

This rule was filed as 11 NMAC 5.5.

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 5 OCCUPATIONAL HEALTH AND SAFETY
PART 5 OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION PROCEDURES

11.5.5.1 ISSUING AGENCY: Occupational Health and Safety Review Commission.
[1/1/96; Recompiled 11/30/01]

11.5.5.2 SCOPE: All parties and advocates for parties to any proceeding before the commission.
[1/1/96; Recompiled 11/30/01]

11.5.5.3 AUTHORITY: Section 50-9-9, NMSA 1978.
[1/1/96; Recompiled 11/30/01]

11.5.5.4 DURATION: Permanent.
[1/1/96; Recompiled 11/30/01]

11.5.5.5 EFFECTIVE DATE: January 1, 1996 [unless a later date is cited at the end of a section]
[1/1/96; Recompiled 11/30/01]

11.5.5.6 OBJECTIVE: To establish procedures for the conduct of proceedings before the occupational health and safety review commission.
[1/1/96; Recompiled 11/30/01]

11.5.5.7 DEFINITIONS:

A. Terms defined in Act or in 11 NMAC 5.1.12. [now 11.5.1.7 NMAC] All terms defined in the Act or in 11 NMAC 5.1.12 [now 11.5.1.7 NMAC] and not otherwise defined in this Part have the same meanings given where defined.

B. Other terms: Except as otherwise provided in this Part, the following terms have the indicated meanings:

- (1) "Act" means the Occupational Health and Safety Act, Sections 50-9-1 to 50-9-25 NMSA 1978.
- (2) "Advocate" means any person authorized by a party to act on behalf of that party in a proceeding under this Part; provided, nothing in this Part shall be construed to preclude an advocate who is a lawyer from using the terms "attorney", "counsel", or "lawyer" in lieu of the term "advocate" in any document filed or served under this Part.
- (3) "Affected employee" means an employee of a responsible employer who, as a result of the employee's assigned duties, is exposed to any alleged hazard described in the citation.
- (4) "Citation" means any of the following documents issued by the department to an employer:
 - (a) a citation and notification of penalty (whether or not any penalty is, in fact, proposed);
 - (b) a notice of ee minimis violation; or
 - (c) a notification of failure to abate alleged violation.
- (5) "Commission" means the occupational health and safety review commission created by Section 50-9-9 NMSA 1978.
- (6) "Commission chair" means:
 - (a) the commission member designated by the governor, pursuant to the Act, to hold the office of chairman; or
 - (b) any commission member to whom the designated chairman delegates the authority to perform the functions delegated to the commission chair by this Part, during the designated chairman's absence or other inability to act.
- (7) "Commission counsel" means:
 - (a) any member of the attorney general's staff designated by the attorney general to provide legal advice and assistance to the commission; or
 - (b) subject to approval of and funding by the legislature, a private lawyer hired by the commission to provide legal advice and assistance to the commission;

(8) “Commission secretary” means any department employee designated by the secretary of environment to provide staff support to the commission as provided in the department of Environment Act, Sections 9-7A-1 to 9-7A-14 NMSA 1978, provided, use of the term “commission secretary” is not intended to suggest any particular personnel classification to be held by any department employee so designated;

(9) “Complainant” means the department, in a case initiated by a notice of contest;

(10) “Conformed copy” means a copy of any document filed with the commission, showing the date of filing of the original, and stamped or otherwise marked to distinguish the copy from the original document;

(11) “Department” means the New Mexico environment department;

(12) “Document” means any pleading, motion, response, memorandum, decision, order, or other paper filed in a proceeding under this Part, but does not include a cover letter accompanying a document transmitted for filing.

(13) “Final resolution” means any of the following events:

(a) the filing of a notice of vacation or notice of withdrawal under the conditions specified in Section 307.A [now Subsection A of 11.5.5.307 NMAC];

(b) expiration of the deadline for the filing of objections to a proposed settlement agreement, as specified in Section 503.E [now Subsection E of 11.5.5.503 NMAC], with no objection having been filed by any person authorized to file objections, if the settlement agreement disposes of all issues in the case; or

(c) the date of filing of any order:

(i) deciding a case on the merits;

(ii) dismissing a notice of contest or a petition for modification of abatement period;

(iii) approving a settlement agreement following the receipt of timely objections; or

(iv) otherwise disposing of a case in its entirety.

(14) “Hearing” means a formal proceeding before the commission at which the parties are provided an opportunity to appear and present evidence or argument in person or through an advocate, but does not include a meeting at which the commission deliberates to decide a case or issue pending before the commission;

(15) “Hearing officer” means the commission chair or any other person appointed by the commission to perform the functions delegated to a hearing officer by this Part;

(16) “Hearing record” includes:

(a) the record proper; and

(b) the transcript of proceedings;

(17) “Intervenor” means any person:

(a) who has filed:

(i) a notice of intervention pursuant to Section 502.A [now Subsection A of 11.5.5.502 NMAC], if such notice has not been stricken; or

(ii) a motion to intervene pursuant to Section 502.B [now Subsection B of 11.5.5.502 NMAC] and SCRA 1986, 1-024.B, if such motion has been granted; and

(b) who has not subsequently been dismissed, or voluntarily withdrawn, as an intervenor.

(18) “Lawyer” means a person who is admitted to practice law in any jurisdiction;

(19) “NMSA 1978” stands for “New Mexico Statutes Annotated, 1978 Compilation”, and when used in conjunction with a specific statutory citation (for example, “Section 50-9-1 NMSA 1978,”), refers to the most recent version of the cited statutory provision;

(20) “Notice of docketing” means a document prepared by the commission secretary to notify the complainant or petitioner and the respondent that a notice of contest or a petition for modification of abatement period has been received and docketed by the commission;

(21) “Order” means any document filed by the commission or, where applicable, by the hearing officer, containing:

(a) the commission’s decision on the merits of any case pending before the commission; or

(b) the commission’s or the hearing officer’s ruling, as applicable, on any other matter pending before the commission;

(22) “Party” includes only:

(a) the complainant or petitioner;

(b) any respondent; and

(c) any intervenor.

(23) “Petitioner” means any responsible employer, affected employee or representative of affected employees filing a petition for modification of abatement period.

(24) “Pleading” includes only those documents identified as pleadings in Section 401 [now 11.5.5.401 NMAC].

(25) “Record proper” includes all documents filed in a case, except any document offered as an exhibit at a hearing.

(26) “Representative of affected employees” means a labor union or other entity, including any local office thereof, authorized pursuant to the federal Fair Labor Standards Act or any state collective bargaining law to bargain collectively for, or otherwise represent in labor-management relations, any group of employees that includes one or more affected employees.

(27) “respondent” means:

(a) in a case initiated by a notice of contest, the responsible employer filing the notice of contest; or

(b) in a case initiated by a petition for modification of abatement period

(i) the department; and

(ii) if the petition is filed by an affected employee or a representative of affected employees, the responsible employer;

(28) “Responsible employer” means an employer named in a citation;

(29) “SCRA 1986” stands for “Supreme Court Rules Annotated, 1986 Compilation”, and when used in conjunction with a specific rule citation (for example, “SCRA 1986, 1-001”), refers to the most recent version of the cited rule; and

(30) “Transcript of proceedings” includes:

(a) the verbatim record of any hearing as recorded by a court reporter; and

(b) all exhibits:

(i) admitted into evidence at the hearing; or

(ii) denied admission into evidence but tendered as an offer of proof pursuant to Section 707.B.2 [now Paragraph (2) of Subsection B of 11.5.5.707 NMAC].

C. Use of singular and plural. As used in this Part, words in the singular also include the plural, and vice versa.

[9/30/76; 4/25/78; 3/6/79; 12/28/81; 1/1/83; 1/1/84; 8/12/93; 1/1/94; 10/1/94; 1/1/96; Recompiled 11/30/01]

11.5.5.8 AMENDMENT AND SUPERSESSION OF PRIOR RULES; REFERENCES IN OTHER REGULATIONS: This Part shall be construed as amending and superseding the Rules of Procedure, OHSRC 93-1, filed November 15, 1993, as amended. Any reference to the occupational health and safety review commission’s rules of procedure in any other rule shall be construed as a reference to this Part.
[1/1/83, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.9 - 11.5.5.99 [RESERVED]

11.5.5.100 SUBPART I: GENERAL PROVISIONS: [see Sections 11.5.5.104 NMAC through 11.5.5.112 NMAC]
[Recompiled 11/30/01]

11.5.5.101 - 103 [RESERVED]

11.5.5.104 APPLICABILITY OF RULES OF CIVIL PROCEDURE: In the absence of a specific provision in this Part governing an action, procedure shall be in accordance with the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102.

A. Commission authority not expanded: The incorporation of the Rules of Civil Procedure shall not be construed to expand or otherwise modify the authority and jurisdiction of the commission under the Act.

B. Meaning of “judge” or “court”: For purposes of this Part, “judge” or “court” as used in the Rules of Civil Procedure means the commission or the hearing officer.

[4/25/78; 1/1/94; Recompiled 11/30/01]

11.5.5.105 [RESERVED]

11.5.5.106 POWERS AND DUTIES OF COMMISSION, COMMISSION CHAIR, COMMISSION COUNSEL, HEARING OFFICER, AND COMMISSION SECRETARY

A. Commission: The commission, acting through a quorum, shall exercise all powers and duties not specifically delegated to the commission chair, the commission counsel, the commission secretary, or a hearing officer.

B. Commission chair: The commission chair shall:

- (1) preside at all meetings of the commission; and
- (2) act as hearing officer in all cases pending before the commission until such time as another hearing officer is appointed.

C. Commission counsel: The commission counsel shall:

- (1) advise the commission, the commission secretary, and the hearing officer on the legal aspects of matters pending before the commission;
- (2) to the extent that doing so would not present a conflict of interest, advise individual commission members on legal matters affecting their individual obligations as commission members;
- (3) if so designated by the commission, act as hearing officer for matters pending before the commission; and
- (4) when requested by the commission, draft orders and opinions to implement decisions of the commission.

D. Hearing officer: The commission may appoint a hearing officer for any matter pending before the commission.

- (1) A hearing officer may be a commission member, the commission counsel, or an independent contractor, but shall not be an officer or employee of any party.
- (2) Except as otherwise provided in this Part, a hearing officer shall have full authority to:
 - (a) rule upon motions for extension of time, motions regarding discovery issues, and similar motions not seeking final resolution;
 - (b) examine witnesses;
 - (c) admit or exclude evidence;
 - (d) require parties to attend a prehearing conference, if deemed appropriate upon motion by a party or upon the hearing officer's own motion;
 - (e) when requested by the commission, issue proposed findings of fact and conclusions of law, a recommended decision, or both; and
 - (f) take any other actions deemed necessary and appropriate for the maintenance of order and the conduct of a fair, impartial, and efficient adjudication of the issues in the hearing.

(3) Nothing in Paragraph 2 of this Subsection shall be deemed to preclude the hearing officer from consulting with the commission prior to making a ruling on any matter pending before the hearing officer, if the hearing officer deems such consultation appropriate.

E. Commission secretary: The secretary of environment shall designate one department employee as commission secretary, and one of more additional department employees to perform the functions of the commission secretary in the commission secretary's absence.

- (1) The commission secretary shall:
 - (a) maintain the commission's official records;
 - (b) receive and file all documents required to be filed with the commission; and
 - (d) exercise all other powers and duties delegated by this Part or by the commission.
- (2) The commission secretary may perform other duties for the department so long as such other duties do not interfere with the proper and timely performance of the duties required by this Part.

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.107 RECUSAL OR DISQUALIFICATION OF COMMISSION MEMBER OR HEARING OFFICER:

A. Notice of voluntary recusal: A commission member or hearing officer may file a notice of voluntary recusal at any time. The specific grounds for recusal need not be stated. Any commission member or hearing officer filing a notice of voluntary recusal shall serve a copy thereof on each party.

B. Motion to disqualify: Any party seeking to disqualify a commission member or the hearing officer shall file a timely motion for disqualification, stating the grounds therefor with particularity.

C. Ruling:

(1) A motion seeking disqualification of a commission member shall be ruled upon by that member, whose ruling shall not be subject to review by the commission.

(2) A motion seeking disqualification of a hearing officer shall be ruled upon initially by the hearing officer. Denial of such motion may be appealed to the commission within five (5) days after such denial. Any such appeal not ruled upon within ten (10) days after filing shall be deemed denied.

[1/1/94; Recompiled 11/30/01]

11.5.5.108 COMPUTATION AND EXTENSION OF TIME:

A. General:

(1) Unless otherwise specifically provided by the Act, by this Part, or by order, any period of time specified in the Act, in this Part, or in any order shall be counted beginning with the day after the event from which the time is measured and shall include every calendar day thereafter until the specified number of days has been reached, except that:

(a) if the last day is a Saturday, Sunday, or holiday, the time is extended until the next day that is not a Saturday, Sunday, or holiday; and

(b) if the applicable period of time is stated as a specified number of "working days," only days other than Saturdays, Sundays, or holidays shall be counted.

