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THE GOVERNING BODY ACTING AS A HEARING PANEL

In mayor-council municipalities without a manager, the governing body must vote on the mayor's actions to appoint, suspend or dismiss employees. Consequently, the governing body often acts as a hearing panel in deciding whether employee conduct warrants suspension or dismissal. The Governing Body may also act as a hearing panel in licensing and planning and zoning matters.

Similarly, many personnel ordinances provide that the governing body shall serve as an appeal panel from adverse actions of the mayor or city manager. An adverse action is one which affects the employee's status or pay, such as suspension without pay, demotion or dismissal from municipal employment.

In either case, it is the responsibility of the governing body to:

1. insure that the employee is given an opportunity to adequately present her/his side of the issue, present witnesses and documentary evidence and cross-examine witnesses;
2. solicit relevant testimony from witnesses to the alleged actions or inactions of the employee and other persons involved in the case;
3. call for and examine any records, documents, payroll and leave records and similar material relevant to the case;
4. weigh the evidence presented fairly and impartially;
5. make findings of fact and determinations based on the evidence; and
6. vote to uphold, deny or modify the action of the mayor or manager.

SCHEDULING THE APPEAL HEARING

The governing body should set a date for the appeal hearing as soon as possible after the appeal is received. Most ordinances provide a given time after the adverse action is taken for the affected employee to file an appeal, and a given time period after the appeal is filed for the governing body to meet to hear the appeal. This protects the interests of both the employee and the municipality, since the adverse action affects the employee's pay and, if the action (such as suspension, demotion or dismissal) is reversed by the governing body, the employee will be returned to the payroll with his/her previous status and may be due back pay for the time since the action was taken. The old adage, "Justice delayed is justice denied," certainly applies where loss of livelihood is involved.

OPEN OR CLOSED MEETING

An appeal hearing on the suspension, demotion or dismissal of an individual employee may be held as a closed meeting for "limited personnel matters" under §10-15-1H, NMSA 1978 (exceptions to the Open Meetings Act) unless the subject employee requests an open hearing, **in which case the hearing must be held as a public meeting**. Whether the hearing is open or closed, adequate notice must be given under the Open Meetings Act.

WHO SHOULD PRESIDE

If it was an action by the mayor which is being appealed, it is desirable to have some member of the governing body other than the mayor chair the hearing. Although the mayor retains his/her right to vote to break a tie, having another member of the governing body chair the hearing serves to promote fairness in the presentation of the case because the presiding officer controls how the hearing is held and what evidence is heard, subject to having the chair's ruling on the evidence overturned by majority vote of the remaining members of the hearing panel.

WHO SHOULD BE PRESENT

The employee should be present at all times when testimony or documentary evidence is being presented, and should have the right to cross-examine witnesses and present opposing testimony or documentary evidence.

All witnesses other than the appealing employee should be excluded from the hearing except when they are testifying, and if they are recalled at a later time, they should be reminded that they are still under oath.

LEGAL COUNSEL

If the employee chooses to be represented by legal counsel, the governing body should arrange for the municipal attorney to be present at the hearing so that the interests of the municipality are represented and so that the members of the hearing panel are not intimidated or frustrated by the employee's legal counsel. Legal counsel should be present throughout actual testimony.

MINUTES

Verbatim minutes of the hearing are not required, and, if a closed hearing, only skeleton minutes stating the time and purpose of the hearing and who was present should be taken. If the hearing is an open meeting of the governing body, the minutes must comply with the requirements of the Open Meetings Act under §10-15-1G.

DUTIES OF THE PRESIDING OFFICER

It is the duty of the presiding officer to make sure that order and decorum are maintained and that no one is badgered by members of the panel, the employee, any witness or any legal counsel.

It is also the duty of the presiding officer to keep the questioning and the testimony on track and to avoid irrelevant issues and endless repetition of the same arguments or testimony. This may sometimes require considerable tact and diplomacy since some members of the panel may have a tendency to dominate the proceedings. Remember, however, that not all members of the panel may grasp a point the first time (or even the third or fourth time) it is presented, and the object of the hearing is make all members of the panel as informed as possible.

The chair may sometimes have to rule a question out of order or repetitious or even rule that certain testimony is irrelevant to the case at hand.

Since this is a meeting of the governing body rather than a trial in a court of law, the ruling of the chair may be appealed and may be overturned by a vote of the remaining members of the panel.

HEARING EVIDENCE

All witnesses should be sworn to present the truth, the whole truth and nothing but the truth, with the oath being administered by the presiding officer or the municipal clerk, if appropriate.

In hearing the issue, it is not necessary to slavishly follow the formal rules of evidence used in court, but such rules should be used as a guide. For instance, the governing body should hear only evidence which is relevant to the action at hand, should ignore matters irrelevant to the case being heard, and should attempt to get first-hand testimony and should ignore hearsay, rumors or anonymous complaints.

Any member of the hearing panel should be allowed to question any witness about the matter being appealed in order to bring out any pertinent points on which the panel must decide.

DECISION AND NOTICE OF DECISION

Once all the evidence has been received, it is the responsibility of the hearing panel to decide whether to uphold, reverse or modify the action being appealed. Nothing in the Open Meetings Act requires this to be done immediately, but the final vote must be taken in open meeting, so if the panel wishes to take its vote and the hearing was closed, **the meeting must reconvene as an open session to take the vote.**

Some members of the panel may wish to have additional time to think over their decision, in which case they may wish to call a special open meeting for the vote at a later time. Most personnel ordinances which provide for appeals hearings have a time limit after the hearing by which the final decision must be made.

