

LCB File No. R061-03

PROPOSED REGULATION OF THE BOARD OF HEARING AID SPECIALISTS

Draft of February 27, 2003; amended June 26, 2003

Explanation: matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

Authority: NRS 637A.100 (2)

If adopted, these regulations will expire November 1, 2003, unless adopted by the Board as permanent regulations prior to that date. NRS 233B.063(3).

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Section 1. NAC 637A.405 is amended to read as follows:

~~[Assignment of complaint for investigation. The secretary of the board will assign each complaint filed against a licensee to a member of the board or a person who provides administrative support to the board. The person assigned by the secretary will help to conduct any investigation relating to the complaint and will recommend to the board any action that he considers necessary concerning the complaint. If the person assigned by the secretary is a member of the board, he may not vote at a hearing concerning the complaint. The person appointed by the secretary shall act without prejudice with regard to all other complaints brought before the board.]—~~

637A.405 Disciplinary complaints; filing of informal complaints and formal complaints; default; response; review; investigation; notice of hearing; consolidation.

1. (a) A person may file an accusation with the board concerning the acts or services provided by an applicant or by the holder of a license, certificate or permit issued under NRS 590. Such persons against whom accusations are made are hereafter referred to collectively as "licensee".

(b) A petition under NRS 233B.120 shall be processed as the formal complaint described in this section and must be preceded by an informal complaint processed as described in this section.

2. Upon receipt of an informal complaint, the staff shall examine the complaint to determine whether it:

(a) has been properly verified; and

(b) alleges sufficient facts to warrant further proceedings.

3. (a) If the board's staff determines that the informal complaint has been properly verified and alleges sufficient facts the staff shall notify the respondent by sending a copy or summary of the informal complaint to the licensee by certified mail. The notification must set forth the potential violations of a provision of this chapter or chapter 637A of NRS arising in the informal complaint.

(b) The notification must request a response for the review by the board's staff before a hearing is set.

(c) The transmission of the copy or summary of the informal complaint will be deemed to be a notice of intended action pursuant to subsection 3 of NRS 233B.127.

(d) Upon the receipt of a copy or summary of an informal complaint that has been filed against him, a licensee shall submit to the board a written response to the informal complaint within 15 days after the date on which the informal complaint was served. A response to a complaint must respond to the allegations made in the informal complaint and be accompanied with all documentation that would be useful to the staff in its review of the allegations made in the informal complaint and the responses made by the licensee to those allegations.

1) The date of service of the informal complaint is the date the complaint is deposited in the mail addressed to the address of record of the licensee.

(e) Failure by a licensee to cooperate with the board during an investigation of an informal complaint, including, without limitation, failing to respond within the time required by this section to the board regarding a copy or summary of the informal complaint sent to the licensee by the staff pursuant to this section, is a ground for disciplinary action against the licensee.

4. If a licensee fails to respond as required pursuant to subsection 3, he shall be deemed to have admitted the allegations in the informal complaint. Based in these admissions the board may impose appropriate discipline on the licensee in the same manner as if the allegations had been proven by substantial evidence at the hearing on the informal complaint.

5. In cases where a response is filed as required pursuant to subsection 3, the staff shall review the informal complaint and the responses made thereto, may enlist the aid of a member of the board or other qualified persons in such review and may take any other reasonable action necessary to further the review. After its review of the informal complaint and the responses made thereto, the staff may:

(a) Investigate the allegations and employ such people as they deem necessary to further the investigations;

(b) Consult with experts in the appropriate field, including, without limitation, employing such persons for the purposes of an investigation or a hearing;

(c) Investigate new leads and allegations that may come to their knowledge in the course of the investigation;

(d) Enlist the aid of a member of the board or other qualified person in the conduct of the investigation; and

(e) Take any other reasonable action necessary to further the investigation.

6. (a) During an investigation of an informal complaint, the staff or investigator may demand that the licensee produce his records or other evidence for inspection or copying, with or without prior notice to the licensee, and with or without a subpoena. A licensee shall not deny any such request for records or other evidence if the record or other evidence is not subject to confidentiality provisions as provided by law.