(2) When the Act, this Part, or any order requires that an action be accomplished within a specified period of time after service of a document, and the applicable document is served by mail, three (3) days shall be added to the time otherwise required for accomplishment of the action. The additional time shall not be allowed if the period of time specified for accomplishment of an action runs from any event other than service of a document.

B. Determination of date of mailing: When the date of mailing of a document is at issue, the date of mailing shall be determined:

(1) by the date of any legible United States postal service postmark appearing on the envelope in which the document was mailed; or

(2) in the absence of a legible United States postal service postmark, by the date of any other legible postmark appearing on the envelope in which the document was mailed; or

(3) in the absence of any legible postmark, by any other credible evidence.

C. Extension of time:

(1) An extension of time for the filing or [of]any document or the accomplishment of any other action may be granted upon timely motion of a party for good cause, except that no extension of time may be granted for the filing of:

(a) a Notice of Contest or a Petition for Modification of Abatement Period; or

(b) an appeal of any final resolution.

(2) A motion for extension of time shall be filed at least three (3) working days before the document is due or the action is to be accomplished, unless the party filing the motion demonstrates that the failure to file a timely motion was the result of excusable neglect.

D. Definition of "holiday": As used in this Section, "holiday" means any day designated as a legal public holiday in New Mexico pursuant to Section 12-5-2 NMSA 1978, or any other day during which the department is closed for business during any consecutive period of four (4) or more hours between 8:00 a.m. and 5:00 p.m.

[9/30/76, 4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.109 COMMISSION RECORDS:

A. Official journal: Copies of all orders of the commission on the merits of any case, and copies of any other orders deemed by the commission to have precedential value, shall be kept by the commission secretary in an official journal, to be maintained indefinitely.

B. Public inspection: All records of the commission not otherwise protected by law will be available for inspection during normal business hours at the office of the commission secretary. Copies of such records will be provided upon request and payment of the cost of duplication. Certification of such copies, if requested, shall be provided at no additional charge.

[9/30/76, 1/1/94; Recompiled 11/30/01]

11.5.5.110 PROTECTION OF TRADE SECRETS AND OTHER CONFIDENTIAL INFORMATION:

Upon application by any person in a proceeding where trade secrets or other confidential matters may be divulged, the hearing officer shall issue such orders as may be appropriate to protect the confidentiality of such matters. [9/30/76, 4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.111 APPEARANCE BY PARTIES OR ADVOCATES; SUBSTITUTION OF ADVOCATE:

A. General:

- (1) At any stage of the proceedings:
 - (a) a party who is an individual may appear in person or through an advocate; and
 - (b) any other party shall appear through an advocate.
- (2) An advocate may, but need not, be a lawyer. The commission recognizes, however, that commission proceedings, particularly those that continue beyond the informal administrative review, may involve complex legal and factual issues in which a party would be best served by obtaining the services of a lawyer as the party's advocate.
- (3) Entry of appearance by an advocate on behalf of a party, regardless of whether the advocate is a lawyer, an officer or employee of the party, or an independent contractor other than a lawyer, constitutes a certification that the advocate has full authority to act on behalf of, and to bind, the party, subject only to the provisions of Subsection C of this Section.
- (4) Entry of appearance by an advocate shall be in writing; provided that the filing of any pleading or motion signed by the advocate shall constitute an entry of appearance without the necessity of filing an additional document specifically as an entry of appearance.

B. Substitution or withdrawal of advocate:

- (1) A party may replace its advocate with another advocate at any time not later than filing of the party's first pleading after docketing of the case:
 - (a) by filing of a written notice of substitution as illustrated in Section 1003 [now 11.5.5.1003 NMAC]; or
 - (b) if the party is replacing an advocate who is not a lawyer with an advocate who is a lawyer, by having the applicable pleading signed by the new advocate, without the necessity of a specific withdrawal by the original advocate.
- (2) After expiration of the time specified in Paragraph 1 of this Subsection, an advocate may withdraw from the case only as specified in SCRA 1986, 1-089.

C. Standards of conduct: All advocates appearing in any proceeding under this Part shall conform to the New Mexico Rules of Professional Conduct, SCRA 1986, 16-101 to 16-805. For purposes of this Part, the term "lawyer" as used in the Rules of Professional Conduct means any advocate appearing in a proceeding under this Part, whether or not licensed to practice law in any jurisdiction. [9/30/76, 4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.112 EX PARTE DISCUSSIONS:

A. General:

- (1) At no time during the pendency of a case shall any party or any advocate, officer, agent, or employee of a party discuss the merits of the case with any commission member, commission counsel, commission secretary, or hearing officer, except as provided in Subsection B of this Section.
- (2) Paragraph 1 of this Subsection shall not be construed to preclude:
 - (a) the disclosure of any information contained in the commission's records to any person, including a party, so long as such information is not otherwise protected by law; nor
 - (b) the commission secretary or commission counsel from discussing individually with any party or any party's advocate, procedural matters such as the scheduling of hearings and similar non-substantive issues, so long as no party is afforded preferential treatment in any such discussion.

B. Communications to be on the record: Any communication by a party with the commission, any commission member, the commission counsel, or the hearing officer relating to the merits of any case pending before the commission shall be:

- (1) in open hearing; or
- (2) in writing and in compliance with the format and service requirements set forth in Subpart II [now Sections 11.5.5.201 through 11.5.5.203 NMAC] of this Part.

[4/25/78, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.113 - 11.5.5.199 [RESERVED]

11.5.5.200 SUBPART II: GENERAL DOCUMENT REQUIREMENTS: [see Sections 11.5.5.201 NMAC through 11.5.5.203 NMAC]
[Recompiled 11/30/01]

11.5.5.201 FORM OF DOCUMENTS:

A. General: Unless otherwise provided in this Part, all documents, except exhibits attached to other documents, filed or served in any proceeding under this Part shall be substantially in the format illustrated in Section 1000 [now 11.5.5.1000 NMAC], or any other applicable form illustrated in Subpart X [now Sections 11.5.5.1000 through 1018 NMAC].

B. Signing of documents:

(1) Except as provided in Paragraph 2 of this Subsection and in Subsection C of this Section, each document filed under this Part shall contain the name, address, and telephone number of, and shall be signed by, the party filing the document or by that party's advocate.

(a) The signature on a document constitutes a certificate that the signer has read the document; that to the best of the signer's knowledge, information and belief the statements made in the document are true; that there are good grounds to support the document; and that the document is not interposed for delay. If a document is signed with the intent to defeat the purpose of this Section, the document may be stricken as sham and false, and the case may proceed as if the document had not been filed or served.

(b) Only the original of a document is required to bear an original signature. Copies may either bear a copy of the signature or an indication, by rubber stamp, the symbol "s/", or other means, that the original was signed by the person whose signature block appears on the document.

(2) An affidavit of posting shall be signed by the person who actually accomplished the required posting, and shall contain that person's name, address and telephone number. An affidavit of explanation for non-posting filed in lieu of an affidavit of posting shall be signed by a person who has actual knowledge of the facts stated in the affidavit of non-posting. The certificate of service, if applicable, accompanying either form of affidavit shall be signed by the party filing the affidavit, or that party's advocate.

C. Exhibits:

(1) Exhibits prepared specifically for attachment to other documents filed or served under this Part shall, to the extent feasible, comply with the general format illustrated in Section 1000 [now 11.5.5.1000 NMAC], except that a heading and caption are not required, and a signature block is required only if otherwise appropriate (such as for an affidavit)

(2) Exhibits attached to other documents served or filed under this Part, but not prepared specifically for that purpose (for example, a copy of a pre-existing letter), need not comply with the format illustrated in Section 1000 [now 11.5.5.1000 NMAC]; but if feasible, documents larger than 8 1/2 x 11 inches shall be reduced to 8 1/2 x 11 inches before being attached as exhibits.

(3) Each exhibit shall be labelled with the word "EXHIBIT" followed by an exhibit letter (for example, "EXHIBIT A"), centered in the bottom margin.

[4/25/78, 1/1/83, 1/1/84; 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.202 FILING AND SERVICE OF DOCUMENTS:

A. General:

(1) The original of any document required to be filed under this Part shall be submitted directly to the commission secretary, except that the following documents first shall be submitted to the department for subsequent submission to the commission secretary:

- (a) a notice of contest;
- (b) an affidavit of posting providing proof of posting of a notice to affected employees (contest of citation), or an affidavit of explanation for non-posting filed in lieu thereof;
- (c) a petition for modification of abatement period;
- (d) an affidavit of posting providing proof of posting of a notice to affected employees (proposed modification of abatement period), or an affidavit of explanation for non-posting submitted in lieu thereof;

(e) an affidavit of posting providing proof of posting of a notice to affected employees (informal administrative review), or an affidavit of explanation for non-posting submitted in lieu thereof;

(f) a settlement agreement; and

(g) an affidavit of posting providing proof of posting of a notice to affected employees (settlement of case), or an affidavit of explanation for non-posting submitted in lieu thereof.

(2) Except as otherwise provided in this part, filing of any document shall be deemed complete:

(a) if the document is one required to be submitted directly to the commission secretary, only upon the commission secretary's receipt of the original of the document;

(b) if the document is a notice of contest, a petition for modification of abatement period, or an affidavit of posting or affidavit of explanation for non-posting filed simultaneously with either, only upon:

(i) receipt of the original document by the department's occupational health and safety bureau; or

(ii) deposit of the original document in the United States mail addressed to the department's occupational health and safety bureau; and

(c) if the document is any other document required to be submitted first to the department, only upon the department's filing of the original of the document with the commission secretary.

B. Service of documents filed:

(1) Except as otherwise provided in Paragraph 2 of this Subsection, a party filing any document in a proceeding under this Part shall serve a copy of the document, including copies of any exhibits to the document, on every other party.

(2) A party is not required to serve the department with additional copies of any of the documents required to be submitted first to the department, as listed in Subsection A(2) of this Section. Notwithstanding this provision:

(a) a copy of any document listed in Subsection A(2) of this Section, except a settlement agreement, must be served by the filing party upon any existing party other than the department and the filing party; and

(b) a copy of any settlement agreement must be served by one of the signatory parties upon any existing non-signatory party.

(3) Except as otherwise provided in Section 601.D [now Subsection D of 11.5.5.601 NMAC] for a supplemental response to discovery, service of a document, when required, shall be accomplished by, and shall be deemed complete upon:

(a) hand-delivery of a copy of the document to the office of the person upon whom service is made;

(b) deposit of a copy of the document in the United States mail, first class postage prepaid, addressed to the business address of the person upon whom service is made; or

(c) telefax of a copy of the document to any telefax number published for, or provided by, the person upon whom service is made.

(4) For any document required to be served upon any party, including documents specified in Paragraph (2) of this Subsection when applicable, proof of service of the document shall be provided by a certificate of service, in the format illustrated in Section 1001 [now 11.5.5.1001 NMAC], on the last page (exclusive of exhibits) of the document.

C. Orders; filing and service:

(1) All orders signed by the commission or the hearing officer shall, after signature, be provided to the commission secretary for filing and service.

(2) Upon filing of any order, the commission secretary shall serve a copy of the order upon each party, and attest to such service by a commission secretary's certificate of service in the format illustrated in Section 1002 [now 11.5.5.1002 NMAC].

D. Expanded definition of "party": As used in this Section, "party" includes, in addition to the persons listed in Section 105.B.21 [now Paragraph 22 of Subsection B of 11.5.5.7 NMAC], any person who has filed a motion to intervene that has not been denied.

[1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96, Recompiled 11/30/01]

11.5.5.203 NON-CONFORMING DOCUMENTS; NOTIFICATION OF DEFECTS; RESUBMISSION:

A. General: The commission secretary shall record the date of receipt of, but shall not file, any document, other than a notice of contest or a petition for modification of abatement period, that:

- (1) is not on 8 1/2 x 11-inch paper (except for exhibits);
- (2) is not an original;
- (3) does not contain a case caption and a case number;
- (4) is not signed by the party submitting the document or that party's advocate; or
- (5) does not include a certificate of service, unless the document is one for which this Part does not require a certificate of service.

B. Notification; resubmission: When a document is not filed for one or more of the reasons listed in Subsection A of this Section, the commission secretary shall notify the party or advocate submitting the document of the non-filing and the reasons therefor. If the errors resulting in non-filing of the document are corrected within ten (10) days after notification by the commission secretary, the document shall then be filed, and such filing shall be effective for all purposes as if the document had been filed on the original date of submission.

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.204 - 11.5.5.299 [RESERVED]

11.5.5.300 SUBPART III: INITIATION OF CASE AND INFORMAL ADMINISTRATIVE

REVIEW: [see Sections 11.5.5.301 NMAC - 11.5.5.307 NMAC]

[Recompiled 11/30/01]

11.5.5.301 ISSUANCE AND AMENDMENT OF CITATION:

A. General: Issuance of a citation shall be in accordance with the requirements of the Act and 11 NMAC 5.1.23 [now 11.5.1.23 NMAC].

