

CHAPTER 16

FORMAL ADMINISTRATIVE HEARINGS

I. INTRODUCTION

Formal administrative hearings are one of the options provided to a person who has significant (or substantial) interests that will be affected by agency action and who contests the material facts involved in the case. In the context of this Manual and the practice of nursing, we are usually discussing a hearing involving the professional license of the nurse. In many cases this will be a notice of intent to deny a license application; however, in most cases, it will be based on an administrative complaint filed against the nurse charging the nurse with a violation of the Nurse Practice Act or other misconduct.

A formal administrative hearing is the only chance which is provided to a nurse to actually challenge the facts of the case and show, for example, that she is not guilty of the charges alleged against her. The formal administrative hearing is the only proceeding in which the nurse against whom the complaint is filed (called the "respondent") may confront the evidence against her (documents and witnesses) and introduce her own evidence (including her own testimony, if desired), to show she is not guilty of the charges.

Formal administrative hearings are governed by the Florida Administrative Procedure Act (APA), Chapter 120, Florida Statutes. Please see the separate chapter in this Manual on the Administrative Procedure Act.

This chapter discusses the administrative complaint and the process by which an administrative hearing is conducted.

II. THE ADMINISTRATIVE COMPLAINT

A formal administrative hearing is usually commenced by the service of an administrative complaint on an individual or organization. In this case, we will assume it will be on an individual and that the individual is a nurse.

The administrative complaint will usually be accompanied by an election of rights (EOR) form. A sample election of rights form is attached as Appendix 16-1 to this chapter.

It is extremely important that the EOR is filed (actually received) at the Department of Health within the time specified in it. We recommend that you telefax it in (keeping a copy of the telefax cover sheet and the transmittal receipt showing it was timely and properly telefaxed) and that you also mail it in via certified mail, return receipt requested, keeping a copy of it.

In most cases, it will be the best option for a nurse to elect a formal administrative hearing. By making this election and disputing the allegations made in the administrative complaint, you have preserved all of your options. Later on, if you change your mind, an agreement to settle the matter can be entered into at any time before a final decision is made on the merits of the case.

A settlement agreement (also called a "stipulation") can be negotiated at any time. A settlement agreement is similar to a plea bargain in a criminal case. If you enter into a settlement agreement or stipulation, it will be scheduled for presentation and approval at a Board of Nursing meeting. However, the Board of Nursing does not always accept such settlement agreements and may reject it or offer you a different one.

If you are not able to obtain a settlement agreement with terms that are acceptable to you, you have preserved your right to have the charges tried before an impartial administrative law judge (ALJ). As your case progresses, the decision of whether or not it is advisable to enter into a stipulation or to proceed on toward the formal administrative hearing is one which may be reviewed and considered periodically. If you do desire to settle the case, you should immediately let your attorney know this.

There are a number of procedural requirements that are somewhat unique to administrative hearings before an administrative law judge.

III. APPOINTMENT OF THE ADMINISTRATIVE LAW JUDGE AND LOCATION OF THE HEARING

When you filed your election of rights form, you should have indicated that you desired a formal hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. Upon receiving this, the Department of Health should immediately make a formal request to the Division of Administrative Hearings ("DOAH") for the appointment of an administrative law judge to try the issues which are framed by the administrative complaint.

The Division of Administrative Hearings is a separate, independent agency of the Florida government. It is composed of attorneys who act as judges in all types of different administrative matters. These may include environmental permits, zoning disputes, tax cases, and other forms of administrative cases, as well as DOH matters. You should consider the administrative law judge as similar to a civil trial court judge. The ALJ exercises many of the same powers as a civil court trial judge does, but not all of them.

It is the ALJ's ultimate task to hear all of the evidence presented by both sides, in a fair and impartial matter, and to decide what testimony is credible and what facts are true. The ALJ will also determine how the law applies to the facts that are determined. The ALJ will make a recommendation as to how the case should be resolved. The decision of the ALJ will be in written form and is called a Recommended Order (or "RO"). The ALJ's RO will be sent to the Board of Nursing for its review in preparing a Final Order (or "FO") which will be the final determination of your case. In most cases, the decision (recommended order) of the ALJ must be followed, at least as to the facts that are decided by the ALJ.

