

**PROPOSED REGULATION OF THE
STATE BOARD OF HEALTH**

LCB File No. R037-97

September 9, 1997

EXPLANATION--Matter in italics is new; matter in brackets [] is material to be omitted.

AUTHORITY: NRS 439.200.

Section 1. Chapter 439 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 14, inclusive, of this regulation.

Sec. 2. *“Appellant” means a person who appeals proposed disciplinary action against him by the division.*

Sec. 3. *“Board” means the state board of health.*

Sec. 4. *“Disciplinary action” includes, without limitation:*

1. Administrative sanctions; and

2. The denial, suspension or revocation of a license, permit, certificate, endorsement, approval, registration, charter, designation or other similar grant of permission to operate issued to a person, facility or governmental entity by the division.

Sec. 5. *“Division” means the health division of the department of human resources.*

Sec. 6. *“Hearing officer” means a person appointed by the administrator of the division to preside at a hearing conducted pursuant to this chapter.*

Sec. 7. *“Respondent” means a person against whom a petition is filed or an investigation is initiated.*

Sec. 8. *1. Except as otherwise provided by specific statute or regulation or in the case of an emergency or a summary suspension, if the division intends to take disciplinary action, the division must notify the applicant for or holder of a license, permit, certificate, endorsement, approval, registration, charter, designation or other similar grant of permission to operate or other affected person of the proposed disciplinary action, in writing, at least 5 business days before the effective date of the disciplinary action. The notice must include, without limitation:*

- (a) A citation of the statutory and regulatory authority for the disciplinary action;*
- (b) The facts on which the disciplinary action is based;*
- (c) A description of any circumstances that the division considered in taking the disciplinary action;*
- (d) Instructions for responding to the notice, including, without limitation, a statement of the right to an informal discussion and informal conference, the right to a hearing, the period during which a hearing must be requested and the consequences of waiving a hearing; and*
- (e) The effective date of the disciplinary action.*

2. The division shall serve the notice by personal delivery to the applicant, holder or other affected person or by mailing the notice by registered or certified mail to his last known residential or business address.

Sec. 9. *1. The administrator shall appoint three permanent employees of the division to act as hearing officers. The hearing officers shall perform their duties in addition to their regularly assigned duties.*

2. The administrator of the division shall rotate the assignment of appeals among the hearing officers. Upon receipt of a request for an appeal to be heard by a hearing officer, the

administrator shall assign the appeal to the next hearing officer in the rotation unless that hearing officer has a conflict of interest or is otherwise disqualified from hearing the appeal.

3. A hearing officer shall not hear requests for variances from the requirements of a regulation.

4. The administrator may revoke the appointment or change the assignment of a hearing officer for good cause.

Sec. 10. *1. A person who wishes to file an appeal with a hearing officer contesting proposed disciplinary action taken by the division must first exhaust all internal informal procedures for appeals.*

2. A request for an appeal must be addressed to the administrator of the division and must be received by the administrator no later than 10 business days after the date on which the appellant received notice of the proposed disciplinary action pursuant to section 8 of this regulation. The request must specify:

(a) The disciplinary action to be contested;

(b) The name of the officer or employee of the division who proposed the disciplinary action;

and

(c) The reasons that the appellant believes the disciplinary action is incorrect.

Sec. 11. *Except in the case of an emergency or a summary suspension, upon receipt of an appeal, the hearing officer assigned to hear the appeal must provide notice of the hearing to the appellant. The notice must include:*

1. The date, time, place and subject matter of the hearing;

2. A citation of the statutory and regulatory authority and jurisdiction pursuant to which the hearing is to be held; and

3. *A brief and concise statement of the matters asserted.*

Sec. 12. *Except as otherwise provided in NAC 449.99908 or in the case of an emergency or a summary suspension, the effective date of the finding is stayed upon receipt of an appeal until the hearing officer renders a decision regarding the appeal.*

Sec. 13. *The decision of a hearing officer made pursuant to the procedures set forth in NAC 439.300 to 439.440, inclusive, is a final decision in a contested case. Any person aggrieved by such a decision is entitled to judicial review of the decision pursuant to NRS 233B.130.*

Sec. 14. 1. *Except as otherwise provided in this section, in any administrative hearing that the board is required to hold, the procedures for hearing officers set forth in NAC 439.350 to 439.440, inclusive, apply.*

