

94-649 MAINE COMMISSION ON ~~INDIGENT LEGAL~~PUBLIC DEFENSE  
SERVICES

Chapter ~~6201~~: APPEALS OF DECISIONS OF THE EXECUTIVE DIRECTOR

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**Summary:** This Chapter establishes the process for an appeal from a decision of the Executive Director to the Commissioners of the Commission on Public Defense-Indigent Legal Services (~~"Commission"~~) pursuant to 4 M.R.S.A. § 1804(3)(J). ~~It provides for the appointment by the Commission Chair of a Presiding Officer to conduct an appeal process and to prepare a recommended decision for consideration and action by the Commission.~~

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SECTION 1. ~~DEFINITIONS~~DEFINITIONS.

1. ~~1.~~ Appellant~~Appellant~~. "Appellant~~Appellant~~" means a person who has filed an appeal.
2. ~~2.~~ Commission or PDS~~MCILS~~. "Commission" or "PDS~~MCILS~~" means the Maine Commission on Indigent Legal~~Public Defense~~ Services.
3. ~~3.~~ Executive Director. "Executive Director" means the Executive Director of the Maine Commission on Indigent Legal~~Public Defense~~ Services or the ~~Executive Director's~~ ir decision-making designee.
4. ~~4.~~ File or Filing. "File" or "Filed" means delivery of an original document to ~~the MCILS-PDS-Central Office~~. Delivery may be in-hand, by regular mail, by commercial delivery service, or by email to the Executive Director or the like. ~~Delivery may not be by electronic means such as email or facsimile.~~
5. ~~5.~~ MCILS-PDS Clerk~~Advisor~~. "MCILS-PDS Clerk~~Advisor~~" means a MCILS-PDS staff member designated by the Commission Chair to act in as an administrative role to support the Presiding Officer in discharging their duties~~MCILS-PDS A advisor with respect to an appeal.~~
6. Party. "Party" means the person bringing an appeal and the MCILS-PDS Executive Director.
7. ~~7.~~ Presiding Officer. "Presiding Officer" means the individual appointed by the Commission Chair to conduct~~preside over~~ the appeal proceedings under this Chapter ~~and make a recommended decision to the Commission.~~
8. ~~8.~~ Record. "Record" means those materials required by 5 ~~M.R.S.~~M.R.S. § 9059.

## SECTION 2. ~~APPLICABILITY; WHO MAY APPEAL~~APPLICABILITY; WHO MAY APPEAL.

### ~~1. 1.~~ Application.

~~A.~~ A. This ~~rule-Chapter~~ applies to appeals to the Commission from decisions of the Executive Director on issues specifically set forth in 4 ~~M.R.S.~~M.R.S. § 1804(3)(J).

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A decision of the Executive Director concerning issues not specifically set forth in 4 ~~M.R.S.~~M.R.S. § 1804(3)(J) constitutes final agency action and is not subject to appeal under this Chapter.

~~B.~~ B.  
~~2. 2.~~ Who may Appeal. A person who has been aggrieved by a decision of the Executive Director pertaining to the issues set forth in 4 ~~M.R.S.~~M.R.S. § 1804(3)(J) may appeal the decision to the Commission. An ~~appellant~~Appellant may be represented by another person ~~—at Appellant’s expense—~~ in accordance with 4 ~~M.R.S.~~M.R.S. § 807 or may proceed without representation.

## SECTION 3. ~~BRINGING AN APPEAL~~BRINGING AN APPEAL.

~~1. Decision, reconsideration~~reconsideration. Except as stated below, a decision of the Executive Director becomes final if no appeal is filed within the time limits set forth in this ~~S~~Section.

~~2. Reconsideration.~~ A person aggrieved by a decision of the Executive Director may, within 10 ~~calendar~~ days after receipt of the decision of the Executive Director, request that the Executive Director reconsider that decision. Such a request must be accompanied by additional materials not previously submitted with respect to the original decision. If a request for reconsideration is filed in accordance with this subsection, the ~~running of that period~~deadline to file an appeal pursuant to Section 3(3) herein, is tolled, and the time for filing a Statement of Appeal shall be 30 calendar days after receipt of the decision on reconsideration.