B. Amended citation: After receipt of a notice of contest or a petition for modification of abatement period, the department may amend a citation only:

- (1) by leave of the commission pursuant to motion of the department; or
- (2) pursuant to a settlement agreement.

C. Vacation of citation: Nothing in Subsection B of this Section shall preclude the department from unilaterally vacating a citation as provided in Section 307.A.1.a [now Subparagraph (a) of Paragraph (1) of Subsection A of 11.5.5.307 NMAC].

[10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.302 NOTICE OF CONTEST:

A. Who may file: A notice of contest may be filed by any responsible employer.

B. Grounds: A notice of contest may be based upon any combination of:

- (1) the existence or classification of any violation alleged in the citation;
- (2) the amount of the penalty proposed for any violation; or
- (3) the reasonableness of the abatement period for any violation alleged in the citation.

C. Deadline: A notice of contest shall be filed with the department within fifteen (15) working days after the employer's receipt of the citation.

D. Format: A notice of contest shall:

- (1) substantially comply with the format illustrated in Section 1011[now 11.5.5.1011 NMAC];
- (2) name the department as the complainant, and the responsible employer filing the notice as the respondent;
- (3) for each citation contested, identify the items within that citation that are contested;
- (4) for each item contested, state whether the contest relates to:
 - (a) the alleged violation itself (either the existence of the alleged conditions or that such conditions constitute a violation of the cited provision);
 - (b) the classification of the alleged violation;
 - (c) the proposed penalty;
 - (d) the abatement date; or
 - (e) a specified combination of any of the foregoing; and
- (5) have attached to it:

(a) a copy of each citation to which the contest applies, with each such citation being marked as a separate exhibit; or

(b) if the contest applies only to certain items within the citation, a copy of each page on which any contested item appears, with each such item being marked as a separate exhibit (except that if two or more contested items appear on the same page, that page may be marked as a single exhibit).

E. Employee notification requirements:

(1) Upon filing of a notice of contest, except as provided in Paragraph 2 of this Subsection, the responsible employer shall post, at one or more locations reasonably accessible to the affected employees, a Notice to affected employees (contest of citation), as illustrated in Section 1004 [now 11.5.5.1004 NMAC], with an attached copy of the notice of contest (including all exhibits thereto, such notice shall remain posted until the earliest of the following events:

(a) the filing of a notice of withdrawal of contest by the respondent;

(b) the respondent's receipt of a copy of a notice of vacation of citation filed by the department;

(c) the posting of a notice to affected employees (informal administrative review);

(d) the posting of a notice to affected employees (pendency of hearing); or

(e) the respondent's receipt of any order of the commission dismissing the notice of contest or vacating all citations in the case.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time the notice of contest is filed, the responsible employer has no affected employees.

(3) The responsible employer shall file, with the notice of contest:

(a) an affidavit of posting in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting in the format illustrated in Section 1010 [now 11.5.5.1010 NMAC].

F. Forwarding to commission secretary: The department shall forward the notice of contest, including all exhibits and accompanying documents, to the commission secretary within five (5) working days after receipt thereof. Any written document clearly stating an intention to contest any portion of an identifiable citation shall be forwarded as a notice of contest without regard to its timeliness or format.

G. Untimeliness; improper format:

(1) Any party alleging that a notice of contest is untimely may file a motion for dismissal of the contest on that ground.

(a) If the commission determines that such contest was filed later than fifteen (15) working days after receipt of the citation to which the notice of contest is directed, the commission shall dismiss the notice of contest unless the commission also finds that the untimeliness was caused by some action of the department.

(b) If the notice of contest includes a contest of any abatement period for which the time for filing a petition for modification of abatement period had not expired at the time the notice of contest was filed, the commission shall, in dismissing the notice of contest, grant leave for the filing of a petition for modification of abatement period within ten (10) days after dismissal of the notice of contest. If filed within that period, the petition shall be treated in all respects as timely as to any such abatement periods contested in the original notice.

(2) Any party alleging that a notice of contest is not substantially in the format required by this Section may file a motion seeking to require amendment of the notice of contest to conform with the requirements of this Section. If the hearing officer finds that the notice of contest does not substantially conform with the requirements of this Section, the hearing officer may order the respondent to file an amended notice of contest, conforming to the requirements of this Section, within ten (10) days after service of the order on the respondent. If the respondent fails to comply with such order, the commission may, upon subsequent motion of the same party, dismiss the respondent's notice of contest.

[9/30/76, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.303 PETITION FOR MODIFICATION OF ABATEMENT PERIOD:

A. Who may file: A petition for modification of abatement period may be filed by any responsible employer, any affected employee, or any representative of affected employees.

B. Grounds:

(1) A petition for modification of abatement period filed by a responsible employer shall be based upon allegations that the responsible employer has made a good faith effort to comply with the abatement

requirements of a citation, but has been unable to complete such abatement because of factors beyond the responsible employer's reasonable control.

(2) A petition for modification of abatement period filed by an affected employee or a representative of affected employees shall be based upon allegations that the abatement period provided in the citation is unreasonable, and that the responsible employer reasonably can abate the violation within a shorter period.

C. Deadline: A petition for modification of abatement period shall be filed with the department:

(1) on or before the date on which abatement of the violation to which the petition relates was originally required if the petition is filed by a responsible employer;

(2) within fifteen (15) working days after posting of the citation, if the petition is filed by an affected employee or a representative of affected employees.

D. Format: A petition for modification of abatement period shall:

(1) substantially comply with the format requirements illustrated in Section 1012 [now 11.5.5.1012 NMAC];

(2) name the person filing the petition as the petitioner, and the department as a respondent;

(3) if the petition is filed by an affected employee or a representative of affected employees, name the responsible employer as an additional respondent;

(4) for each citation to which the petition applies, list each item within that citation for which modification of the abatement period is requested;

(5) include the following information for each item for which modification of the abatement period is requested:

(a) if filed by a responsible employer:

(i) all steps taken by the responsible employer in an effort to achieve compliance during the prescribed abatement period and the dates of such action;

(ii) the specific additional abatement time necessary in order to achieve compliance;

(iii) the reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date; and

(iv) all available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; or

(b) if filed by an affected employee or a representative of affected employees:

(i) the basis for the petitioner's belief that the original abatement period is unreasonable; and

(ii) the specific period of time within which the petitioner believes the responsible employer could reasonably abate the violation;

(6) have attached to it:

(a) a copy of each citation to which the petition applies, with each such citation being marked as a separate exhibit; or

(b) if the petition applies only to certain items within the citation, a copy of each page on which any item to which the petition applies appears, with each such item being marked as a separate exhibit (except that if two or more contested items appear on the same page, that page may be marked as a single exhibit); and

(7) if filed by an affected employee or a representative of affected employees, include a certificate of service, as illustrated in Section 1001 [now 11.5.5.1001 NMAC], showing that the petition has been served on the responsible employer.

E. Employee notification requirements:

(1) Upon filing of a petition for modification of abatement period, except as provided in Paragraph 2 of this Subsection, the petitioner shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (proposed modification of abatement period), as illustrated in Section 1005 [now 11.5.5.1005 NMAC], with an attached copy of the petition (including all exhibits thereto. Such notice shall remain posted until the earliest of the following events:

(a) the filing of a notice of withdrawal of petition by the petitioner;

(b) the posting of a notice to affected employees (informal administrative review);

(c) the posting of a notice to affected employees (pendency of hearing); or

(d) the responsible employer's receipt of any order of the commission dismissing the petition for modification of abatement period.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if:

(a) the petition is filed by a responsible employer who has no affected employees at the time of filing; or

(b) the petition is filed by an affected employee, and the responsible employer has no other affected employees at the time of filing.

(3) The petitioner shall file, with the petition:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) Under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

F. Forwarding to commission secretary: The department shall forward the petition for modification of abatement period, including all exhibits and accompanying documents, to the commission secretary within five (5) working days after receipt thereof. Any written document clearly expressing a request for modification of the abatement period for any portion of an identifiable citation shall be forwarded as a petition for modification of abatement period without regard to its timeliness or format.

G. Untimeliness; improper format:

(1) Any party alleging that a petition for modification of abatement period is untimely as to any abatement period to which the petition is addressed may file a motion for dismissal of the petition, in whole or in part, on that ground.

(a) If the commission determines that such petition was filed later than any original abatement period addressed in the petition, the commission shall dismiss the petition as to each abatement period for which the petition is found to be untimely, unless the commission also finds that the untimeliness was caused by some action of the department.

(b) Dismissal of a petition for untimeliness as to one or more abatement periods shall not affect the validity of the petition as to any abatement periods for which the petition is timely.

(2) Any party alleging that a petition for modification of abatement period is not substantially in the format required by this Section may file a motion seeking to require amendment of the petition to conform with the requirements of this Section. If the hearing officer finds that the petition does not substantially conform with the requirements of this Section, the hearing officer may order the petitioner to file an amended petition, conforming to the requirements of this Section, within ten (10) days after service of the order on the petitioner. If the petitioner fails to comply with such order, the commission, upon subsequent motion of the same party, may dismiss the petition.

[4/25/78, 3/6/79, 12/28/81, 1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.304 DOCKETING OF CASE: Promptly upon receipt of a notice of contest or a petition for modification of abatement period, the commission secretary shall docket the case, assign a case number, and issue a notice of docketing.

[1/1/94; 1/1/96; Recompiled 11/30/01]

11.5.5.305 STAY OF ABATEMENT PERIOD:

A. General: In a case initiated by a responsible employer in good faith and not solely for delay or avoidance of the penalty, the abatement period shall not begin to run until final resolution.

B. Lack of good faith or delay: Any findings of lack of good faith or of delay or avoidance of penalties must be set forth in an order by the commission together with the facts upon which the finding is based.

[9/30/76, 1/1/94; Recompiled 11/30/01]

11.5.5.306 INFORMAL ADMINISTRATIVE REVIEW:

A. General: The department shall initiate an informal administrative review promptly upon receipt of a notice of contest or a petition for modification of abatement period.

(1) Except as otherwise provided in this Section, scheduling and conduct of the informal administrative review shall be within the sole control of the department.

(2) When notifying the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, of any meeting or telephone conference held as part of the informal administrative review, the department shall include with such notification:

(a) a form for the notice to affected employees (informal administrative review) (Section 1006 [now 11.5.5.1006 NMAC] which the responsible employer may complete as appropriate;

(b) a form for the affidavit of posting (Section 1009) [now 11.5.5.1009 NMAC], including a certificate of service (Section 1001) [now 11.5.5.1001 NMAC] if applicable, which the responsible employer may complete as appropriate; and

(c) a brief explanation of how each form should be completed and either posted, or served and filed, as applicable.

B. Who may participate: In addition to the department and the respondent, any affected employee or representative of affected employees may participate as a party in the informal administrative review by intervening in accordance with Section 502.A.1 [now Paragraph (1) of Subsection A of 11.5.5.502 NMAC].

C. Employee notification requirements:

(1) At least five (5) days prior to the date of any meeting or telephone conference scheduled as part of the informal administrative review, except as provided in Paragraph 2 of this Subsection, the respondent in a case initiated by a notice of contest or the petitioner in a case initiated by a petition for modification of abatement period shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (informal administrative review) as illustrated in Section 1006 [now 11.5.5.1006 NMAC]. Such notice shall remain posted until the earlier of the following events:

(a) the date of the meeting or telephone conference; or

(b) receipt by the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, of any notification by the department rescheduling the meeting or telephone conference, at which time the notice shall be replaced by another notice informing the affected employees of the rescheduled date.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time posting otherwise would be required:

(a) the case was initiated by a notice of contest and the responsible employer has no affected employees; or

(b) the case was initiated by a petition for modification of abatement period filed by an affected employee, and the responsible employer has no other affected employees.

(3) The person responsible for posting the notice specified in Paragraph 1 of this Subsection shall submit to the department, within five (5) days after posting or by the date of the scheduled meeting or telephone conference, whichever is earlier:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

(4) The department shall file the affidavit of posting or the affidavit of explanation for non-posting, as applicable, with the commission secretary within five (5) working days after receipt.

D. Conclusion:

(1) Except as otherwise provided in Subsection E of this Section or by order of the hearing officer, and unless a settlement agreement disposing of all issues in the case has been filed:

(a) in a case initiated by a notice of contest, the department shall file an administrative complaint with the commission within ninety (90) days after docketing of the case; and

(b) in a case initiated by a petition for modification of abatement period, the petitioner shall file a request for hearing with the commission within twenty (20) days after docketing of the case.

(2) The informal administrative review shall be deemed concluded:

(a) if the case was initiated by a notice of contest, upon the earlier of:

(i) the respondent's receipt of the department's administrative complaint; or

(ii) three (3) days after expiration of the deadline specified in Paragraph 1.a [now Subparagraph (a) of Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Subsection, or any extension of such time granted by the hearing officer or automatically as provided by Subsection E.2 [now Paragraph (2) of Subsection E of 11.5.5.306 NMAC] of this Section; and

(b) if the case was initiated by a petition for modification of abatement period, upon the earlier of:

(i) filing of the petitioner's request for hearing; or

(ii) expiration of the deadline specified in Paragraph 1.b [now Subparagraph (b) of Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Subsection, or any extension of such time granted by the hearing officer or automatically as provided by Subsection E.2 [now Paragraph (2) of Subsection of 11.5.5.306 NMAC] of this Section.

