forms**

1. **Multiple Petition Forms.** Multiple petition forms may be circulated as part of any one petition. The petitioner shall complete page one of the petition form and attach it to each petition copy before circulating for signatures.
2. **Certification of Petitions.** The petition must be verified and certified according to procedures defined by Title 21, Section 494, sub-section 7, Maine Revised Statutes prior to presentation to the Commission.
3. **Submission of Petition and Text of Proposed Rule.** Petitions and the text of proposed rules shall be submitted to: Maine State Harness Racing Commission, State House Station #28, Augusta, Maine 04333. All petition forms which are part of any one petition shall be submitted simultaneously.
4. **Action on Petition**
  - A. If the petition is submitted containing less than 150 signatures, and is in accordance with subsections 1, 2, and 3, the Commission may initiate appropriate rule making proceedings but is not required to do so. If the Commission does initiate appropriate rule making proceedings, it shall send a copy of the notice of rule making to the person designated as the petitioners' representative. If the Commission declines to initiate appropriate rule making proceedings, it shall notify the designee, in writing, of its denial and state the reasons therefor. The Commission shall initiate appropriate rule making proceedings or send its written notice of denial, as the case may be, within 60 days after receipt of the petition.
  - B. If a petition is submitted containing 150 or more signatures in accordance with subsections 1, 2, and 3, the Commission shall initiate appropriate rule making proceedings within 60 days after receipt of the petition. The

Commission shall send a copy of the notice of rule making hearing to the designee of the petitioner or petitioners and any other person who has requested such notice.

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