

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
REPEAL OF 11 NYCRR 4
(INSURANCE REGULATIONS 3 AND 97)
REPEAL OF 3 NYCRR SUPERVISORY PROCEDURE G 111
AND
NEW 23 NYCRR 2**

**RULES GOVERNING THE PROCEDURES FOR ADJUDICATORY PROCEEDINGS BEFORE THE
DEPARTMENT OF FINANCIAL SERVICES**

I, Linda A. Lacewell, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and the State Administrative Procedures Act, do hereby promulgate the following amendments to Titles 3, 11, and 23 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to take effect upon publication of the Notice of Adoption in the State Register:

Part 4 of 11 NYCRR is hereby repealed.

Supervisory Procedure G 111 of 3 NYCRR is hereby repealed.

A new Part 2 is added to 23 NYCRR, to read as follows:

§ 2.1 Applicability.

(a) This Part applies to The New York State Department of Financial Services (“Department”) adjudicatory proceedings, as defined in State Administrative Procedure Act section 102.3, commenced on or after the effective date of this Part or an applicable amendment thereto, except it shall not apply to:

- (1) a rulemaking proceeding;
- (2) an employee disciplinary action or other personnel action pursuant to Civil Service Law article 5;
- (3) a public hearing for the purpose of acquiring information or evaluating an application or a transaction;

or

(4) proceedings pursuant to Insurance Law section 4308, which shall be governed by the provisions of such section.

(b) Adjudicatory proceedings before the Department shall be conducted as provided by the Financial Services Law and the regulations promulgated there under and shall be in accordance and consistent with the procedures that apply under the State Administrative Procedure Act.

§ 2.2 Hearing officer.

(a) A hearing in an adjudicatory proceeding shall be conducted by a hearing officer chosen from among the following persons:

(1) the Superintendent of Financial Services;

(2) any Deputy Superintendent; or

(3) any designated salaried employee of the Department authorized by the Superintendent for such purpose.

(b) A hearing officer shall have the powers set forth in State Administrative Procedures Act section 304.

(c) No person who shall have previously dealt in a substantial way with the substance of the matter that is the subject of the adjudicatory proceeding, or who has an existing or potential conflict of interest, shall act as the hearing officer in such proceeding.

(d) A hearing officer shall be bound by the Department's code of ethics and the code of ethics as set forth in Public Officers Law section 74.

(e) An application to recuse a hearing officer may be made by any party on the hearing record. The hearing officer shall rule on such application in accordance with the above codes of ethics.

(f) In the event of a hearing officer's death, resignation, removal, recusal, termination of employment, disability, or other inability or failure to otherwise conclude a hearing or make a timely written report after the completion of the hearing, another duly designated hearing officer may be substituted to continue the hearing on the existing record or to render a written report on the completed record.

§ 2.3 Notice of adjudicatory proceeding and answer.

(a) Unless otherwise provided in the Banking Law, Insurance Law, or any other applicable law, an adjudicatory proceeding shall be commenced by service of a notice of action or proposed action as provided in Financial Services Law section 304. Unless otherwise provided in the Banking Law, Insurance Law, or any other applicable law, such notice shall be served on each party at least ten (10) days prior to the return date.

(b) Such notice shall contain the information set forth in State Administrative Procedures Act sections 301.2 and Financial Services Law section 304.

(c) Such notice may be amended or supplemented:

(1) prior to the commencement of the hearing, on at least ten (10) days written notice; or

(2) after commencement of the hearing, as authorized by the hearing officer.

(d) A party may file a written answer to the notice of action or proposed action with the Department attorney who issued the notice thereof at least two (2) days prior to the return date.

§ 2.4 Representation.

(a) Any party to an adjudicatory proceeding may be represented by an attorney.

(b) Provided that such individual is not currently suspended or debarred from practice before the Department:

(1) An individual may appear on the individual's own behalf;

(2) A member of a partnership may represent the partnership; or

(3) A duly authorized officer of a corporation, trust or association may represent the corporation, trust or association.

(c) An attorney or individual representing a party shall file a notice of appearance on a form prescribed by the Superintendent pursuant to Executive Law sections 166 and 168.

§ 2.5 Subpoenas.

(a) Subpoenas in connection with an adjudicatory proceeding may be issued by:

(1) the Superintendent,

(2) a Deputy Superintendent,

(3) the hearing officer assigned to hear the matter, or

(4) any employee of the Department authorized by the Superintendent to issue a subpoena in their discretion at the request of any party to the proceeding.

(b) The party requesting the subpoena shall be responsible for serving the subpoena and payment of all required fees.

§ 2.6 Discovery.

Discovery is available to respondents and applicants to the extent permitted by the State Administrative Procedure Act sections 301.2, 305, and 401.4.

§ 2.7 Evidence.

(a) The rules of evidence for Department adjudicatory proceedings are set forth in State Administrative Procedure Act section 306.

(b) Each witness shall be sworn or shall give an affirmation.

§ 2.8 Adjournment of Hearings.

(a) Prior to commencement, a hearing may be adjourned upon written application by a party to the Department official who issued the notice or notice of proposed action. The application may be granted upon a showing of good cause at the discretion of the Department official who issued the notice or notice of proposed action.

(b) After commencement, a hearing may be adjourned at the discretion of the hearing officer for good cause shown upon request of any party or upon consent of all parties.

(c) The factors to be considered in determining good cause shown, as used in this section, shall include, but not be limited to, the following:

- (1) illness of a party;
- (2) temporary absence or illness of a witness;
- (3) opportunity to obtain an attorney;
- (4) illness of an attorney;
- (5) actual engagement of an attorney in a court proceeding; and
- (6) the number and nature of previous requests for adjournment.

