



STATE OF NEVADA
DEPARTMENT OF WILDLIFE
Director's Office

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#19 A

MEMORANDUM

February 11, 2017

To: Nevada Board of Wildlife Commissioners, County Advisory Boards to Manage Wildlife, and Interested Publics

From: Jordan Neubauer, Management Analyst III

Title: Commission General Regulation 464, Appeals, LCB File No.R074-16

Description: The Commission will consider amendments to Chapter 501 of the Nevada Administrative Code (NAC), which were approved by the Wildlife Commission's Administrative Procedures, Regulations, and Policy (APRP) Committee after several public meetings, and incorporating relevant suggestions from the public and legal counsel.

Presenter: APRP Committee Chairman and Commissioner David McNinch

Summary:

As part of the review of the Rules of Practice, the Administrative Procedures, Regulations, and Policy Committee held several public committee meetings to review the regulations within Nevada Administrative Code governing practice and procedure before the Wildlife Commission Hearings otherwise known as "Appeals."

The Committee held meetings on the conceptual appeals regulation on January 13, 2016, and on the amendment development on February 18, April 13, and finally on May 12 before submitting the language to LCB for drafting.

The existence of this regulation, dating back to 1998 and 2006, is to fulfill the public's ability to have due process; a hearing before the Wildlife Commission to pursue an appeal to license revocations, or suspensions, and compliance with NRS 233B.121. The proposed amendments provide flexibility and clarity on the roles of the Department, the Commission, and Appellant in NAC.

Purpose:

The amendments are necessary to improve the regulation:

1. To provide flexibility and more efficiency in scheduling appeals at a convenient date or a separate meeting; and that "calendar" days are used for calculation of deadlines for the Department, Commission, and appellant, because current language requires appeals be heard on the next regularly scheduled meeting and is a logistical time constraint.
2. To avoid conflicts with one Attorney General advising two sides of an issue by providing for two separate Attorney Generals during an appeal; one to represent the Department and one to represent the Commission.
3. To clarify to appellants in advance of any hearings that the Commission has limited jurisdiction because it is unclear to persons who have recently pleaded or been convicted that there is no jurisdiction to overturn court actions. It most significantly clarifies for the Department and appellant in advance of a hearing that if a person has been convicted in a court of law, they will only be able to appeal procedural error, and that a criminal case will not be retried on its merits.

The Commission only has powers granted to it by statute and is not an appellate court to a criminal court decision. Only a higher court could do that. The licenses are administered by the Department.

Many times in the last few years the appellant has basically retried their entire court case in front of the Nevada Board of Wildlife Commissioners, hoping to change an action of a court, missing work and still not getting the relief they anticipate because they have false expectations. Lengthy and unproductive appeal hearings not only are unsatisfying for appellant, they disrupt regular business of setting wildlife policy with several members of the public waiting for hours.

4. Require advance notification of legal representation if the appellant has retained an attorney so the scheduling can be for a separate meeting or allow enough time because an appellant with representation often lengthens the actual appeal hearing.

Recommendation:

The Department recommends that the Commission adopts the regulation as presented.

**REVISED PROPOSED REGULATION OF THE
BOARD OF WILDLIFE COMMISSIONERS**

LCB File No. R074-16

August 30, 2016

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1-3, NRS 501.181; §4, NRS 501.181 and 501.1816.

A REGULATION relating to the Board of Wildlife Commissioners; revising provisions relating to practice before the Commission; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law requires the Board of Wildlife Commissioners to adopt regulations necessary to carry out the provisions of title 45 of NRS regarding wildlife. (NRS 501.181) Existing law also requires that all parties in a contested case be afforded an opportunity for a hearing after reasonable notice. (NRS 233B.121) Existing regulations require the Commission to hold a hearing requested by a person who is aggrieved by a decision of the Department of Wildlife on the agenda for the next regularly scheduled meeting of the Commission after the request, unless the person and the Department agree otherwise in writing. (NAC 501.150) **Section 1** of this regulation provides that the Commission may hold a special meeting of the Commission to conduct such a hearing.

Existing regulations require the Department to mail notice of a hearing on an appeal not less than 20 days before the date of the hearing, and provide a rebuttable presumption that an appellant has received the notice not less than 10 days after the notice was mailed by the Department. (NAC 501.150) **Section 1** requires the Department to provide notice of a hearing not less than 30 days before the hearing, and provides a rebuttable presumption that an appellant has received the notice not less than 20 days after the notice was mailed by the Department. **Section 1** also clarifies that such notice must be measured in calendar days.

Existing regulations require each party to an appeal before the Commission to provide, at least 14 days before the date set for a hearing, the Commission and all other parties to the appeal certain documents regarding the appeal. (NAC 501.153) **Section 2** of this regulation provides that if an appellant fails to provide those documents in a timely manner, the Commission may dismiss the appeal with prejudice unless the appellant shows good cause for that failure. **Section 1** requires the Department to include in its notice of the hearing the requirements regarding the provision of certain documents and the potential consequences of an appellant’s failure to meet those requirements.

Existing law provides that a person who receives notice from the Department that the person's license, permit or privilege has been suspended or revoked after accumulating a certain number of demerit points may request a hearing before the Commission. (NRS 501.1816) Under existing regulations, at such a hearing the Commission will: (1) allow to be presented only evidence that is in the record on the matter that is on file with the Department; and (2) consider only allegations of procedural error committed by the Department. (NAC 501.165) **Section 4** of this regulation clarifies that such a hearing will not be a hearing de novo but will be confined to the record on review. **Section 1** also requires that the Department include in its required notice of such a hearing a statement that the hearing is: (1) not a rehearing of the original matter; and (2) limited to determining if the Department committed a procedural error.

