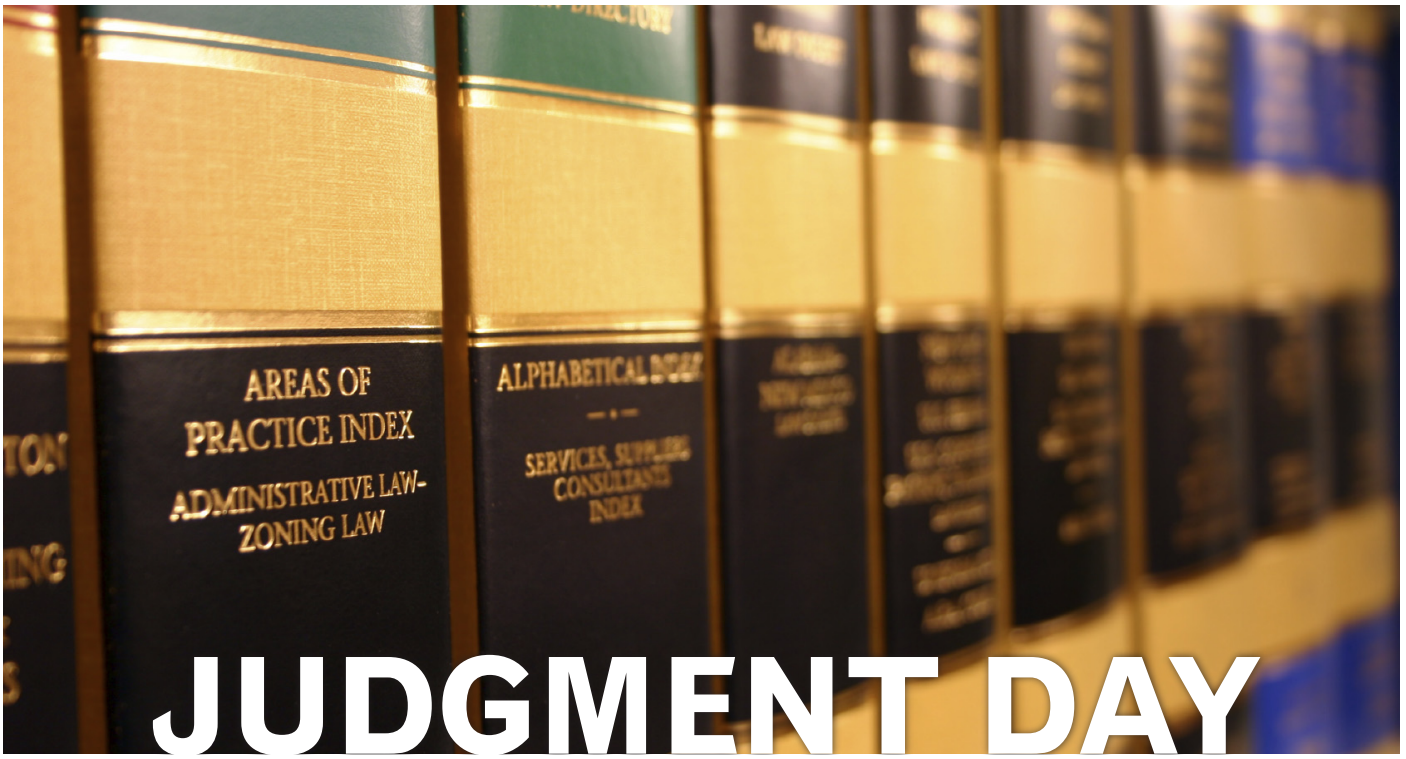

JUDGMENT DAY

THE PRACTICE OF ADMINISTRATIVE LAW IN NEVADA

BY MATTHEW T. DUSHOFF, ESQ.

You are in your office working on your motion to compel discovery when your phone rings. You answer only to hear frantic pleas for help from your client. He tells you that he has received a Notice of Violation from a Nevada state licensing agency.

While you are a seasoned attorney, you have never handled administrative matters. Your flashbacks from law school remind you that administrative law is different from the practice of civil or criminal law, but you are not entirely sure what you should do next.

An attorney who does not regularly practice administrative law should review the relevant state law as well as the overall legal process for administrative matters in order to prepare and properly handle an agency's notice. These laws and processes apply to notices received from most state agencies, with the specific exceptions that are listed in NRS 233B.039.

The most relevant state laws and codes to review include:

1. **NRS 233B.121 - .150 –** Considered the Bible for practicing administrative law in Nevada, NRS 233B is the Nevada Administrative Procedures Act, which outlines the specifics of filing and defending a contested administrative matter.
2. **NRS 622A.120 - .410 –** These sections complement NRS 233B in that they address the adjudication of administrative cases and specifically deal with state agencies' actions against licensees.
3. **"Disciplinary Action" provisions within applicable statutes and administrative code –** Whether you are representing a real estate broker or contractor, there are provisions in the statutes and administrative code that deal specifically with violations, commonly referred to as "Disciplinary Action." The Nevada Administrative Code, found on the Nevada Legislature's website at www.leg.state.nv.us, mirrors every statutory section dealing with a licensee.
4. **Exhausting Administrative Remedies –** With very few exceptions, courts have ruled that you must exhaust your administrative remedies before the matter can be heard in District Court.[1]

Additionally, with very few exceptions, the Nevada Rules of Civil Procedure (NRCP) and the Nevada Rules of Appellate Procedure (NRAP) do not apply in administrative actions.

