

NRS CHAPTER 233B DISCIPLINARY AND HEARING PROCEDURES



**STATE OF NEVADA, OFFICE OF THE
ATTORNEY GENERAL, BOARDS AND
COMMISSIONS TRAINING 2018**

Contested Case



- A proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed. NRS 233B.032.
- Requirements for contested cases are set by the Nevada Administrative Procedures Act (APA) in chapter 233B of the Nevada Revised Statutes and for certain regulatory bodies in chapter 622A.

Constitutional Issues



- A state issued license to practice a profession carries a constitutionally protected property interest.
 - *Gilman v. State Board of Veterinary Medical Examiners*, 120 Nev. 263, 269, 89 P.3d 1000, 1004 (2004).
- Due Process clause prevents the state from depriving an individual of his protected property interest without a “fair trial in a fair tribunal.”
 - *In re Murchison*, 349 U.S. 133, 142 (1955).

Due Process



- Due process of law is required whenever the state deprives a person of “life, liberty, or property.” U.S. Const. amend. XVI, § 1; Nev. Const. art. 1, § 8.
 - Requires **reasonable notice** to the Respondent, which informs them on the pending legal and factual issues
 - An **opportunity for a hearing**, including the opportunity to present evidence, call witnesses, and cross-examine opposing witnesses. (NRS 233B.121)
 - **An impartial adjudicator** presiding over the hearing
 - ✦ No investigator or prosecutor may take part in the adjudication.
 - ✦ No *ex parte* investigations by board members. NRS 233B.122, 233B.126 *Stivers v. Pierce*, 71 F.3d 732, 741-42 (9th Cir. 1995).

Service of the Notice



- **“Reasonable notice” required.**
 - NRS 233B.121; NRS 622A.300
 - Reasonable notice under the Open Meeting Law = 21 working days if served by certified mail. NRS 241.033(2)(a)(2) and NRS 241.034(1)(b)(2).
- **Personal delivery.**
 - NRS 241.034(1)(b)(1)
- **Certified mail to the last known address of the licensee.**
 - NRS 241.034(1)(b)(2)
- **Sending an extra copy by regular mail.**

Check for Specific Notice Provision



- For example, in Real Estate Division cases, a licensee must be given at least 30 days notice in writing.
 - Must give the date, time and place of the hearing,
 - A copy of the Complaint; and
 - Copies of all relevant documents in the Division's possession.
 - Must be served in person or by certified mail to last known address.

NRS 645.680

Summary Suspensions



- If the agency finds that public health, safety or welfare **imperatively** require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings must be instituted and determined within 45 days after the date of the order unless the agency and the licensee mutually agree in writing to a longer period. NRS 233B.127(3)

Summary Suspensions



- Threshold Determination.
- Is there a threat to the public health, safety or welfare that is so imperative that an emergency action is required?
- License will be suspended without notice or full hearing.
- Underlying hearing on the merits must be held within 45 days. NRS 233B.127(3)

Burden of Proof for Contested Cases



- Case must be proven by **preponderance of the evidence**.
 - “Preponderance of the evidence” means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact.
 - ✦ NRS 233B.0375
 - NRS 233B.121(9), NRS 233B.125, NRS 622A.370
 - ✦ Findings of fact must be based exclusively on a preponderance of the evidence.
 - *Nassiri v. Chiropractic Physicians’ Board*, 327 P.3d 487 (2014).

Pre-Hearing Resolutions



- Stipulation of Fact
- Stipulation of Facts and Liability
- Stipulation for Settlement
 - MUST BE APPROVED IN A PUBLIC MEETING.
 - SETTLEMENT AGREEMENTS ARE PUBLIC RECORD.
 - ✦ NRS 622.330
- Voluntary Surrender of License in Lieu of Discipline
- Temporary Voluntary Surrender of License Pending Hearing

Cost Recovery Authorized



- Agencies may not recover costs in a settlement agreement unless, the agreement contains an admission of a violation by the licensee or a statement that the licensee does not contest the violation.
 - NRS 622.400(1)(b)
- Costs recovered must be the actual amount expended and a true reimbursement to the agency.
 - Not permitted to disguise a fine by calling it costs.
- Costs are often important for licensing boards to reimburse the board for actual costs expended on the case.
 - Fines are deposited in the general fund, but costs are retained by the board as reimbursement.

