

LCB File No. R122-98

PROPOSED REGULATION OF THE CONSUMER AFFAIRS DIVISION

FULL TEXT OF REGULATIONS TO BE
ADOPTED BY THE CONSUMER AFFAIRS DIVISION

Note: *Italic* text is new.

AUTHORITY: NRS 598.0971, 233B, NRS 598.2808, NRS 598.2825, 233B.040

Chapter 598 of NAC is hereby amended by adding thereto the provisions set forth as sections 1 to 35, inclusive, of this regulation.

Section 1. *SCOPE. NAC 598.____ TO 598.____, (Sec. 1 to Sec. 35,) inclusive, provide procedures for any hearing authorized by statute to be conducted by the Division, including hearings to determine the distribution of security to claimants under the authority of NRS 598.2808 and hearings held pursuant to a cease and desist order to show cause under the authority of NRS 598.0971.*

Sec. 2. *As used in sections, 1 to 35, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3, 4, 5, 6, 7, 8, 9 and 10, 11, 12, inclusive, of this regulation, have the meanings ascribed to them in those sections.*

Sec. 3. *“Attorney General” means the State of Nevada, Office of the Attorney General.*

Sec. 4. *“Complaint” means any and all essential facts, charges, challenges, grievances, complaints, objections or allegations lodged by consumers which show evidence of a deceptive trade practice and/or loss of money or property.*

Sec. 5. *“Claim” means any written demand made by an individual under penalty of perjury against the security posted by a registrant.*

Sec. 6. *“Claimant” means an individual who has filed a claim with the Division or the Attorney General..*

Sec. 7. *“Commissioner” means the commissioner of the consumer affairs division of the department of business and industry.*

Sec. 8. *“Director” means the director of the department of business and industry.*

Sec. 9. *“Division” means the consumer affairs division of the department of business and industry.*

Sec. 10. *"Hearing officer" means the commissioner or any person designated by him to conduct a hearing.*

Sec. 11. *"Party" means any claimant, business, agency holding the security and/or the entity which issued the security.*

Sec. 12. *"Security" means any bond, letter of credit or certificate of deposit posted pursuant to NRS 598.2807, NRS 598.2825, NRS 598.851, or NRS 598.946.*

Sec. 13. ***SECURITY***

All security required pursuant to NRS 598.2807, NRS 598.2825, 598.851, and 598.946 must be in favor of the State of Nevada and held in trust for consumers, excluding creditors, who:

(a) were injured by a deceptive trade practice as this term is defined by NRS 598.0915, NRS 598.0917, NRS 598.092, NRS 598.0923, NRS 598.0925, and NRS 598.0953, inclusive,

(b) were injured by the bankruptcy of the registrant or the registrant's breach of any agreement entered into in his capacity as a registrant as defined by NRS 598.2808;

(c) were injured by a credit service organization, as this term is defined by NRS 598.281;

(d) were injured by an organization for buying goods or services at a discount, as this term is defined by NRS 598.840; or

(e) were injured by a dance studio and/or health club as these terms are defined by NRS 598.941 and NRS 598.9415.

Sec. 14. ***NOTICE OF HEARING TO RESOLVE CLAIMS AGAINST THE SECURITY***

Notices of Intended Action shall be sent by the Division once the Division has conducted an audit of each claim filed by a claimant against the security. The Division's audit shall determine whether the claimant is entitled to receive his requested refund. After the Division has completed its audit, it shall schedule a hearing and notify the parties of its intent to take action or to decline to take action. If the Division decides that it will take action against the bond, letter of credit or certificate of deposit, it shall notify the registrant not less than 10 days before the date set for the hearing to appear and show cause why the Division should not take the intended action. If the Division decides that it will not take action against the bond, letter of credit or certificate of deposit of a registrant on behalf of the claimant, the Division shall notify the claimant not less than 10 days before the date set for the hearing to appear and show cause why the Division should not decline to take action

Sec. 15. ***PRIORITY OF CLAIMS***

Claims against security have equal priority, except where otherwise provided by law, and if the security is insufficient to pay all those claims in full, they must be paid pro rata. Partial payment of claims is not full payment, and the claimants may bring actions against the company for the unpaid balances.