~~3. Statement of Appeal~~appeal. An individual who wishes to appeal a decision must ~~F~~file a written ~~s~~Statement of Appeal with ~~MCIS-PDS~~ within 30 calendar days after receipt of the Executive Director’s decision. For purposes of this section, a statement of appeal is ~~“F~~filed” on the date it is received ~~at the MCILS PDS Central Office by PDS during normal business hours.~~if it is received by PDS by 4:30PM eastern standard time. A statement of appeal that is received by PDS after 4:30PM eastern standard time is Filed on the next business day.

~~4. ——— 3. ———~~ Contents of the Statement ~~statement~~ of Appealappeal. The ~~s~~SStatement

of ~~a~~Appeal shall include, but is not limited to, a copy of the Executive Director's decision, the grounds for the appeal, and a statement of the ~~appellant~~Appellant's position.

~~4. Only issues that have previously been decided by the Executive Director can be appealed.~~

~~5. 5. Assignment to Presiding Officer & PDS Clerk.~~ When a statement of appeal is received, the Commission Chair ~~should~~ assign the appeal to a Presiding Officer ~~and PDS Clerk within 30 calendar days, in accordance with Section 5.~~ Upon assignment of a Presiding Officer, MCILS staff shall notify the appellant in writing of the Presiding Officer's name and contact information and provide the appellant with a copy of this Chapter.

~~6. Assignment of the MCILS PDS Advisor Clerk.~~ When the Commission Chair assigns a Presiding Officer to the appeal ~~Within 10 days of receiving an appeal, the Commission Chair shall also designate the MCILS PDS Advisor Clerk. No person authorized to make decisions subject to the appeal process may be designated as MCILS PDS Advisor Clerk. Upon assignment of a Presiding Officer, the PDS Advisor Clerk shall notify the appellant in writing of the Presiding Officer's name and contact information and provide the appellant with a copy of this Chapter.~~

#### SECTION 4. ~~CHOICE OF APPEALS PROCESS~~CHOICE OF APPEALS PROCESS.

~~1. 1. Within 170 calendar days of receiving notice of appointment~~assignment as PDS Advisor Clerk, ~~The Presiding Officer~~the PDS Advisor Clerk shall notify the ~~appellant~~Appellant in writing of the option to choose one of two appeal processes:

~~A. A. Expedited Appeal.~~ The ~~appellant~~Appellant may choose to rely solely on the documentary evidence considered by the Executive Director and the Statement of Appeal. The decision to proceed under the Expedited Appeal process is irrevocable once the expedited process has commenced.

~~B. B. Hearing on Appeal.~~ Alternatively, the ~~appellant~~Appellant may request to have a hearing pursuant to 5 ~~M.R.S.~~M.R.S. § 9052.

2. The ~~appellant~~Appellant must respond in writing to the ~~Presiding Officer~~PDS Advisor Clerk as to ~~his or her~~their selection of the type of appeal process within 15 calendar days after the written notice by the ~~Presiding Officer~~PDS Advisor Clerk is received. If the ~~appellant~~Appellant does not respond within the timeframe prescribed herein, ~~unless for good cause shown,~~ the appeal process shall default to ~~Presiding Officer~~ shall commence the Expedited Appeal process set forth in Section 4(1)(A).

3. If the ~~appellant~~Appellant elects a ~~hearing~~Hearing on Appeal process, the Presiding Officer shall notify the ~~appellant~~Appellant in writing of the hearing date ~~and provide notice that if the appellant fails to appear at any hearing, the appeal may be~~is deemed to have been abandoned in accordance with ~~Section 7.~~

