

Chapter 6: APPEALS OF DECISIONS OF THE EXECUTIVE DIRECTOR

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 Services pursuant to 4 M.R.S. § 1804(3)(J).

SECTION 1. DEFINITIONS.

1. Appellant. “Appellant” means a person who has filed an appeal.
2. Commission or PDS. "Commission" or “PDS” means the Maine Commission on Public Defense Services.
3. Executive Director. “Executive Director” means the Executive Director of the Maine Commission on Public Defense Services or their decision-making designee.
4. File or Filed. “File” or “Filed” means delivery of a document to PDS. Delivery may be in-hand, by regular mail, by commercial delivery service, or by email to the Executive Director.
5. PDS Clerk. “PDS Clerk” means a PDS staff member designated by the Commission Chair to act in an administrative role to support the Presiding Officer in discharging their duties.
6. Party. "Party" means the person bringing an appeal and the Executive Director.
7. Presiding Officer. "Presiding Officer" means the individual appointed by the Commission Chair to preside over the appeal proceeding under this Chapter.
8. Record. "Record" means those materials required by 5 M.R.S. § 9059.

SECTION 2. APPLICABILITY; WHO MAY APPEAL.**1. Application.**

- A. This Chapter applies to appeals to the Commission from decisions of the Executive Director on issues specifically set forth in 4 M.R.S. § 1804(3)(J).
- B. A decision of the Executive Director concerning issues not specifically set forth in 4 M.R.S. § 1804(3)(J) constitutes final agency action and is not subject to appeal under this Chapter.

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. § 1804(3)(J) may appeal the decision to the Commission. An Appellant may be represented by another person—at Appellant's expense—in accordance with 4 M.R.S. § 807 or may proceed without representation.

SECTION 3. BRINGING AN APPEAL.

1. **Decision.** 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 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 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.** An individual who wishes to appeal a decision must File a written statement of appeal with PDS within 30 calendar days after receipt of the Executive Director's decision. For purposes of this section, a statement of appeal is Filed on the date it is received by PDS 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. **Contents of the statement of appeal.** The statement of 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's position.
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.

SECTION 4. CHOICE OF APPEALS PROCESS.

1. Within 7 calendar days of receiving notice of assignment as PDS Clerk, the PDS Clerk shall notify the Appellant in writing of the option to choose one of two appeal processes:
 - A. The 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. Alternatively, the Appellant may request to have a hearing pursuant to 5 M.R.S. § 9052.
2. The Appellant must respond in writing to the PDS Clerk as to their selection of the type of appeal process within 15 calendar days after the written notice by the PDS Clerk is received. If the Appellant does not respond within the timeframe prescribed herein the appeal process shall default to the Expedited Appeal process set forth in Section 4(1)(A).
3. If the Appellant elects a Hearing on Appeal process, the Presiding Officer shall notify the Appellant in writing of the hearing date.

SECTION 5. PRESIDING OFFICER.

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; unbiased; and able to conduct a fair, effective, and efficient appeal process.
2. **Who can serve.** The Commission Chair may appoint any Commissioner or other qualified person as the Presiding Officer. The fact that the Presiding Officer is a PDS rostered attorney does not constitute, by itself, direct or indirect personal or financial interest in an appeal or its outcome.
3. **Appointment, removal, & replacement.**
- 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. 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. A Presiding Officer may also independently decide to recuse from the appeal if the Presiding Officer cannot be fair, impartial, and unbiased.
- 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, to avoid substantial prejudice to any party, it is necessary to start the process anew.
4. **Duty and powers of the Presiding Officer.** The Presiding Officer has the duty to preside over any hearing in a fair and impartial manner in accordance with this Chapter and has all the powers and duties as set forth in 5 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 PDS Clerk.

5. Recommended Decision of Presiding Officer.

A. If an 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 10, within 30 calendar days of the date on which Appellant elected an expedited appeal.

B. If an Appellant requests a Hearing on Appeal pursuant to Section 4(1)(B), the Presiding Officer will conduct a hearing in accordance with the requirements of the Maine Administrative Procedure Act, 5 M.R.S. § 9051 *et seq.*, and provide the parties notice of any hearing pursuant to 5 M.R.S. § 9052. A hearing before the Presiding Officer shall be scheduled to occur expeditiously.

SECTION 6. PDS CLERK.

The PDS Clerk shall:

1. Upon request of the Presiding Officer, provide information and documents to the Presiding Officer about the operations and administrative procedures of PDS; and
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.

If an Appellant fails to appear at a hearing, the Appellant shall be deemed by the Presiding Officer to have abandoned the appeal. The Presiding Officer shall immediately notify the Appellant in writing of the finding of default. If, within 10 calendar days after the issuance of the notice of default, the Appellant submits information that demonstrates, in the judgment of the Presiding Officer, that the Appellant had good cause for failing to appear, the appeal will be reinstated. If the 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.

SECTION 8. SUBPOENAS AND DISCOVERY.

1. Any party may request the issuance of a subpoena by presenting the request to the Presiding Officer. The request must contain:
 - A. The name and address of the party requesting the subpoena;

- 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. 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. 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. A subpoena shall comply with the requirements of 5 M.R.S. § 9060.
- 4. 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. Any evidentiary issues the parties wish to address in advance of the hearing;
 - II. 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;
 - 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.

SECTION 9. HEARING.

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

2. **Public hearing.** The hearing shall be public unless there will be substantial confidential information presented. If there will be substantial confidential information presented, the Presiding Officer may utilize the provisions of 5 M.R.S. § 9057(6) to protect the confidentiality of the information, including but not limited to, closing portions—or in a rare case concerning underlying case information from youth 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.
4. **Evidence.**
 - A. Rulings on evidence must be made pursuant to 5 M.R.S § 9057.
 - B. 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.
 - C. 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.
 - D. The fact that evidence is admitted shall not limit the authority of the Presiding Officer to determine the weight to be given the evidence.
 - E. 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.
 - F. Rules of privilege as provided in the Maine Rules of Evidence, Article 5, shall be observed.
 - G. 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.

H. 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.

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.~~

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by bias or error of law;
- (5) Unsupported by substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion.

1. 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.

2. 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.

3. Contents. The recommended decision shall comply with 5 M.R.S. § 9061 and 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 list 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; and
 - 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.
4. **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.

SECTION 11. ACTION BY THE COMMISSION.

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

SECTION 12. DISMISSAL OF APPEAL.

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. 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. 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. §§ 1804(3)(J) and (4)(D)

EFFECTIVE DATE: