

Michelle Lujan Grisham
Governor

Office of the Secretary

Stephanie Schardin Clarke
Cabinet Secretary

February 22, 2022

Enclosed is the following proposal:

The New Mexico Taxation and Revenue Department hereby gives notice as required under Section 14-4-5.2 NMSA 1978 and 1.24.25.11 NMAC that it proposes to create rules regarding requiring deductions to be separately reported as authorized by Section 9-11-6.2 NMSA 1978:

Summary of Proposed Changes:

The New Mexico Taxation and Revenue Department proposes to change the following rule(s):

Taxation and Revenue Department Act, Section 9-11-6.4 NMSA 1978

(Repeal and replace) 3.1.4.18 *Electronic Filing*
(Repeal) 3.1.4.19 *Electronic Filing of Information Returns and Reports*

Tax Administration Act, Section 7-1-24 NMSA 1978

(Repeal) 3.1.8.8 *General Rules on Formal Hearings*
(Repeal) 3.1.8.9 *Hearing Officer*
(Repeal) 3.1.8.10 *Evidence*
(Repeal) 3.1.8.11 *Record*
(Repeal) 3.1.8.12 *Proposed Findings, Conclusions and Briefs*
(Repeal) 3.1.8.13 *Discovery*
(Repeal) 3.1.8.14 *Consequences of Failure to Comply with Orders*
(Repeal) 3.1.8.15 *Prehearing Conferences*
(Repeal) 3.1.8.16 *Motions*

Motor Vehicle Code, Section 66-4-3 NMSA 1978

(Repeal) 18.19.4.32 *Hearings – When Hearing Required Notification*
(Repeal) 18.19.4.33 *Hearings – Informal Conferences*
(Repeal) 18.19.4.34 *Hearings - Dispositions*
(Repeal) 18.19.4.35 *Hearings – Consequences of Failure to Comply with Orders*
(Repeal) 18.19.4.36 *Hearings - Motions*
(Repeal) 18.19.4.37 *Hearings – Prehearing Conferences*
(Repeal) 18.19.4.38 *Hearings – General Rules on Hearings*
(Repeal) 18.19.4.39 *Hearings – Hearing Officer*
(Repeal) 18.19.4.40 *Hearings - Evidence*
(Repeal) 18.19.4.41 *Hearings - Record*
(Repeal) 18.19.4.42 *Hearings – Proposed Findings, Conclusions, and Briefs*

Motor Vehicle Code, Section 66-8-112 NMSA 1978

(Repeal) 18.19.9.8 *Implied Consent Hearing – Request for Hearing – Time and Place – Telephonic Hearings – Continuance*
(Repeal) 18.19.9.9 *Implied Consent Hearing – Subpoenas for Witnesses and Documents – Issuance - Costs*

(Repeal) 18.19.9.10	<i>Implied Consent Hearing -Hearing Officer</i>
(Repeal) 18.19.9.11	<i>Implied Consent Hearing -Powers and Duties of Hearing Officer</i>
(Repeal) 18.19.9.12	<i>Implied Consent Hearing – Parties to the Hearing _ Parties’</i>
<i>Rights</i>	
(Repeal) 18.19.9.13	<i>Implied Consent Hearing – Rules of Evidence</i>
(Repeal) 18.19.9.14	<i>Implied Consent Hearing -Failure to Appear</i>
(Repeal) 18.19.9.15	<i>Implied Consent Hearing – Issues to be Considered at the</i>
<i>Hearings</i>	
(Repeal) 18.19.9.16	<i>Implied Consent Hearing – Hearings Open to the Public</i>
(Repeal) 18.19.9.17	<i>Implied Consent Hearing – Decision and Order</i>
(Repeal) 18.19.9.18	<i>Implied Consent Hearing – Record of the Hearing</i>
(Repeal) 18.19.9.19	<i>Implied Consent Hearing – Time Frames</i>

Technical Information: No technical information was consulted in drafting these proposed rule changes.

Purpose of Proposed Rule: Regulation 3.1.4.18 NMAC is being updated to reflect the changes passed during the 2021 legislative session and to update the regulations based on the Department’s current return processing. Regulation 3.1.4.19 NMAC is being repealed to align with the changes being made to 3.1.4.18 NMAC. The regulations in regard to hearings are being repealed as they are outdated and have since been placed into regulation by the Administrative Hearings Office. Current regulations on hearings can be located under regulations under Title 22 Chapter 600 Administrative Hearings Office.

Notice of Public Rule Hearing: A public hearing will be held on the proposed rule changes on March 24, 2022 at 10 AM through the internet, email, and telephonic means in response to concerns surrounding COVID-19 and in accordance with Executive Order 2020-004, Declaration of a Public Health Emergency, and the March 12, 2020 Public Health Emergency Order to Limit Mass Gatherings Due to COVID-19.