## SECTION 5. ~~PRESIDING OFFICER~~PRESIDING OFFICER.

1. ~~1.~~1. **Appointment.** The Commission Chair shall appoint a Presiding Officer to perform the duties and exercise the powers set forth in this Chapter. The Presiding Officer must be fair, ~~impartial,~~impartial, ~~unbiased,~~unbiased, and able to conduct a fair, ~~efficient and effective~~effective, and efficient appeal process.
2. ~~2.~~2. **Who ~~Can can~~ Serveserve.** The Commission Chair may appoint any Commissioner or other qualified person as the Presiding Officer. The fact that the Presiding Officer is a ~~MCILS-PDS~~ rostered attorney does not constitute, by itself, direct or indirect personal or financial interest in an appeal or its outcome.
3. ~~3.~~3. **~~Assignment~~Appointment, ~~Removal~~removal, ~~& Replacement~~replacement.**
- A. ~~A.~~A.—An appeal will be assigned to a Presiding Officer who has no personal or financial interest, direct or indirect, in the appeal or its outcome, and who has not been involved directly or indirectly in the matter that is the subject of the appeal.
- B. ~~B.~~B.—If a party files a timely charge of bias, prejudice, or personal or financial interest, either direct or indirect, with the Presiding Officer, the Presiding Officer will promptly determine whether to recuse from the appeal and will include that determination in the record.
- C. ~~C.~~C.—A Presiding Officer may also independently decide to recuse from the appeal if the Presiding Officer cannot be fair, impartial, and unbiased.
- D. ~~D.~~D.—When a Presiding Officer decides to recuse or cannot continue, the Commission Chair will assign the appeal to a new Presiding Officer pursuant to this Section. The Presiding Officer will continue the ongoing appeal process, unless the Presiding Officer determines that, ~~in order~~ to avoid substantial prejudice to any party, it is necessary to start the process anew.
4. ~~3.~~3. **Duty and ~~powers~~ powers of the ~~Presiding~~ Presiding ~~Officer~~ Officer.** The Presiding Officer has the duty to ~~preside over any hearing in a~~ render a fair and impartial ~~manner~~ recommended decision to the Commission in accordance with ~~Section 12~~this Chapter and has all the powers and duties as set forth in 5 ~~M.R.S.~~M.R.S. § 9062. In addition, it is the duty of the Presiding Officer to disclose, upon the request of any party, the substance of the Presiding Officer's communication with the ~~MCILS-PDS~~ AdvisorClerk.

#### 5. 4. Recommended Decision of Presiding Officer.

~~a. A.~~ If an ~~appellant~~Appellant requests an Expedited Appeal pursuant to Section 4(1)(A), the Presiding Officer shall issue a recommended decision to the Commission, as set forth in Section ~~10412~~, within ~~a reasonable time period.~~30 calendar days of the date on which Appellant elected an expedited appeal.

~~A.~~

~~B.~~ If an ~~appellant~~Appellant requests a ~~hearing~~Hearing on Appeal pursuant to Section 4(1)(B), the Presiding Officer will conduct a hearing ~~before the full Commission~~ in accordance with the requirements of the Maine Administrative Procedure Act, 5 ~~M.R.S.~~M.R.S. § 9051 *et seq.*, ~~and provide the parties notice of any hearing pursuant to 5 M.R.S. § section 9052. A hearing before the Commission~~Presiding Officer shall be noticed within 30 days of appellant's election of a hearing and shall be scheduled to occur within 90 days of appellant electing a hHearing on Appeal. scheduled to occur expeditiously.

#### **SECTION 6. MCILS PDS ADVISOR CLERK.**

The ~~MCILS PDS Advisor~~Clerk shall:

1. 1. Upon request of the Presiding Officer, provide information and documents to the Presiding Officer about the operations and administrative procedures of ~~MCILSPDS~~; and
2. 2. Provide technical and administrative assistance to the Presiding Officer at any hearing ~~or pre-hearing conference, including ensuring that all events are recorded in a form susceptible to transcription.~~

#### **SECTION 7. DEFAULT.**

1. ~~Failure to appear.~~ If an ~~appellant~~Appellant fails to appear at a hearing, ~~without good cause,~~ the ~~appellant~~Appellant ~~may~~shall be deemed by the Presiding Officer to have abandoned the appeal. The Presiding Officer shall immediately notify the ~~appellant~~Appellant in writing of the finding of default. If, within ~~15~~10 calendar days after the issuance of the notice of default, the ~~appellant~~Appellant submits information that demonstrates, in the judgment of the Presiding Officer, that the ~~appellant~~Appellant had good cause for failing to appear, the appeal will be reinstated. If the ~~appellant~~Appellant does not submit such information to the Presiding Officer

within the timeframe herein, the appeal will be dismissed, and the decision of the Executive Director will become final agency action.

