

POINT-COUNTER

Attorneys Debate the Benefits and Drawbacks of Hearing Officers vs. Peer Boards in Deciding Administrative Law Cases

JUST NOT EXCLUSIVELY, PLEASE – A BRIEF AND RESPECTFUL REBUTTAL

BY LOUIS LING, ESQ.

I have tried cases to hearing officers, and I have tried cases to boards. I have sat with boards, as their counsel, advising them while cases are being presented to them by other attorneys. I am still an administrative prosecutor and I still act as board counsel. I am also a hearing officer for the Nevada Department of Personnel. In other words, I have had experience from every perspective regarding how administrative law is practiced in Nevada, and I think things are fine just as they are.

Nevada's occupational licensing boards all have language – either through their own practice acts or through NRS chapter 622A – that would allow them to use a hearing officer to hear their disciplinary cases. Some do use hearing officers, but most do not. Much would be lost in a system that is, in some cases, more than 100 years old, were the boards required to use hearing officers. On behalf of the state's occupational licensing boards, I would submit that there are several substantive reasons why Nevada's occupational licensing boards should be allowed to continue to hear disciplinary cases themselves if they so choose:

1. The boards are subject matter experts; hearing officers are not.

Who will likely be in a better position to sort through the usual “battle of the experts” in a complex disciplinary case: a hearing officer who knows little about the subject matter of the dispute or a board consisting of members of the profession at issue? This is why NRS 233B.123(5) allows board members to avail themselves of their special expertise when evaluating cases, and this is why the Supreme Court grants the decisions of boards great deference when the boards are interpreting the laws within their purview.¹ When, for example, a lawyer is being disciplined, he or she tries the matter

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before a panel that includes fellow lawyers. Why should it be any different if the licensee at issue is an architect, a cosmetologist, a pharmacist or any other holder of a Nevada occupational license?

2. The boards are particularly sensitized to problems within their individual professions that a hearing officer would not be familiar with.

In their private lives and as board members, the professionals who serve on Nevada's boards know the poor practices that are occurring in Nevada within their professions. Every profession has its bad practitioners and its unique trouble spots. A hearing officer, usually a lawyer, cannot be expected to know what the trouble areas are for 35 different professions, and cannot be expected to keep up with the positive and negative trends within 35 different professions. The professional practices are too dynamic and evolving, and only professionals within those professions are best able to identify and address those issues as they arise.

3. The boards use disciplinary actions to teach and guide their professions.

Hearing officers are excellent in assuring a well-run hearing but often, boards use a series of disciplinary cases to teach, correct and direct the profession. A hearing officer cannot be involved in directing and creating public policy through discipline, but a board can and should. Furthermore, what might appear trivial or slight to a hearing officer might be a big deal to a board working within the particular profession.

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4. The boards assure uniformity of treatment for all similarly situated licensees...

...whereas hearing officers can be expected to reach very different conclusions when faced with the same sets of facts, thus exposing each licensee to the risk of a harsh or lenient result depending upon who the hearing officer is. ■

AUTHOR'S BIOGRAPHY ON PAGE 36.

1 *Dutchess Business Services v. Nevada Board of Pharmacy*, 124 Nev. Adv. Op. 63, at 12, 191 P.3d 1159, 1165 (2008); *Nevada Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 866 P.2d 297 (1994); *State v. State Engineer*, 104 Nev. 709, 766 P.2d 263 (1988); *Dep't Human Resources v. UHS of The Colony*, 103 Nev. 208, 735 P.2d 319 (1987); *Sierra Pacific Power v. Dep't of Taxation*, 96 Nev. 295, 607 P.2d 1147 (1980); *State ex rel Tax Comm'n v. Saveway*, 99 Nev. 626, 668 P.2d 291 (1983); *Clark Co. School Dist. v. Local Gov't*, 90 Nev. 442, 530 P.2d 114 (1974).

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