The Public Hearing will be accessible via Zoom
<https://us02web.zoom.us/j/87373616009?pwd=Y1hGM0Q0RFJZRzFoR1NXZ09qbGEvdz09>
 or by telephone by dialing 1 346 248 7799 Meeting ID: 873 7361 6009 Passcode: 77095
 . Any oral comments made during this hearing will be recorded and any electronic written comments can be submitted during the hearing at policy.office@state.nm.us.

The proposals were placed on file in the Office of the Secretary on February 7, 2022. Pursuant to Regulation 3.1.2.9 NMAC under Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final of the proposals, if filed, will be filed as required by law on or about April 8, 2022.

Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Alicia Romero at Alicia.Romero@state.nm.us. The Taxation and Revenue Department will make every effort to accommodate all reasonable requests but cannot guarantee accommodation of a request that is not received at least ten calendar days prior to the scheduled hearing.

Copies of the proposed rules may be found at end of this notice and at www.tax.newmexico.gov/proposed-regulations-hearing-notice.aspx or are available upon request by contacting the Tax Policy Office at policy.office@state.nm.us.

Notice of Acceptance of Written Public Comment: Written comments on the proposals can submitted by email to policy.office@state.nm.us or by mail to the Taxation and Revenue Department, Tax

Information and Policy Office, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before March 24, 2022 by 5 PM. All written comments received by the agency will be posted on www.tax.newmexico.gov no more than 3 business days following receipt to allow for public review.

Stephanie Schardin Clarke
Cabinet Secretary

3.1.4.18 ELECTRONIC FILING:

- A.** This regulation is adopted pursuant to the secretary’s authority in Section 9-11-6.4 NMSA 1978.
 - B.** The secretary or secretary delegate will publish on the department’s public website a full list of all tax programs that have an electronic filing or payment mandate. This website will also include information on how to obtain an electronic filing or payment exception or waiver.
 - C.** Once a taxpayer is required to file returns or make payments electronically pursuant to this regulation, the taxpayer may not file future returns or make future payments by mail or any method other than electronically unless they receive an exception or waiver. An exception or a waiver may be granted if the taxpayer has shown a good faith attempt to comply with the electronic filing and payment requirements but is unable to do so due to a reason listed in Subsections D or E below. If a taxpayer is granted an exception or, the taxpayer must file a paper return and make a payment by the due date unless an extension pursuant to 3.1.4.12 NMAC has been granted. If a return is not filed and a payment is not made timely, interest will be due, and penalty may be due.
 - D.** A taxpayer may request in writing an **exception** to the requirement of electronic filing or making electronic payments for a year at a time. The request must be on the form prescribed by the department and must be received by the department at least 30 days before the taxpayer’s electronic return or payment is due. An exception may be granted for the following reasons:

 - (1)** if the taxpayer shows a hardship including but not limited to no reasonable access to internet in the taxpayer’s community;
 - (2)** if the taxpayer does not have reasonable access to a computer or technology required to electronically file;
 - (3)** if the taxpayer does not have the knowledge or expertise to file a return electronically; or
 - (4)** if the taxpayer is unable to utilize technology or the internet for religious reasons.
 - E.** A taxpayer may request in writing a **waiver** to the requirement of electronic filing for a single tax return or for a single payment. The request for a waiver must be on a form prescribed by the department and received by the department on or before the date that the tax return is due. A waiver may be granted for the following reasons:

 - (1)** if the taxpayer is temporarily disabled because of injury or prolonged illness and the taxpayer can show that the taxpayer is unable to procure the services of a person to complete and file the taxpayer’s return electronically or make the necessary payment electronically.
 - (2)** if the conduct of the taxpayer’s business has been substantially impaired due to the disability of a principal officer of the taxpayer, physical damage to the taxpayer’s business or other similar impairments to the conduct of the taxpayer’s business causing the taxpayer an inability to electronically file or pay;
 - (3)** if the taxpayer’s accountant, agent, or employee who routinely electronically files for taxpayer has suddenly died, has become disabled, or sick and is unable to perform services for the taxpayer and the taxpayer can show that the taxpayer is unable either to electronically file the return, electronically pay the tax due or to procure the services of a person to electronically file the return or make the electronic payment before the due date; or
 - (4)** if the taxpayer’s accountant, agent, or employee who routinely electronically files for taxpayer is no longer employed with the taxpayer and the taxpayer has been unable to gain access to their method of electronically filing and making payment of tax due in time to file electronically before the due date.
- [3.1.4.18 NMAC - Rp, 3.1.4.18 NMAC, 7/7/2021, Rp: xx/xx/xxxx]