~~2. **Hearing in the absence of the appellant.** A hearing may be held in the absence of the appellant when the Presiding Officer chooses to proceed with the hearing as an alternative to a default.~~

## ~~SECTION 8. EVIDENCE~~

- ~~1. **Admissibility.** 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.~~
- ~~2. **Testimony.** Witnesses may provide testimony orally before the Presiding Officer or in person by deposition, by video, or by a sworn written statement. Parties must ensure that witnesses who provide sworn written statements or testimony are available for cross examination at the hearing, although the cross examination of a witnesses may, at the request of a party, take place at a later date.~~
- ~~3. **Irrelevant or repetitious evidence.** Evidence that is irrelevant or unduly repetitive may be excluded. Evidence that is relevant to the appellant's fitness or qualifications to provide indigent legal services consistent with constitutional, statutory, and ethical provisions or Commission rules is relevant whether the evidence arose prior to the decision appealed from or subsequent to the decision being appealed.~~
- ~~4. **Weight of evidence.** The fact that evidence is admitted shall not limit the authority of the Presiding Officer Commission to determine the weight to be given the evidence.~~
- ~~5. **Hearsay.** Hearsay evidence shall not be excluded simply because of its hearsay nature. The Presiding Officer Commission will, in accordance with law, determine the weight to be given to hearsay evidence.~~
- ~~6. **Rules of privilege.** Rules of privilege as provided in the Maine Rules of Evidence, Article 5, shall be observed.~~
- ~~7. **Stipulation of facts.** When all parties stipulate to a fact, the Presiding Officer may make draft findings of fact on the basis of the stipulation and the Commission shall decide what weight to give the stipulated facts. Signed statements or on the record oral statements by parties are sufficient as stipulations.~~
- ~~8. **Official notice of facts.** The Presiding Officer Commission may take official notice of a fact upon his or hers own initiative or at the request of a party. Official notice may be taken of any fact of which judicial notice could be taken, and in addition, of any~~

~~general or technical matter within the specialized experience or knowledge of the Presiding Officer/Commissioners, and of any statutes, rules and non-confidential public records. The Presiding Officer will notify the parties when official notice is taken and shall afford the parties an opportunity to contest the substance or materiality of the material noticed.~~

## **SECTION 98. ~~\_\_\_\_\_~~ SUBPOENAS AND DISCOVERY.**

1. ~~1.~~ **Request for subpoenas.** Any party may request the issuance of a subpoena by presenting the request to the Presiding Officer. The request must contain:
  - A. ~~A.~~ The name and address of the party requesting the subpoena; and
  - B. ~~B.~~ The name and address of the person to be subpoenaed, or other place where the person to be subpoenaed may be found; and
  - C. ~~C.~~ A brief statement why the testimony or evidence of the person to be subpoenaed is relevant to an issue of fact in the appeal.
2. ~~2.~~ **Issuance on approval.** If the Presiding Officer determines that the request pertains to testimony or evidence relevant to an issue of fact in the appeal, the Presiding Officer must submit the subpoena for approval by the Attorney General or a Deputy Attorney General who is not involved in the appeal.
3. **Requirements.** A subpoena shall comply with the requirements of 5 ~~M.R.S.M.R.S.:~~ §9060.
4. **Pre-hearing discovery.** No prehearing discovery is allowed, except that any party may conduct its own investigation and offer evidence it believes is relevant to the issues to be decided regarding the decision on appeal.
5. **Pre-hearing conference.**
  - A. If a full hearing under Section 4(1)(B) is elected, then the Presiding Officer shall conduct a pre-hearing conference with the parties and/or their representatives at least 30 calendar days before the hearing date.
  - B. The scope of the prehearing conference will encompass:
    - I. A-any evidentiary issues the parties wish to address in advance of the hearing;
    - II. T,the potential for stipulations;:

III. Arrangements for remote appearance by witnesses;

IV. The exchange of witness and exhibit lists and exhibits, which must occur at least 14 calendar days in advance of the hearing; ~~at least 7 days in advance of hearing.~~

V. The filing of objections to evidence or witnesses, which must occur at least 7 calendar days in advance of the hearing; and

