

205 CMR: MASSACHUSETTS GAMING COMMISSION

205 CMR 101.00: M.G.L. C. 23K ADJUDICATORY PROCEEDINGS

Section

- 101.01: Hearings Before the Commission
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101.01: Hearings Before the Commission

(1) Hearings held before the full commission pursuant to 205 CMR 101.01 shall be adjudicatory proceedings conducted in accordance with M.G.L. c. 30A, §§ 10 and 11. All hearings shall be further held under 205 CMR 101.00, as applicable, and 801 CMR 1.02: *Informal/Fair Hearing Rules*, unless the applicant/petitioner makes a written request for a hearing under 801 CMR 1.01: *Formal Rules*. In that event the commission shall determine, based on the facts and circumstances of the matter, whether 801 CMR 1.01 or 1.02 will apply in order to ensure a fair outcome. Such determination shall be based on such factors as the complexity of the issues presented, whether all parties are represented by counsel, and similar considerations. Conflicts between 801 CMR 1.01 or 1.02 and 205 CMR 101.00 shall be resolved in favor of 205 CMR 101.00. If the commission grants a request for a hearing to be held pursuant to 801 CMR 1.01, the provisions of 801 CMR 1.01(1), (2), (3), (5), (6), (11) and (14) shall not apply.

(2) The following types of adjudicatory hearings shall be held directly, in the first instance, by the commission:

- (a) Suitability hearings before the commission pursuant to M.G.L. c. 23K, § 17(f), concerning any findings of fact, recommendations and/or recommended conditions by the Bureau relative to the suitability of the applicant for an initial gaming license or renewal of a gaming license, including without limitation, recommendations and recommended conditions resulting from the RFA-1 or new qualifier process pursuant to 205 CMR 115.00: *Phase 1 and New Qualifier Suitability Determinations, Standards and Procedures*.
- (b) Hearings regarding the failure of a gaming licensee or qualifier to maintain adequate suitability as set forth in 205 CMR 115.01(4) and any adverse action taken against a gaming licensee or qualifier as a result of said failure.
- (c) Hearings regarding the termination, revocation or suspension of a category 1 or category 2 gaming license issued by the commission pursuant to M.G.L. c. 23K, and/or the addition or modification of a condition thereto, or the termination, revocation or suspension of a license to conduct a racing meeting pursuant to M.G.L. c. 128A.
- (d) Hearings regarding the transfer of a category 1 or category 2 gaming license or the transfer of a license to conduct a racing meeting or related to the transfer of interest in a category 1 or category 2 gaming license or gaming establishment in accordance with 205 CMR 116.08 through 116.10;
- (e) Hearings regarding the assessment of a civil administrative penalty pursuant to M.G.L. c. 23K, § 36, against a category 1 or category 2 gaming licensee or a racing meeting licensee.
- (f) Hearings regarding the approval or amendment of the gaming licensee's Operation Certificate as discussed in 205 CMR 151.00: *Requirements for the Operations and Conduct of Gaming at a Gaming Establishment*;
- (g) For purposes of reviewing a petition to reopen a mitigation agreement in accordance with 205 CMR 127.04: *Commission Review of a Petition to Reopen a Mitigation Agreement*.
- (h) Any challenge to the certification or denial of certification of an independent testing laboratory in accordance with 205 CMR 144.06: *Independent Testing Laboratory Certification and Auditing*.
- (i) Any challenge to the certification or denial of certification as a gaming school in accordance with 205 CMR 137.01(4).
- (j) Review of an application for a gaming beverage license, or request to amend, alter, or add a licensed area, pursuant to 205 CMR 136.03(4).

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(3) Any request for such a hearing shall be filed with the clerk of the commission on a form provided by the clerk. Such a request shall not operate as a stay of the underlying action unless specifically allowed by the commission upon motion of the aggrieved party. A request for a stay may be allowed at the commission's discretion if one or both of the following two circumstances are demonstrated by the aggrieved party:

- (a) 1. there is a likelihood that the party seeking the stay will prevail on the merits of the case; and
- 2. there is a likelihood that the moving party will be harmed irreparably absent a stay.
- (b) 1. the consequences of the decision(s) to be made in the case are far-reaching;
- 2. the immediate impact upon the parties in a novel and complex case is substantial; or
- 3. a significant legal issue(s) is involved.