Once the decision is made and the vote is taken, the appealing employee (and his/her legal counsel, if applicable) should be given written notice of the decision of the hearing panel. The person who took the adverse action should also be notified in writing, and a copy of the notice should be placed in the employee's personnel file. At this point, the hearing panel's work is complete, although if the employee is not satisfied with the result, he or she may take action in court or, if discrimination is alleged, with the State Human Rights Commission or the federal Equal Employment Opportunity Commission.

Remember, the more fairly and impartially the hearing is conducted, the more likely the employee is to accept the panel's decision and the better the municipality's chances are of prevailing in any subsequent court or administrative law hearing.

LICENSING AND PLANNING AND ZONING MATTERS

Occasionally, the Governing Body may be called upon to conduct hearings concerning licensing matters or planning and zoning matters. Because these hearings involve substantial individual rights, they must be conducted in a quasi-judicial manner. This means that the Governing Body is sitting more in the capacity of a Judge rather than as a legislative body. As a result, more attention needs to be paid to fairness, open-mindedness, and Due Process.

In 1989, the Court of Appeals in New Mexico decided *Battershell v. City of Albuquerque* 108 N.M. 658, 777 P.2d 386 (Ct. App. 1989) which expanded a long line of cases dealing with Due Process requirements in land use decisions. New Mexico courts have consistently required that procedural due process be afforded the parties before an administrative body acting in an Adjudicatory or quasi-judicial role. In affording procedural due process, the body must swear the witnesses and provide for cross examination of witnesses. The body must also avoid *ex parte* contacts that would improperly interfere with its role. In addition, all evidence that is presented and admitted into the record must be considered by the body.

Battershell made it clear that in quasi judicial proceedings, any person giving testimony will be required to do so under oath or affirmation. Although it is far from a unanimous position among the several states, the rule in New Mexico with respect to zoning hearings is that witnesses should be sworn, and their testimony taken only on an oath or affirmation.

The cross examination of all witnesses giving testimony is another essential element of procedural due process. This does not mean that an exhaustive, long-winded and comprehensive cross examination is required. A **reasonable** opportunity to confront and cross examine witnesses is all that is required by the Due Process Clause. In conducting the hearing, the body need not adhere strictly to the evidentiary standards applied by a court for examination and cross examination, but the body must adhere to the fundamental principles of fairness and due process. A reasonable opportunity to cross examine involves the right to ask questions bearing on the testimony presented or the position taken by the witness. It might include exploration of motivation or bias on the part of the witness, and might even touch on issues involving conflicts of interest. Cross examination must always be conducted politely and professionally; a witness should never be subjected to badgering or unreasonable attack by the cross examiner.

***Ex Parte* Communications**

1. An *ex parte* communication is any communication, whether oral or written that:
 - a) involves less than all the parties having a legal interest in the matter;
 - b) is about a pending or impending matter within the jurisdiction of the administrative body;
 - c) made to or initiated by a commission member having jurisdiction over the matter.
2. An *ex parte* communication may include:
 - a) communications with people involved in the subject matter pending before the commission.
 - b) communications with people not involved in the pending matter at all.
 - c) independent investigations such as visiting the site proposed for development.
 - d) communications made with the best of intentions.
3. Permissible *ex parte* communications include:
 - a) communications for the purpose of scheduling, administrative matters or emergency purposes.
 - b) communications with the municipal attorney
 - c) communications with commission staff (if any)
4. *Ex Parte* communications are prohibited for a variety of reasons:
 - a) It is not fair to the other party because the decision maker may be improperly influenced.
 - b) It is not fair to the other party because the decision maker may be inaccurately informed.
 - c) It is not fair to the other party because the decision maker is only provided with one side of the issue.
 - d) In the absence of actual influence or misinformation, the other side may nevertheless feel cheated and believe the proceedings have been tainted.
 - e) The commission can acquire a reputation for being susceptible to improper influence.
 - f) Improper *ex parte* communications can invalidate the actions of the commission.

Manner of Presentations to the Commission.

A. Applicants. Applicants are asked to address and explain the material which is the subject of their application in a succinct manner, confining their comments to matters relevant to the application and the Commission's jurisdiction and decision making responsibilities. At the conclusion of the applicant's testimony, Commissioners may question the applicant to assist in the Commissioner's understanding of the matter to be considered. Following questions by the Commissioners, people in opposition to the application may pose questions in the nature of cross examination to the applicant. (NO TESTIMONY WILL BE TAKEN AT THIS TIME). Finally, members of the public may pose questions to the applicant.

B. Opponents. Opponents to the application will proceed with their direct testimony following cross examination of the applicant. In the same manner, the opponents will stand for questions by the Commissioners, cross examination by the applicant and cross examination by the applicant.

C. Members of the Public. Similarly, any interested member of the public may make a statement concerning the application pending before the Commission., Anyone making

such a statement will be subject to questioning by members of the Commission, the applicant, opponents and other interested members of the public.

D. All People Giving Testimony. All testimony and all questioning of witnesses will be confined to matters relevant to the application pending before the Commission and the Commission's decision making authority concerning the pending application. No questions shall be asked of any individual Commissioner by applicants or others testifying before the Commission except through the Chair of the Commission. All people participating in the proceedings are expected to conduct themselves in a courteous manner,

E. Evidence. The Chair of the Commission shall enter into evidence any relevant written document tendered by any person during the course of the proceedings.