3.1.4.19 [ELECTRONIC FILING OF INFORMATION RETURNS AND REPORTS:

- A.** [Annual income and withholding information returns, federal Form 1099-MISC, *pro forma* 1099-MISC or successor forms must be filed with the department using a department approved electronic medium if a pass through entity has more than 50 New Mexico payees in a tax year, unless the pass through entity obtains an exception pursuant to Subsection C of 3.1.4.19 NMAC.
- B.** The annual income and withholding detail report of pass through entity allocable net income must be filed using a department approved electronic medium if the pass through entity has more than fifty New Mexico payees in a tax year, unless the pass through entity obtains an exception pursuant to Subsection C of 3.1.4.19 NMAC.
- C.** A taxpayer may request an exception to the requirement of electronic filing. The request must be in writing, addressed to the secretary of the taxation and revenue department and must be received by the department at least 30 days before the taxpayer’s electronic information return or report is due. Exceptions will be granted in

writing and only upon a showing of hardship including that there is no reasonable access to the internet in taxpayer's community. The taxpayer must also show a good faith effort to comply with the electronic filing requirements before an exception will be considered. The request for an exception must include the information return or report to which the exception if granted will apply; a clear statement of the reasons for the exception; and the signature of the taxpayer.

~~_____ D. _____ If a pass through entity is required by regulation or statute to file information returns or reports electronically, the information return or report shall not be considered filed until filed electronically if filed by any means other than as specified in that regulation or statute.] **RESERVED**
[3.1.4.19 NMAC - Rp, 3.1.4.19 NMAC, 7/7/2021; Repealed, xx/xx/xxxx]~~

3.1.8.8 [GENERAL RULES ON FORMAL HEARINGS:

~~_____ A. _____ Formal hearings are held in Santa Fe. Hearings are not open to the public except upon request of the taxpayer. Taxpayers may appear at a hearing for themselves or be represented by a bona fide employee or an attorney licensed to practice in New Mexico, certified public accountant or registered public accountant.~~

~~_____ B. _____ Every party shall have the right of due 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.~~

~~_____ C. _____ 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.~~

~~_____ D. _____ 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 the department, assessments issued by the department, returns and payments filed by the party taxpayers and 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.] **RESERVED**
[7/19/1967, 11/5/1985, 8/15/1990, 10/31/1996; 3.1.8.8 NMAC - Rn, 3 NMAC 1.8.8, 1/15/2001, A, 8/30/2001; A, 4/30/07, Repealed, xx/xx/xxxx]~~

3.1.8.9 [HEARING OFFICER:

~~_____ A. _____ Hearings in adjudicative proceedings shall be presided over by a hearing officer designated by the secretary who will be referred to herein as the hearing officer.~~

~~_____ 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 and/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 the 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; and~~

~~_____ (12) _____ to make and issue decisions and orders.~~

~~_____ 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 department.~~

~~D.~~ In the performance of these adjudicative functions, the hearing officer is prohibited from ex parte discussions with either party on any protested matter.

~~E.~~ Disqualification of a hearing officer:

~~(1)~~ When a hearing officer has substantial doubt as to whether the hearing officer has a conflicting interest, the hearing officer shall disqualify himself or herself and withdraw from the hearing by notice on the record.

~~(2)~~ Whenever any party believes the hearing officer for any reason should be disqualified in a particular proceeding, such party may file with the secretary a motion to disqualify and remove the hearing officer, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. A copy of the motion shall be served on the opposing party and on the hearing officer whose removal is sought. The hearing officer shall have 25 days from such service within which to accede or to reply to the allegations. If the hearing officer does not disqualify himself or herself within that time, the secretary shall promptly review the validity of the grounds alleged and determine whether or not the hearing officer shall be disqualified. The secretary's decision shall be final.

~~(3)~~ If the hearing officer is disqualified, the secretary shall designate another person to act as hearing officer.] **RESERVED**

[11/5/1985, 1/4/1988, 5/24/1990, 8/15/1990, 10/31/1996; 3.1.8.9 NMAC - Rn, 3 NMAC 1.8.9, 1/15/2001; A, 8/30/2001, Repealed, xx/xx/xxxx]

3.1.8.10 **[EVIDENCE:**

~~A.~~ The taxpayer shall have the burden of proof, except as otherwise provided by law.

~~B.~~ Relevant and material evidence shall be admitted. Irrelevant, immaterial, unreliable or unduly repetitious evidence may be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as is practicable. The hearing officer shall consider all evidence admitted.

