

PENNSYLVANIA DEPARTMENT OF AGRICULTURE
Procedures for Administrative Hearings
During COVID-19 Pandemic

§ 1. Definitions.

Agency head---the secretary of a department, a quorum of an authority or departmental administrative board or commission or independent board or commission, or another officer or group of officers whose action with respect to a matter pending before the agency exhausts opportunity for administrative review within the agency and constitutes the action of the administrative agency for the purposes of PA. CONT. art. V, § 9.

Hearing---an adjudicatory proceeding conducted by or on behalf of an executive agency under the Governor's jurisdiction.

Presiding Officer---a member of the agency or one or more trial examiners appointed according to law and designated, to preside at hearings or conferences, or other officers specially provided for and designated under statute to conduct specified classes of proceedings, but not including the agency head when sitting as such.

Telephonic conference hearing---a hearing conducted by telephone where there is a physical and geographic separation between the tribunal and attorneys representing parties, the parties, witnesses and other persons involved in the hearing.

Video conference hearing---a hearing conducted by video or other electronic media interaction where there is a physical and geographic separation between the tribunal and attorneys representing parties, the parties, witnesses and other persons involved in the hearing.

§ 2. Authority to conduct video conference or telephonic conference hearing.

In accordance with the Governor's [Executive Order](#) issued on July 10, 2020 and his authority pursuant to 35 Pa. C.S. §7301(b) and (f) of the Emergency Management Services Code, a Presiding Officer, as the designee of the agency head, shall be authorized to order and conduct video or telephonic conference hearings. Any regulatory statute, order, rule or regulation of any Commonwealth agency that prevents a Presiding Officer from utilizing video or telephonic conference hearings has been suspended for the duration of the COVID-19 emergency.

§ 3. Notice of telephonic or video conference hearings; requests for such hearings.

A Presiding Officer shall, through pre-hearing order, notify the parties and if known, their attorney, in advance of a hearing that will be held as a video or telephonic conference hearing, whichever is more feasible, in the discretion of the Presiding Officer, keeping in mind the nature of the evidence and the technology available to the parties and witnesses. The notice shall include:

- (a) The date and time of the hearing.
- (b) Whether the hearing will be conducted by telephone or video conference.
- (c) Instructions on how to participate in the hearing remotely.
- (d) The deadline and method by which the Presiding Officer and court reporter are to receive documents and the directive that all documents must be pre-marked and exchanged prior to the hearing. Electronic pre-hearing submission of documents is preferred.
- (e) Any party may also file a motion to conduct a hearing by telephone or video conference, to which the responding party may reply.

- (f) Any party may file an objection to the order designating a hearing for video conference or telephonic hearing and, in ruling on such a motion, the Presiding Officer shall consider the criteria set forth in Section 6 (b)(2) of this policy.

§ 4. Conduct of video conference or telephonic conference hearing.

- (a) *Telephone or video conference documented on record.*

At the beginning of the hearing, the Presiding Officer will document on the record the decision to schedule the hearing via telephone or video conference.

- (b) *Contacting attorneys, parties and witnesses in a telephone or video conference.*

(1) At the beginning of the hearing, the Presiding Officer will place on the record the following information:

- (i) The names of each individual participating in the hearing.
- (ii) Whether the individual is participating by telephone or video conference.
- (iii) The time at which the Presiding Officer initiates contact with the attorney, parties and witnesses.

(2) The witness to be examined shall be available and ready to be sworn and present testimony upon being telephoned or when video conferencing is initiated unless directed otherwise by the Presiding Officer and shall remain available until excused by the Presiding Officer.

- (3) Where a party is not on the telephone or video conference call at the scheduled time for the hearing or a witness is not on the telephone or video conference call at a pre-designated time, the Presiding Officer, for a period of time not less than ten minutes nor more than twenty minutes, following the scheduled time of the hearing or other pre-designated time, will make at least three attempts to contact that party or witnesses before conducting the hearing without the party or witness being present. If a party or witness seeks to join the proceeding after that time and can show good cause for the delay in joining, the Presiding Officer, in his or her discretion, may permit the party or witness to fully participate in the proceeding.
- (4) The equipment used by the court reporter, the parties and their witnesses must be capable of producing a clear transmission satisfactory to the Presiding Officer. The parties and their witnesses are responsible for having a reliable internet for video hearings or telephonic connection for telephone hearings in a quiet space, free from background noise that could impede the integrity of the transcription of the hearing and the ability of the Presiding Officer, the court reporter and the parties and their counsel to hear and consider testimony and other evidence and argument that will be presented as part of the hearing.
- (5) To facilitate matters, at least three business days prior to the hearing, each party should provide, when feasible, at least one alternative

means of contacting the individual that will be effective for the date and time of the hearing.

(c) *Oath or affirmation.*

(1) The witness testifying by telephone or video conference will be placed under oath in the same manner as if the witness were appearing in person.

(2) The witness testifying by telephone or video conference must also indicate while under oath that the witness will not testify from or use any document unless the document has been brought to the attention of the Presiding Officer and that the testimony shall not be prompted or directed during the hearing by any other person.

(d) *Opportunity to verify witnesses.*

(1) The tribunal will permit parties a reasonable opportunity to question a witness testifying by telephone or video conference for the purpose of verifying the identity of the witness.