Sec. 16. REINSTATING SECURITY

1. *If, after a registration certificate is issued, the amount of the bond, letter of credit or certificate of deposit which secures the registration falls below the amount that is required by law, the registrant shall be deemed not to be registered for the purposes of NRS 598.2825, NRS 598.851, and/or NRS 598.946.*

2. *Failure to reinstate the security is a violation of NRS 598.289, 598.930, and/or 598.966.*

Sec. 17. CEASE AND DESIST ORDER TO SHOW CAUSE AND NOTICE OF HEARING.

1. *A cease and desist order to show cause and notice of hearing will be served at least 10 calendar days before the date of the hearing, unless such time is waived, in writing, by the party against whom the action is being filed. The order must be served upon the person directly or by certified or registered mail, return receipt requested.*

2. *Every cease and desist order to show cause and notice of hearing shall bear an identifying number, assigned by the Division, which shall be the number assigned to all hearings, orders, and communications between the parties relating to the subject matter of the order to show cause.*

3. *Every cease and desist order to show cause shall include the following information, but may include other information:*

(a) *A statement of the charges that consists of a short and plain statement of the matters asserted.*

(b) *A reference to the particular statutory sections of the alleged deceptive trade practice.*

(c) *A notice of a hearing that consists of a statement of the date, time, and place of the hearing.*

(d) *A statement that the hearing is being held pursuant to NRS 598.0971.*

(e) *An affidavit by an employee of the Division and/or the Attorney General's office in support of the Order stating that an investigation was conducted and there is reasonable cause to believe a violation of the Nevada Deceptive Trade Practices Act has occurred.*

Sec. 18. NOTICE OF CEASE AND DESIST ORDER TO SHOW CAUSE HEARING.

The notice of hearing shall be substantially in the following form, but may include other information:

(use legal caption)

TO: *(insert name and address of Respondent)*

COMES NOW (insert name of Commissioner), Commissioner, Consumer Affairs Division, Department of Business and Industry, state of Nevada, pursuant to Nevada Revised Statutes (hereinafter "NRS") Section 598.0971, and hereby **ORDERS** (insert name of Respondent) to show cause, if any, why the Commissioner should not order (insert name of Respondent) to cease and desist from engaging in the following deceptive trade practices, in violation of NRS 598.____:

1. (describe violations; use multiple paragraphs if multiple violations)

You may be present at the hearing and may be, but need not be, represented by counsel. Pursuant to NRS Ch. 233B, you may present any relevant evidence, and you will be given full opportunity to cross-examine all witnesses testifying against you. At the discretion of the Commissioner, you may request the issuance of subpoenas to compel the attendance of witnesses and the Production of books, documents, or other things by applying to the Consumer Affairs Division of the Department of Business & Industry.

IT IS FURTHER ORDERED that a copy of this Order and the affidavits in support thereof be served on (insert name of Respondent) by certified mail, return receipt requested, no later than (insert date).

TAKE NOTICE that the Commissioner has reasonable cause to believe, upon investigation, that (insert name of Respondent) has been engaged or is engaging in the foregoing deceptive trade practices and that a **HEARING** will be held thereon at her offices, located at _____, Las Vegas, Nevada, (insert zip code) at _____:____ a.m./p.m. on the _____ day of _____, 199__.

TAKE FURTHER NOTICE that if the Commissioner determines that (insert name of Respondent) has violated any of the provisions of NRS 598.____, as alleged, or if (insert name of Respondent) fails to appear for the hearing after being properly served with the statement of charges contained in this order and the affidavits in support thereof and notice of hearing, the Commissioner may make a written report of his findings of fact concerning the violations and cause to be served a copy thereof upon (insert name of Respondent) and an intervenor at the hearing.

TAKE FURTHER NOTICE that if the Commissioner determines in the report that such violation or violations have occurred, he may order (insert name of Respondent) to:

1. Cease and desist from engaging in the practices or other activities constituting the violations;
2. Pay the cost of reporting services, fees for experts and other witnesses, charges for the rental of a hearing room if such a room is not available to the commissioner free of charge, charges for providing an independent hearing officer, if any, and charges incurred for service of process, if (insert name of Respondent) is adjudicated to have committed a violation of NRS 598.0903 to 598.0999, inclusive, and

3. *Provide restitution for any money or property improperly received or obtained as a result of said violations.*

Sec. 19. *ANSWERS TO CEASE AND DESIST ORDER TO SHOW CAUSE.*

1. *A party in a proceeding who desires to contest a cease and desist order to show cause may file an answer with the Division.*