Existing law provides that any party in a hearing on a contested case against the Department is entitled to be represented by counsel. (NRS 233B.121) **Section 2** requires a person who intends to be represented by counsel in a hearing before the Commission to notify the Commission in writing at least 10 calendar days before the date set for the hearing. **Section 1** requires the Department to include in its required notice of a hearing the requirements for notifying the Commission if an appellant intends to be represented by counsel.

Under existing law, the Attorney General and the duly appointed deputies of the Attorney General are the legal advisors on all state matters arising in the Executive Department of the State Government. (NRS 228.110) Existing law also authorizes the Attorney General to appoint a special deputy to provide legal advice to a regulatory body in certain instances, such as when the Attorney General determines that a conflict of interest exists. (NRS 228.091) **Section 3** of this regulation provides that if the Commission and the Department are represented by the same deputy attorney general, the Commission will request that the Attorney General appoint a deputy attorney general separate from the deputy attorney general representing the Department to represent the Commission in a hearing.

Section 1. NAC 501.150 is hereby amended to read as follows:

501.150 1. A person who is aggrieved by a decision of the Department must submit a written request for a hearing before the Commission within 30 *calendar* days after the person receives a notice from the Department pursuant to subsection 3 of NRS 233B.127 that his or her license or permit will be denied, revoked or suspended. Otherwise, his or her right to the hearing shall be deemed waived. The date of receipt of the notice from the Department that the license or permit will be denied, revoked or suspended shall be deemed to be:

(a) The date that is indicated on the signed certified mail receipt; or

(b) If the person refuses to accept delivery of the notice, 3 *calendar* days after the date the certified mail has been refused by the person.

2. The hearing must be requested on a form provided by the Department.

3. ~~The~~ *Except as otherwise provided in NRS 501.1816 and unless the appellant and the Department agree otherwise in writing, the* Commission will ~~include~~ :

(a) *Include* the hearing on the agenda for the next regularly scheduled meeting of the Commission that is conducted after the Department receives the request for a hearing ~~unless the appellant and Department agree otherwise in writing~~ ; or

(b) *Hold a special meeting pursuant to NRS 501.177 for the purpose of conducting the hearing.*

4. The Department shall *send by certified* mail a notice of hearing that complies with the provisions of NRS 233B.121 not less than ~~20~~ *30 calendar* days before the date of the hearing. There is a rebuttable presumption that the notice of hearing has been received by an appellant ~~10~~ *20 calendar* days after the date the notice was deposited in the United States mail. *Such a notice must include a statement notifying the appellant of the requirements of NAC 501.153.*

5. *A notice sent pursuant to subsection 4 for a hearing conducted pursuant to NRS 501.1816 must include a statement notifying the appellant that a hearing conducted by the Commission pursuant to NRS 501.1816 is:*

(a) *Not a rehearing of the matter for which the appellant is seeking the hearing; and*

(b) *Limited to determining if the Department committed procedural error.*

6. Any contention that improper notice was given by the Department shall be deemed waived unless the contention is raised at the hearing.

~~16.1~~ 7. Except as otherwise provided in NRS 501.1816, the Department may grant a stay of its decision to deny, revoke or suspend the license or permit pending the hearing before the Commission if the Department determines that:

- (a) There is good cause to stay its decision; and
- (b) A stay will not have a detrimental impact on wildlife.

Sec. 2. NAC 501.153 is hereby amended to read as follows:

501.153 *1.* At least 14 *calendar* days before the date set for a hearing for an appeal, each party to the appeal must file with the Commission and serve upon all other parties to the appeal:

~~11.1~~ (a) All documents that the party intends to introduce as evidence at the hearing; and

~~12.1~~ (b) A written statement setting forth:

~~1(a)~~ (1) The name and address of the party;

~~1(b)~~ (2) The reason for the appeal, if the party is the appellant;

~~1(c)~~ (3) A brief statement supporting the position of the party; and

~~1(d)~~ (4) If the party intends to introduce witnesses, a list setting forth the name of each

witness together with a brief summary of the proposed testimony of the witness.

2. If an appellant fails to meet the requirements of subsection 1 and the appellant does not show good cause for the failure to meet those requirements, the Commission may dismiss the appeal with prejudice. An appeal that is dismissed pursuant to this subsection may not be reconsidered by the Commission. The dismissal of an appeal pursuant to this subsection is a final decision for purposes of judicial review.

3. An appellant or petitioner who intends to be represented by an attorney pursuant to NAC 501.155 must notify the Commission of that fact in writing at least 10 calendar days before the date set for the hearing for an appeal or a petition.

Sec. 3. NAC 501.155 is hereby amended to read as follows:

501.155 **1.** An appellant or a petitioner may be represented by an attorney who is licensed to practice law in this State.

2. *If the Commission and the Department are represented by the same deputy attorney general, the Commission will request, at least 10 days before a hearing, that the Attorney General appoint a deputy attorney general separate from the deputy attorney general representing the Department to represent the Commission in the hearing.*

Sec. 4. NAC 501.165 is hereby amended to read as follows:

501.165 **1.** Except as otherwise provided in subsection 2, a hearing regarding a denial, revocation or suspension of a license or permit ordered pursuant to the provisions of chapters 501 to 506, inclusive, of NRS and any regulations adopted pursuant to those chapters will be conducted by the Commission as a hearing de novo.

2. ~~At a~~ *A hearing conducted pursuant to NRS 501.1816 ~~the~~ will not be conducted as a hearing de novo but will be confined to the record on review. The* Commission will:

(a) Allow to be presented only evidence that is in the record regarding the suspension or revocation of the license, permit or privilege that is on file with the Department; and

(b) Consider only allegations of procedural error committed by the Department that affect the substantive rights of the appellant.