The ALJ usually resides in Tallahassee, Florida, where the DOAH is located. However, the formal hearing which you have requested may be held in or very near to the city in which you live. You have the right to request this. This is done for the convenience of the witnesses and other participants in the hearing, including you. The ALJ will schedule an amount of time which should be reasonable to try the case. You should expect to have at least a month's advance notice so that you can arrange your schedule accordingly,

obtain time off from work, and notify any witnesses you may have. You should plan on attending the entire hearing, even if it is two or three days long.

A formal administrative hearing is similar to a civil trial without a jury. The rules for admission of evidence (Rules of Evidence) are generally the same as in civil trials in state court, but there are some noteworthy differences. You should be sure that the attorney you retain to represent you has experience at such administrative hearings so that she will be familiar with these differences. The overall hearing proceedings will seem almost identical to a non-jury trial.

It is important to know that the Department of Health has the burden of proving the charges which it has brought against you. The attorney for DOH will call witnesses to testify on the stand against you. Expect that the DOH investigator who investigated your case will be the chief witness against you. However, there may be a number of others, depending on the circumstances of your case. The DOH attorney may also introduce records and documentary evidence and may even call you as a witness.

After the DOH attorney has presented its evidence before the ALJ, it will be your attorney's job (or yours if you do not have an attorney) to put on evidence in your defense. You do not need to if the DOH attorney has been unable to prove the charges against you (remember, DOH has the burden of proof; if it does not meet this burden, you win), but this is rare. It is almost always the best choice to go forward with evidence that proves your position in the case. This needs to be planned for and prepared for well before the hearing.

An administrative hearing is considered to be a "public hearing" pursuant to Florida's Sunshine Act. This means that the hearing is open to the public (if anyone else is even aware of it) and wishes to attend. Such hearings are rarely publicized and rarely attended by anyone who does not have a direct interest in the individual respondent or the particular issues being considered. The hearing is usually not held in a courtroom; instead they are usually held in an agency conference room, classroom or similar room located within a public building. They are, on occasion, held in a courtroom. If you are concerned about publicity or media attention, this is not usually the case unless there has been great deal of pre-hearing publicity, media stories or the matter is of political interest.

IV. PRE-HEARING DISCOVERY

You have the right to initiate formal discovery to the DOH attorney to find out what documents, witnesses and evidence may be presented against you at the hearing. This may also be done to require DOH to make the charges against you clearer and more specific. It may also be done to help determine what the witnesses for DOH will actually say when they testify.

The DOAH Rules of Uniform Procedure (contained in the Florida Administrative Code and available on the DOAH website) provides that the Florida Rules of Civil Procedure on discovery (Rules 1.310 through 1.370) apply to administrative hearings. Therefore, you are entitled to the same discovery of the state's case against you as you would be in a civil trial in state court.

You may serve written interrogatories (questions about the case) to the DOH attorney. You may serve a request for production of documents and things (or "request to produce") to obtain copies of

documents to be introduced against you or to examine physical evidence that may exist against you. You have the right to serve a request for admissions (to request that DOH admit certain facts about your case that are true, so you don't have to prove these at the hearing). You have the right to depose any witnesses DOH intends to call at the hearing, or any of your own witnesses, or to obtain copies of records and documents from other people or organizations. You also have the right to issue subpoenas to require witnesses to appear for depositions or for the final hearing, or to obtain documents or other evidence for depositions or the final hearing.

Although these discovery rights are conferred by the Florida Rules of Civil Procedure as implemented by the Florida Administrative Code, you also have another important right which many people (and often even civil trial litigators) overlook. This is the right to obtain information and documents through a Public Records Act request. Most of the records and files kept by DOH are public records and must be released pursuant to a proper Public Records Act request.

Although this may provide you a great deal of information on the case before the hearing, it may also have the undesirable side-effect of requiring the DOH attorney to review and analyze the case ahead of time. Frequently, the DOH attorney may not become familiar with your case file until shortly before the final hearing. In other words, this may cause the DOH attorney to become more familiar with the case a long time prior when she would normally review the file and begin preparing for the final hearing. Because of the significant crush of the large number of cases currently placed on each DOH attorney, using formal discovery may be a tactical question.

Additionally, it may result in similar discovery being served on you. Then, if you had any "surprise" documents or witnesses the DOH attorney would find out about these ahead of time and be prepared to counter them. Furthermore, if your financial resources are stretched and you only have a limited amount of money to pay your attorney, saving money by not conducting discovery may be one way of doing this. This is certainly an option that should be considered and discussed.

Therefore, the use of formal discovery directed to DOH should be carefully considered. Usually it is desirable in order to be prepared to the greatest possible extent.

V. THE FINAL HEARING

A great deal of time and effort must be spent by an attorney in preparing for a final hearing. The final hearing is the trial of the case. Everything must be reviewed, organized, prepared, labeled and copies of any exhibits or discovery made for all parties at the hearing. Witness testimony must be reviewed and questions prepared to ask the DOH witnesses. If the attorneys make the hearing seem easy and effortless, this means that even more time has gone into preparation than you imagine.

The final hearing is a proceeding similar to a court case. It will be presided over by the ALJ. It will be less formal than a court hearing and the overall atmosphere should be less intimidating. There will be a court reporter there to record everything that is said at the hearing; the DOH is required to provide this court reporter at its expense. The ALJ will make introductory remarks and will explain how the proceedings will take place.

Most often, the attorneys for each side will be offered the opportunity to present a short statement summarizing what the case is about. Sometimes the ALJ or the attorneys waive this. It is not always necessary, especially if the ALJ has read everything filed in the case and is familiar with the case.

The ALJ will then review the pre-hearing stipulation the parties were supposed to file before the hearing. This may narrow the issues for the hearing, shorten the hearing and resolve many matters.

The ALJ will then turn the proceedings over to the DOH attorney who will act similar to a prosecutor in a criminal case.

Do not be surprised if the DOH attorney calls you as the first witness. DOH can do this, if you do not plan on invoking the Fifth Amendment right against presenting testimony against yourself. You can only invoke the Fifth Amendment, however, and refuse to testify, if you do not intend to be a witness at all in the case. In most cases, you will want to testify on your own behalf, as you may be the only person who knows what actually happened. However, you should be prepared in the event that the DOH attorney does call you as a witness for DOH.

The DOH will often call the DOH investigator as one of its chief witnesses. The problem with this is that often the investigator can only testify as to what other witnesses told him or her. This is hearsay testimony and should be objected to, because it is not admissible by itself. Additionally, if the DOH attempts to introduce the DOH investigation report, this should be objected to, as well, since it is not only written hearsay, but it is also considered to be a prosecution-oriented document (just like every other police report). An experienced DOH attorney will not make these mistakes, unless he or she thinks you or your attorney is not experienced and that he or she can get away with it.

Witnesses are questioned, first by the attorney that calls the witness. Then, the other party's attorney gets to ask questions (sometimes called cross-examination). Often the ALJ will allow another round of questions, but sometimes he or she will not.

When the DOH has finished presenting all of its witnesses and exhibits, it will rest and it is then your attorney's time to present your witnesses and exhibits. The same procedure as before applies.

When your attorney has finished presenting your case or defense, each attorney is usually allowed to present any additional witnesses or documents to rebut or refute what the other side has produced at the hearing.

After this, the ALJ may allow closing arguments by each attorney to summarize the evidence produced at the hearing. Often the ALJ will state that this is not necessary or the attorneys will decide it is not necessary. This is because each side must later file a written brief or a proposed recommended order (or "PRO") which states what each side believes was proven at the hearing. The PRO also contains citations and arguments concerning relevant court cases, laws, and other legal authority that might apply to the case. This is often thought to take the place of an oral closing summary. This will be discussed further below.

VI. AFTER THE FINAL HEARING

The Administrative Law Judge is required to prepare a written decision for the Board of Nursing. As discussed above, the decision is called a recommended order (or "RO").

The Uniform Rules for DOAH that govern administrative proceedings provide an opportunity for both sides to submit a proposed recommended order (or "PRO") to the ALJ for review and consideration. The main purpose of the PRO is to emphasize to the ALJ whatever facts that side believes have been proven by the evidence at the hearing and to discuss how the law applies to those facts.

Since the final hearing is recorded by a court reporter, a written record may be obtained of the hearing. However, court reporters do charge for typing up a transcription of the hearing and this is not cheap. If a party orders the hearing to be transcribed by the court reporter, usually the transcript will be ready within two to three weeks after it is ordered. It is often most persuasive for the proposed recommended order to refer to pages in the transcript of the hearing so that the ALJ can review these. The ALJ can then go to those pages of the transcript and review the actual testimony from the witness at the hearing. This is often the best way to have the ALJ decide the case in your favor. In addition, a transcript will be required if the case is decided against you and you later decide to appeal the decision. Therefore, we usually recommend obtaining a transcript of the hearing, regardless of the cost.