(4) In order to be considered by the commission, a request for a hearing must be filed no later than 30 days from the date the complained of action was taken, except in the event of civil administrative penalties. The request for review of a civil administrative penalty issued by the Bureau pursuant to M.G.L. c. 23K, § 36 shall be filed no later than 21 days after the date of the Bureau's notice of issuance of the civil administrative penalty and such a request must comply with the provisions of M.G.L. c. 23K, § 36(e). In the case of a temporary suspension of a license by the Bureau in accordance with M.G.L. c. 23K, § 35(e), a gaming licensee shall be entitled to a hearing before the Commission within seven days after the suspension was issued.

(5) The request for a hearing shall include:

- (a) the contact information of the party requesting the hearing;
- (b) the contact information of counsel representing the party requesting the hearing, if any; and
- (c) a brief description of the basis for the request for the hearing. In the event that a temporary suspension has been issued in accordance with M.G.L. c. 23K, § 35(e), at its election the licensee may include a request that the hearing be scheduled within seven days of the date of the issuance of the suspension. If the matter involves a civil administrative penalty, the request shall include a written statement denying the occurrence of any of the acts or omissions alleged by the Bureau in the notice, or assert that the amount of the proposed civil administrative penalty is excessive.

(6) The failure of a party to provide a specific description of the basis for the request for hearing may result in the dismissal of the request per the discretion of the commission.

(7) Any adjudicatory hearing conducted under 205 CMR 101.01 may be closed to the public at the request of either party, or on the commission's own initiative, in order to protect the privacy interests of either party or other individual, to protect proprietary or sensitive technical information including, but not limited to, software, algorithms and trade secrets, or for other good cause shown. Such a determination rests in the sole discretion of the commission.

(8) Pursuant to M.G.L. c. 23K, § 3(h), the chair may direct that all of the commissioners participate in the hearing and decision of the matter before the commission. In the alternative, pursuant to M.G.L. c. 23K, § 3(h), the chair with the concurrence of one other commissioner may appoint a single commissioner to preside over the hearing. The notice scheduling the time and place for the hearing shall specify whether the commission or a designated individual shall act as presiding officer in the particular case.

(9) Burden of Proof.

- (a) The applicant shall have the affirmative obligation to establish by clear and convincing evidence both its affirmative qualification for licensure and the absence of any disqualification for licensure.
- (b) In the case of a recommendation to terminate, revoke or suspend a category 1 or category 2 gaming license, or a license to conduct a racing meeting, the bureau or the racing division, as appropriate, shall have the affirmative obligation to establish by substantial evidence grounds upon which the commission should terminate, revoke or suspend the licensee's category 1 or category 2 gaming license or the licensee's license to conduct a racing meeting.

101.01: continued

(c) In the case of an adverse action taken against a gaming licensee or qualifier for failure to maintain their suitability pursuant to 205 CMR 115.01(4) the Bureau or the racing division, as appropriate, shall have the affirmative obligation to establish by substantial evidence the lack of clear and convincing evidence that the gaming licensee or qualifier remains suitable.

(d) In the case of a transfer of interest, the gaming licensee shall have the affirmative obligation to establish by clear and convincing evidence its compliance with 205 CMR 116.09: *Approval*.

(e) In the case of a civil administrative penalty, the Bureau shall have the obligation to prove the occurrence of each act or omission by a preponderance of the evidence.

(10) Decisions. Upon completion of the hearing, the commission shall render a written decision as promptly as administratively feasible, in accordance with M.G.L. c. 30A, § 11(8). The written decision of the commission shall be the final decision of the commission.

(11) Appeal. Pursuant to M.G.L. c. 23K, § 17(g), the applicant and/or the gaming licensee shall not be entitled to any further review from the commission's determination of suitability. Decisions by the commission concerning the matters set forth in 205 CMR 101.01(2)(b) may be reviewed by the appropriate court pursuant to the provisions of M.G.L. c. 30A.