2. *The answer must:*

(a) *Be in writing, and*

(b) *Specifically admit or deny each material allegation and state any new matter constituting a defense.*

(c) *All affirmative defenses must be specifically stated and unless objection is stated in the answer, all objections to the form of the cease and desist order to show cause and notice of hearing are waived.*

Sec. 20. *APPEARANCES AND REPRESENTATION OF PARTIES.*

1. *Appearances and representation of parties must be as follows:*

(a) *A party is entitled to appear in person or be represented by his attorney.*

2. *An attorney appearing as counsel in any proceedings must be an attorney at law, admitted to practice and in good standing before the highest court of any state. If the attorney is not admitted and entitled to practice before the Supreme Court of Nevada, he must be associated with an attorney licensed in Nevada in a manner consistent with the procedure established for such attorneys to appear as counsel in the courts of this state.*

Sec. 21. *CORRESPONDENCE.*

A request for a hearing, claims and all other correspondence regarding the hearing must be addressed to: The Department of Business and Industry, Consumer Affairs Division, at its principal office located in Las Vegas, Nevada.

Sec. 22. *SUBPOENAS.*

1. *Prior to a hearing before the Division, and during a hearing upon reasonable cause shown, the Division and/or the Attorney General may issue subpoenas and subpoenas duces tecum. The Division may also issue subpoenas and subpoenas duces tecum at the written request of a party. Subpoenas will only be issued to require the attendance of a witness from any place in the state at any designated place to give oral testimony before the hearing officer.*

2. *Subpoenas will not be issued in blank. A subpoena submitted for issuance must contain the title and number of the case, the name of the person to whom it will be directed, the date, time, and place of the hearing and the name and signature of the requesting party or his attorney. A subpoena duces tecum must in addition contain a complete description of specific documents or other tangible things that the witness will be required to produce at the hearing. A subpoena will not be issued if the request is untimely, or the evidence to be offered is not material or relevant to the*

determination of the issues before the hearing officer. If the request for a subpoena is granted, the subpoena will be issued within five (5) business days after it was requested. If a request for the issuance of a subpoena is denied, the Division will notify the requesting party in writing, as soon as practicable, of the reasons for the denial.

3. Any witness appearing on behalf of the Division or testifying on behalf of the Division without service of a subpoena or pursuant to a subpoena, except a party or an officer or employee of the state testifying during his regular hours for work, is entitled to receive the same fees and expenses as are provided for witnesses in NRS 50.225.

4. A party requesting the issuance of a subpoena shall pay for the service of the subpoena and the fees and expenses of the witness.

Sec. 23. AFFIDAVITS.

Affidavits may be received in evidence at any hearing of the Division in accordance with the following:

(a) *The party wishing to use an affidavit shall, not less than 5 days prior to the day set for hearing, serve upon the opposing party or counsel, either personally or by registered or certified mail, a copy of the affidavit which he proposes to introduce in evidence together with a notice as provided in paragraph (c).*

(b) *Unless the opposing party, within 3 days after such service, mails or delivers to the proponent a request to cross-examine affiant, his right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, must be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made in accordance herewith, the affidavit may be introduced in evidence, but must be given only the same effect as other hearsay evidence.*

(c) *The notice referred to in paragraph (a) must be substantially in the following form:*

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing set for the day of ____, 19___. (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify the undersigned that you wish to cross-examine him. To be effective, your request must be mailed or delivered to the undersigned on or before 7 days from the date this notice and the enclosed affidavit are served upon you.

(Party or Counsel)

(Address)

(Telephone)

Sec. 24. INSPECTION OF DOCUMENTS.

A party may inspect, before the hearing, all documents which may be considered by the hearing officer as part of the case presented by the Division. The party may have a copy made of a document upon payment of a fee in the amount of \$0.25/page to reimburse the Division for the cost of providing the copy.

Sec. 25. STIPULATIONS.

With the approval of the hearing officer, the parties may stipulate as to any fact at issue. Any such stipulation is binding upon all parties so stipulating and may be regarded by the Division as evidence at the hearing. The Division may require proof by evidence of the facts stipulated to, notwithstanding the stipulation of the parties.

Sec. 26. CONTINUANCE OF HEARING.

A hearing may be continued only after the hearing has commenced and only if:

- (a) requested by any party for good cause shown, or,*
- (b) sua sponte by the hearing officer.*

Sec. 27. PRESIDING HEARING OFFICER.