E. Automatic stay of time to file administrative complaint or request for hearing:

(1) The filing deadline otherwise specified in Subsection D.1 [now Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Section automatically shall be stayed by the filing, prior to expiration of the time otherwise provided by this Part or by any order, of any motion:

(a) seeking dismissal or other relief with the effect of ultimately disposing of a case; or

(b) to require the filing of an amended notice of contest or petition for modification of abatement period, as applicable.

(2) If any such motion is denied, the filing deadline otherwise specified in Subsection D.1 [now Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Section automatically shall be extended for a period equal to the number of days between filing of the motion and filing of the commission's order. If the motion is one to require the filing of an amended notice of contest or petition for modification of abatement period, and such motion is granted, the filing deadline shall automatically be extended for a period equal to the number of days between filing of the motion and filing of the amended pleading.

F. Failure to file timely administrative complaint or request for hearing:

(1) If the department fails to file a timely administrative complaint in a case initiated by a notice of contest, the respondent may file a motion seeking vacation of the citations.

(2) If the petitioner fails to file a timely request for hearing in a case initiated by a petition for modification of abatement period, any respondent or intervenor may file a motion seeking dismissal of the petition.

(3) Upon the filing of a motion authorized by Paragraph 1 or 2 of this Subsection, the commission shall grant the relief sought unless the commission finds that:

(a) the pleading at issue was, in fact, timely filed;

(b) the failure to file a timely pleading was caused by some action of the respondent; or

(c) there is other good cause for the failure to file a timely pleading.

[1/1/82, 1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.307 UNILATERAL VACATION OF CITATION; WITHDRAWAL OF CONTEST OR PETITION:

A. General: At any time prior to conclusion of the informal administrative review, provided there are no intervenors:

(1) in a case initiated by a notice of contest:

(a) the department may unilaterally and unconditionally vacate all contested items of a citation by filing a notice of vacation in the format illustrated in Section 1013 [now 11.5.5.1013 NMAC]; or

(b) the respondent may unilaterally and unconditionally withdraw the notice of contest, by filing a notice of withdrawal in the format illustrated in Section 1014 [now 11.5.5.1014 NMAC]; and

(2) in a case initiated by a petition for modification of abatement period, the petitioner may unilaterally and unconditionally withdraw the petition, by filing a notice of withdrawal in the format illustrated in Section 1014 [now 11.5.5.1014 NMAC].

B. Commission approval unnecessary: Commission approval for vacation of a citation or withdrawal of a notice of contest or petition for modification of abatement period, under the conditions specified in Subsection A of this Section, is not necessary.

C. Effect:

(1) The effect of the department's vacation of a citation, as provided in Subsection A.1.a [now Subparagraph (a) of Paragraph (1) of Subsection A of 11.5.5.307 NMAC] of this Section, shall be the same as if the citation had never been issued.

(2) The effect of the respondent's withdrawal of a notice of contest, as provided in Subsection A.1.b [now Subparagraph (b) of Paragraph (1) of Subsection A of 11.5.5.307 NMAC] of this Section, shall be the same as if the notice of contest had never been filed.

(3) The effect of the petitioner's withdrawal of a petition for modification of abatement period, as provided in Subsection A.2 [now Paragraph (2) of Subsection A of 11.5.5.307 NMAC] of this Section, shall be the same as if the Petition had never been filed.

D. When settlement agreement required: If there is an intervenor in the case, or at any time following conclusion of the informal administrative review, unilateral vacation of a citation or withdrawal of a notice of contest or a petition for modification of abatement period shall not be allowed; but such vacation or withdrawal may be accomplished by settlement agreement in accordance with Section 503 [now 11.5.5.503 NMAC].

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.308 - 11.5.5.399 [RESERVED]

11.5.5.400 SUBPART IV: PLEADINGS SUBSEQUENT TO DOCKETING: [see Sections 11.5.5.401 NMAC - 11.5.5.404 NMAC]
[Recompiled 11/30/01]

11.5.5.401 SUBSEQUENT PLEADINGS ALLOWED:

A. Case initiated by notice of contest: The following pleadings, in addition to the notice of contest, are allowed in a case initiated by a notice of contest:

- (1) the department's administrative complaint; and
- (2) the respondent's answer (which shall be deemed a petition for hearing, whether or not the respondent includes a specific request for hearing).

B. Case initiated by petition for modification of abatement period: The following pleadings, in addition to the petition for modification of abatement period, are allowed in a case initiated by a petition for modification of abatement period:

- (1) the petitioner's request for hearing; and
- (2) the respondents' responses to the petition for modification of abatement period.

[1/1/94; Recompiled 11/30/01]

11.5.5.402 ADMINISTRATIVE COMPLAINT:

A. Content: The administrative complaint, in a case initiated by notice of contest, shall set forth, either directly or through incorporation by reference to the citation, all facts necessary to establish:

- (1) the commission's jurisdiction over the parties and the subject matter;
- (2) the date, location, and circumstances of each alleged violation that has been contested;
- (3) any such alleged violations that have been settled and are no longer at issue, and all such alleged violations that are still at issue; and
- (4) the considerations upon which each contested classification of violation, abatement period, or proposed penalty is based.

B. Service: The administrative complaint shall be served upon the respondent:

- (1) by certified mail, return receipt requested; or
- (2) if the administrative complaint is returned by the United States postal service after attempted service by mail, by hand-delivery.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.403 REQUEST FOR HEARING:

A. Content: The request for hearing, in a case initiated by a petition for modification of abatement period, shall state that the case has not been settled during the informal administrative review, and shall request that a hearing be scheduled on the petition for modification of abatement period, but need not reiterate the allegations contained in the petition.

B. Service: The request for hearing may be served upon the respondent by any method authorized by Section 202.B.2 [now Paragraph (2) of Subsection B of 11.5.5.202 NMAC].

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.404 ANSWER TO ADMINISTRATIVE COMPLAINT; RESPONSE TO PETITION FOR MODIFICATION OF ABATEMENT PERIOD:

A. When filed:

(1) In a case initiated by notice of contest, the respondent's answer shall be filed within fifteen (15) days after the respondent's receipt of the administrative complaint.

(2) In a case initiated by a petition for modification of abatement period, each respondent's response to the petition for modification of abatement period shall be filed within ten (10) days after service of the petitioner's request for hearing.

B. Response to allegations: A respondent's answer to the administrative complaint, or response to the petition for modification of abatement period, as applicable, shall, as to each allegation of the notice of contest or the petition for modification of abatement period:

(1) state whether such allegation is admitted or denied;

(2) if the allegation cannot in good faith be fully admitted or fully denied, state the extent to which the allegation is admitted and the extent to which it is denied;

(3) if the respondent has insufficient knowledge to form a belief as to the truth of the allegation, so state and deny the allegation.

C. Affirmative defenses: Any affirmative defenses the respondent has to the administrative complaint or the petition for modification of abatement period shall be set forth in the answer or response, as applicable.

(1) Any affirmative defense not set forth in the answer or response, as applicable, except a defense of lack of subject matter jurisdiction, shall be waived unless the respondent demonstrates that the basis for the affirmative defense was not known, and could not reasonably have been discovered, by the respondent at the time the answer or response was filed.

(2) Any affirmative defense listed in SCRA 1986, 1-012.B shall be treated as a motion, to which the provisions of Section 501 [now 11.5.5.501 NMAC] shall apply, except that the affirmative defense shall be set forth in the answer or response, as applicable, rather than as a separate document.

[4/25/78, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.405 - 11.5.5.499 [RESERVED]

11.5.5.500 SUBPART V: MOTIONS, INTERVENTION, AND SETTLEMENT: [see Sections 11.5.5.501 NMAC - 11.5.5.503 NMAC]
[Recompiled 11/30/01]

11.5.5.501 MOTIONS:

A. General: All motions, except those made orally during a hearing, shall:

(1) be in writing;

(2) specify the grounds for the motion;

(3) state the relief or order sought; and

(4) if the motion requires consideration of facts not already in the record, have attached as exhibits all affidavits, certificates, depositions, or other documentary evidence relied upon.

B. Determination of opposition: The moving party shall determine whether the motion will be opposed, except that the moving party may assume that the motion will be opposed if:

(1) the motion seeks dismissal or other relief with the effect of ultimately disposing of the case; or

(2) the moving party has been unable, after reasonable effort, to contact the non-moving party to determine whether the motion will be opposed.

C. Unopposed motions: If the motion will not be opposed, the motion shall state that concurrence of all other parties was granted.

(1) With any unopposed motion, the moving party shall submit a proposed order.

(2) The proposed order shall be approved by all parties. Approval of the moving party shall be indicated by the signature of the moving party or that party's advocate. Approval of a non-moving party may be indicated by the signature of the non-moving party or that party's advocate, or by a statement on the proposed order indicating that concurrence of that party was obtained by telephone.

(3) The hearing officer shall grant any unopposed motion, unless the hearing officer finds that granting of the motion would not be consistent with the purpose of the Act. If the hearing officer denies an unopposed motion, any party may, within five (5) days after service of the hearing officer's order, request review of such action by the commission.

D. Opposed motions:

(1) Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought.

(a) Except as otherwise provided in Subparagraph b of this Paragraph, an opposed motion shall be accompanied by a written argument.

(b) The following motions, even if opposed, need not be accompanied by a written argument, but shall cite the applicable provisions of the Act and of this Part, or any other authority deemed necessary:

(i) a motion to dismiss a notice of contest or a petition for modification of abatement period as untimely;

(ii) a motion to require submission of an amended notice of contest or petition for modification of abatement period when the original notice or petition does not comply with the format required by this Part;

(iii) a motion to dismiss a notice of contest for the respondent's failure, or a petition for modification of abatement period for the petitioner's failure, to file: (a) a timely affidavit of posting as proof of compliance with any applicable employee notification requirements; or (b) a timely affidavit of explanation for non-posting in lieu of an affidavit of posting, when applicable;

(iv) a motion to vacate the citations for the department's failure to file a timely administrative complaint;

(v) a motion to dismiss a notice of contest for the respondent's failure to file a timely answer;

(vi) a motion to dismiss a petition for modification of abatement period for the petitioner's failure to file a timely request for hearing;

(vii) a motion seeking summary approval of a petition for modification of abatement period for the respondent's failure to file a timely response to the petition; or

(viii) any motion made orally during the course of a hearing.

(2) Any party upon whom an opposed motion is served shall have ten (10) days from the date of service to file a response and any documentary evidence in support of the response. A non-moving party who fails to file a response within that time, or any extension of the time granted by the commission chair, shall be deemed to have consented to the granting of the motion.

(3) The moving party may, but is not required to, submit a reply to the non-moving party's response within five (5) days after service of the response.

(4) When every party upon whom a motion has been served is deemed to have consented to granting of the motion pursuant to Paragraph 2 of this Subsection, the moving party shall submit a proposed order granting the motion. A copy of the proposed order shall be attached as an exhibit to a supplementary document filed by the moving party no later than five (5) days after the response was due.

(5) All opposed motions will be decided without a hearing, whether or not a hearing is requested by a party, unless otherwise ordered by the commission or the hearing officer, as applicable. Any request for hearing must be filed simultaneously with:

(a) the motion, if requested by the moving party; or

(b) the response to the motion, if requested by any non-moving party.

(6) The decision shall be implemented by written order, except that a decision on an oral motion made during a hearing on the merits may be incorporated into the commission's order on the merits.

(a) The commission or the hearing officer, as applicable, shall specify whether the order on an opposed motion, except one on which the decision will be incorporated into the order on the merits, will be drafted by:

(i) the commission counsel;

(ii) a commission member;

(iii) the hearing officer; or

(iv) the prevailing party or that party's advocate.

(b) The drafter of the proposed order shall attach a copy thereof to a cover document, which shall then be filed with the commission secretary and served upon each party or advocate except, if applicable, the party whose advocate drafted the proposed order.

(c) Any party may file an objection to the proposed order within five (5) days after service. A copy of the objection shall be served on each party and, if the drafter is anyone other than a party or a party's advocate, on the drafter. The objection:

(i) shall be directed to the form of the proposed order;

(ii) shall not raise any substantive issue unless the issue relates to a ground for the proposed order that was not raised by any party; and

(iii) shall include, as an exhibit, an alternative form of proposed order.

(d) If the order is issued by the commission, any member who dissented from the decision, or who differed with the grounds upon which the majority reached the decision, may write a dissenting or concurring opinion to be attached to the order.

E. Withdrawal of motion: The party filing a motion may voluntarily, and without the necessity of obtaining the consent of any other party, withdraw the motion at any time prior to entry of an order ruling on the motion.

