

CHAPTER 15

ADMINISTRATIVE LAW AND THE ADMINISTRATIVE PROCEDURE ACT (APA)

I. INTRODUCTION

Almost all actions of a state administrative agency in Florida are governed by the Florida Administrative Procedure Act (APA), Chapter 120, Florida Statutes. The Florida APA is modeled after the federal Administrative Procedure Act, 5 U.S.C. Section 500. Case law in Florida has rules that, because of this, federal cases interpreting the federal APA can also be used as authority in interpreting the Florida APA.

Many matters involving health care professionals in their dealings with state agencies are impacted by the Florida APA. This includes matters such as applications for licenses, how administrative rules are adopted, how unauthorized administrative rules may be challenged (rule challenge cases), how agency policies that exceed the agency's scope of authority may be challenged, the rights that must be given to an individual in any hearing before that agency (informal and formal hearings), time limits on approvals or disapprovals of license applications, when cases must be referred to the Division of Administrative Hearings (DOAH) for a hearing, and other matters. Any time a health professional has a substantial interest that is affected by an agency's action, he, she or it should be able to challenge the agency's action in one of the methods provided in the Florida APA, Chapter 120, Florida Statutes.

Following are more details on matters governed by the Florida APA.

II. APPLICATIONS FOR LICENSES

A state agency only has one (1) year from the date an application is initially filed to grant it or deny it. If the agency fails to deny it in a year, and there is no extension agreed to, the license is deemed to be granted. In addition, if all licensure requirements have been met and the application is complete, the agency only has 90 days to grant it or deny it. Section 120.60(1), Florida Statutes. After the 90 days passes, if not denied by the agency, the license is automatically deemed to be granted. However, an applicant may need to retain the services of an attorney experienced in administrative law to force the agency to actually give the applicant a license. If the agency denies the application, then the applicant is entitled to a hearing governed by the APA.

Please see the separate chapter in this Manual on Licensing of nurses in Florida. Credentials Committee hearings are governed by the APA.

III. CHALLENGES TO ADMINISTRATIVE RULES (RULE CHALLENGES)

An administrative agency may adopt certain administrative rules which are then enacted into the Florida Administrative Code (F.A.C.). The agency's authority to adopt such rules or regulations is very limited. Administrative agencies may only enact rules that are within the subject matter over which the

agency has been given authority by the Florida Legislature. For example, the Board of Nursing may only issue rules related to the practice of nursing. It may not issue rules or other areas of health care. It may only enact rules governing nurses. It may not issue rules governing other health care practitioners, such as physician assistants, phlebotomists, medical assistants, home health aides or others.

Before an administrative agency is allowed to enact a rule, it must be given specific statutory authority by the Florida Legislature. Then it must follow certain rule making procedures that are calculated to provide the public, especially those who will be affected by it, with notice of the proposed rule and the opportunity to have input to the agency before it finalizes the rule.

There are many instances in which administrative agencies adopt rules for which they have been given no authority. There are many instances in which administrative agencies adopt rules which exceed the scope of the authority that they have been given. For example, if the Florida Legislature has adopted a statute or act (Florida Statutes) that states: "If you meet requirement A, B and C, you can be licensed" and the agency adopts a rule that, in addition to meeting requirements A, B and C "you must also meet requirements X, Y and Z" then the agency most probably has exceeded its authority.

In cases where an individual or organization believes the agency has exceeded its statutory authority in promulgating an administrative rule, it may challenge this through the Rule Making Challenge procedure set forth in Section 120.56(1), Florida Statutes. If the individual is successful in showing the agency has exceeded its authority, the rule is declared invalid and the petitioner is entitled to int attorney's fees and costs, which must be paid by the agency.

IV. NON-RULE POLICY CHALLENGE

Many times an administrative agency will adopt informal rules, procedures, methods or requirements which would have the same effect as a formal rule. If the agency has not followed the formal rule making procedures required by the APA, Chapter 120, Florida Statutes, then the non-rule policy may be challenged in the same way in which an unauthorized rule is challenged. This procedure is set forth in Section 120.56(4), Florida Statutes. If a petitioner challenges an agency's non-rule policy and is successful, then the petitioner is entitled to its attorney's fees and costs from the agency.

V. ADMINISTRATIVE HEARINGS

Any time the decision of an administrative agency affects the substantial interests of an individual or organization, that individual or organization will be entitled to an administrative hearing, either an informal hearing or a formal hearing (explained below). The type of actions that will typically allow someone to request an administrative hearing include.

- Denial of an application for a license
- Imposition of a fine
- Imposition of a monetary penalty
- Discipline against a professional license
- Revocation of a license or the right to do business
- Termination of benefits

- A significant change in benefits or entitlements
- Denial of claims
- Imposition of a moratorium or suspension

VI. INFORMAL HEARINGS

Informal hearings are for the occasion when there are no disputed issues of material fact. In other words, you agree with the agency's position or you agree with the agency's statement of charges (or administrative complaint) against you. This is the equivalent of a nollo contendere (or "nolo") plea in a criminal case. In effect, it is the same as a guilty plea. You are agreeing to all of the facts and conclusions as stated by the agency.

The only matter left open to decision in an informal administrative hearing is the ultimate result or final punishment. In the case of a disciplinary hearing this means you are only there to decide the type and amount of punishment. Since most professional boards, such as the Board of Nursing, have standard amounts of fines, suspension, probation or community service, they award for different offenses, this may be a futile exercise.

MANY HEALTH PROFESSIONALS MISTAKENLY BELIEVE THAT THEY WILL BE ABLE TO ARGUE GUILT OR INNOCENCE OR TO DISPUTE THE FACTS AT AN INFORMAL HEARING. THIS IS INCORRECT.

An informal hearing maybe presided over and the decisions or recommendations made by the Secretary of the department or agency or by someone else appointed by him or her. Often this will be one of the agency's or department's own attorneys. We believe this is an inherent conflict of interest, because a hearing officer is supposed to be a fair, neutral, objective, detached individual. An attorney assigned to an agency or department is, by definition, supposed to be an advocate for the agency's position. Furthermore, since the attorney is employed by and paid by that agency, how can he or she be fair, neutral, objective and detached, when the agency's decision or recommendation is being attacked or questioned?

WE ALWAYS RECOMMEND THAT YOU ELECT A FORMAL HEARING AND STATE THAT YOU ARE DISPUTING THE FACTS OF THE COMPLAINT OR ALLEGATIONS.

We also recommend that you attend at least one of your professional board's meetings before you decide you will accept an informal hearing. You may be surprised by what you see. You will definitely be educated by what you see.

Attached is a sample election of rights (EOR) form which properly selects a formal administrative hearing and not an informal hearing. Please note the wording of "informal hearing" choice.

Please see the separate chapters in this Manual on Informal Administrative Hearings and on Board of Nursing Meetings. Both are governed by the APA.

VII. FORMAL HEARINGS

A formal administrative hearing is governed by Section 120.569 and 120.57, Florida Statutes. It is also governed by Chapter 28-106, Florida Administrative Code (F.A.C.).

In most cases, if you request a formal administrative hearing, you must also state you are contesting material facts in the case. In the case of discipline against a professional license, you may do this on the election of rights (EOR) form sent to you by the department. Since disciplinary cases against a professional license are considered to be penal (or "quasi-criminal") in nature, you have all of the same rights you would have in a criminal trial, including the Fifth Amendment right against giving evidence against yourself. In addition, the state has the burden of proof in going forward and proving the case against you. You do not have to prove anything. If revocation of a license is one of the punishments sought, the agency or department must prove its case by "clear and convincing evidence." This is higher than "preponderance of the evidence (more than 50% or "more likely than not") but less than beyond a reasonable doubt (the burden is an actual criminal case).

In most types of formal administrative hearings the agency or department is required to send your case over to the Division of Administrative Hearings (DOAH), a completely different administrative agency which hears a variety of different types of cases such as environmental protection cases, tax cases, discrimination cases, permit cases, zoning cases and professional licensure cases. This may be your only likely avenue to obtaining an actual fair hearing where you receive due process of law.

When your case is received at the DOAH, an Administrative Law Judge (ALJ) will be assigned to hear the case and preside over it. ALJ's are appointed by the governor and are supposed to be fair, neutral, objective, and detached magistrate's. Formal hearings are governed by procedural rules set forth in the Florida Administrative Code (F.A.C.). These "Uniform Rules of Procedure" may be reviewed on the DOAH website at www.doah.fl.st.us.

The rules and the Florida APA, Chapter 120, Florida Statutes, are to protect your rights and to ensure a fair hearing, a right guaranteed to you by the U.S. Constitution and the Florida Constitution. They set forth the procedures for applying for a hearing, for discovery, for pre-hearing procedures, for admissibility of evidence at hearing, for how the hearing will be conducted and other procedural matters.

Many of the procedures set forth for formal administrative hearings are the same as those that apply to the trials of civil cases in state courts. For example, the Florida Rules of Civil Procedure are used to govern discovery in administrative hearings and the Florida Rules of Evidence are applied to most evidentiary issues (but not all) in an administrative hearing. Therefore, we recommend that you always obtain representation by a qualified, experienced litigation attorney who has administrative hearing experience in any formal administrative hearing.

Additionally, we strongly recommend against using consultants, accountants, or "qualified representatives" in such hearings. They may not have the litigation experience, the advocacy skills the legal research and writing capabilities or other qualifications that you need and expect in such hearings. We also strongly recommend against attempting to represent yourself in such proceedings, although, if you lack the financial resources to hire an attorney, you may have no choice. Please see the separate chapter in this Manual on "Representing Yourself before the Division of Administrative Hearings."

The first thing you should do is to review and memorize, to the greatest extent you are able, the following, as they will apply to virtually every aspect of the upcoming hearing:

1. The Uniform Rules for Formal Administrative hearings: Rule Chapter 26-106 Florida Administrative Code (F.A.C.) also available at www.doah.fl.st.us
2. The Florida Rules of Evidence, Chapter 90, Florida Statutes, also available at: www.leg.state.fl.us/statutes.
3. The Florida Rules of Civil Procedure on discovery. There are Rule 1.310 through 1.370, Florida Rules of Civil Procedure; also available at: www.floridabar.org. Go to the main website. Select "Professional Practice" on the menu on the left side. Then select "Rules of Procedure." This will take you to a page where you can select the Florida Rules of Civil Procedure and review the rules indicated.
4. Go to the DOAH website and do a case research under your assigned ALJ's name. See what other cases this ALJ has decided that are similar to yours. Then click on the menu item for "Recommended Order" or "Final Order" (if there is no recommended order) print these out and review these. This will give you great insight into the types of issues that may come up and how this ALJ has decided them in prior cases.
5. Section 120.57(2), Florida Statutes. This is also available at www.leg.state.fl.us/statutes.

Please see the separate chapter in this Manual on Formal Administrative Hearings.

VIII. CONCLUSION

Before the state is allowed to take any action affecting a person's property rights or any substantial right that he may have, both the U.S. Constitution and the Florida Constitution require that due process of law principles be followed. These include the right to notice and a fair hearing. In the federal system, these are ensured through the Federal Administrative Procedure Act. In the state system, these are ensured through the Florida Administrative Procedure Act.

Practically all dealings with Florida state agencies are controlled and regulated by the Florida APA. When dealing with state agencies or when facing a hearing or other procedure involving a state agency, it is always a good idea to review the Florida APA and know what it requires.

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