(b) If a licensee refuses or fails to cooperate with a request for records in violation of this section, the board may immediately suspend his license, certificate or permit until the licensee complies with the request for records or other evidence. If the licensee continues to refuse or fail to cooperate with a request for records or other evidence in violation of this section, the board may take such further disciplinary action against the licensee as the board determines necessary.

7. (a) If the staff or investigator determine that a specific record or other specific evidence is material to or necessary for an investigation, the staff or investigator may remove the record or evidence and provide a copy of the record or evidence to the respondent.

(b) If a record or other evidence can be readily copied at the location where the record or evidence is located, the staff or investigator shall make a copy of the record and evidence at that location.

(c) If a record or other evidence cannot be readily copied at the location where the record or evidence is located, the staff or investigator may remove the record or evidence from that location to copy the record or evidence.

(1) If the staff or investigator removes a record or other evidence to be copied, the staff or investigator shall provide the person to whom the record or evidence being removed belongs with a receipt for the record or evidence and, not later than 5 business days after the record or evidence is removed, provide a copy of the record or evidence to that person.

8. (a) When an investigation of an informal complaint is complete, the staff and investigator shall determine whether substantial evidence exists to sustain the alleged violation of a statute or regulation set forth in the informal complaint. If the staff and investigator determine that no allegation of a violation of a statute or regulation set forth in the informal complaint can

be sustained, the staff shall notify, in writing, the complainant and the respondent of this determination.

(b) If the staff and investigator determine that a violation of a statute or regulation as alleged in the complaint can be sustained, the legal counsel shall:

a) offer mediation, settlement agreements, stipulations of facts and liability or informal hearings; or

b) prepare a notice of hearing and a formal complaint.

9. A notice of hearing and formal complaint must:

(a) Be a plain statement of the facts and applicable provisions of statutes and regulations regarding the alleged acts of the respondent alleged to be in violation of the statutes and regulations governing the licensee;

(b) Include the date, time and place that the board will hear the matter, if this information is known at the time when the notice of hearing and formal complaint is sent to the respondent; and

(c) Be signed by the legal counsel and, if a member of the board was active in the investigation, by that member of the board.

10. The staff shall send a notice of hearing and formal complaint prepared pursuant to subsection 9 to the respondent named in the notice of hearing and the formal complaint by certified mail.

11. (a) A respondent who receives a notice of hearing and formal complaint must file his answer to the notice of hearing and the formal complaint not later than 15 days after the date on which the notice of hearing and formal complaint were served. An answer to a notice of hearing and formal complaint filed by a respondent must include a response to each allegation and statement made in the notice of hearing and the formal complaint by either admitting to or denying the allegation or statement.

1) The date of service of the formal complaint is the date the complaint is deposited in the mail addressed to the address of record of the licensee.

(b) If the licensee fails to file an answer as required pursuant to this subsection, he shall be deemed to have admitted each allegation and statement contained in the notice of hearing and the formal complaint.

(1)Based on these admissions the board may enter a finding and impose appropriate discipline on the licensee in the same manner as if the allegations had been proven by substantial evidence at a board hearing held on the formal complaint.

(c) Failure by a licensee to cooperate with the board during an investigation of a formal complaint, including, without limitation, failing to respond within the time required by this section to the board regarding the formal complaint sent to the licensee by the staff pursuant to this section, is a ground for disciplinary action against the licensee.

12. Not later than 10 days after the filing of the responses by the respondent, the legal counsel and the respondent shall exchange a list of evidence and witnesses that will be used at the hearing. A party may not present evidence it obtains after the date the exchange was required pursuant to this subsection unless it demonstrates to the board that the evidence or witness was not available upon diligent investigation before the date the exchange was required and that the evidence or witness was given or communicated to the other party immediately after it was obtained.

13. The board may join two or more formal complaints into one formal complaint if:

(a) The causes of action of each formal complaint are against the same person and deal with substantially the same or similar violations of statutes and regulations; and

(b) The joining of the formal complaints will serve the best interest of the board, complainants and respondent.