101.02: Review of Orders or Civil Administrative Penalties/Forfeitures Issued by the Bureau, Commission Staff, or the Racing Division

(1) An aggrieved party may file a request for review of an order, decision, or civil administrative penalty issued by the Bureau, where applicable, relative to the interpretation or application of a statute, regulation, or other applicable authority, or order, decision, or forfeiture issued by the racing judges or stewards, other than those enumerated in 205 CMR 101.01(2), with the clerk of the commission on a form provided by the clerk. A request for review shall not operate as a stay of the order, decision, or civil administrative penalty/forfeiture unless specifically allowed by the hearing officer upon motion of the aggrieved party. A request for a stay may be allowed at the hearing officer's discretion if one or both of the following two circumstances are present:

- (a) 1. there is a likelihood that the party seeking the stay will prevail on the merits of the case; and
2. there is a likelihood that the moving party will be harmed irreparably absent a stay.
- (b) 1. the consequences of the decision(s) to be made in the case are far-reaching;
2. the immediate impact upon the parties in a novel and complex case is substantial; or
3. a significant legal issue(s) is involved.

(2) All requests for review, aside from those for civil administrative penalties, must be filed no later than 30 days from the date of the order or decision. The request for review of a civil administrative penalty issued by the Bureau pursuant to M.G.L. c. 23K, § 36 shall be filed within 21 days after the date of the Bureau's notice of issuance of the civil administrative penalty and such a request must comply with the provisions of M.G.L. c. 23K, § 36(e).

In the case of the temporary suspension of a license by the Bureau in accordance with M.G.L. c. 23K, § 35(e), a licensee shall be entitled to a hearing before a hearing officer within seven days after the suspension was issued.

(3) The request for review shall include:

- (a) contact information of the party requesting review;
- (b) contact information of counsel representing the party requesting review, if any;
- (c) a specific description of the basis for the request for review. In the event that a temporary suspension has been issued in accordance with M.G.L. c. 23K, § 35(e), at its election, the licensee may include a request that the hearing be scheduled within seven days of the date of the issuance of the suspension. If the matter involves a civil administrative penalty, the request shall include a written statement denying the occurrence of any of the acts or omissions alleged by the Bureau in the notice, or assert that the amount of the proposed civil administrative penalty is excessive; and
- (d) a copy of the order or fine that is the subject of the request for review.

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(4) The failure of a party to provide a specific description of the basis for the request for review in accordance with 205 CMR 101.03(3)(c) shall be grounds for dismissal of the request per the discretion of the hearing officer.

(5) Upon receipt, the clerk shall assign the request for review to a hearing officer and schedule the hearing. Mailing of notice to the address on record with the commission, or emailing the notice to the email address provided by the licensee or registrant on their application for licensure or registration shall be deemed satisfactory notice. The notice of hearing shall contain:

- (a) The name of the petitioner; and
- (b) The date, time and place of the hearing.

(6) Any adjudicatory hearing conducted under 205 CMR 101.02 may be closed to the public at the request of either party in order to protect the privacy interests of either party or other individual, to protect proprietary technical information including, but not limited to, software, algorithms and trade secrets, or for other good cause shown. Any such request may be opposed by the other party. The final determination rests in the sole discretion of the hearing officer.

(7) (a) Upon receipt of the appeal, the hearing officer shall, within ten days, schedule a telephone status conference with all parties. During the status conference the hearing officer shall:

- 1. Address any argument that the proceeding should proceed under 801 CMR 1.01: *Formal Rules*;
- 2. Establish a briefing schedule including deadlines for the filing of the petitioner's brief and providing for a reasonable amount of time for the respondent to file a reply brief;
- 3. Establish deadlines for the filing of a witness list and exhibit list at reasonable amount of time before the hearing date;
- 4. Establish a briefing schedule with respect to any anticipated motions including deadlines for the filing of the movant's brief and providing for a reasonable amount of time for the respondent to file a reply brief;
- 5. After completion of the status conference, the hearing officer shall issue a written order memorializing all deadlines and provide it to all parties.