Beyond understanding the applicable state laws that address administrative matters, there are specific steps that need to be followed to effectively handle an administrative law case. The process begins with a Notice of Violation being filed by the prosecutor with the regulatory body and the notice being issued to the licensee. NRS 233B.121(2) specifies what must be contained within the notice.

Upon review of the notice, you will be able to determine what type of penalty the agency is requesting. Your client could be subject to penalties ranging from a fine to a driver's license revocation.

The majority of the state agencies are represented by the Nevada Attorney General's Office. Once you receive the notice and speak with

continued on page 32

THE PRACTICE OF ADMINISTRATIVE LAW IN NEVADA

continued from page 31

your client, contact the deputy that will be handling the matter on behalf of the agency. It is best to negotiate directly with that deputy on the matter.

Each aggrieved party has a right to have legal representation in response to a notice (NRS 233B.121(3)). If your client desires to challenge the notice, the client has a right to a hearing on the matter (NRS 233B. 121(4)).

However, it is important to note that once a notice is issued, many of the disciplinary action sections provide a definite time line within which your client needs to:

- request a hearing;
- provide a written response to the charge(s); or
- appear at the hearing to defend the charges.

To properly represent your client, you must familiarize yourself with the specific agency's administrative code and statutes in regards to their disciplinary action sections.

Many agencies use an independent hearing officer. No one employed with the agency that was involved with the investigation or prosecution of your client can take part in the adjudication of the matter (NRS 233B.122(1)).

The rules for discovery in an administrative case differ from typical civil and criminal procedures; the NRCP discovery rules do not apply. You are not entitled to depositions, requests for production, interrogatories, etc., unless specifically provided for in the statutes or administrative code of that agency. If discovery is not specifically allowed, you should request some limited discovery from the hearing officer who has the authority to grant limited discovery requests. NRS 622.330 also provides guidance regarding discovery in administrative cases.

It is prudent to request that each party be permitted to submit a pre-administrative hearing brief. Unlike a District Court judge, the administrative hearing officer may not have any knowledge of the facts and circumstances of your case. Moreover, he/she may not even be an attorney. The pre-administrative hearing brief educates the administrative hearing officer on the matter and provides critical information about the case from each side's perspective.

The hearing is usually held at the office of the hearing officer or any similar, suitable location. Each party is afforded an opportunity to make an opening statement, admit documentary evidence, direct and cross witnesses and make a closing argument. Every witness will be sworn in. An administrative hearing is basically a trial without a judge, jury or the trappings of court formalities. Depending on how complicated the matter is, it is usually best to prepare a written closing argument.

You will need to specifically request that a court reporter be present at the hearing. Unless specifically provided for in the agency's statutes or regulations, there is no general requirement to have a court reporter (NRS 233B.121(7)).

Regarding evidence, NRS 233B.123 provides the relevant information. Very rarely are stringent evidentiary rules adhered to regarding the admission of documents. The rule of thumb is that everything gets admitted (unless extremely prejudicial and/or irrelevant). The hearing officer will give the evidence the weight it deserves, including hearsay. You can also use authenticated copies of documentary evidence unless there is a legal basis for the production of the original. You can coordinate with the prosecutor in advance and agree on the admission of the majority of documents. At the hearing, the agency has the burden of proof. Unless specifically provided otherwise, the standard of proof in an administrative hearing is substantial evidence (NRS 622A.370(1)).

NRS 233B.125 outlines how the hearing officer renders a decision at the conclusion of the hearing. "A decision or order adverse to a party in a contested case must be in writing or stated in the record… [A] final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon substantial evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency regulations, a party submitted proposed findings of fact, the decision must include a ruling upon each proposed finding" (NRS 233B.125).

Should the hearing officer rule against your client, you have the right to appeal the decision.

This is called a Petition for Judicial Review, which must follow the guidelines of NRS 233B.130 - 135 and is not an appeal pursuant to NRAP.

Once a final decision is served by the hearing officer, you only have 30 days to file a petition (NRS 233B.130). This date is jurisdictional. If you do not file a petition in a timely manner, you lose the right to do so.[2] Motions before the hearing officer do not toll the time to file your petition.

After the petition is filed, the agency has 20 days to file a Notice of Intent to Participate (NRS 233B.130(3)). Within 30 days of the filing of the petition, the agency that rendered the decision will submit the entire record to the District Court (NRS 233B.131(1)).

Within 40 days after the agency files its Notice of Intent, you will need to file a memorandum of points and authorities. The agency will then have 30 days to file an answer brief. You will then have an additional 30 days to file a reply brief (NRS 233B.133). To have an oral argument on the petition, you must request a hearing on the matter within seven days after the filing of your reply brief (NRS 233B.133(3)).

Regarding the standard of review before the District Court as well as the Supreme Court, "[on] review, neither the Supreme Court nor the District Court may substitute its judgment or evaluation of the record developed at the agency level for that of the agency; rather, the court must review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion."[3]

Moreover, "[t]he decision of the agency will be affirmed if substantial evidence exists to support it; substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. On review of an agency decision, questions of law are reviewed de novo."[4]

If the District Court fully grants your petition, then congratulations are in order. If the court fails to be persuaded by your arguments, then you can still appeal this decision to the Nevada Supreme Court. ■

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1 *Allstate Insurance Company v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007)

2 *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P3d. 1150, 1154 (2006) citing, *Bing Construction v. Nevada Department of Taxation*, 107 Nev. 630, 631, 817 P2d. 710, 710-711 (1991).

3 *Gilman v. Nevada State Board of Veterinary Medical Examiners*, 120 Nev. 263, 267, 89 P.3d 1000, 1003 (2004) See also, *NRS 233B.135*.

4 *Gilman* at 267-268.