F. Applicability to affirmative defenses: This Section shall be applicable to any affirmative defense based on the grounds listed in SCRA 1986, 1-012.B, except that a defense asserting a lack of subject matter jurisdiction shall not be denied solely for failure to comply with the procedural requirements of this Section. [4/25/78, 3/6/79, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.502 INTERVENTION:

A. Intervention as of right:

(1) In any case, whether initiated by a notice of contest or a petition for modification of abatement period, any affected employee or representative of affected employees may intervene as of right by filing a notice of intervention, in the format illustrated in Section 1015 [now 11.5.5.1015 NMAC], at any time prior to commencement of the commission's hearing on the merits or filing of a settlement agreement, whichever is earlier.

(2) Any party who believes that a notice of intervention has been filed by a person not entitled to intervene as of right under this Subsection may, within five (5) days after being served with the notice of intervention, move to strike the notice of intervention.

B. Permissive intervention: Any person not entitled to intervene as of right pursuant to Subsection A of this Section may file a motion to intervene, pursuant to SCRA 1986, 1-024.B, at least five (5) days prior to commencement of the commission's hearing on the merits or filing of a settlement agreement, whichever is earlier.

C. Untimely intervention: No intervention shall be allowed after expiration of the time limits specified in Subsections A and B or this Section unless the person seeking to intervene demonstrates, to the commission's satisfaction, that there was good cause for failure to intervene within such time limits.

D. Withdrawal of intervention: An intervenor may unilaterally and unconditionally withdraw from the case at any time prior to final resolution by filing a notice of withdrawal of intervention in the format illustrated in Section 1016 [now 11.5.5.1016 NMAC].

[1/1/83, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.503 SETTLEMENTS:

A. Settlement encouraged: Settlement upon terms that are consistent with the provisions of the Act is encouraged at any stage of the proceedings.

B. Content of settlement agreement: Every proposed settlement agreement shall:

(1) state how each contested item of every citation in the case is affected by the settlement;

(2) if the settlement is contingent upon certain action by the respondent, describe the contingency and the consequences of the respondent's failure to meet the contingency;

(3) if the settlement is not intended as a full and complete settlement of all issues in the case, list those issues not settled;

(4) if the case was initiated by a notice of contest contain:

(a) a withdrawal of the respondent's contest, except as to any items not settled;

(b) statements that:

(i) the cited violations, except any alleged violations vacated by the settlement: a) have been abated; or b) will be abated by a date specified in the settlement agreement; and

(ii) the penalty, if any: a) previously has been paid; b) is tendered with the settlement agreement; or c) will be paid by a specified date;

(5) bear the signature and date of signature of:

- (a) the complainant or petitioner, or that party's advocate;
- (b) the respondent, or that party's advocate; and
- (c) if there are intervenors, each intervenor who approves the settlement agreement, or their

advocates; and

(6) if there are parties who have not approved the settlement agreement, include a certificate of service signed by one of the approving parties or by the advocate for one of the approving parties, and attesting to service of a copy of the settlement agreement on each party who has not approved the settlement agreement.

C. Additional terms allowed: A settlement agreement may contain additional terms and conditions deemed appropriate by the parties, so long as such additional terms and conditions are consistent with the provisions of the Act.

D. Employee notification requirements:

(1) Prior to the filing of any settlement agreement, the respondent in a case initiated by a notice of contest or the petitioner in a case initiated by a petition for modification of abatement period shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (proposed settlement of case), as illustrated in Section 1008 [now 11.5.5.1008 NMAC], with an attached copy of the settlement agreement signed by all approving parties. Such notice shall remain posted until at least twenty (20) days after filing of the settlement agreement.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time posting otherwise would be required:

(a) the case was initiated by a notice of contest and the responsible employer has no affected employees; or

(b) the case was initiated by a petition for modification of abatement period filed by an affected employee, and the responsible employer has no other affected employees.

(3) The person responsible for posting the notice specified in Paragraph 1 of this Subsection shall submit to the department, within five (5) days after posting, the original settlement agreement and:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

E. Filing: The department shall be responsible for filing a settlement agreement regardless of which party initiated the settlement agreement. As soon as practicable after receipt of the settlement agreement and the affidavit of posting or affidavit of explanation for non-posting, as applicable, the department shall file the settlement agreement and the affidavit with the commission secretary.

F. Objections:

(1) At any time prior to expiration of twenty (20) days after filing of a settlement agreement, objections to the settlement agreement may be filed by:

(a) any affected employee or representative of affected employees other than a party;

(b) any party who has not approved the settlement agreement; or

(c) any commission member.

(2) Any objection filed shall be served on each party and, if filed by any person other than a commission member, shall state the reasons for the objection. The objection must include a certificate of service in the format illustrated in Section 1001 [now 11.5.5.1001 NMAC].

G. Approval of settlement agreement:

(1) If no timely objection to a settlement agreement is filed:

(a) the settlement agreement shall become a final order of the commission, without further action, upon expiration of the time for filing of objections; and

(b) the commission secretary shall promptly issue a notice of finality of settlement agreement and serve a copy on each party.

(2) If a timely objection is filed, the commission shall meet and consider the proposed settlement agreement, with or without a hearing as the commission deems appropriate. The commission may approve the settlement agreement, notwithstanding the objection, if the commission finds that the settlement agreement is consistent with the purpose of the Act and is otherwise appropriate.

[4/25/78, 1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.504 - 11.5.5.599 [RESERVED]

11.5.5.600 SUBPART VI: DISCOVERY AND SUBPOENAS: [see Sections 11.5.5.601 NMAC - 11.5.5.608 NMAC]
[Recompiled 11/30/01]

11.5.5.601 GENERAL RULES REGARDING DISCOVERY:

A. Timing of discovery: Unless otherwise ordered by the hearing officer pursuant to Section 607 [now 11.5.5.607 NMAC], no discovery shall be allowed until after conclusion of the informal administrative review.

B. Filing not required; service and notice: Except as otherwise provided, neither a request for discovery nor any response shall be filed with the commission.

(1) A party requesting discovery shall serve the discovery request upon the party from whom discovery is sought and shall file a notice with the commission, in the format illustrated in Section 1017 [now 11.5.5.1017 NMAC], indicating the date of service of the discovery request, the type of discovery sought, and the party from whom discovery is sought.

(2) A party responding to a discovery request shall serve the response upon the party making the request and shall file a notice with the commission, in the format illustrated in Section 1017 [now 11.5.5.1017 nMAC], indicating the date of service of the response, the type of discovery request to which the party is responding, and the party upon whom the response was served.

(3) A party making or responding to a discovery request shall, upon the request of any party other than the party upon whom the request or response is required to be served, provide a copy of the discovery request or response to that party.

C. Reliance upon facts established through discovery:

(1) A party wishing to rely upon facts established through discovery shall:

(a) if the facts are relied upon in support of a motion, attach the relevant documents to the motion as exhibits; or

(b) if the facts are relied upon at the hearing, offer the relevant documents into evidence at the hearing.

(2) A party seeking to compel discovery from another party, or seeking sanctions against another party for failure to comply with a request for discovery, shall include copies of the relevant requests and any responses thereto as exhibits to the motion to compel or for sanctions.

D. Continuing obligation to supplement responses: Any party from whom discovery is sought has a continuing obligation, subject to any objections interposed and not overruled by the hearing officer, to supplement any responses with relevant information obtained after serving of the initial response and any previous supplemental responses. Unless otherwise ordered by the hearing officer, supplemental responses shall be served within the same time, after the new information is obtained, as required for the initial response after service of the discovery request; provided, if the hearing is set for a time sooner than the supplemental response would otherwise be due, the supplemental response shall be served:

(1) at least eight (8) working days prior to the hearing, if served by first-class mail;

(2) at least six (6) working days prior to the hearing, if served by a courier service with guaranteed overnight delivery;

(3) at least five (5) working days prior to the hearing, if served by hand-delivery or by facsimile transmission; or

(4) if the new information is obtained later than five (5) working days prior to the hearing, by hand-delivery or facsimile transmission within one (1) working day after the new information is obtained but in no event later than:

(a) the beginning of the hearing, if obtained before the beginning of the hearing;

(b) the conclusion of the hearing, if obtained after the beginning, but before the conclusion, of the hearing; or

(c) the close of the record, if obtained after the conclusion of the hearing but before the close of the record.

E. Failure to make discovery; sanctions: The hearing officer may, upon motion by a party and a showing that another party from whom discovery was requested has failed to respond within the required time, enter an order requiring such other party to respond within the time specified by the hearing officer. If a party who has

been ordered to respond to a discovery request persists in failing to respond, then upon subsequent motion by the requesting party:

- (1) the hearing officer may impose such sanctions as may be appropriate, including:
 - (a) refusal to allow the testimony of a witness not identified in a response to a request for identity of witnesses;
 - (b) denial of admission of a document not disclosed in response to a request for access to documents; or
 - (c) drawing of adverse inferences against the non-responsive party; and
- (2) the commission may:
 - (a) order the non-responding party to pay the requesting party's costs of compelling discovery;
 - (b) order dismissal or default judgment against the non-responding party.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.602 IDENTITY OF WITNESSES:

A. Definition: As used in this Section, "witness" means any person known or reasonably believed to have first-hand knowledge of the facts or circumstances of any matter relevant to any issue in a proceeding under this Part, whether or not any party intends to call such person to testify at the hearing.

B. Request: Except as otherwise provided in Subsection C of this Section, any party, upon request made to another party prior to hearing, is entitled to obtain the following information, to the extent known to the party from whom the information is requested:

- (1) the names and addresses of all witnesses;
- (2) the relationship, if any, of each such witness to the party of whom the request is made;
- (3) a description of the general subject matter of the knowledge of each witness relevant to any issue in the case; and
- (4) with regard to each witness, whether the party from whom the information is requested intends to call to testify at the hearing.

C. Response: A party upon whom a request for identity of witnesses has been served shall, within five (5) days after service or such other period as the hearing officer may order upon motion and for good cause, serve upon the requesting party a response providing the requested information, except that:

- (1) such information need not be provided as to any officer, employee or agent of the party making the request, unless the party responding to the request intends to call the officer, employee or agent to testify at the hearing; and
- (2) if the party responding to the request files a motion for a protective order pursuant to Subsection D of this Section on or before the date the response is due, such information need not be provided as to any person whose identity the responding party is seeking to protect.

D. Protection of witness identity: The hearing officer may, upon motion and for good cause shown, protect the identity of any witness from disclosure.

(1) If such motion is granted, the moving party may not call the witness to testify at the hearing unless the moving party files a supplemental response, not later than ten (10) days before the hearing, providing the information required by Subsection B of this Section.

(2) If such motion is denied, the moving party shall file a supplemental response, within five (5) days after such denial, providing the information required by Subsection B of this Section.

[9/30/76, 4/25/78, 3/6/79, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.603 PRODUCTION OF DOCUMENTS:

A. Definition: As used in this Section, "document" includes writings, drawings, graphs, charts, photographs, audio recordings and other data compilations from which information can be obtained, and if necessary, translated through detection devices into reasonably usable form. In addition, each copy of a document that is not identical in all respects to every other copy shall be considered a separate document.

B. Request: Any party, upon written request made to another party, is entitled to inspect and make copies of any relevant documents in the possession or control of the other party, whether or not such documents are intended to be offered into evidence, subject only to such privilege as may be interposed. The request shall:

- (1) set forth the items to be inspected, either by individual item or by category;
- (2) describe each item and category with reasonable particularity; and

(3) specify a reasonable time, place and manner of making the inspection and copying the documents.

C. Response: A party upon whom a request for access to documents is served shall fully comply with the request unless such party serves a written objection upon the requesting party. Any such objection shall be served no later than seven (7) days prior to the specified date of inspection or, if the request is received later than seven (7) days prior to such date, on or before the specified date of inspection.

(1) If objection is made to the time, place or manner specified for inspection and copying of documents, the responding party shall specify an alternate time, place or manner. If the parties subsequently are unable to agree as to the time, place, and manner of document inspection, the hearing officer, upon motion of the party seeking access, shall determine the time, place and manner thereof.

(2) If objection is made to production of specified documents, the specific ground for objection as to each such document shall be stated. Inspection of the documents specified in the objection shall not be allowed except upon order of the hearing officer. The hearing officer may conduct an in camera review of such documents as an aid in determining whether inspection should be allowed.

[9/30/76, 4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.604 REQUEST FOR ADMISSIONS:

A. Request: At any time after docketing of the case, any party may serve upon any other party a written request for the admission of any relevant facts set forth in the request, including the genuineness of any document. Each fact as to which admission is requested shall be set forth separately. A copy of any document referred to in the request shall be attached to the request as an exhibit, unless the document is already in the record. If the document is already in the record, it will be referred to with sufficient particularity to enable the party to whom the request is directed to identify the document with reasonable certainty.

B. Response: Each fact as to which admission is requested shall be deemed admitted unless, within ten (10) days after service of the request, or within such other period as the hearing officer may order upon motion and for good cause, the party to whom the request is directed serves upon the requesting party a written response specifically denying such fact.

[4/25/78, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.605 INTERROGATORIES:

A. Request: Any party may serve upon any other party, without leave of the hearing officer, a single document containing no more than fifteen (15) written interrogatories. Each separately identified Subsection of any interrogatory shall be considered a separate interrogatory. Interrogatories exceeding the scope authorized by this Subsection shall be allowed only by order of the hearing officer in accordance with the procedures set forth in Section 607 [now 11.5.5.607 NMAC].

B. Response: The party to whom the interrogatories are directed shall answer the interrogatories in writing, under oath, within ten (10) days after service of the interrogatories, or within such other period as the hearing officer may order upon motion and for good cause. The response shall be based not only upon the personal knowledge of the person signing on behalf of the responding party, but also upon information reasonably available to that person upon diligent inquiry.

[4/25/78, 3/6/79, 4/25/79, 1/1/94; Recompiled 11/30/01]

11.5.5.606 DEPOSITIONS:

A. Discovery depositions: Discovery depositions shall not be allowed except by order of the hearing officer pursuant to the provisions set forth in Section 607 [now 11.5.5.607 NMAC].

B. Depositions to preserve evidence: Any party may, for the purpose of preserving evidence, take the deposition of any person who would otherwise be called to testify at the hearing if the party taking the deposition reasonably believes that the deponent is likely to be unavailable at the hearing, within the meaning of SCRA 1986, 11-804.A.

(1) Any party who intends to take a deposition as authorized by this Subsection shall serve a notice of deposition on each other party, stating the name of deponent; the date, time and place of the deposition; and the grounds for believing the deponent is likely to be unavailable at the hearing. In addition, the party intending to take the deposition shall have the deponent served with a subpoena, except that no subpoena shall be required for any person who is a party or an officer, agent or employee of a party.

(2) Any party or the deponent may move for a protective order at any time within five (5) days after service of a notice of deposition or a subpoena, or at any time prior to the beginning of the deposition if the deposition is set for a time less than five (5) days after service of the notice of deposition or the subpoena. [4/25/78, 3/6/79, 1/1/94; Recompiled 11/30/01]

11.5.5.607 OTHER DISCOVERY:

A. Additional discovery not favored: Discovery not specifically provided for under this Part, including any discovery to be conducted prior to the conclusion of the informal administrative review, shall be permitted only upon determination by the hearing officer that:

- (1) such discovery will not unreasonably delay the proceeding;
- (2) the information to be obtained is not otherwise reasonably obtainable, may be lost, or may become unavailable because of physical illness or infirmity;
- (3) there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence; and
- (4) if the party seeking to conduct the discovery seeks to do so prior to conclusion of the informal administrative review, that there is good cause to allow the discovery at that time.

B. Motion for additional discovery: Any party to the proceeding desiring an order of discovery shall file a motion therefor setting forth:

- (1) the circumstances warranting the taking of the discovery;
- (2) the nature of the information expected to be discovered; and
- (3) the proposed time and place where the discovery will be taken.

C. Order for additional discovery: Upon determining that a motion for additional discovery should be granted, the hearing officer shall issue an order for the taking of such discovery together with any conditions and terms of the additional discovery.

[1/1/94; Recompiled 11/30/01]

11.5.5.608 SUBPOENAS:

A. Issuance:

(1) The commission secretary shall, upon request by a party and without the necessity for notice to any other party, issue a subpoena requiring the attendance and testimony of any witness and the production of any evidence in the possession or under the control of the witness, at a hearing or at a deposition authorized by Section 606 [now 11.5.5.606 NMAC] or by order of the hearing officer. The party requesting the subpoena shall be responsible for:

- (2) Any party requesting a subpoena shall be responsible for:
 - (a) providing the commission secretary with a subpoena form as illustrated in Section 1018 [now 11.5.5.1018 NMAC], completed except for the commission's seal and the name and signature of the commission secretary; and
 - (b) having the subpoena served upon the witness to whom it is directed.

(3) The commission secretary shall maintain on hand a supply of blank subpoena forms to be provided to a party upon request.

B. Motion to quash: The person to whom the subpoena is directed may move, in writing, to quash or modify the subpoena.

(1) A motion to quash or modify a subpoena shall be filed within ten (10) days after service on the party seeking to quash or modify it, or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service. The motion shall comply with all requirements of Section 501 [now 11.5.5.501 NMAC], and shall be served upon all parties to the proceeding, except that no copy need be served upon any party represented by the same person representing the person filing the motion.

- (2) The hearing officer shall quash or modify the subpoena only upon a finding that:
 - (a) the evidence sought does not relate to any matter relevant to the proceeding;
 - (b) the subpoena does not describe with sufficient particularity the evidence sought;
 - (c) the evidence sought is privileged; or
 - (d) the subpoena is invalid for any other reason sufficient in law.

C. Action to compel compliance: Upon the failure of any person to comply with a subpoena, the party upon whose request the subpoena was issued may initiate proceedings, in the name of the commission, for

enforcement of the subpoena in the appropriate court. A copy of each pleading or other document filed in such action shall be furnished to the commission by the party initiating the action.
[9/30/76, 3/6/79, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.609 - 11.5.5.699 [RESERVED]

11.5.5.700 SUBPART VII: HEARING PROCEDURES: [see Sections 11.5.5.701 NMAC - 11.5.5.708 NMAC]
[Recompiled 11/30/01]

11.5.5.701 SCHEDULING OF HEARING:

A. Time limitations: Hearings shall be scheduled within the following time limits:

(1) Any hearing on a motion or settlement agreement shall be scheduled as promptly as feasible.

(2) Any hearing on the merits shall be scheduled to commence on a date within thirty (30) days after filing of the answer or request for hearing, as applicable.

B. Location of hearings: The location of the hearing shall be as directed by the commission or the hearing officer. Specification of a location in the hearing notice shall be sufficient evidence of the direction of the commission or the hearing officer, without the necessity of a separate written order.

C. Notice of hearing:

(1) The commission secretary shall issue a notice of hearing and serve a conformed copy upon each party, at least ten (10) days in advance of the hearing.

(2) With the notice of hearing served upon the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, the commission secretary shall include:

(a) a form for the notice to affected employees (pendency of hearing) (Section 1007) [now 11.5.5.1007 NMAC] which the responsible employer may complete as appropriate;

(b) a form for the affidavit of posting (Section 1009) [now 11.5.5.1009 NMAC], including a certificate of service (Section 1001) [now 11.5.5.1001 NMAC], which the responsible employer may complete as appropriate; and

(c) a brief explanation of how the forms should be completed and either posted, or served and filed, as applicable.

D. Employee notification requirements:

(1) At least five (5) days prior to the date of any hearing, except as provided in Paragraph 2 of this Subsection, the respondent in a case initiated by a notice of contest or the petitioner in a case initiated by a petition for modification of abatement period shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (pendency of hearing) as illustrated in Section 1007 [now 11.5.5.1007 NMAC]. Such notice shall remain posted until the earlier of the following events:

(a) the date of the hearing; or

(b) receipt by the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, of a notice of rescheduled hearing, at which time the notice shall be replaced with a new notice informing the affected employees of the rescheduled date.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time posting otherwise would be required:

(a) the case was initiated by a notice of contest and the responsible employer has no affected employees; or

(b) the case was initiated by a petition for modification of abatement period filed by an affected employee, and the responsible employer has no other affected employees.

(3) The person responsible for posting the notice specified in Paragraph 1 of this Subsection shall file with the commission secretary, within five (5) days after posting or by the date of the hearing, whichever is earlier:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

[9/30/76, 4/25/78, 1/1/83, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.702 CONTINUANCE OF HEARINGS:

A. General:

(1) Except as provided in Paragraph 2 of this Subsection, the hearing officer may grant a continuance of any hearing upon motion of any party and for good cause.

(2) In a case initiated by a notice of contest, no continuance that would result in the commencement of the hearing on the merits later than thirty (30) days after the commission secretary's receipt of the respondent's answer shall be granted without the concurrence of the respondent, unless the hearing officer finds that the continuance is reasonably required due to some action, or failure to act, on the part of the respondent.

B. Scheduling of continued hearing:

(1) If the hearing officer orders a continuance of the hearing, the order may specify the time and place of such continuance, or direct the commission secretary to issue a new notice of hearing for a time and place to be determined by the commission secretary subject to any limitation the hearing officer may order.

(2) If the order granting a continuance directs the commission secretary to issue a new notice of hearing, the commission secretary shall make a reasonable effort to secure the agreement of all parties on the time and place of such continued hearing before issuing the new notice of hearing. If the secretary is unable to secure such agreement by the parties, the continued hearing shall be set for a time and place determined by the commission secretary subject only to the limitations imposed by the hearing officer. The provisions of Section 701.C [now Subsection C of 11.5.5.701 NMAC] shall apply to the new notice of hearing.

[9/30/76, 3/6/79, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.703 PREHEARING CONFERENCE: At any time prior to a hearing on the merits, the hearing officer may, with or without motion by a party, order the parties to participate in a prehearing conference for the purpose of considering matters for simplification of the issues or expedition of the hearing.

[9/30/76, 1/1/94; Recompiled 11/30/01]

11.5.5.704 FAILURE TO APPEAR:

A. Sanction: If a party fails to appear for a hearing, the commission or the hearing officer may impose such sanctions as the commission or hearing officer, as applicable, deems appropriate; provided, any such sanctions having the effect of ultimately disposing of the case may be imposed only by the commission.

B. Setting aside of sanction: The commission or hearing officer, as applicable, shall set aside any sanctions imposed pursuant to Subsection A of this Section only upon motion of the party failing to appear and a showing that:

(1) the party did not receive the notice of hearing; or

(2) the party's failure to appear was not reasonably avoidable.

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.705 CONDUCT OF HEARING:

A. New Mexico Rules of Evidence as general guidance: Except as otherwise provided in Subsection B of this Section, the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102, shall be used as a general guide to the principles of evidence and may be used by the commission or hearing officer in determining the weight to be given any item of evidence, but shall not be binding in the determination of the admissibility of evidence.

B. Specific provisions of Rules of Evidence applicable to commission proceedings:

(1) The following provisions of the New Mexico Rules of Evidence shall be binding in commission proceedings:

(a) Article 2, Judicial Notice; provided, the term "judicial notice" shall be construed to mean "official notice";

(b) Article 4, Relevancy and its Limits; provided, for purposes of SCRA 1986, 11-408, the informal administrative review shall be deemed a compromise negotiation;

(c) Article 5, Privileges;

(d) the following portions of Article 6, Witnesses:

(i) Rule 11-603, Oath or Affirmation;

(ii) Rule 11-604, Interpreters;

(iii) Rule 11-605, Competency of Judge as Witness;

(iv) Rule 11-614, Calling and Interrogation of Witnesses by Judge; and

(v) Rule 11-615, Exclusion of Witnesses; and

(e) Rule 11-804.A, Definition of Unavailability.

(2) The term “judge” or “court”, as used in any provision of the New Mexico rules of evidence made applicable to commission proceedings by Paragraph 1 of this Subsection, shall be construed to mean, as the context requires, the commission, any commission member, or the hearing officer.

C. Exhibits:

(1) All exhibits offered in evidence shall be marked with a designation identifying the party by whom the exhibit is offered, and numbered serially in the sequence in which they are offered.

(2) Large charts and diagrams, models, and other bulky exhibits are discouraged. Exhibits shall be limited to 8 1/2 x 11 inches, or be capable of being folded and placed in an 8 1/2 x 11-inch envelope, unless the hearing officer finds that an exception is necessary for adequate presentation of the offering party’s case.

(3) The original of each exhibit shall be given to the court reporter. Unless the hearing officer finds it impractical, a copy of each exhibit shall be given to the hearing officer, each commission member, the commission counsel, and each party. Copies for any person entitled to a copy but not present at the hearing shall be given to the commission secretary or, in the absence of the commission secretary, the hearing officer, unless otherwise ordered by the hearing officer.

(4) Exhibits denied admission into evidence shall not be included in the transcript of proceedings unless the party offering the exhibits tenders the exhibit as an offer of proof pursuant to Section 707.B.2 [now Paragraph (2) of Subsection B of 11.5.5.707 NMAC].

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.706 BURDEN OF PROOF:

A. Case initiated by notice of contest: In proceedings commenced by the filing of a notice of contest, the department shall have the burden of establishing a prima facie case as to:

- (1) the existence and classification of each alleged violation;
- (2) the propriety of the proposed penalty, if any, for each alleged violation; and
- (3) the reasonableness of the abatement period for each alleged violation.

B. Case initiated by petition for modification of abatement period: In proceedings commenced by a petition for modification of abatement period, the burden of establishing a prima facie case shall rest with the petitioner.

C. Affirmative defenses: In all cases, the respondent shall have the burden of establishing a prima facie case as to any affirmative defenses asserted.

D. Rebuttal: In any case, once a prima facie case has been established by the party with the burden of doing so, the burden then shifts to any opposing party to introduce sufficient evidence to rebut such prima facie case.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.707 OBJECTIONS:

A. General: Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection. All objections, and the hearing officer’s rulings thereon, shall be included in the record.