~~C.~~ The hearing officer shall take administrative notice of facts to the extent provided in the New Mexico Rules of Civil Procedure for District Courts. When any decision of the hearing officer rests, in whole or in part, upon the taking of administrative notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

~~D.~~ Parties objecting to evidence shall timely and briefly state the grounds relied upon. Rulings of the hearing officer on all objections shall appear in the record.

~~E.~~ Formal exception to an adverse ruling is not required.

~~F.~~ When an objection to a question propounded to a witness is sustained, the examining representative may make a specific offer of what the representative expects to prove 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, shall be retained in the record so as to be available for consideration by any reviewing authority.] **RESERVED**

[7/19/1967, 11/5/1985, 8/15/1990, 10/31/1996; 3.1.8.10 NMAC - Rn, 3 NMAC 1.8.10, 1/15/2001; A, 8/30/2001, Repealed, xx/xx/xxxx]

3.1.8.11 **[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 means. Unless otherwise ordered by the hearing officer, the party requesting recording by an alternative 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.] **RESERVED**

[11/5/1985, 5/24/1990, 8/15/1990, 10/31/1996, 1/15/98; 3.1.8.11 NMAC - Rn, 3 NMAC 1.8.11, 1/15/2001; A, 8/30/2001, Repealed, xx/xx/xxxx]

3.1.8.12 **[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 any party may 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.] **RESERVED**

[11/5/1985, 8/15/1990, 10/31/1996; 3.1.8.12 NMAC - Rn, 3 NMAC 1.8.12, 1/15/2001, Repealed, xx/xx/xxxx]

3.1.8.13 **[DISCOVERY:** The parties are expected to accomplish adequate discovery by the time a formal hearing is held. 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. Depositions may be taken orally or upon written interrogatories and cross interrogatories. Unless order 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 five working 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.] **RESERVED**

[11/5/1985, 1/4/1988, 5/24/1990, 8/15/1990, 10/31/1996, 1/15/98; 3.1.8.13 NMAC - Rn, 3 NMAC 1.8.13, 1/15/2001, Repealed, xx/xx/xxxx]

3.1.8.14 [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 for the taking of a deposition or otherwise relating to discovery, 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) 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;
- (3) 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;
- (4) 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; or
- (5) 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 compensate for the withheld testimony, documents or other evidence.

C. Any party who previously requested the secretary to issue a subpoena may request the secretary to seek the assistance of the court in the enforcement of any subpoena issued to any person who fails to provide the information or documents requested in the subpoena under the provisions of Subsection 7-1-4D-NMSA-1978.]

RESERVED

[11/5/1985, 8/15/1990, 10/31/1996; 3.1.8.14 NMAC - Rn & A, 3 NMAC 1.8.14, 1/15/2001; A, 8/30/2001, Repealed, xx/xx/xxxx]

3.1.8.15 [PREHEARING CONFERENCES:

A. The hearing officer may, and upon motion of any party shall, direct representatives for all parties to meet with the hearing officer for a prehearing conference to consider any or all of the following:

- (1) simplification and clarification of the 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 on 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 may be recorded in the discretion of the hearing officer.

C. The hearing officer may enter in the record an order which recites the results of the conference. 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.] **RESERVED**

[7/19/1967, 11/5/1985, 8/15/1990, 10/31/1996; 3.1.8.15 NMAC - Rn, 3 NMAC 1.8.15, 1/15/2001; A, 8/30/2001, Repealed, xx/xx/xxxx]

3.1.8.16 [MOTIONS:

~~A. After a formal hearing is scheduled on a protest, all motions shall be addressed to the hearing officer with copies to the opposing parties and shall be ruled upon by the hearing officer.~~

~~B. All written motions shall state the particular order, ruling or action desired and the grounds therefor.~~

~~C. Within ten calendar days after personal service or service by facsimile transmission of any written motion, or within thirteen calendar days after the motion is mailed or within such longer or shorter time as may be designated by the hearing officer, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the hearing officer.] **RESERVED**~~

[11/5/1985, 8/15/1990, 10/31/1996; 3.1.8.16 NMAC - Rn, 3 NMAC 1.8.16, 1/15/2001; A, 8/30/2001, Repealed, xx/xx/xxxx]

18.19.4.32 [HEARINGS WHEN HEARING REQUIRED NOTIFICATION:

~~A. Whenever the department has reason to believe any licensee has violated any provision of the Motor Vehicle Code or the regulations promulgated thereunder, the department shall schedule a hearing to determine whether or not the licensee's license should be canceled, suspended, revoked or continued.~~