1. *The commissioner may designate any person to conduct a hearing, whose decision will be subject to review by the commissioner. If the commissioner delegates someone else to conduct a hearing, the commissioner may resume the primary duties of conducting the hearing at any time. Any authority granted to a hearing officer in NAC 598.____ to 598.____ (Sec. 1 to Sec. 35,) inclusive, is also granted to the commissioner.*

2. *In the event the commissioner cannot preside over the hearing, the director shall appoint a hearing officer to preside over the hearing, whose decision will be subject to review by the director.*

Sec. 28. AUTHORITY OF HEARING OFFICER.

The hearing officer shall:

- (a) Call the hearing to order and note the appearances of the parties who are present.*
- (b) Hold appropriate conferences before or during the hearing.*
- (c) Receive and rule on the admissibility of evidence.*
- (d) Rule on the admissibility of amendments to the order to show cause.*
- (e) Act upon any pending motions or petitions or applications which do not involve a final determination of the proceeding.*
- (f) Make proposed findings, opinions, and conclusions of law.*
- (g) Issue appropriate interim orders.*
- (h) Recess the hearing as required.*
- (i) Rule on all procedural matters.*

(j) *Set reasonable limits of time for the presentation of oral testimony.*

Sec. 29. HEARING. PROCEDURES.

1. *The proceedings at the hearing shall be either recorded by equipment for recording sound by the hearing officer or reported by a court reporter certified in accordance with NRS 656.*

2. *The hearing officer shall do the following:*

(a) *Ascertain whether all persons commended to appear under subpoena are present, and whether all documents, books, records, and other evidence under subpoena are present in the hearing room.*

(b) *Administer the oath to all persons whose testimony will be taken.*

(c) *Ascertain whether any party desires to have a witness excluded from the hearing room until he is called.*

(d) *Ascertain whether a copy of the Notice of Intended Action or the Order to Show Cause has been sent to all parties and/or claimants.*

(e) *Request the Division to proceed with the presentation of its case.*

3. *If a party fails to appear at the hearing, no continuance having been requested and granted, and the Division presents evidence that the party has been served with a notice of the hearing, his default may be entered, the evidence may be heard and the matter may be considered and disposed of on the basis of the evidence before the hearing officer in the manner required by this section.*

4. *The Respondent may cross-examine witnesses in the order that the Division presents them.*

5. *When the Division has completed its presentation, the hearing officer shall request the Respondent to proceed with the introduction of evidence and the calling of witnesses on his behalf. The Division may cross-examine witnesses in the order that the Respondent presents them.*

6. *When the Respondent has completed his presentation, the Division, may call any rebuttal witnesses.*

7. *Witnesses or counsel may be questioned by the hearing officer at any time during the proceeding.*

8. *If a party does not testify in his own behalf, he may be called and examined as if under cross-examination.*

9. *The hearing need not be conducted according to the technical rules relating to evidence and witnesses. Evidence shall be introduced and considered in accordance with NRS 233B.123. Any relevant evidence may be admitted and is*

sufficient in itself to support a finding if it is the sort of evidence commonly relied upon by reasonable and prudent men in the conduct of their affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action. This includes the admission of claim form in lieu of, or in addition to the testimony.

10. *Rules of privilege recognized by law shall be given effect.*

11. *Objections to evidentiary offers may be made and shall be noted in the record. If an objection is made to the admission of evidence, such evidence may be received subject to a later ruling by the hearing officer. If an objection to the admission of evidence is sustained, the offering party may make an offer of proof for the record.*

12. *Oral argument is not permitted unless ordered by the commissioner or the hearing officer. The hearing officer may request that the parties summarize their presentations.*

13. *The hearing officer may adjourn the hearing for the submittal of further evidence or to hear further testimony when justice would not be served otherwise, and may adjourn the hearing at the request of any party for good cause shown, but for not more than 30 days after the date scheduled for the first hearing,*

14. *Any documentary or real evidence introduced at the hearing must be marked for identification by the court reporter or hearing officer. If such evidence is admitted by the hearing officer then it shall be marked as the offering party's exhibit.*

15. *The hearing officer will indicate for the record that the hearing is terminated and that he will issue a written decision after considering all of the evidence admitted pursuant to NRS 233B.123.*

16. *The commissioner will review the decision of a hearing officer and enter a final order affirming, modifying or setting aside the decision. If the hearing officer is a designee of the commissioner or director, the director will review the order and enter the final order affirming, modifying or setting aside the decision.*