Voluntary Surrender



- The Respondent agrees to Surrender his license in lieu of other discipline, such as fines, costs, revocations, and/or suspensions.
- Adjudicator may accept or reject.
 - Usually does not include a fine, but may still impose if behavior especially egregious.
- This is **DISCIPLINE!**
 - “The voluntary surrender of a license in a contested case shall be deemed to constitute disciplinary action against the licensee.” NRS 233B.121(6)

Duties of Adjudicator in a Hearing



- **Responsible to develop full record. NRS 233B.121(7)**
 - all pleadings, motions and intermediate rulings,
 - evidence received or considered,
 - a statement of matters officially noticed,
 - questions and offers of proof and objections, and rulings thereon,
 - proposed findings and exceptions,
 - Any decision, opinion, or report of the of hearing officer
- **Explain reasoning for a decision**

Opening the Hearing



- Introduce yourself.
- Introduce case.
- Date, time, and place of hearing.
- Set out order of presentation.
- Indicate that the hearing is “on the record” or that it is being recorded.
- Have parties note appearances for the record.

Opening the Hearing (continued)



- Any preliminary motion, issues or stipulations?
- Swear in witnesses.
 - Every witness is required to declare by oath or affirmation that he/she will testify truthfully.
 - ✦ NRS 233B.123(3).
 - Interpreter.
- Sequester witnesses, if requested.
 - NRS 622A.380

Failure to Appear



- Was the party properly noticed?
 - Service by mail to last known address via certified and regular U.S. mail.
 - Notice document included the time and place of hearing.
- Adjudicator hears evidence related to service.
- Prosecutor can either:
 - Proceed with evidence; or
 - Ask for a default judgment. NRS 622A.350.

Default Judgment



- All allegations and violations in the Complaint deemed proven.
- Adjudicator asks if the Respondent has prior discipline.
- Staff may give a discipline recommendation.
- Adjudicator imposes discipline.

Introduction of Evidence



RELIABILITY is the key. Is the evidence sought to be introduced reliable?

- Each type of evidence is sufficient to make a finding.
 - ✦ NRS 233B.123; NRS 622A.370

- Testimony by witnesses

- Witness must be competent, i.e., must have personal knowledge.

- Documents

- Copies are allowed, use certified copies if possible; self authenticating.
- Opposing party can request to review original.

- Tangible objects

Preserve Record of Objection



- Require party making objection to state reason why evidence should not be admitted.
- Allow opponent to state why evidence should be admitted.
- Seek assistance from counsel.
- If objection is sustained, allow the opponent to “offer proof” of the testimony for the record.

Ex Parte Communications



- Unless required for the disposition of ex parte matters authorized by law, **members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party,** nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate.
 - NRS 233B.126; NRS 622A.340

Reasoned Decision



- **Must include:**
 - Findings of Fact.
 - ✦ Must include concise and explicit statement of the underlying facts supporting the findings.
 - ✦ Facts supporting the decision must be in the record and must be supported by a preponderance of evidence.
 - ✦ Preponderance of Evidence: the existence of the contested fact is more probable than the nonexistence of the contested fact, also termed “the greater weight of evidence.”
 - ✦ Conclusions of Law.
 - Both must be stated separately.
- NRS 233B.125

Reasoned Decision (Continued)



- Adjudicator should determine both the findings and the conclusions.
- Decision must be in writing or stated in record.
- Served by personal service or certified mail.
 - **BEST PRACTICE**: Also served by regular U.S. mail, even if no statutory requirement to do so.
- Within statutory time limits; under chapter 622A, time allowed is 60 days.
 - NRS 622A.380(I).

Discipline Imposed



- Hold a full discussion on the record of reasons for particular discipline imposed.
- Discipline in accordance with your statutes.
- May be:
 - Public Reprimand.
 - Fines.
 - Probation.
 - Suspension or revocation.
 - Other (check your statutes!)

Revocation of a License



- Under chapter 622A, if a license is revoked, the Order must prescribe a period of time during which the respondent may not apply for reinstatement of that license.
- The prescribed period must be at least 1 year but not more than 10 years.
 - NRS 622A.410

Judicial Review



- Must be filed within 30 days after service of the final decision.
 - NRS 233B.130
- Confined to record of hearing.
 - NRS 233B.135
- Burden of proof on the party attacking the decision.
- Disciplinary Order is not stayed unless the party files a Motion for Stay and such Stay is granted by the Court.
 - NRS 233B.140
 - Motion for Stay must be filed at the same time the Petition for Judicial Review is filed.
 - ✦ NRS 233B.140(1)

Judicial Review



- **Court considers whether decision:**
 - Violates constitutional or statutory provisions,
 - Exceeds agency's statutory authority,
 - Made upon unlawful procedure,
 - Affected by legal error,
 - Is clearly erroneous in view of reliable, probative and substantial evidence in the records, or
 - Is arbitrary, capricious, or characterized by abuse of discretion, i.e., was the decision based on evidence from which a reasonable person could draw the same conclusion?

NRS 233B.135

QUESTIONS?