VI. A good faith estimate of time needed for the hearing.  
and a good faith estimate of time for the hearing.

## **SECTION 10. ~~HEARINGS RECORDED~~**

~~1. All hearings will be recorded in a form susceptible for to transcription.~~

## **SECTION 11. ~~DISMISSAL OF APPEAL~~**

~~1. At any time before receipt of notice of the Presiding Officer's Commission's recommended decision, the parties may enter into an agreement as to resolution of the issues subject to the appeal. If they reach such an agreement, they shall file with the Presiding Officer a stipulation of dismissal that outlines the agreement reached. Upon receipt, the Presiding Officer shall recommend dismissal to the Commission.~~

~~2. At any time before receipt of notice of the Presiding Officer's recommended Commission's decision, the appellant may withdraw the appeal by written notice to the Presiding Officer. Upon receipt of notice withdrawal of the appeal, the Presiding Officer shall recommend dismissal of the appeal to the Commission.~~

~~3. The Commission must dismiss the appeal if the Presiding Officer recommends dismissal on the grounds set forth in subsection 1 or 2.~~

## **SECTION 192. ~~RECOMMENDED DECISION OF THE PRESIDING OFFICER~~HEARING.**

1. **Recording.** All hearings will be recorded in a form susceptible to transcription.

1. ~~The Presiding Officer will preside over a hearing before the Commission pursuant to 5 M.R.S. section 9051, et seq., and will remain impartial and take no part in rendering a decision. The Presiding Officer will have those powers and duties set out in 5 M.R.S. section 9062, including the power to administer oaths, rule on the admissibility of evidence, regulate the course of the proceedings, and otherwise control the procedure of the appeal. A quorum of the voting members of the Commission are required to conduct the hearing.~~

~~The Commission shall render a decision conforming to 5 M.R.S. section 9061 at the conclusion of the hearing, and it shall limit its consideration and deliberations to the admitted evidence presented during the hearing, including any stipulations by the parties, together with the record upon which the Executive Director made the decision being appealed.~~

~~2. **Public hearing.** The hearing shall be public unless there will be substantial confidential information presented. If there will be substantial confidential information presented, in which case, the Presiding Officer may utilize the provisions of 5 M.R.S. M.R.S. §section 9057(6) to protect the confidentiality of the information, including but not limited to, taking the step of closing portions—, or in a rare case concerning underlying case information from juvenileyouth representation or Title 22 child protection proceedings—, all of the proceeding to the public.~~

~~3. **Presiding Officer's powers and duties.** The Presiding Officer will have those powers and duties set out in 5 M.R.S. § 9062, including the power to administer oaths, rule on the admissibility of evidence, regulate the course of the proceedings, issue a recommended decision for consideration by the Commission, and otherwise control the procedure of the appeal from inception through the rendering of a recommended decision to the Commission.~~

~~1. **Evidence.**~~

~~4. **Evidence.**~~

~~A. 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 .~~

~~B. Rulings on evidence are must be made pursuant to 5 M.R.S § 9057.~~

~~C. Witnesses may provide testimony orally before the Presiding Officer or in-person by deposition, by video, or by a sworn written statement. Parties must ensure that witnesses who provide sworn written statements or testimony are available for cross-examination at the hearing, although the cross-examination of a witness may, at the request of a party, take place at a later date.~~

~~D. Evidence that is irrelevant or unduly repetitive may be excluded. Evidence pertaining to the Appellant's fitness or qualifications to provide indigent legal services consistent with constitutional, statutory, or ethical provisions or Commission rules is relevant, whether the evidence arose prior or subsequent to the decision being appealed.~~

~~E. The fact that evidence is admitted shall not limit the authority of the Presiding Officer to determine the weight to be given the evidence.~~

~~F. Hearsay evidence shall not be excluded simply because of its hearsay nature. The Presiding Officer will, in accordance with administrative law, determine the weight to be given to hearsay evidence.~~

- G. Rules of privilege as provided in the Maine Rules of Evidence, Article 5, shall be observed.
- H. When all parties stipulate to a fact, the Presiding Officer may make draft findings of fact based on the stipulation, and the Commission shall decide what weight to give the stipulated facts. Signed statements or on-the-record oral statements by parties are sufficient as stipulations.
- I. The Presiding Officer may take official notice of a fact upon its own initiative or at the request of a party. Official notice may be taken of any fact of which judicial notice could be taken, and of any statutes, rules and non-confidential public records. The Presiding Officer will notify the parties when official notice is taken and shall afford the parties an opportunity to contest the substance or materiality of the material noticed.