~~B. The licensee shall be notified of the hearing. Notification shall inform the licensee of the suspected violations of particular provisions of the Motor Vehicle Code and shall briefly advise the licensee of the procedures employed in hearings and of remedies subsequent to the hearing if the license is refused, canceled, suspended or revoked. At the end of the hearing or within ten (10) days thereafter, the department shall enter a written decision and order.] **RESERVED**~~

[7/19/1994, 9/14/1996, 11/30/1999; 18.19.4.32 NMAC - Rn, 18 NMAC 19.4.10.4, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.4.33 [HEARINGS INFORMAL CONFERENCES:

~~A. The secretary, in appropriate cases, may provide for an informal conference before setting a hearing. An informal conference will be scheduled at a time and place agreed to by both parties. The secretary may attend or designate a delegate to attend. Both parties may bring representatives of their own choosing to the conference, and both parties may bring any records or documents that are pertinent to the issues to be discussed. An informal conference will be vacated if the parties resolve the issue prior to the scheduled date.~~

~~B. The purpose of the informal conference is to discuss the facts and the legal issues. The result of an informal conference will usually be one of the following:~~

~~(1) an agreement that the license can be issued without further action;~~

~~(2) an agreement that the license can be issued, but only after certain specific requirements are satisfied;~~

~~(3) an agreement to schedule a hearing; or~~

~~(4) any combination of the above agreements.~~

~~C. The appellant or the department may be given the opportunity to provide more facts if the situation warrants. There is no statutory restriction on the number of informal conferences that may be scheduled.~~

~~D. In the event the appellant fails to appear at the informal conference without reasonable notice to the Secretary, the protest may be scheduled for a hearing without further opportunity for an informal conference.]~~

RESERVED

[7/19/1994, 9/14/1996, 11/30/1999; 18.19.4.33 NMAC - Rn, 18 NMAC 19.4.10.5, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.4.34 [HEARINGS DEPOSITIONS: The parties are expected to accomplish adequate discovery by the time a hearing is held. 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 hearing is scheduled, any party may apply to the hearing officer for an order to require depositions, production of records or answers to interrogatories. Depositions may be taken

orally or upon written interrogatories and cross-interrogatories.] **RESERVED**
[7/19/1994, 9/14/1996; 18.19.4.34 NMAC - Rn, 18 NMAC 19.4.10.6, 9/14/2000]

18.19.4.35 [HEARINGS—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 for the taking of a deposition or otherwise relating to discovery, the hearing officer, for the purpose of resolving issues and disposing of the proceeding without unnecessary delay despite such failure, may 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) 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;~~

~~(3) rule that the noncomplying party may not introduce into evidence or otherwise rely, in support of any claim or defense, on testimony by such party, officer or agent or on the documents or other evidence discovery of which has been denied; or~~

~~(4) 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.~~

~~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 the 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 compensate for the withheld testimony, documents or other evidence.~~

~~C. Any party who previously requested the secretary to issue a subpoena may request the secretary to seek the assistance of the court in the enforcement of any subpoena issued to any person who fails to provide the information or documents requested in the subpoena.] **RESERVED**~~

~~[7/19/1994, 9/14/1996; 18.19.4.35 NMAC - Rn, 18 NMAC 19.4.10.7, 9/14/2000, Repealed, xx/xx/xxxx]~~

18.19.4.36 [HEARINGS—MOTIONS:

~~A. After a hearing is scheduled, all written motions shall be addressed to the hearing officer with copies to the opposing parties and shall be ruled on by the hearing officer. All written motions shall state the particular order, ruling or action desired and the grounds therefor.~~

~~B. Within 15 days after personal service of any written motion, or within 20 days after the motion is mailed, or within such longer or shorter time as may be designated by the hearing officer, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the hearing officer.] **RESERVED**~~

~~[7/19/1994, 9/14/1996; 18.19.4.36 NMAC - Rn, 18 NMAC 19.4.10.8, 9/14/2000, Repealed, xx/xx/xxxx]~~

18.19.4.37 [HEARINGS—PREHEARING CONFERENCE:

~~A. The hearing officer may, and upon motion of any party shall, direct representatives for all parties to meet with the hearing officer for a prehearing conference to consider any or all of the following:~~

~~(1) simplification and clarification of the 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 on the number of expert, economic or technical witnesses;~~

~~(4) matters of which official 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 may be recorded in the discretion of the hearing officer.~~

~~C. The hearing officer may enter in the record an order which recites the results of the conference. Such order shall include the hearing officer's rulings on 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.] **RESERVED**~~

~~[7/19/1994, 9/14/1996; 18.19.4.37 NMAC - Rn, 18 NMAC 19.4.10.9, 9/14/2000, Repealed, xx/xx/xxxx]~~

18.19.4.38 [HEARINGS—GENERAL RULES ON HEARINGS:]