2. *In any administrative hearing that the board is required to hold:*

(a) *A request for a hearing must be addressed to the administrator as the executive secretary of the board and must be received within the period prescribed by statute or regulation. The request must specify the reasons that the appellant is requesting a hearing.*

(b) *Upon receipt of the request for a hearing, the executive secretary shall schedule the matter to be heard at a public hearing held:*

(1) *At the next regularly scheduled meeting of the board;*

(2) *At the next meeting of the board held in Carson City, Las Vegas or Reno, as requested by the appellant; or*

(3) *As soon thereafter as the schedule of the board allows.*

(c) *Written notice of the date of the hearing must be served by personal delivery to the appellant or by mailing the notice by registered or certified mail to the last known residential or business address of the appellant.*

Sec. 15. NAC 439.300 is hereby amended to read as follows:

439.300 As used in NAC 439.300 to 439.390, inclusive, unless the context otherwise requires [:

1. Interested party” means any person who believes that he may be affected by a proceeding but who does not seek to participate in it.

2. “Intervener” means any person who was not an original party to a proceeding but who may be directly or substantially affected by it and who secures an order from the board or its presiding officer granting him leave to intervene. The board’s granting of leave to a person to intervene or otherwise appear in any matter or proceeding is not a finding or determination of the board that the person will or may be a party aggrieved by any ruling, order or decision of the board for purposes of judicial review or appeal.

3. “Petitioner” means a person who petitions for affirmative relief.

4. “Respondent” means a person against whom any petition is filed or investigation initiated.], *the words and terms defined in sections _ to _ , inclusive, of this regulation, have the meanings ascribed to them in those sections.*

Sec. 16. NAC 439.310 is hereby amended to read as follows:

439.310 1. [The] *All hearings concerning appeals of findings of the division are governed by the* provisions of NAC 439.300 to [439.390, inclusive, govern all practice and procedure before the state board of health for hearings convened to consider the denial, revocation or suspension of licenses issued by the department of human resources or any officer or agency of the department] *439.440, inclusive, and sections 1 to 13, inclusive, of this regulation,* unless the applicable practice or procedure is specifically provided by law or another regulation of the board.

2. In special cases, where good cause appears, the [board may permit] *hearing officer may allow* deviation from these provisions if [it] *he* finds compliance with the provisions to be impractical or unnecessary.

Sec. 17. NAC 439.320 is hereby amended to read as follows:

439.320 The provisions of NAC 439.300 to [439.390,] *439.440*, inclusive, will be liberally construed to secure just, speedy and economical determination of all issues presented to the [board.] *hearing officer*.

Sec. 18. NAC 439.330 is hereby amended to read as follows: The provisions of NAC 439.300 to [439.390,] *439.440*, inclusive, are severable. If any provision of these regulations or any application to any person, thing or circumstance is held invalid, the board intends that such invalidity not affect the remaining provisions or applications to the extent that they can be given effect.

Sec. 19. NAC 439.340 is hereby amended to read as follows:

439.340 The principal office of the board is the office of the [state health officer.] *administrator of the division*. The office of the [board] *administrator* is open during regular business hours.

Sec. 20. NAC 439.350 is hereby amended to read as follows:

439.350 1.]In lieu of counsel, a party may be represented by another person of his own choosing.] *A party is entitled to be represented by counsel. Counsel for a party must enter an appearance by submitting written notice of the representation to the administrator of the division.*

2. Following the entry of an appearance by an attorney for a party, all notices, pleadings and orders to be served thereafter upon the party must be served upon his attorney, and such service is for all purposes considered valid service upon the party represented.

3. Any attorney of record wishing to withdraw from a proceeding before [the board] a *hearing officer* shall, in writing, immediately notify the [board or its presiding officer,] *hearing officer*, the party whom he represented and any other parties to the proceeding.

Sec. 21. NAC 439.360 is hereby amended to read as follows:

439.360 1. A pleading before the [board] *hearing officer* must be styled a “petition” or “response.”

2. The [board will,] *hearing officer may*, when the substantial rights of the parties are not involved, allow a pleading to be amended or corrected or any omission in it to be supplied.