(b) After the initial status conference, either party may file a brief explaining how they believe the matter should be decided including the specific relief requested. No late briefs shall be accepted without express permission of the hearing officer. No sur-reply briefs shall be accepted without express permission of the hearing officer. No brief shall be longer than 15 double-spaced pages without express permission of the hearing officer.

A party may request permission to file a brief longer than 15 pages. Such request shall be filed with the clerk who will forward it to the hearing officer for review. The request must be in writing and state the number of additional pages requested. It shall be up to the discretion of the hearing officer as to whether to grant such request. If the hearing officer grants a request for additional pages, the clerk shall forward the order of the hearing officer to all parties and all parties shall have the right to file such additional number of pages.

(8) With or without the submission of a brief, each party shall submit a copy of all written documentary evidence they intend to offer for consideration by the hearing officer as well as a list of all witnesses that the party intends to present at the hearing. The documentary evidence and witness lists shall be provided on or before the date determined by the Hearing Officer during the initial status conference. Failure to submit a brief shall not preclude a party from submitting written evidence or calling witnesses to be considered by the hearing officer. Upon request, the petitioner shall be provided an opportunity in advance of the hearing to examine and copy the entire content of their case file and all other documents to be used by the commission, bureau, or racing division. All materials submitted to the clerk/hearing officer including, but not limited to, briefs, evidence and witnesses lists, shall be contemporaneously provided to the all other parties and their counsel *via* first-class mail or e-mail. Evidence or witnesses that are filed without providing reasonable notice to the opposing party may be precluded at the hearing officer's discretion.

101.02: continued

(9) All requests for extensions of time to file a brief or to reschedule a hearing date shall be made in writing and filed with the clerk. No request for extension of time to file a brief or to reschedule a hearing shall be considered unless it is made at least seven days prior to the hearing date or briefing deadline. The clerk of the commission may issue orders on procedural and scheduling matters consistent with M.G.L. c. 23K and 205 CMR in order to further the efficient administration of the commission's hearings process. The clerk may provide an extension of time to file a brief or reschedule a hearing date in the clerk's discretion and for good cause shown. The clerk shall send the order granting an extension of time to file a brief or the rescheduling of a hearing date to all parties. Any order shall include the number of days granted for the extension of time or the new date for the rescheduled hearing. Absent extenuating circumstances, no hearing shall be rescheduled more than once.

In the event of the appeal of a decision by the Racing judges or stewards, if the petitioner fails to appear at the hearing, the Hearing Officer, after determining that the petitioner received proper notice of the hearing, shall dismiss the matter. In the event of a matter before the hearing officer concerning an action taken by the bureau, the bureau may proceed with a hearing before the Hearing Officer, even in the absence of the petitioner, after determining that the petitioner received proper notice of the hearing.

(10) Hearings held before the hearing officer pursuant to 205 CMR 101.02 shall be adjudicatory proceedings conducted in accordance with M.G.L. c. 30A, §§ 10 and 11. All hearings shall be further held under 205 CMR 101.00, as applicable, and 801 CMR 1.02: *Informal/Fair Hearing Rules* unless the applicant/petitioner makes a written request for a hearing under 801 CMR 1.01: *Formal Rules*. In that event the hearing officer shall determine, based on the facts and circumstances of the matter, whether 801 CMR 1.01 or 1.02 will apply in order to ensure a fair outcome. Such determination shall be based on such factors as the complexity of the issues presented, whether all parties are represented by counsel, and similar considerations. Conflicts between 801 CMR 1.01 or 1.02 and 205 CMR 101.00 shall be resolved in favor of 205 CMR 101.00. If the hearing officer grants a request that a hearing be held pursuant to 801 CMR 1.01 Formal Rules, the provisions of 801 CMR 1.01 (1), (2), (3), (5), (6), (11) and (14) shall not apply.

(11) There shall be no motions or formal discovery allowed in hearings under 205 CMR 101.03 and 101.04 unless, upon the request of a party and for good cause shown, the hearing officer allows such motions or formal discovery request to be served. In the event that motions or formal discovery are allowed by the hearing officer, the hearing officer shall also set forth a reasonable schedule for responding to such motions or discovery requests.