## SECTION 10. —RECOMMENDED DECISION.

- 1. **Standard.** In rendering a recommended decision, the Presiding Officer shall afford high deference to the Executive Director's decision and will only recommend that the Executive Director's decision be vacated—in whole or in part—if the Presiding Officer determines that the Executive Director's decision was arbitrary and capricious or constituted an abuse of discretion.
- 2. **Basis.**
  - A. Expedited Appeal. If the Appellant has chosen an Expedited Appeal, following review of the documentary record, the Presiding Officer will prepare a recommended decision based on a review of the materials submitted by the Appellant with Appellant's notice of appeal and any materials considered by the Executive Director in rendering a decision, including any materials submitted or relied upon as part of a motion for reconsideration.
  - B. Hearing on Appeal. The recommended decision following a hearing on appeal must be based **only** on the evidence, filings, argument presented to the Presiding Officer by the Parties, and any statements made by the Parties throughout the appellate process. ~~at that hearing~~
- 3. **Timing.**
  - A. In the event of an expedited appeal, the Presiding Officer shall issue a recommended decision within 30 calendar days of the date on which the Appellant elected an expedited appeal.
  - B. In the event of a hearing on appeal, the Presiding Officer shall issue a recommended decision within 30 calendar days of the close of all evidence and argument.

**4. Contents.** The recommended decision shall comply with 5 M.R.S. § 9061 and include:

- A. A.—A clear statement of the subject(s) of the appeal and of the issue(s) that must be resolved to decide the appeal;
- B. B.—A list of all evidence considered and upon which the recommended final decision is based;
- C. C.—Findings of fact reasonably supported by the materials considered, which must be sufficient to apprise the parties of the basis for the recommended decision; and
- D. D.—A clear statement indicating whether the Presiding Officer concludes the Executive Director’s decision was or was not arbitrary and capricious or constituted an abuse of discretion.

**5. Delivery.** The Presiding Officer will have the PDS Clerk deliver copies of the recommended decision to the parties. The parties will have 10 calendar days from receipt of the recommended decision to submit written responses or objections to the recommended decision. If the Presiding Officer amends the recommended decision based on responses or objections by a party or parties, the Presiding Officer will have the PDS Clerk deliver copies of the final recommended decision to the parties with no further opportunity to respond. The PDS Clerk will then deliver to the Commission the final recommended decision and all written documents in the record to the Commission.

~~Contents. Following the hearing or, if the appellant has chosen an Expedited Appeal following review of the documentary record, the Presiding Officer will prepare a recommended decision, which will include:~~

- ~~A.—A clear statement of the subject(s) of the appeal and of the issue(s) that must be resolved to decide the appeal;~~
- ~~B.—A listing of the date of hearing, place of hearing, and participants at the hearing or, if no hearing was held, the written agreement from the appellant attorney to proceed without a hearing;~~
- ~~C.—A listing of all evidence admitted and upon which the recommended final decision is based;~~
- ~~D.—Findings of fact, which must be sufficient to apprise the parties of the basis for the recommended decision;~~
- ~~E.—A clear statement of result resolving all issues under consideration;~~

F. — A clear explanation of the reasoning underlying the result, including references to applicable law, procedures, and rules.

2. — Comments, modification, and delivery to the Commission

A. — The Presiding Officer will send a copy of the recommended decision to each of the parties for comment. A may submit comments regarding the recommended decision, which must be in writing and must be filed with the Presiding Officer within 10 days of receipt of the Presiding Officer's recommended decision.

B. — The Presiding Officer may, but is not required to, modify the recommended decision in response to the parties' comments. If in the judgment of the Presiding Officer the previously issued recommended decision should be substantially modified, the Presiding Officer will send the recommended decision as modified to the parties for further comment, as provided in subparagraph A.

C. — The Presiding Officer will deliver copies of the recommended decision, as originally prepared and as modified, to the Commission. The Presiding Officer will deliver the written comments made by the parties with the recommended decision. When the recommended decision is not modified, the Presiding Officer will also deliver to the Commission its written response to the parties' written comments.