3. All pleadings will be liberally construed to effect justice between the parties, and the [board or its presiding officer will,] *hearing officer may*, at every stage of any proceeding, disregard errors or defects in the pleadings or proceedings which do not affect the substantial rights of the parties.

Sec. 22. NAC 439.370 is hereby amended to read as follows:

439.370 1. All motions, unless made during a hearing, must be in writing.

2. Each written motion must set forth the nature of the relief sought, the grounds for the relief and citations of applicable authority.

3. A party desiring to oppose a motion may serve and file a written response to the motion within 10 days after his receipt of the motion.

4. The moving party may serve and file a written reply within 5 days after a written response to the motion has been served and filed.

5. A decision on a motion will be rendered without oral argument unless the [board] *hearing officer* requires an oral argument, and in that event the [board will] *hearing officer shall* set a date and time for hearing the argument.

Sec. 23. NAC 439.380 is hereby amended to read as follows:

439.380 1. If [the petitioner or respondent] *a party* fails to appear at a hearing scheduled by the [board] *hearing officer* and no continuance has been [requested or] granted, the [board] *hearing officer* may hear the evidence [of such witnesses as may have appeared] and proceed to consider the matter and dispose of it on the basis of the evidence before the [board. Where, because of accident, sickness or other reasonable cause, a person fails to appear for a hearing or request a continuance, he may within a reasonable period, but not more than 15 days, apply to the secretary of the board to reopen the proceedings. Upon finding the cause sufficient and reasonable, the board will immediately fix a time and place for a hearing and give the person notice of the hearing. At the time and place fixed, a hearing will be held at which the person may testify in his own behalf or present such other evidence as may be beneficial to his cause. Witnesses who have previously testified are not required to appear at the second hearing unless so directed by the board.] *hearing officer. If the subject matter of the hearing is proposed disciplinary action and the appellant fails to appear at the hearing and fails to reply to the notice, the charges specified in the proposed finding are presumed to be true.*

2. With the approval of the [chairman,] *hearing officer*, the parties may stipulate as to any fact at issue, either by a written stipulation introduced in evidence as an exhibit or by oral statements shown upon the record. Any such stipulation is binding upon all parties so stipulating and may be regarded by the [board] *hearing officer* as evidence at the hearing. [The board may require evidential proof of the facts stipulated to, notwithstanding the stipulation.]

3. The [board will,] *hearing officer may*, before or during a hearing, upon a proper showing, grant a continuance for submission of additional proof or other reasonable purpose.

4. In addition to the facts mentioned in subsection 5 of NRS 233B.123, the [board] *hearing officer* may take official notice of:

(a) Regulations, official reports, and decisions and orders of the board or any other regulatory agency of the State of Nevada.

(b) Contents of certificates and permits issued by the [board.] *division*.

(c) Any provision of the Nevada Revised Statutes.

Sec. 24. NAC 439.390 is hereby amended to read as follows:

439.390 1. An order or decision *with separately stated findings of fact and conclusions of law* will be rendered [within 30 days] *by the hearing officer* after the completion of the hearing .
[unless a shorter time is required by statute.]

2. A proceeding stands submitted for decision by the [board] *hearing officer* after the taking of evidence, the filing of briefs or the presentation of such oral *or written* arguments as may have been permitted by the [board.] *hearing officer*.

Sec. 25. NAC 439.430 is hereby amended to read as follows:

439.430 1. All requests for an appeal [and other pertinent communications directed to the board] must be addressed to the [state health officer.

2. *Hearings*] *administrator of the division*.

2. *Except as otherwise provided in this subsection, hearings* on appeals must be open to the public. [However, upon motion of an interested party, the chairman of the board,] *Upon the motion of a party, the hearing officer*, in his discretion, may exclude from the hearing room any

witnesses *in the matter* not at the time under examination except a party or parties to the proceeding, or his counsel . [, or other person conducting his case.]

3. The [board] *hearing officer* shall determine the evidence upon the charges and specifications as set forth by the [health] division in its letter of notice of violation describing the nature of the violation and the action taken or to be taken, or as contained in other appropriate documents, and must not consider any additional evidence beyond the scope of the charges.