17. *If a decision is rendered orally, the time to file a petition for judicial review does not begin to run until:*

(a) *The decision and order are reduced to writing and signed by the commissioner or director; and*

(b) *Written notice of the decision and order is mailed, postage prepaid, to the parties.*

18. *Notice of the order of the commissioner or director shall be served on all parties in accordance with NRS 233B.125. The order of the commissioner or director becomes effective after proper service of the notice.*

19. *Prehearing depositions of witnesses and parties may not be taken and no formal discovery of evidence will be allowed.*

20. *Briefs must be filed upon the order of the hearing officer. The time for filing briefs will be set by the hearing officer conducting the hearing.*

Sec. 30. REHEARING.

1. *If a petition for judicial review of the decision has not been filed, upon written application by a party within 15 days after service of a copy of the decision and order, a rehearing may be ordered upon such terms and conditions as the hearing officer considers just and proper. The application shall not be granted except upon a showing that:*

- (a) A party was not properly served with a notice to appear, or*
- (b) There is additional evidence which is material and necessary, and reasonably calculated to change the decision of the hearing officer, and good cause existed for the failure to present that evidence at the hearing, or*
- (c) A material fact or point of law has been overlooked or misconstrued as set forth in the decision.*
- (d) There has been a change in the laws affecting the decision.*

2. *The application for rehearing must:*

- (a) be supported by an affidavit of the party or his counsel showing cause for failing to appear or failing to present the evidence at the hearing.*
- (b) state with particularity the materiality and necessity of the additional evidence and the reason why it was not introduced at the hearing or state with particularity the material fact or point of law which, in the opinion of the party, has been overlooked or misconstrued.*
- (c) contain every argument in support of the position of the party that he/she desires to present;*
- (d) not exceed 10 pages in length.*

3. *Matters already presented in briefs and/or oral arguments may not be reargued in the application for rehearing; no point may be raised for the first time in an application for rehearing.*

4. *A party may file and serve an answer to the application for rehearing. Any such answer must be filed within five (5) days after the party receives the application for rehearing.*

5. *An application for rehearing does not operate to stay the order, excuse compliance with, or suspend the effectiveness of the challenged order, except as otherwise ordered by the commissioner or the director..*

6. *An application for rehearing does not toll the time for filing a petition for judicial review.*

7. *Oral argument on an application for rehearing will not be permitted.*

8. *If an application is granted, upon rehearing, rebuttal evidence to the additional evidence shall be permitted. After rehearing, the commissioner or the director may modify his decision and order as the additional evidence may warrant.*

Sec. 31. BEHAVIOR AT HEARING.

All parties at a hearing and their counsel will conduct themselves in a respectful manner. If any person behaves in such a manner as to interfere with the orderly conduct of the hearing, the hearing officer will warn the person to cease the improper behavior. The warning will be part of the record. If the improper behavior continues or resumes, the hearing officer may exclude that person from the hearing.

Sec. 32. PHONOGRAPHIC OR ELECTRONIC RECORD.

If a hearing is phonographically or electronically recorded, the record will be retained for a period of 90 days after the date of the decision and order, at which time it will be destroyed or reused, unless a petition for judicial review has been filed pursuant to NRS 233B. A certified copy of the phonographic or electronic record will be made available to a party upon written request to the Division and payment of \$20.00.

Sec. 33. COPIES OF TRANSCRIPTS.

Any party may obtain a copy of the transcript of a hearing from the official reporter upon payment of the fees fixed therefor. Any party who files a petition for judicial review pursuant to NRS 233B shall pay for the costs of the transcript as follows:

- (a) if made by the Division from a tape recording, \$2.00/page.*
- (b) if prepared by the official reporter, the costs or fees charged by the official reporter for preparing a transcript.*

Sec. 34. PAYMENT OF COSTS OR FEES.

Payment of any costs, fees, fines, penalties, charges or restitution authorized by statute or regulation to be collected the Division, or ordered by the commissioner or the director to be paid by a party pursuant to NRS 598.0971(2) (b) and (c) or any regulation must be made by cashiers check, money order, or other certified funds payable to the Division.

Sec. 35. *REMEDY NOT EXCLUSIVE.*

The provisions of NAC 598. to 598. inclusive, do not preclude the commencement or pursuit of any additional remedies by the Division.