Section 2. NAC 637A.407 is amended to read as follows:

~~During an investigation of a licensee pursuant to NAC 637A.405, any employee, agent or member of the board involved in the investigation may: — (a) Enter the site of the investigation. — (b) Examine any record, document or equipment that may be relevant to the investigation. — (c) Request that the licensee provide any information which may be relevant to the investigation. — 2. If the board requests information during an investigation, a licensee shall provide the information: — (a) Immediately if the licensee is present at the site of the investigation when the information is requested and the information can be reasonably copied during the visit; or — (b) Within 5 working days after the information is requested if the information cannot be reasonably copied during the visit.]~~

637A.407 Order of presentation in proceedings.

1. The chairman or presiding officer will call the hearing to order and proceed to take the appearances on behalf of the board, the applicant or licensee.

2. The notice of hearing, any petition, answer, response or written stipulation, and, if the hearing concerns a disciplinary proceeding, the complaint or any other responsive pleading, becomes a part of the record without being read into the record. A party may request that a document be read into the record.

3. The legal counsel for the board will present the evidence for the board first and, if the board allows closing arguments, will present the closing arguments for the board last.

4. The member of the board presiding over a single or consolidated hearing will determine the order of evidence for the hearing. Unless otherwise ordered the order of presentation shall be as follows:

(a) opening statement by board counsel

(b) opening statement by respondent's counsel, who may choose to make the opening statement at the beginning of respondent's case.

(b) for each witness offered by board counsel,

(1) direct examination by board counsel

(2) cross-examination by respondent's counsel

(3) redirect examination by board counsel

(4) recross examination by respondent's counsel

(5) examination by board members

a) A member of the board may, at any time:

(a) Question a witness; and

(b) Request or allow additional evidence, including additional rebuttal or documentary evidence.

(c) for each witness offered by respondent's counsel, the same opening statement and order as for board counsel's witnesses;

(d) in a consolidated hearing, the same order as provided above with the order of the parties to be at the discretion of the presiding officer;

(e) closing arguments by respondent's counsel

(f) closing arguments by board counsel

(f) post-hearing briefs may be allowed at the discretion of the presiding officer or by vote of the board. If the board allows closing briefs to be submitted, the board will establish a time for the submission of the closing briefs.

Section 3. NAC 637A.410 is amended to read as follows:

~~[Failure of party to appear at hearing.—1. If a party fails to appear at a hearing scheduled by the board and no continuance has been requested or granted, the board may hear the evidence of such witnesses as may have appeared and the board may proceed to consider the matter and dispose of it on the basis of the evidence before it.—2. If, because of accident, sickness, or other reasonable cause, a person fails to appear for a hearing scheduled by the board or fails to request a continuance thereof, the person may, within a reasonable length of time not to exceed 30 days, apply to the secretary of the board to reopen the proceedings and the board, upon finding such cause sufficient and reasonable, will immediately fix a time and place for a hearing and give the person notice thereof. At the time and place fixed, 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 will not be required to appear at the second hearing unless subpoenaed by the board.]~~

637A.410 Procedural and prehearing matters.

1. The chairman or the person designated as the presiding officer to preside over a hearing may issue rulings on all preliminary matters, including, without limitation, scheduling matters, protective orders, the admissibility of evidence, and other procedural or prehearing matters.

2. A ruling on a preliminary matter is subject to reconsideration by the entire board upon the request of a board member or the motion of a party.

3. The failure of a party who is affected by a ruling on a preliminary matter to move for reconsideration of the ruling does not constitute:

(a) Consent to the ruling; or

(b) Waiver of any objection previously made to the ruling.

4. For the purposes of this section, a matter is preliminary if it is not dispositive of a contested case or a substantive issue therein.

Section 4. NAC 637A.415 is amended to read as follows:

~~[Presentation of evidence at hearing.—1. Evidence at a hearing must be presented in the following order:—(a) Opening statements by counsel for the complainant and the defendant;—(b) Presentation of the complainant's case, followed by cross-examination;—(c) Presentation of the defendant's case, followed by cross-examination;—(d) Rebuttal testimony, if any; and—(e) Arguments by respective counsel:—(1) Opening argument by the complainant.—(2)~~

~~Argument by the defendant. (3) Closing argument by the complainant. 2. The rule of exclusion of witnesses from a hearing room is available to either party.]~~

637A.415 *Appearances; required attendance; default for failure to appear.*

1. *Except as otherwise provided in subsection 2, a party may appear at a hearing in person or by an attorney.*

2. *A party must attend a hearing on the merits in person unless the chairman or presiding officer waives the requirement of the attendance of the party.*