~~A. Hearings are held in Santa Fe. Hearings are open to the public. An appellant may appear at a hearing in person or be represented by a bona fide employee, an attorney or other bona fide representative.~~

~~B. Every party shall have the right of due 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 18.19.4.30 through 18.19.4.42 NMAC.~~

~~C. 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 witness.~~ **RESERVED**

[7/19/1994, 9/14/1996, 11/30/1999; 18.19.4.38 NMAC - Rn & A, 18 NMAC 19.4.10.10, 9/14/2000, **Repealed, xx/xx/xxxx**]

18.19.4.39 [HEARINGS—HEARING OFFICER:]

~~A. Hearings in adjudicative proceedings shall be presided over by a hearing officer designated by the secretary.~~

~~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 all 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 schedule a prehearing conference for simplification of the issues, or any other proper purpose;~~

~~(6) to require the filing of briefs on specific legal issues prior to the hearing;~~

~~(7) to rule upon offers of proof and receive evidence;~~

~~(8) to regulate the course of the hearings and the conduct of the parties and their representatives therein;~~

~~(9) to continue and reschedule hearings;~~

~~(10) to consider and rule upon all procedural and other motions appropriate in proceeding;~~

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

~~(12) to make and issue decisions and orders.~~

~~C. In the performance of these functions, the hearing officer shall not be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for the department.~~

~~D. In the performance of the adjudicative functions, the hearing officer is prohibited from ex parte discussions with either party on any matter relating to the complaint.~~

~~E. Disqualification of a hearing officer:~~

~~(1) When a hearing officer has substantial doubt as to whether he or she has a conflicting interest, the hearing officer shall disqualify himself or herself and withdraw from the hearing by notice on the record.~~

~~(2) Whenever any party believes for any reason the hearing officer should be disqualified to preside in a particular proceeding, such party may file with the secretary a motion to disqualify and remove the hearing officer, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. A copy of the motion shall be served on the opposing party and on the hearing officer whose removal is sought. The hearing officer shall have twenty five (25) days from such service within which to accede or to reply to the allegations. If the hearing officer does not disqualify himself or herself within that time, the secretary shall promptly review the validity of the grounds alleged and determine whether or not the hearing officer shall be disqualified. The secretary's decision shall be final.~~

~~(3) If the hearing officer is disqualified, the secretary shall designate another person to act as hearing officer.~~ **RESERVED**

[7/19/1994, 9/14/1996; 18.19.4.39 NMAC - Rn, 18 NMAC 19.4.10.11, 9/14/2000, **Repealed, xx/xx/xxxx**]

18.19.4.40 [HEARINGS—EVIDENCE:]

~~_____ A. _____ The appellant shall have the burden of proof, except in those cases where the department is the petitioner seeking to cancel, revoke or suspend a license or temporary permit and as otherwise provided by law.~~

~~_____ B. _____ Relevant and material evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence may be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as is practicable. The hearing officer shall consider all evidence admitted.~~

~~_____ C. _____ The hearing officer shall take judicial notice of facts and law to the extent provided in the New Mexico rules of civil procedure for district courts. When any decision of the hearing officer rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.~~

~~_____ D. _____ Parties objecting to evidence shall timely and briefly state the grounds relied upon. Rulings of the hearing officer on all objections shall appear in the record.~~

~~_____ E. _____ Formal exception to an adverse ruling is not required.~~

~~_____ F. _____ When an objection to a question propounded to a witness is sustained, the examining person may make a specific offer of what that person expects to prove 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, shall be retained in the record so as to be available for consideration by any reviewing authority.]~~

RESERVED

[7/19/1994, 9/14/1996, 11/30/1999; 18.19.4.40 NMAC - Rn, 18 NMAC 19.4.10.12, 9/14/2000, **Repealed, xx/xx/xxxx**]

18.19.4.41 [~~**HEARINGS—RECORD:** Hearings shall be either stenographically recorded by an official reporter or mechanically recorded, as the hearing officer directs.~~] **RESERVED**

[7/19/1994, 9/14/1996; 18.19.4.41 NMAC - Rn, 18 NMAC 19.4.10.13, 9/14/2000, **Repealed, xx/xx/xxxx**]

18.19.4.42 [~~**HEARINGS—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 any party may file with the hearing officer proposed orders, proposed findings of fact and proposed conclusions of law, together with reasons therefor and briefs in support thereof.~~] **RESERVED**

[7/19/1994, 9/14/1996; 18.19.4.42 NMAC - Rn, 18 NMAC 19.4.10.14, 9/14/2000, **Repealed, xx/xx/xxxx**]