(1) If a quorum of the commission is present at the hearing, any party dissatisfied by a ruling of the hearing officer may immediately take exception to such ruling.

(a) If an exception is taken, the commission shall immediately decide whether to sustain or reverse the hearing officer’s ruling.

(b) Failure to take an exception when a quorum of the commission is present shall constitute a waiver of the objection.

(2) If a quorum of the commission is not present at the hearing, an exception to the hearing officers’ ruling is automatic, and shall not be deemed waived by further participation in the hearing.

B. Offer of proof: Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof which shall be included in the record of the proceedings.

(1) For excluded oral testimony, an offer of proof shall consist of a brief statement describing the nature of the excluded evidence.

(2) For an excluded exhibit, an offer of proof shall consist of insertion of such exhibit into the transcript of proceedings. Excluded exhibits placed in the transcript of proceedings as offers of proofs shall be clearly identified as such, and kept separate from admitted exhibits.
[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.708 TRANSCRIPTION OF PROCEEDINGS: Unless otherwise ordered by the commission, a verbatim transcript of the hearing shall be made by a certified court reporter. The cost of transcription, including the cost of the commission's copies of the transcript, shall be paid by the commission. The cost of copies of the transcript for the parties shall be paid by the parties requesting such copies.
[9/30/76, 4/25/78, 1/1/83, 1/1/84, 8/12/93, 1/1/94; Recompiled 11/30/01]

11.5.5.709 - 11.5.5.799 [RESERVED]

11.5.5.800 SUBPART VIII: POST-HEARING PROCEDURES: [see Sections 11.5.5.801 NMAC - 11.5.5.807 NMAC]
[Recompiled 11/30/01]

11.5.5.801 FILING OF TRANSCRIPT; NOTICE; CORRECTION:

A. Filing: A copy the original of the transcript, duly certified by the reporter, shall be filed with the commission secretary as soon as practicable after conclusion of the hearing.

B. Notice of transcript filing: Upon receipt of the transcript of proceedings, the commission secretary shall issue a notice of transcript filing and serve a conformed copy upon each party.

C. Corrections to transcript: Corrections to the transcript may be made by the following procedure:

(1) All parties to a case may stipulate to a correction to the transcript. The original of any such stipulation shall be filed with the commission secretary, and a copy thereof shall be served on the court reporter by the party initiating the stipulations.

(2) If the parties are unable to stipulate to correction of the transcript, then within ten days after service of the notice of transcript filing a party seeking to make corrections shall send to the court reporter a list of the proposed corrections, by page and line number, setting forth the language as it appears in the transcript and the language as the party believes it should appear. The list shall also include adequate space for the court reporter to make the annotations required by Subparagraph b of this Paragraph.

(a) A copy of the correspondence with the court reporter shall be sent to each other party to the case, but shall not be filed with the commission at the time it is sent.

(b) Upon receipt of the proposed transcript corrections, the court reporter will check the original stenographic record and will indicate, in the space provided for each proposed correction:

(i) concurrence, if the court reporter agrees with the proposed correction;

(ii) non-concurrence, if the court reporter believes the original language is correct; or

(iii) the language as it should appear, if the court reporter determines that the original language is in error but does not agree with the proposed correction.

(c) Upon completion of the actions required by Subparagraph b of this Paragraph, the court reporter shall return the annotated list of proposed corrections to the party submitting it.

(d) Upon receipt of the annotated list of proposed transcript corrections, the initiating party shall prepare an appropriate document in the format illustrated in Section 1000 [now 11.5.5.1000 NMAC], attach the proposed corrections as an exhibit, file the document with the commission secretary, and serve a copy on each other party and on the court reporter.

(e) Any other party may file objections to the proposed transcript corrections within five (5) days after the date of service of the corrections. Any party filing objections shall serve a copy of the objections on each other party to the case and on the court reporter.

(i) In the absence of a timely objection, the proposed transcript corrections as annotated by the court reporter shall be accepted as accurate.

(ii) If a timely objection is filed, the hearing officer shall rule on such objections. Such ruling shall be without hearing, unless otherwise ordered by the hearing officer. A copy of such ruling shall be served by the commission secretary on each party and on the court reporter.

(3) The commission secretary shall enter on the original transcript of hearing in the case file all corrections made pursuant to this Subsection, and shall enter and sign the following annotation on the first page of

the transcript: “Transcript corrections made pursuant to [stipulation] [proposed corrections] [order] filed [date of filing].”

D. **Non-delay of briefing schedule:** The submission of proposed transcript corrections shall not delay the date by which briefs or proposed findings of fact and conclusions of law are due, pursuant to Section 802 [now 11.5.5.802 NMAC], unless otherwise ordered by the hearing officer on motion of a party. [4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.802 FILING OF BRIEFS AND PROPOSED FINDINGS AND CONCLUSIONS: Unless otherwise ordered by the hearing officer upon motion of a party, each party may file proposed findings of fact and conclusions of law, a closing brief, or both, within twenty (20) days after service of the notice of transcript filing. [4/25/78, 1/1/83, 1/1/94; Recompiled 11/30/01]

11.5.5.803 REOPENING OF HEARING:

A. **General:** A hearing may be reopened to permit the taking of additional evidence at any time prior to issuance of an order on any issue heard at the hearing, upon a finding by the commission or the hearing officer, as applicable:

(1) as to any excluded evidence, whether or not in response to a motion of a party, that such exclusion was both erroneous and prejudicial; provided:

(a) if a quorum of the commission was present at the hearing, the party offering the evidence took exception to the hearing officer’s ruling; and

(b) in any event, the party offering the evidence submitted an offer of proof; or

(2) upon motion of a party alleging that new evidence exists, that such new evidence:

(a) was not, and could not have been, considered at the hearing; and

(b) is relevant and likely to be admissible at the hearing.

B. **Limitation of reopened hearing:** Any hearing reopened pursuant to Subsection A of this Section shall be limited to the specific issues set forth in the order reopening the hearing. [1/1/94, 1/1/96, Recompiled 11/30/01]

11.5.5.804 DECISIONS ON THE MERITS:

A. **Form:** All decisions on the merits shall be by written order signed by the commission members deciding the contest. The order shall set forth the facts necessary to an understanding of the case, the reasons for the decision, and the decision.

B. **Concurring or dissenting opinion:** Any commission member who does not agree in full with the majority may write a concurring or dissenting opinion, which shall be included with the commission’s decision.

C. **Filing and service of, and response to, recommended decision:** If a hearing officer, other than a commission member or the commission counsel, has been directed by the commission to submit a recommended decision, the hearing officer shall serve a copy of the recommended decision upon each party and file the original with the commission secretary.

(1) Any party may file a response to the recommended decision, including argument for or against the recommended decision or for modification of the recommended decision, within twenty (20) days after service of the recommended decision.

(2) Any response to the recommended decision shall include appropriate citations to the hearing record or to legal authority. No new evidence shall be included in a response, nor shall any legal argument be presented that was not presented at the hearing unless the party filing the response shows that the issue addressed by such legal argument could not reasonably have been anticipated at the hearing.

(3) As used in this Subsection, “recommended decision” includes proposed findings of fact and conclusions of law.

D. **Non-applicability of SCRA 1986, 1-058:** The provisions of SCRA 1986, 1-058 shall not apply to orders of the commission or the hearing officer. The provisions of this Part regarding submission of and comment upon proposed orders shall instead apply.

E. **Effective date of orders:** All orders, whether issued by the commission or by the hearing officer, shall become effective immediately upon filing.

[9/30/76, 1/1/83, 1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.805 REHEARINGS:

A. Showing required: After final resolution, the commission shall not rehear the case unless the party requesting the rehearing demonstrates, to the satisfaction of the commission, that new evidence exists, that it was not, and could not have been, considered at the prior hearing, and that the new evidence could have affected the final resolution.

B. Effect on finality of order: A motion for rehearing does not affect the finality of the order nor suspend its operation.

[9/30/76, 4/25/78, 1/1/83, 1/1/94; Recompiled 11/30/01]

11.5.5.806 STAY OF ORDER:

A. Time for filing: Any motion for stay of an order shall be filed within fifteen (15) days after the order is filed.

B. Showing required; granting of stay: No stay shall be granted from any final resolution unless the party requesting the stay demonstrates, to the satisfaction of the commission, that good cause exists for a stay. If the commission finds that good cause exists, it may order a stay for the period requested or, at its discretion, for any period it deems appropriate.

C. Automatic denial: Any motion for stay that is not acted upon within fifteen (15) days after filing shall be deemed denied.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.807 APPEALS:

A. How taken: Appeals from commission orders shall be as provided by statute.

B. Preparation of record on appeal:

(1) The commission secretary shall be responsible for preparation and certification of the record proper in accordance with applicable court rules regarding appeals from decisions of administrative agencies.

(2) The court reporter who recorded the hearing shall be responsible for preparation of the transcript of hearing in accordance with applicable court rules regarding appeals from decisions of administrative agencies.

C. Costs: The cost of perfecting an appeal shall be borne by the appellant.

[4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.808 - 11.5.5.899 [RESERVED]

11.5.5.900 SUBPART IX: MISCELLANEOUS PROVISIONS: [see Sections 11.5.5.901 NMAC - 11.5.5.906 NMAC]

[Recompiled 11/30/01]

11.5.5.901 CONSTRUCTION: This Part shall be construed so as to accomplish the purpose of the Act.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.902 WAIVER OF RULES: Upon motion of a party and for good cause shown, the commission may waive any provision of this Part, provided that such waiver does not conflict with the Act nor affect any party's right to due process.

[4/25/78, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.903 SEVERABILITY: If any provisions or application of this Part is held invalid, the remainder of this Part, or its application to other persons or situations, shall not be affected.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.904 - 11.5.5.905 [RESERVED]

11.5.5.906 SAVINGS CLAUSE: No amendment to this Part shall apply to any case in which the notice of contest or the petition for modification of abatement period was filed prior to the effective date of such amendment.

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.907 - 11.5.5.998 [RESERVED]

11.5.5.999 SUBPART X: SAMPLE FORMS: [see Sections 11.5.5.1000 NMAC - 11.5.5.1018 NMAC]
[Recompiled 11/30/01]

11.5.5.1000 SAMPLE DOCUMENT (GENERAL):

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION
[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],
v. No. [insert case no.]
[NAME(S) OF RESPONDENT(S)],
respondent[s].

[TITLE OF DOCUMENT]

[Documents filed or served pursuant to this Part, except for exhibits attached to other documents, must contain a heading and caption, as illustrated above, on the first page. The top margin shall be at least one and one-half (1 1/2) inches, and all other margins shall be at least one (1) inch. All pages after page 1 shall be numbered. The page number may appear within the bottom margin allowance. The body of the document (after the title) shall be double-spaced, except for footnotes, block-indented quotations, sub-headings, signature blocks, and similar material.]

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: If applicable, include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1001 SAMPLE CERTIFICATE OF SERVICE:

A. Format:

CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing [title of document] was served on the following [parties/advocates of record], by [method of service], on [date of service]:
[Insert name(s) and address(es) of person(s) upon whom service is made.]
[Signature] _____
[Typed or printed Name]

B. Usage note: The certificate of service must appear on the signature page, or on the page immediately following the signature page, of the document to which it relates.
[1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1002 SAMPLE COMMISSION SECRETARY'S CERTIFICATE OF SERVICE:

A. Format:

COMMISSION SECRETARY'S CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing [title of document] was served on each party or advocate of record, on [date of service].
[Signature] _____
[Typed or printed Name]
commission secretary

B. Usage note: The commission secretary's certificate of service shall be stamped or typed on the signature page, or on the page immediately following the signature page, of the document to which it relates.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1003 SAMPLE NOTICE OF SUBSTITUTION OF ADVOCATE:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION
[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],
v. No. [insert case no.]
[NAME(S) OF RESPONDENT(S)],
respondent[s].

NOTICE OF SUBSTITUTION OF ADVOCATE

Pursuant to 11 NMAC 5.5.110.B.1 [now Paragraph (1) of Subsection B of 11.5.5.110 NMAC], the undersigned person hereby withdraws as advocate for [name of party].

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

The Following person hereby enters [his/her] appearance as advocate for [name of party].

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1004 SAMPLE NOTICE TO AFFECTED EMPLOYEES (CONTEST OF CITATIONS):

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT,
complainant,
v.
[NAME OF RESPONDENT],
respondent.