3. *If a party who is required to attend a hearing in person fails to do so without having obtained a waiver of the requirement of his attendance pursuant to subsection 2, the board may:*

(a) *Determine that his failure to attend the hearing in person shall be deemed:*

(1) *An admission of all matters and facts contained in the record with respect to the party; and*

(2) *A waiver of the right to an evidentiary hearing; and*

(b) *Take action based upon such admission or upon any other evidence, including affidavits, without any further notice or a hearing.*

4. *If a party retains an attorney to represent him before the board, the attorney shall so notify the board not later than 10 days after he is retained. Thereafter:*

(a) *The attorney shall sign all motions, oppositions, notices, requests, and other papers, including requests for subpoenas; and*

(b) *The board will serve all notices, motions, orders, decisions, and any other papers or pleadings upon the attorney.*

5. *An attorney who is not a member of the State Bar of Nevada may represent a party before the board if the attorney is otherwise authorized to practice law in this state pursuant to the rules of the supreme court.*

Section 5. NAC 637A.420 is amended read as follows:

~~[Decision by board. The board, within 30 days of a hearing, will enter its written decision and notify the parties of that decision.]~~

637A.420 *Discovery of witnesses and evidence; pre-hearing conference; motions.*

1. Not less than 10 days after the filing of the response by the respondent to the formal complaint, a party to the matter must serve upon any other party to the matter:

(a) Copies of all documents that are reasonably available to the party which the party reasonably anticipates will be used in support of his position; and

(b) A written list of the names of the persons whom the party reasonably anticipates will testify at the disciplinary hearing in support of his position. The list must include the name and address of each such person and a general description of the anticipated subject matter of his testimony.

2. A party who provides documents or information pursuant to these regulations shall promptly supplement and update his submission to the other parties if, after initially providing the documents and information, the party reasonably anticipates that other documents or witnesses will be used in support of his position, or if any of the documents or information previously provided changes.

3. If a party fails to provide any documentation or information as required in this section the presiding officer will exclude the undisclosed document or the testimony of the witness at the hearing, unless the party demonstrates to the board that the evidence or witness was not available upon diligent investigation before the date the exchange was required and that the evidence or witness was given or communicated to the other party immediately after it was obtained.

4. Discovery may only be done in accordance with the provisions of this section. Depositions are not allowed.

5. The presiding officer of the board may order a pre-hearing conference and may enter such pre-hearing orders to the parties as the officer determines are appropriate for the efficient conduct of the hearing, including without limitation,

a) the exchange of written direct testimony of witnesses;

b) the exclusion of particular testimony or other evidence;

c) the admission of particular testimony and other exhibits by agreement of the parties;

d) the advance marking of all exhibits;

e) the exchange of written pre-hearing statements or briefs by the parties similar to pretrial statements filed in district court; and

f) settlement negotiations. Settlement negotiations and statements of parties made at a pre-hearing conference are not admissible in evidence unless the parties agree and the agreement is incorporated in a pre-hearing order.

6. A motion concerning any matter before the board must be made in writing, unless the motion is made during the hearing on that matter. The presiding officer may deny as untimely a motion made during a hearing if the motion could have reasonably been made before the hearing. The presiding officer may deny as untimely a motion that is filed on a date that does not provide opposing parties a reasonable time to respond.

7. A written motion must set forth the nature of the relief sought by and the grounds for the motion.

8. A party may oppose a written motion by filing and serving within 10 days a written response to the motion with the board and all the parties to the proceeding to which the motion relates.

9. If a written response to a motion is filed, the party who made the motion may file and serve a written reply to the response.

10. The presiding officer of the board shall rule on all written motions on a matter at or before the hearing scheduled on the matter. The presiding officer may rule on a motion without oral argument or may allow oral arguments to be made before ruling on the motion. If the presiding officer allows oral arguments on a written motion to be made, the presiding officer shall set a time and date for hearing the oral arguments.

11. The presiding officer may require the board to vote to decide a motion.

12. As used in this section, “parties” to a disciplinary proceeding include, without limitation:

(a) A licensee who has been served with a formal complaint alleging a disciplinary violation;

(b) The attorney, if any, representing the licensee; and

(c) The legal counsel for the board.