## **SECTION 1311. — ACTION BY THE COMMISSION.**

~~1. **Commission Consideration.** At the conclusion of the hearing by the Presiding Officer, the Commission shall consider the evidence before it and deliberate its decision. Such deliberations shall not be public but shall take place in executive session pursuant to 4 M.R.S. section 1806(2)(F) and 1 M.R.S. section 405(6)(E),(F). A quorum of the Commission will consider the Presiding Officer's recommended decision on a timely basis.~~

~~1. A quorum of the voting members of the Commission will consider the Presiding Officer's recommended decision at the next regularly scheduled Commission meeting, unless the next regularly scheduled Commission meeting is set to occur less than 14 calendar days after the Presiding Officer's recommended decision issues, in which case, the recommended decision will be considered at the following Commission meeting. No additional evidence, testimony, or argument will be heard.~~

~~2. 2.-If requested by the Commission, the Presiding Officer may be present to assist the Commission. If the Presiding Officer appointed by the Commission Chair is a Commissioner, that Commissioner shall recuse from voting on Commission action on the recommended decision.~~

~~3. 3.-After considering the recommended decision, a quorum of the voting members of the Commission shall vote as to whether the decision of the Executive Director was arbitrary and capricious or constituted an abuse of discretion.~~

- A. If a majority of the Commission votes that the decision of the Executive Director was either arbitrary and capricious or constituted an abuse of discretion, then the Executive Director's decision shall be vacated.
- B. If a majority of the Commission (or the vote is equally split) votes that the Executive Director's decision was neither an abuse of discretion nor arbitrary and capricious, —the Commission shall uphold the Executive Director's decision
- ~~4. —4.—~~ A decision as adopted by the Commission pursuant to this Section is the final administrative decision in the appeal and constitutes final agency action.
- ~~2.—~~ **Recommended decision and record.** ~~In advance of consideration, a copy of the Presiding Officer's recommended decision must be sent to each Commissioner, with parties' comments as provided in Section 12.~~
- ~~3.—~~ **Presiding Officer.** ~~If requested by the Commission, the Presiding Officer may be present to assist the Commission. If the Presiding Officer appointed by the Commission Chair is a Commissioner, that Commissioner shall recuse from consideration of or voting on Commission action on the recommended decision.~~
- ~~24.—~~ **Action after consideration.** ~~After considering the recommended final decisionevidence before it, the Commission shall exit executive session, and a quorum of the voting members of the Commission shall vote as to whether the decision of the Executive Director is arbitrary and capricious or constitutes an abuse of discretion.~~  
~~If a majority of the Commission votes that the decision of the Executive Director is either arbitrary and capricious or constitutes abuse of discretion, then the Executive Director's decision shall be vacated.~~  
~~If it is the vote of a majority of the Commission (or the vote is equally split) that the Executive Director's decision is neither an abuse of discretion nor arbitrary and capricious:~~  
~~— the Commission shall uphold the Executive Director's decision; or~~  
~~ii. — if a majority of the Commission determines that circumstances have materially changed since the Executive Director's decision was made such that the grounds cited therein for suspension have been ameliorated, the Commission may modify the original suspension decision and restore appellant to roster eligibility with appropriate conditions.: The Commission may seek PDS staff recommendations on appropriate conditions.~~
- A. ~~Adopt the Presiding Officer's recommended decision as delivered;~~
- B. ~~Modify the Presiding Officer's recommended decision;~~
- C. ~~Send the matter back to the Presiding Officer for the taking of further evidence or for additional consideration of issues, as set forth by the Commission; or~~
- D. ~~Reject the Presiding Officer's recommended decision in whole or in part and decide the appeal itself on the basis of the existing record.~~

~~5. A decision as adopted by the Commission pursuant to this Section is the final administrative decision in the appeal and constitutes final agency action.~~

~~6. If the vote of the Commission to accept or not accept the Presiding Officer's recommended decision is evenly divided, the decision of the Executive Director is affirmed.~~