(12) A written transcript or electronic record of each hearing shall be created and all witnesses presenting testimony shall be sworn to testify under oath.

(13) In addition to the duties and powers of the hearing officer under 801 CMR 1.02(10)(f), the hearing officer shall make all factual and legal findings necessary to reach a decision, including evaluating the credibility of all witnesses and evidence presented. The hearing officer may ask questions of a party or a witness at the hearing. The hearing officer can request additional information from any party and may recess or continue the hearing to a later date. Any party to such a hearing shall be entitled to issue subpoenas as approved by the hearing officer in compliance with 205 CMR 101.02(11) and in accordance with M.G.L. c. 30A, § 12(3). The hearing officer may request a post-hearing brief from the parties and shall determine the page limit for such brief and the time by which it must be submitted. The parties may request leave of the hearing officer to submit a post-hearing brief as long as such a request is made within ten days of the hearing.

(14) The standard of review of an order or fine issued by the bureau or the racing division shall be the substantial evidence standard unless a different standard is required by M.G.L. c. 23K or M.G.L. c. 128A or M.G.L. c.128C. The hearing officer shall conduct a review of the matter, making findings of fact and conclusions of law to render a decision. The hearing officer shall affirm the order issued by the bureau or the racing division if there is substantial evidence to support it.

101.02: continued

(15) The hearing officer shall issue a written decision as soon as administratively feasible after the close of the hearing. The written decision shall include findings of fact and conclusions of law and shall clearly state the basis for the hearing officer's decision. The hearing officer shall file its decision with the clerk. The decision of the hearing officer shall be the final decision of the commission unless a request for appeal to the commission is filed by a party to the proceeding within 30 days of the date of the hearing officer's decision. In the event of a timely filed appeal of a civil administrative penalty to the commission, payment of any such penalty shall be stayed through the final decision by the commission.

(16) The clerk shall send a copy of the decision to all parties and shall include with the decision a letter stating that a party may request appeal of the hearing officer's decision by the commission and describing the process for requesting an appeal by the commission.

(17) The hearing officer is authorized to certify any matter directly to the commission. The exercise of such authority will generally be reserved for matters of first impression or those which present extraordinary or unique circumstances. Either party may also request that the hearing officer certify such a matter for commission review. The commission may accept and review the matter or may remand the matter to the hearing officer. In the event that the commission accepts the matter, such hearings will be conducted in accordance with 205 CMR 101.02 in which the commission will perform the hearing officer's functions. Appeals of such decisions may be taken in accordance with M.G.L. c.30A in *lieu* of 205 CMR 101.03.

101.03: Review by the Commission of Decisions of the Hearing Officer

(1) Any decision issued by a hearing officer in accordance with 205 CMR 101.02 may be appealed to the commission for review. An appeal of the decision shall be filed with the clerk of the commission on a form provided by the clerk. An appeal shall not operate as a stay of the decision of the hearing officer unless specifically allowed by the commission upon motion of the appellant. A request for a stay may be allowed at the commission's discretion if one or both of the following two circumstances are present:

- (a) 1. there is a likelihood that the party seeking the stay will prevail on the merits of the case; and
2. there is a likelihood that the moving party will be harmed irreparably absent a stay.
- (b) 1. the consequences of the decision(s) to be made in the case are far-reaching;
2. the immediate impact upon the parties in a novel and complex case is substantial; or
3. a significant legal issue(s) is involved.

(2) In order to be considered by the commission, the appeal must be filed no later than 30 days from the date the decision was served by the clerk in accordance with 205 CMR 101.02(16).

(3) The appeal shall include:

- (a) contact information of the party requesting the appeal;
- (b) of counsel representing the party requesting the appeal, if any;
- (c) a brief description of the basis for the appeal; and
- (d) a copy of the decision of the hearing officer that is the basis for the appeal.

(4) Upon receipt of the appeal by the commission, the clerk shall docket the request and provide a copy of the administrative record to all parties involved in the matter to be reviewed by the commission. The record may be provided electronically or *via* other similar means. The record shall include the decision of the hearing officer, any briefs submitted by the parties, the evidence submitted to the hearing officer and the transcript or audio recording of the adjudicatory hearing before the hearing officer. The record may only be expanded by the commission upon petition by a party and a showing of good cause as to why the evidence was not included as part of the hearing record.