Section 6. NAC 637A.425 is amended by adding a new section to read as follows:

~~[A record of a hearing will be kept either by a mechanical or electronic device.—2. A copy of the record will be made available to any party upon his request and at that party’s expense.]~~

637A.425 Final order or decision.

1. After a hearing on the merits in a disciplinary proceeding, if the board finds that the licensee is:

a) Not guilty as charged in the formal complaint, the board will issue a final order dismissing the charges and notify the licensee that the charges have been dismissed.

b) Guilty as charged in the formal complaint, the board will:

(1) Before agreeing on a punishment, consider all relevant factors, including, without limitation:

- (a) The danger to the health or safety of the public from the violation;*
- (b) The economic benefit received by the licensee from the violation;*
- (c) Any mitigation or aggravation by the licensee of the effects of the violation;*
- (d) The extent to which the licensee demonstrates his good faith;*
- (e) Any previous history of violations by the licensee;*
- (f) Whether the licensee knew or, as a competent person, should have known that the action complained of violated a law, a regulation or a condition on his license;*
- (g) Whether the licensee has initiated remedial measures to prevent similar violations;*
- (h) The magnitude of penalties imposed on other licensees for similar violations;*
- (i) The proportionality of the penalty in relation to the misconduct; and*
- (j) If the licensee offered evidence of mitigating factors, all such evidence.*

(2) Agree on punishment that may, in addition to any sanction authorized pursuant to this chapter or NRS 637A, require the licensee to:

- (a) Fulfill certain training or educational requirements approved by the board; and*
- (b) Pay all costs incurred by the board relating to his disciplinary proceedings; and*

(3) Issue and serve its final order or decision on the licensee.

2. A decision or order in a disciplinary proceeding adverse to a licensee must:

- (a) Be in writing;*
- (b) Except as otherwise provided in subsection 5 of NRS 233B.121, include findings of fact and conclusions of law; and*
- (c) Specifically set forth the punishment imposed on the licensee.*

3. An order or decision of the board is effective upon:

- a) being personally served on the licensee;*
- b) being posted at the premises occupied by the licensee; or*
- c) three days after being deposited in the U.S. mail as certified mail addressed to the licensee's address of record.*

Section 7. NAC 637A is amended by adding a new section to read as follows:

NAC 637A.230 Grounds for disciplinary action against a licensee.

1. The following acts and omissions by a licensee are grounds for discipline:

a) Any violation of this chapter or NRS 637A;

b) Failure to cooperate with the board in the investigation of a consumer complaint or a disciplinary complaint;

c) Failure to respond to a consumer complaint, an informal disciplinary complaint or a formal disciplinary complaint;

d) Failure to attend a disciplinary hearing without having obtained a waiver of the requirement of his attendance;

e) Conducting business while the license or certificate of competency has lapsed and has not been renewed;

f) Conducting business while the liability insurance required by _____ has lapsed and has not been renewed;

g) Willfully making false reports, records or claims in the licensee's business;

h) Failure to comply with a settlement agreement, order of the board or other disposition of a prior disciplinary action or consumer complaint;

i) Advertising the licensee's business in a manner that is:

1) false;

2) intended or has a tendency to:

a) deceive or mislead the public; or

b) create unrealistic expectations in any particular case.

j) Engaging in any other conduct that the board determines constitutes unfitness or incompetence to engage in activities that are authorized by the license.

k) Acting or conducting his operations in any manner which the board deems to be inimical and not to the best interests of the health, safety or welfare of the people of this state;

l) Being subject to disciplinary action where a board or entity in another state or this state which has issued a license, certificate, registration or other credential to a licensee for a related field revokes or suspends the license, certificate, registration or other credential, or takes any other disciplinary action against the licensee;

a) as used in this section “related field” includes, without limitation, a _____ license;

m) Delivering a lesser quantity or quality of hearing aids than the licensee bills the customer for with the intent to defraud.

Section 8. NAC 637A is amended by adding a new section to read as follows:

1. As used in NAC 637A the term “person” includes a natural person and an entity such as an association, corporation, partnership or limited liability company.

Section 9. Sections 1 through 8 expire by limitation 120 days from the effective date of this regulation pursuant to NRS 233B.0385(2).