18.19.9.8 [~~**IMPLIED CONSENT HEARINGS—REQUEST FOR HEARING—TIME AND PLACE—TELEPHONIC HEARINGS—CONTINUANCES:**~~

~~_____ A. _____ Requests for hearing must be in writing, must be accompanied by the required fee or statement of indigency and must be made within ten days after receipt of notification of revocation as defined in Section 66-8-112 NMSA 1978. Incomplete requests or requests received after this time will not be honored. Timeliness of the request shall be determined either by the date of actual delivery to the department's headquarters in Santa Fe or, if mailed, by the postmark date of the envelope containing the request delivered through the U. S. postal service.~~

~~_____ B. _____ The department will notify the driver or the driver's agent by certified mail of the time and place scheduled for the hearing. This notice will be directed to the address contained on the request for a hearing or, if no return address is indicated, to the address last given the division pursuant to Section 66-5-22 NMSA 1978.~~

~~_____ C. _____ The hearing officer may conduct the hearing in person or, with the driver's consent, by telephone. If the hearing is to be conducted by telephone, the notice shall so inform the driver or the driver's agent and provide no less than seven days for the driver or the driver's agent to object to the hearing being conducted telephonically. Such telephonic hearings shall be conducted so that the driver, the driver's agent and any percipient witnesses are present together at a place designated by the department, usually a motor vehicle field office, in the county where the arrest took place. The department will bear the expense of the telephone call. The field office shall have a speaker telephone and unless other arrangements are made, a fax machine available so that all may hear the proceedings and documentary evidence may be transmitted between witnesses and the hearing officer.~~

~~_____ D. _____ Within ten days prior to the time an in person hearing is scheduled, the driver or the driver's agent may request that one or both appear by telephone. The hearing officer shall grant the request so long as the driver or driver's agent can make arrangements either to have access to a fax machine during the hearing or to exchange all documentary evidence prior to the hearing. It will be the responsibility of the driver or the driver's agent to call the designated telephone number at the time of the hearing. If the driver or driver's agent fails to call, it will be treated as a non appearance.~~

~~E. At the request of the driver or the driver's agent or on the hearing officer's own motion, the hearing officer may, for good cause, continue the hearing. The hearing officer shall consider only those requests made at least three working days prior to the scheduled hearing absent extraordinary circumstances which the requesting party could not have known earlier. Employees of the department's DWI scheduling section may grant or deny the request on behalf of the hearing officer.] **RESERVED**
[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.8 NMAC - Rn & A, 18 NMAC 19.9.8, 9/14/2000; A, 10/13/00, Repealed, xx/xx/xxxx]~~

18.19.9.9 [IMPLIED CONSENT HEARINGS—SUBPOENAS FOR WITNESSES AND DOCUMENTS—ISSUANCE—COSTS:

~~A. Under the authority granted by Subsection D of Section 66-8-112 NMSA 1978 and by Section 66-2-10 NMSA 1978, the department may subpoena witnesses to give testimony under oath and to require the production of relevant books, or other records.~~

~~B. The department may issue subpoenas to the law enforcement officer(s) whose name(s) are identified in any affidavit submitted to the department pursuant to Section 66-8-111 NMSA 1978 and to any other person who the department, in its discretion, believes may have relevant testimony to offer at the hearing. Such subpoenas shall be served by personal service as provided by NMRA 1-045(e) or by certified mail.~~

~~C. The driver or the driver's agent may make written application to the secretary requesting that a subpoena be issued to compel the attendance of a witness and for the production of specific books, papers or other records. Such written application shall set forth reasons supporting the issuance of the subpoena in order that relevancy of the proposed testimony or documents to be produced can be ascertained. The driver or the driver's agent shall be responsible for the service of any such subpoenas. Unless a request for continuance is made at least three working days prior to the scheduled date for the hearing, inability to serve such subpoenas shall not be grounds for continuance.] **RESERVED**~~

~~[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.9 NMAC - Rn & A, 18 NMAC 19.9.9, 9/14/2000, Repealed, xx/xx/xxxx]~~

18.19.9.10 [IMPLIED CONSENT HEARINGS—HEARING OFFICER: The secretary shall designate a hearing officer to conduct the hearings, continue hearings, receive evidence and issue decisions on behalf of the department. Only hearing officers designated by the secretary may conduct Implied Consent Act hearings.]