(2) Falsification of identity may be subject to prosecution and punishment under 18 Pa. C.S. § 4902 (relating to perjury) and 18 Pa. C.S. § 4903 (relating to false swearing).

(e) *Use of documents.*

(1) A witness testifying by telephone or video conference may only use a document previously provided to all parties and the Presiding Officer.

(2) A copy of each document to be relied upon by a witness shall be pre-marked as an exhibit and pre-submitted as set forth above and as may be further defined in a pre-hearing scheduling order.

§ 5. Determination of Nature of Hearing.

The type of hearing held whether video conference/telephonic conference or in-person hearing will be governed by whatever phase (Red, Yellow or Green) the Governor has designated for the county where the Presiding Officer is sitting at the time the hearing notice is issued. Should the designation change between that time and the date of the hearing, the Presiding Officer has authority to change the type of hearing *sua sponte* with reasonable notice to the parties under the circumstances or on motion of any party served on all other parties.

§ 6. Hearing Procedures for Phases.

(a) Red Phase

- (1) There will be no in-person hearings.
- (2) Members of the press and the public may listen to the video or telephonic proceedings by contacting the Department of Agriculture, Office of Chief Counsel, where they will be provided with a call-in number or live stream access, if such access exists, for the video or telephonic hearing. **They will be permitted only to listen.**

(b) Yellow phase

- (1) Video or telephone hearings are highly preferred.
- (2) The decision on whether to conduct an in-person hearing or, schedule or convert the matter to a telephone or video conference hearing instead, will

be made on a case-by-case basis by the Presiding Officer using the following criteria:

- (i) Presence and importance of factual/credibility matters in issue, including the type of case;
 - (ii) Number of documents to be proffered/admitted; and
 - (iii) Urgency of matter to be adjudicated, balancing the safety of the public if the adjudication is delayed against the deprivation the respondent faces if adjudication of the matter is delayed.
- (3) Even if an in-person hearing is held, the Presiding Officer may allow a specific witness or party to testify by video conference or telephone.
- (4) If an in-person hearing is held, the following health and safety rules, which are based upon the orders of the Governor of Pennsylvania and the Pennsylvania Secretary of the Health, will apply:
 - (i) All persons in the hearing room, including spectators, shall wear masks, even while testifying. This includes the court reporter and the Presiding Officer. To assure sanitation, all persons shall supply their own masks.
 - (ii) Hand sanitizer or disposable sanitizing hand wipes shall be available in the hearing room at all times during hearings.
 - (iii) All chairs shall be placed a minimum of six feet apart and face forward toward the bench. Tape on the floor will establish the six-foot marks. Persons in the room shall maintain a six-foot distance from each other to the extent possible.

- (iv) Excluding the Presiding Officer, the number of persons permitted in the hearing room at one time is twelve. Members of the press and public are deemed non-essential visitors for purposes of the conduct of the hearing and will not be permitted to be present if their number would exceed the twelve-person limitation. However, a least one member of the press must be permitted admittance with the selection of which press person to be determined by drawing lots, if there is not enough space for all members of the press who wish to attend.
- (v) All parties, the Presiding Officer, the court reporter and members of the public or press who enter the hearing room can be subject to a brief COVID-related questionnaire and, if required by the Governor or Pennsylvania Secretary of Health at the time, a temperature check. If the person's temperature is 100.4. F or greater, the person will be refused admittance and, if necessary, the hearing will be continued.
- (vi) Any person exhibiting outward symptoms of illness, such as a cough, difficulty breathing, congestion or runny nose, can be refused admittance to the hearing at the discretion of the Presiding Officer.

(c) Green Phase

- (1) Video or telephone hearings are permitted and preferred.
- (2) The decision on whether to conduct an in-person hearing will be made on a case-by-case basis by the Presiding Officer.

- (3) If an in-person hearing is held, the Presiding Officer may allow a specific witness or party to testify by video conference or telephone.
- (4) If an in-person hearing is held, the following health and safety rules, which are based upon the orders of the Governor of Pennsylvania and the Pennsylvania Secretary of the Health, will apply:
- (i) All persons in the hearing room, including spectators, shall wear masks, even while testifying. This includes the court reporter and the Presiding Officer. To assure sanitation, all persons shall supply their own masks.
 - (ii) Hand sanitizer or disposable sanitizing hand wipes shall be available in the hearing room at all times during hearings.
 - (iii) All chairs shall be placed a minimum of six feet apart and face forward toward the bench. Tape on the floor will establish the six-foot marks. Persons in the room shall maintain a six-foot distance from each other to the extent possible.
 - (iv) Excluding the Presiding Officer, the number of persons permitted in the hearing room at one time is twelve. Members of the press and public are deemed non-essential visitors for purposes of the conduct of the hearing and will not be permitted to be present if their number would exceed the twelve-person limitation. However, a least one member of the press must be permitted admittance with the

selection of which press person to be determined by drawing lots, if there is not enough space for all members of the press who wish to attend.

- (vi) Any person exhibiting outward and commonplace symptoms of illness, such as a cough, difficulty breathing, congestion or runny nose can be refused admittance to the hearing at the discretion of the Presiding Officer.