#### **SECTION 14. EXPEDITED APPEAL**

~~1. **Recommended decision.** If the appellant has chosen an Expedited Appeal following review of the documentary record, the Presiding Officer will prepare a recommended decision based on a review of the materials submitted by the appellant with appellant's notice of appeal and any materials considered by the Executive Director in rendering a decision, including any materials submitted or relied upon as part of a motion for reconsideration. The Presiding Officer shall use an arbitrary and capricious standard of review in analyzing these materials and the Executive Director's decision. The recommended decision shall include:~~

~~A. A clear statement of the subject(s) of the appeal and of the issue(s) that must be resolved to decide the appeal;~~

~~B. A listing of all evidence considered and upon which the recommended final decision is based;~~

~~C. Findings of fact reasonably supported by the materials considered, which must be sufficient to apprise the parties of the basis for the recommended decision;~~

~~D. A clear statement indicating whether the Presiding Officer concludes the Executive Director's decision was or was not arbitrary and capricious;~~

~~E. A clear explanation of the reasoning underlying the result, including references to applicable law, procedures, and rules.~~

~~F. The Presiding Officer will have the PDS Advisor/Clerk deliver copies of the recommended decision to the Commission.~~

~~2. **Commission Action.** A quorum of the Commission will consider the Presiding Officer's recommended decision at the next regularly scheduled Commission meeting, unless the next regularly scheduled Commission meeting is set to occur less than 14 days after the Presiding Officer's recommended decision issues, in which case, the recommended decision will be considered at the following Commission meeting. No additional evidence or testimony or argument will be heard on the expedited appeal from any party or witness.~~

~~A. In advance of consideration, a copy of the Presiding Officer's recommended decision must be sent to each Commissioner, along with all the materials the Presiding Officer utilized in reaching the recommended decision.~~

~~\_\_\_\_\_ B. \_\_\_\_\_ If requested by the Commission, the Presiding Officer may be present to assist the Commission. If the Presiding Officer appointed by the Commission Chair is a Commissioner, that Commissioner shall recuse from voting on Commission action on the recommended decision.~~

~~\_\_\_\_\_ After considering the recommended final decision, and the materials utilized by the Presiding Officer in reaching the recommended decision, a quorum of the Commission shall:~~

~~\_\_\_\_\_ Adopt the Presiding Officer's recommended decision as delivered;~~

~~\_\_\_\_\_ 2. \_\_\_\_\_ Send the matter back to the Presiding Officer for additional consideration of issues set forth by the Commission; or~~

~~\_\_\_\_\_ 3. \_\_\_\_\_ Reject the Presiding Officer's recommended decision and proceed to a full hearing under Section 4(1)(B).~~

~~\_\_\_\_\_ 3. \_\_\_\_\_ A decision as adopted by the Commission pursuant to this Section, except under Section 14(2)(C)(3) is the final administrative decision in the appeal and constitutes final agency action.~~

~~\_\_\_\_\_ 6. \_\_\_\_\_ If the vote of the Commission to accept or not accept the Presiding Officer's recommended decision is evenly divided, the decision of the Executive Director is affirmed.~~

## ~~SECTION 12. \_\_\_\_\_ DISMISSAL OF APPEAL.~~

- ~~1. \_\_\_\_\_ 1. \_\_\_\_\_ At any time before receipt of notice of the Presiding Officer's recommended decision, the parties may enter into an agreement as to resolution of the issues subject to the appeal. If they reach such an agreement, they shall file with the Presiding Officer a stipulation of dismissal that outlines the agreement reached. Upon receipt, the Presiding Officer shall recommend dismissal to the Commission.~~
- ~~2. \_\_\_\_\_ 2. \_\_\_\_\_ At any time before receipt of notice of the Presiding Officer's recommended decision, the Appellant may withdraw the appeal by written notice to the Presiding Officer. Upon receipt of notice withdrawal of the appeal, the Presiding Officer shall recommend dismissal of the appeal to the Commission.~~
- ~~3. \_\_\_\_\_ 3. \_\_\_\_\_ The Commission must dismiss the appeal if the Presiding Officer recommends dismissal on the grounds set forth in subsections 1 or 2.~~

STATUTORY AUTHORITY: 4 ~~M.R.S.~~M.R.S. §§ 1804(3)(J) and (4)(D)

EFFECTIVE DATE:

August 21, 2011 – filing 2011-282