4. The technical rules of evidence do not apply. All testimony and exhibits offered must be relevant and bear upon the matter in contention. Any testimony or exhibits considered by the [board] *hearing officer as* not meeting this criterion may properly be excluded. The [board] *hearing officer* shall also consider the objection of either side to the introduction of evidence, whether oral testimony or exhibit. Competence and relevance are the primary test in ruling on such objections.

5. The [board will make no assumptions of innocence or guilt, but will be guided in its decision by] *hearing officer shall base his decision on* the weight of the evidence [as it appears to it] *presented* at the hearing. *Findings of fact, conclusions of law and decisions must be based on substantial evidence.*

6. At the beginning of his testimony, each witness who has not previously testified in the hearing [then before the board] shall be required to state his name [, address,] and business, employment or position.

7. Any letter, paper or object offered in evidence must be properly authenticated, and if received must be marked by the hearing reporter with a distinguishing number or letter, such as [“Health Division’s] “*Division’s* Exhibit 1” or “Licensee’s Exhibit A.”

8. Testimony may be presented in statement or question and answer form . **[and, in the discretion of the board, must be reported and transcribed.]**
9. Good cause appearing, hearings may be continued beyond the period originally scheduled or recessed until a future date agreeable to the **[board]** *hearing officer* and the parties.
10. Witnesses may be subpoenaed by either party to the hearing and shall receive the fees and mileage allowed a witness in a civil case.
11. A record of the proceedings must be kept but need not be transcribed unless the decision is appealed or a transcript is requested by an interested party, who shall bear the cost of transcription.

Sec. 26. NAC 439.440 is hereby amended to read as follows:

439.440 1. The **[chairman of the board shall convene the board at the time and place specified for the purpose of hearing the appeal. Written notice of the time and place of the hearing must have been furnished the parties at least 10 days in advance.**

2. **The chairman of the board shall state the subject of the hearing and the names of the principals. The chairman may make a general statement as to the issues involved or may read explanatory correspondence.**

3. **The parties may appear in person and may be represented by counsel.]** *hearing officer shall call the hearing to order, state the appearances of the parties and their respective counsel and act upon any pending motions, stipulations and preliminary matters.*

2. All testimony must be under oath administered by the **[chairman. The matter must then be heard]** *hearing officer. Unless otherwise indicated by the hearing officer, the hearing must proceed* in the following manner:

- (a) Opening statement for **[health]** division;

- (b) Opening statement for appellant;
- (c) Presentation of [health] division's case, followed by cross-examination;
- (d) Responsible presentation by appellant, followed by cross-examination;
- (e) [The parties may then respectively offer rebutting testimony only, unless the board in its discretion permits additional evidence upon the original cause;
- (f) Argument for health division;
- (g) Argument for appellant;] *Rebuttal testimony for division;*
- (f) *Rebuttal testimony for appellant;*
- (g) *Surrebuttal testimony for division;*
- (h) Closing argument for [health] division;
- (i) Closing argument for appellant; [and]
- (j) *Rebuttal closing argument for division; and*
- (k) Submission of case [.
- 4.] *to the hearing officer.*

3. At the conclusion of the hearing , the [board] *hearing officer* shall take the case under submission and [will] *shall* notify the parties in writing [within 30 days from the date of the hearing of the board's findings] *of his findings of fact, conclusions of law and decision* in the matter.

Sec. 27. NAC 439.400, 439.410 and 439.420 are hereby repealed.

TEXT OF REPEALED SECTIONS

439.400 Appeals board: Creation, purpose.

1. There is hereby created the health division appeals board to consist of three persons appointed by the director of the department of human resources.
2. The purpose of creating a health division appeals board is to provide a means under the Administrative Procedure Act, chapter 233B of NRS, whereby a person who feels aggrieved by an action of the health division in matters of alleged noncompliance, violation or enforcement of the regulations of the health division or the provisions of NRS may appeal its decision. The health division appeals board does not deal with variance requests.

439.410 Appeals board: Membership; chairman.

1. Membership on the appeals board is at the discretion of the director who may appoint or dismiss members in keeping with the expertise required for the particular hearing.
2. For each hearing, the director shall appoint a chairman who shall preside over all meetings of the health division appeals board pertinent to the hearing.

439.420 Appeals board: Duties. The appeals board shall hear appeals from all administrative decisions or actions of the health division not subject to hearings before special hearing boards or the state board of health.