[case no. omitted]

NOTICE TO AFFECTED EMPLOYEES
(CONTEST OF CITATIONS)

[Name of respondent] is filing the attached notice of contest pursuant to the Occupational Health and Safety Act. This contest will be the subject of an informal administrative review before the New Mexico environment department, and may be the subject of a hearing before the occupational health and safety review commission. Any affected employee or representative of affected employees may participate as a party in these proceedings, as provided in the Act and in 11 NMAC 5.5 [now 11.5.5 NMAC], Occupational Health and Safety Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5 from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____
[Typed or printed name]

B. Usage note: This document must be posted, with an attached copy of the notice of contest, in accordance with Section 302.E [now Subsection E of 11.5.5.302 NMAC]. Neither the original nor a copy should be filed with the department or the commission.
[1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1005 SAMPLE NOTICE TO AFFECTED EMPLOYEES (PROPOSED MODIFICATION OF ABATEMENT PERIOD):

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF PETITIONER],

Petitioner,
v. [case no. omitted]
NEW MEXICO ENVIRONMENT DEPARTMENT [and]
[NAME OF RESPONSIBLE EMPLOYER],
respondent[s].

NOTICE TO AFFECTED EMPLOYEES
(PROPOSED MODIFICATION OF ABATEMENT PERIOD)

[Name of petitioner] is filing the attached petition for modification of abatement period pursuant to the Occupational Health and Safety Act. Any affected employee or representative of affected employees may participate as a party in these proceedings, as provided in the Act and in 11 NMAC 5.5 [now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5 [now 11.5.5. NMAC] from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____
[Typed or printed name]

B. Usage note: This document must be posted, with an attached copy of the petition for modification of abatement period in accordance with Section 303.E [now Subsection E of 11.5.5.303 NMAC]. Neither the original nor a copy should be filed with the department or the commission.
[1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1006 SAMPLE NOTICE TO AFFECTED EMPLOYEES (INFORMAL ADMINISTRATIVE REVIEW):

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/petitioner],
v. No. [insert case no.]
[NAME(S) OF RESPONDENT(S)],
respondent[s].

NOTICE TO AFFECTED EMPLOYEES
(INFORMAL ADMINISTRATIVE REVIEW)

A [meeting/telephone conference] between the New Mexico environment department and [name(s) of respondent(s)], as part of the informal administrative review of this case, has been scheduled for [time] on [date], at [location]. Any affected employee or representative of affected employees is entitled to participate as a party in the [meeting/telephone conference], as provided in the Occupational Health and Safety Act and in 11 NMAC 5.5 [now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5 [now 11.5.5. NMAC] from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____
[Typed or printed name]

B. Usage note: This document must be posted in accordance with Section 306.C [now Subsection C of 11.5.5.306 NMAC]. Neither the original nor a copy should be filed with the department or the commission.
[1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1007 SAMPLE NOTICE TO AFFECTED EMPLOYEES (PENDENCY OF HEARING):

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],
v. No. [insert case no.]
[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE TO AFFECTED EMPLOYEES
(PENDENCY OF HEARING)

A hearing on [issue or issues to be heard] has been scheduled before the Occupational Health and Safety Review Commission to commence at [time] on [date], at [location]. Any affected employee or representative of affected employees is entitled to participate as a party in the hearing, as provided in the Occupational Health and Safety Act and in 11 NMAC 5.5[now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5[now 11.5.5. NMAC] from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____
[Typed or printed name]

B. Usage note: This document must be posted in accordance with Section 701.C [now Subsection C of 11.5.5.701 NMAC]. Neither the original nor a copy should be filed with the department or the commission. [1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1008 SAMPLE NOTICE TO AFFECTED EMPLOYEES (PROPOSED SETTLEMENT OF CASE):

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/petitioner],

v.

No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],
respondent[s].

NOTICE TO AFFECTED EMPLOYEES
(PROPOSED SETTLEMENT OF CASE)

The attached settlement agreement has been entered into by the [signing] parties. Any affected employee [or representative of affected employees] who objects to the settlement agreement should file a written objection, including reasons, by hand-delivery to the commission secretary at [street address], or by first class mail addressed to [mailing address]. Objections must be received by the commission secretary within twenty (20) days after filing of the settlement agreement. Specific procedures for objection are set forth in 11 NMAC 5.5 [now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures, a copy of which may be obtained from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____
[Typed or printed name]

B. Usage note: This document must be posted, with an attached copy of the settlement agreement, in accordance with Section 503.D[now Subsection D of 11.5.5.503 NMAC]. Neither the original nor a copy should be filed with the department or the commission. [1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1009 SAMPLE AFFIDAVIT OF POSTING:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/petitioner],

v.

No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],
respondent[s].

AFFIDAVIT OF POSTING

STATE OF [NAME OF STATE IN WHICH AFFIDAVIT SIGNED])

) ss.

COUNTY OF [NAME OF COUNTY IN WHICH AFFIDAVIT SIGNED])

[Name of person signing affidavit], being duly sworn, states:

1. I am the [title] of the [respondent/petitioner], [name of party], and I am authorized to make this affidavit.

2. I posted copies of the notice to affected employees ([specific type of notice]), [with an attached copy of the (title of attached document),] in accordance with 11 NMAC 5.5.203.A [now Subsection A of 11.5.5.203 NMAC], on [date of posting].

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

SUBSCRIBED AND SWORN TO before me by [name of person signing affidavit] on [date].

[Signature of notary] _____

Notary public

My commission expires:

[Expiration date] _____

B. Usage note: If applicable, include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1010 SAMPLE AFFIDAVIT OF EXPLANATION FOR NON-POSTING:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/petitioner],

v.

No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent(s).

AFFIDAVIT OF EXPLANATION FOR NON-POSTING

STATE OF [NAME OF STATE IN WHICH AFFIDAVIT SIGNED])

) ss.

COUNTY OF [NAME OF COUNTY IN WHICH AFFIDAVIT SIGNED])

[Name of person signing affidavit], being duly sworn, states:

1. I am the [title] of the [respondent/petitioner], [name of party], and I am authorized to make this affidavit.

2. A notice to affected employees ([specific type of notice]) was not posted because [brief explanation of reason for not posting].

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

SUBSCRIBED AND SWORN TO before me by [name of person signing affidavit] on [date].

[Signature of notary] _____

Notary public

My commission expires:

[Expiration date]

B. Usage note: If applicable, include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1011 SAMPLE NOTICE OF CONTEST:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT,
complainant,

v.

[Case no. omitted]

[NAME OF RESPONDENT],
respondent.

NOTICE OF CONTEST

TO: [Name and address of person who signed citation for department]

[Name of respondent] contests the following portions of the citations issued by the New Mexico environment department on [date]:

[List, by citation and item number, each item being contested, and state what specific aspect (existence of cited condition, that cited condition constitutes a violation, classification, penalty, or abatement date) is being contested.]

[A copy/copies] of the relevant [citation(s)/item(s)] [is/are] attached hereto as Exhibit[s] A [through (last exhibit letter)].

Dated: [insert filing date]

[Signature] _____

TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Attached exhibits must be labelled ("EXHIBIT A", etc.) in the center of the bottom margin. Each citation should be a separate exhibit, but items within a single citation should not be separate exhibits unless on non-consecutive pages. A certificate of service is not required, but an affidavit of posting (form 10) or affidavit of explanation for non-posting (Section 1010) [now 11.5.5.1010 NMAC] must be filed.
[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1012 SAMPLE PETITION FOR MODIFICATION OF ABATEMENT PERIOD:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF PETITIONER],
Petitioner,

v.

[case no. omitted]

NEW MEXICO ENVIRONMENT DEPARTMENT
[and] [NAME OF RESPONSIBLE EMPLOYER],
respondent[s].

PETITION FOR MODIFICATION OF ABATEMENT PERIOD

TO: [Name and address of person who signed citation for department]

[Name of petitioner] petitions for amendment of the abatement dates for the following-listed items of the citation issued to [name of responsible employer] on [date]:

[List each item for which abatement date modification is requested, state what longer or shorter period is requested, and state reasons for request.]

[A copy/copies] of the relevant [citation(s)/item(s)] [is/are] attached hereto as Exhibit[s] A [through (last exhibit letter)].

Dated: [insert filing date]

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Attached exhibits must be labelled ("EXHIBIT A", etc.) in the center of the bottom margin. Each citation should be a separate exhibit, but items within a single citation should be separate exhibits only if on non-consecutive pages. A certificate of service (Section 1001) [now 11.5.5.1001 NMAC], showing service on the responsible employer is required if the petition is filed by an affected employee or a representative of affected employees. An affidavit of posting (form 10) or affidavit of explanation for non-posting (Section 1010) [now 11.5.5.1010 NMAC] must be filed.
[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1013 SAMPLE NOTICE OF VACATION OF CITATION:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT,
complainant,
v.
[NAME OF RESPONDENT],
respondent.

No. [insert case no.]

NOTICE OF VACATION OF CITATION[S]
complainant, New Mexico environment department, hereby gives notice of the unconditional vacation of [the/all] citation[s] at issue in this matter.

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.
[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1014 SAMPLE NOTICE OF WITHDRAWAL OF CONTEST OR PETITION:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],
v.
[NAME(S) OF RESPONDENT(S)],
respondent[s].

No. [insert case no.]

NOTICE OF WITHDRAWAL OF [CONTEST/PETITION]
[respondent/Petitioner], [Name of respondent or Petitioner, as applicable], hereby gives notice of the unconditional withdrawal of the [Notice of Contest/Petition for Modification of Abatement Period] in this matter.

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Include Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.
[1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1015 SAMPLE NOTICE OF INTERVENTION:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],

v.

No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],
respondent[s].

[NAME OF INTERVENOR],
Intervenor.

NOTICE OF INTERVENTION

Notice is hereby given that [Name of Intervenor], [an affected employee/a representative of affected employees] of [Petitioner/respondent], [Name of Responsible Employer], intervenes in this case.

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Include Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC] on or immediately following the signature page, to show service upon the other parties.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1016 SAMPLE NOTICE OF WITHDRAWAL OF INTERVENTION:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],

v.

No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],
respondent[s].

[NAME OF INTERVENOR],
Intervenor.

NOTICE OF WITHDRAWAL OF INTERVENTION

Notice is hereby given that Intervenor [Name of Intervenor] withdraws from this case.

[Signature] _____
[TYPED OR PRINTED NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Include Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC] on or immediately following the signature page, to show service upon the other parties.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1017 SAMPLE NOTICE OF SERVICE OF DISCOVERY REQUEST OR RESPONSE:

A. Format:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],
[complainant/Petitioner],

v.

No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE OF SERVICE OF
[RESPONSE TO] [TYPE OF DISCOVERY]

Notice is hereby given that a [Response to] [Type of Discovery] was served upon [Name of Party], by [type of service], on [date].

[Signature] _____
[TYPED OR PRINTED
NAME]
[Address of signer (use as many lines as necessary)]
[Signer's telephone number]

B. Usage note: Insert Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC] on or immediately following signature page.
[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1018 SAMPLE SUBPOENA AND RETURN:

A. Format; subpoena:

STATE OF NEW MEXICO
BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER]
[complainant/Petitioner],
v.
[NAME(S) OF RESPONDENT(S)],
respondent[s].

No. [insert case no.]

SUBPOENA [DUCES TECUM]

TO: [Name and address of person to whom Subpoena addressed]

You are hereby commanded to appear before [the Occupational Health and Safety Review commission/a Certified court reporter] at [location] on [date], at the hour of [time] and testify in this matter at the request of [party requesting Subpoena]. [You are further ordered to bring with you the following items:]
[If Subpoena Duces Tecum, list items to be brought.]

OCCUPATIONAL HEALTH AND SAFETY
REVIEW COMMISSION

[Location of commission Seal]

By: [Signature] _____
[TYPED OR PRINTED NAME]
Commission secretary

Subpoena requested by: [List name, address, and phone no. of person requesting Subpoena]

B. Format; return of service: Include a return of service, in the following format, on the reverse of the Subpoena or on a separate page:

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY

STATE OF NEW MEXICO)
) ss.
COUNTY OF [NAME OF COUNTY])

I certify that on [date], in the County of [Name of County], I served this Subpoena [Duces Tecum] on [name of person served], by delivering a copy of the Subpoena [Duces Tecum] to such person.

SHERIFF OR DEPUTY

RETURN FOR COMPLETION BY
OTHER PERSON MAKING SERVICE

STATE OF NEW MEXICO)

) ss.
COUNTY OF [NAME OF COUNTY])

I, being duly sworn, on oath say that I am over the age of 18 years and not a party to this case, and that on [date], in the County of [name of county], I served this Subpoena [Duces Tecum] on [name of person served], by delivering a copy of the Subpoena [Duces Tecum] to such person.

Person Making Service

SUBSCRIBED AND SWORN TO before me by [name of person signing affidavit] on [date].

Judge, Notary, or Other Officer
Authorized to Administer Oaths

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1019 - 11.5.5.1099 [RESERVED]

HISTORY OF 11.5.5 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:

OHSRC 76-1, Rules of Procedure, filed 9/30/76.

OHSRC 78-1, Amended Rules of Procedure, filed 4/25/78.

OHSRC 1, Rules of Procedure, filed 12/28/81.

OHSRC 82-1, Rules of Procedure, filed 12/21/82.

OHSRC 83-1, Rules of Procedure, filed 12/16/83.

OHSRC 93-1, Rules of Procedure, filed 11/15/93.

History of Repealed Material: [RESERVED]