101.03: continued

(5) The clerk shall schedule a date for review by the commission. The clerk shall request that each party file a brief stating why the decision of the hearing officer should be affirmed, vacated or modified and the relief requested. Issues not raised before the hearing officer shall not be raised in a brief to the commission. The briefing schedule shall be set by the commission and shall be staggered to provide the appellee adequate time to address the matters raised in the appellant's brief prior to the scheduled hearing before the commission. No brief shall be longer than 15 pages. The briefs shall be filed with the clerk. Each party shall serve a copy of its brief on the other party(ies) to the hearing.

(6) The clerk shall provide copies of the briefs and a copy of the written record to the commission.

(7) A party may request permission to file a brief longer than 15 pages. Such request must be in writing. The clerk shall forward the request to the commission. It shall be up to the discretion of the commission as to whether to grant such a request. If the commission grants a request for additional pages, the clerk shall forward a copy of the commission's order to all parties to the hearing and all parties shall have the right to file such additional number of pages. Requests to file a brief longer than 15 pages may be granted by an order issued by a single commissioner appointed by the chairman to issue such orders.

(8) All requests for extensions of time to file a brief shall be made in writing to the clerk. The clerk shall forward the request for an extension of time to file a brief to the commission. It shall be up to the discretion of the commission as to whether to grant the request for an extension of time to file a brief. If the commission grants the request for an extension of time to file a brief, the clerk shall forward a copy of the commission's order to the parties and all parties shall have the extension of time to file a brief. Requests for an extension of time to file a brief may be granted by an order issued by a single commissioner appointed by the chairman to issue such orders.

(9) The commission's review of the decision of the hearing officer shall be on the administrative record of the hearing conducted by the hearing officer. The commission, in its sole discretion and upon its own motion, may request oral argument on the request to review the decision of the hearing officer.

(10) When reviewing a decision from the hearing officer, the commission's determination shall be supported by substantial evidence unless a different standard is required by M.G.L. c. 23K or M.G.L. c. 128A or M.G.L. c. 128C.

(11) The commission shall conduct a *de novo* review of the decision of the hearing officer based upon the administrative record, provided however, that findings made by the hearing officer regarding credibility of witnesses shall be entitled to substantial deference by the commission. As provided by M.G.L. c. 30A, § 10, such appeal shall comply with M.G.L. c. 30A, § 11(8). The procedures described in M.G.L. c. 30A, § 11(7) shall only apply if, where applicable, a party makes written request to the commission in advance for a tentative or proposed decision.

(12) The commission may, in whole or part, affirm the decision of the hearing officer, reverse the decision of the hearing officer, modify the decision of the hearing officer or remand the matter to the hearing officer for further action in accordance with the commission's decision. Further, the commission may add any condition reasonably calculated to ensure a person's compliance or faithful performance, to penalize for the violations, and/or to deter future violation, including but not limited to fines. In making its decision, the commission may rely on any evidence contained in the administrative record and is not limited to the evidence cited by the hearing officer in support of hearing officer's decision.

(13) The Commission shall issue a written decision as soon as administratively feasible and file it with the clerk. The decision shall advise the parties of their rights to review in accordance with M.G.L. c. 23K and M.G.L. 30A, as applicable. The clerk will provide a copy of the commission's decision to all parties.

101.04: Informal Disposition of an Adjudicatory Proceeding

At any time during an adjudicatory proceeding before a hearing officer or the Commission, the parties may make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement or consent order. Upon such a disposition, the parties are obligated to notify the hearing officer or commission through a joint filing indicating that the matter has been resolved and that is signed by all parties and/or their representatives.

REGULATORY AUTHORITY

205 CMR 101.00: M.G.L. c. 7, § 4H; c. 23K, §§ 3(h); 4(15), (28), (29), (37); 5; 13; 17(f), (g); 30(g); 31; 35(g); 36(c), (d), (f); and c. 30A.