(d) The party or attorney making an application for adjournment for good cause shown shall present documentary evidence as the hearing officer deems appropriate.

(e) A hearing officer may, in the hearing officer's sole discretion, adjourn a hearing.

§ 2.9 Failure to appear.

In the event a party fails to appear or to be represented without having obtained an adjournment at an adjudicatory proceeding initiated by the Department, such adjudication proceeding shall proceed on the existing record and a decision shall be rendered thereon. With respect to the application for a license, authorization, approval or permit, the Department in its sole discretion may deem said application withdrawn.

§ 2.10 Conduct of hearings.

All hearings shall be conducted in an impartial, efficient, timely, expert, and fair manner. The hearing officer shall be responsible for the conduct of a hearing.

§ 2.11 Order of hearings.

(a) The Department attorney shall present the Department's case-in-chief first, unless otherwise ordered by the hearing officer or unless otherwise expressly specified by law or regulation.

(b) The Department attorney shall be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's or applicant's closing statement.

(c) If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the hearing officer shall fix the order.

§ 2.12 Burden of proof.

(a) The burden of proof shall be on the party who initiated the proceeding as set forth in State Administrative Procedure Act section 306.1.

(b) The burden of proof is substantial evidence.

§ 2.13 Record of proceedings.

(a) A verbatim recording shall be made of the proceedings.

(b) A transcription of the record shall be made available to any party upon request and payment of the cost of the transcription.

§ 2.14 Hearings open to the public.

(a) Hearings shall be open to the public as provided in Financial Services Law section 305(c), unless:

(1) conducted concurrently pursuant to the Banking Law; or

(2) the Superintendent or the Superintendent's designee determines that a closed hearing would be in the public interest, in which case the hearing shall be closed to the public.

(b) The hearing officer may exclude from the hearing room any person engaging in improper conduct at the hearing or a testifying witness attending the hearing prior to such witness's testimony, but may not exclude a party or an attorney representing a party.

§ 2.15 Application to reopen.

(a) Upon written application made by a party, the hearing officer may reopen a hearing and may recommend to the Superintendent or the Superintendent's designee such further action as justice may require. Such application shall be determined in accordance with the following:

(1) Where the party failed to appear at the hearing, the party, in making the application to reopen, must establish that there were valid reasons for having failed to appear and that there is a meritorious case on behalf of such party.

(2) Where the party making such an application appeared at the hearing, the party must establish that there is newly discovered evidence, that despite due diligence by the party was not available at the time of the hearing, or other compelling reason for reopening.

(b) All such applications to reopen an adjudicatory proceeding shall be made within one-hundred and twenty (120) days from the effective date of the Superintendent's or the Superintendent's designee determination in the proceeding.

(c) The right of a party to seek judicial review pursuant to Financial Services Law section 308 and Civil Practice Law and Rules article 78 shall not be restricted, delayed or extended by the provisions of this section.

§ 2.16 Incomplete record.

Where a hearing record is incomplete or otherwise fails to provide the basis for an informed decision, the Superintendent, the Superintendent's designee, or the hearing officer may direct that the hearing be reopened.

§ 2.17 Hearing officer's report.

(a) Within ninety (90) days after the record of the hearing is closed in an adjudicatory proceeding, other than a hearing seeking relief from an order of summary suspension pursuant to Part 31 of Title 11, the hearing officer shall make a written report of findings and recommendations, if any, to the Superintendent or the Superintendent's designee of the action to be taken. The time herein provided for the hearing officer to make the report to the Superintendent shall confer no substantive rights on respondents.

(b) Prior to the close of the hearing, a party may request a copy of the report and an opportunity to comment thereon before the Superintendent or the Superintendent designee acts on such report.

(c) Where a request has been made pursuant to subsection (b) of this section, the hearing officer shall serve a copy of the report on each party.

(d) Within fourteen (14) days of such service or such other period specified by the hearing officer, a party shall have the opportunity to submit written comments to the Superintendent or the Superintendent's designee on the report.

(e) Within seven (7) days of service of written comment or such other period specified by the hearing officer, a party shall have the opportunity to submit written comments in reply to another party's written comment.

(f) The party submitting the comments shall simultaneously serve such comments on all parties.

§ 2.18 Health provider violations.

(a) When a complaint alleging patterns of overcharging by a health provider is received by the Department, either in accordance with section 68.9 of Title 11 or from any source, and the allegations, if true, would constitute a violation of Insurance Law section 5108 or Part 68 of Title 11, a hearing shall be conducted in accordance with this Part.

(b) If the Superintendent determines after a hearing that such violations have been demonstrated, the determination, which shall include a statement of facts and findings, shall be forwarded:

(1) in the case of physicians and physicians' assistants, to the director of the Office of Professional Medical Conduct, New York State Department of Health at the appropriate address; and

(2) in the case of other health providers, to the director of the Office of Professional Discipline, Education Department at the appropriate address.



Department of Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

I, Linda A. Lacewell, Superintendent of Financial Services, do hereby certify that the foregoing is the repeal of Supervisory Procedure G 111 of Title 3, the repeal of Part 4 of Title 11, and the addition of a new Part 2 to Title 23 of the Official Compilation of Codes, Rules and Regulations of the State of New York, entitled Rules Governing the Procedures for Adjudicatory Proceedings Before the Department of Financial Services, signed by me on March 9, 2020, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Article 3 of the State Administrative Procedure Act, to take effect upon publication of the Notice of Adoption in the State Register.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed rule was published in the New York State Register on December 31, 2019. No other publication or prior notice is required by statute.

A handwritten signature in blue ink that reads "Linda A. Lacewell".

Linda A. Lacewell
Superintendent of Financial Services

Dated: March 9, 2020