RESERVED

~~[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.10 NMAC - Rn, 18 NMAC 19.9.10, 9/14/2000, Repealed, xx/xx/xxxx]~~

18.19.9.11 [IMPLIED CONSENT HEARINGS—POWERS AND DUTIES OF HEARING OFFICER:

Hearing officers have the duty to conduct fair and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings and to maintain good order and decorum. Hearing officers possess all powers necessary to that end, including the following:

~~A. to administer or have administered oaths and affirmations;~~

~~B. to receive evidence and to rule upon offers of proof;~~

~~C. to consider and rule upon all procedural and other motions and objections appropriate in proceeding;~~

~~D. to insure that all, and only, relevant and material issues are considered during the hearing;~~

~~E. to require the production or inspection of relevant documents and other items;~~

~~F. to participate, when appropriate, in the examination of witnesses;~~

~~G. to cause a complete record of the hearing to be made;~~

~~H. to regulate the course of the hearing and the conduct of the parties and their representatives therein;~~

~~I. to make and issue decisions and orders; and~~

~~J. to take such other action as may be necessary and appropriate, consistent with legal authority vested in the department, and with the rules and regulations and policies of the department.] **RESERVED**~~

~~[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.11 NMAC - Rn, 18 NMAC 19.9.11, 9/14/2000, Repealed, xx/xx/xxxx]~~

18.19.9.12 [IMPLIED CONSENT HEARINGS—PARTIES TO THE HEARING—PARTIES' RIGHTS:

The parties to the hearing shall be the department and the driver. The parties shall be entitled to call and examine witnesses, to introduce exhibits, to cross-examine witnesses, to make opening and closing arguments and to be

represented by counsel at their own expense. Rebuttal evidence and argument may only be allowed at the discretion of the hearing officer.] **RESERVED**

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.12 NMAC - Rn, 18 NMAC 19.9.12, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.13 [IMPLIED CONSENT HEARINGS – RULES OF EVIDENCE:

~~A. The technical rules of evidence shall not apply to the conduct of any hearing held under the provisions of Section 66-8-112 NMSA 1978. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The hearing officer may give probative effect to evidence that is of a kind commonly relied upon by reasonably prudent people in the conduct of serious affairs.~~

~~B. The hearing officer may take notice of judicially cognizable facts and of general technical or scientific facts and of other facts within the specialized knowledge of the division.~~

~~C. All evidence in the possession of the division may be placed in evidence and made part of the record of the proceeding. Documentary evidence may be received in evidence in the form of copies or excerpts.~~

~~D. The experience, technical competence and specialized knowledge of the division and of the hearing officer may be utilized in the evaluation of the evidence.] **RESERVED**~~

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.13 NMAC - Rn & A, 18 NMAC 19.9.13, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.14 [IMPLIED CONSENT HEARINGS – FAILURE TO APPEAR: If a driver who has requested a hearing fails to appear at the scheduled time and place, either in person or through an attorney licensed to practice law in New Mexico, and notice was given to the driver or to the driver's agent of the time and place, and no continuance has been granted, the right to a hearing shall be forfeited and the revocation shall be sustained.]

RESERVED

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.14 NMAC - Rn, 18 NMAC 19.9.14, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.15 [IMPLIED CONSENT HEARINGS – ISSUES TO BE CONSIDERED AT THE HEARING:

~~The hearing shall be strictly limited to those issues set out in Subsection E of Section 66-8-112 NMSA 1978 and whether the driver previously has had a driver's license revoked under the provisions of the Implied Consent Act.]~~

RESERVED

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.15 NMAC - Rn & A, 18 NMAC 19.9.15, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.16 [IMPLIED CONSENT HEARINGS – HEARINGS OPEN TO PUBLIC: The hearing, including any continuations, shall be open to the public.] **RESERVED**

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.16 NMAC - Rn, 18 NMAC 19.9.16, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.17 [IMPLIED CONSENT HEARINGS – DECISION AND ORDER: The hearing officer shall enter a written order either sustaining or rescinding the revocation of the driver's license, permit or privilege to drive. The written order sustaining the revocation shall contain the findings required by Subsection F of Section 66-8-112 NMSA 1978.] **RESERVED**

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.17 NMAC - Rn & A, 18 NMAC 19.9.17, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.18 [IMPLIED CONSENT HEARINGS – RECORD OF THE HEARING: Hearings shall be electronically recorded unless the hearing officer requires recording by stenographic, mechanical or other means.] **RESERVED**

[7/2/1990, 1/10/1994, 12/31/1996; 18.19.9.18 NMAC - Rn, 18 NMAC 19.9.18, 9/14/2000, Repealed, xx/xx/xxxx]

18.19.9.19 [IMPLIED CONSENT HEARING – TIME FRAMES: In computing any period of time under this section, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.] **RESERVED**

[1/10/1994, 12/31/1996; 18.19.9.19 NMAC - Rn, 18 NMAC 19.9.19, 9/14/2000, Repealed, xx/xx/xxxx]