Unfortunately, it takes a tremendous amount of time to review the transcript, review the exhibits, research the law and organize and prepare a proposed recommended order. Additionally, preparation of a PRO can be delayed by the time it takes the court reporter to prepare the transcript. It will usually take approximately 30 to 45 days after the final hearing before a PRO can be submitted. However, sometimes it may take longer. Because the PRO serves as a closing brief arguing your position in the case, its importance should not be underestimated.

The ALJ's recommended order consists of four major parts. The Preliminary Statement summarizes what the case is about and outlines the procedural aspects of the case; this section may also state the basic issues in the case. The Findings of Fact section states each fact that the ALJ has decided the evidence has proven (that are relevant to the issues in the case). The Conclusions of Law section states the applicable principles of law that the ALJ has decided apply to the case and the conclusions the facts and the law have led the ALJ to believe are correct. The Recommendations section of the PRO states how the ALJ recommends the disposition of the case, including dismissal or, if one or more charge is found to be proven, a recommended punishment (fine, suspension, etc.).

The facts found by the ALJ must be supported by competent evidence in the record. Facts that are found by the ALJ usually cannot be altered by the Board of Nursing when it later reviews the case. However, the conclusions of law that are determined by the ALJ may be changed if they are determined to be in error. It is rare for the Board of Nursing to make any significant changes to the PRO, except with respect to a recommended punishment.

When the recommended order is first received, both sides are allowed to file objections (called exceptions) to any particular finding of fact or conclusion of law, if there is a sufficient legal ground upon which to base it. At the time that your case is considered by the Board, the exceptions which have been filed may be argued by your attorney and then argued against by the attorney for the DOH. The Board, with the advice of its own attorney, an assistant attorney general, will decide whether or not the exceptions are founded and will then consider a final disposition of the case. ALJs are usually very knowledgeable

in the law which governs these proceedings. While exceptions to their findings of fact and conclusions of law may be filed, it is rare that their determinations are overturned by the Board of Nursing.

After it considers the PRO and the exceptions are argued, the Board of Nursing will make decisions that are then set forth in a written final order (FO). In most cases, the final order will adopt the findings, conclusions and recommendations of the ALJ. The final order is then filed with the Clerk of the Department of Health. The date it is filed with the Clerk starts your time running for appeal purposes. You should make sure that you are diligent in checking with the Clerk of the DOH after the Board of Nursing meeting at which your case is considered. We are aware of cases where the final order has not been mailed out, has been mailed to the wrong person or has been mailed to the wrong address. If you have not received it within two weeks, you (or your attorney) should be writing to the attorney for the Board of Nursing and asking for a copy.

Whether or not you should appeal a final order that makes determinations against you or the likelihood of success in such an appeal are matters that you should discuss with your attorney. Your attorney may recommend that you retain the services of an experienced appellate attorney if you decide to appeal. Appeals are beyond the scope of this chapter.

VII. TIPS, POINTERS AND REMINDERS FOR ADMINISTRATIVE HEARINGS

This is a partial checklist of some of the matters we check in preparing for administrative hearings. It is not complete and it may not apply in every case. It should serve as a reminder of certain issues that should be checked up on prior to the actual date of the hearing.

1. If you need one, make sure to notify the ALJ or make a reservation for a television monitor, VCR/DVD, projector, screen, or conference phone early (when the original order setting the hearing is received), and follow up with a confirmation letter to the hearing coordinator
2. Make sure all witnesses testifying have been listed in your answers to interrogatories, and if not, amend your answers to include all witnesses. Also, check the witness list for the pre-hearing stipulation.
3. File all discovery responses/answers immediately when received, with the Clerk of the Division of Administrative Hearings, using a notice of filing, so these will be in the official record. If there is discovery not answered, do a motion to compel (except with requests for admissions).
4. Some administrative law judges have certain procedures they require or certain things they don't allow in hearing procedures. It is a good idea to check with someone else who has appeared before the ALJ to find out if that ALJ has any.
5. Go onto the Division of Administrative Hearing website, search for and review the last few recommended orders (ROs) and Final Orders on your administrative law judge ahead of time. This will give you an idea of what the administrative law judge is like and how

he/she has ruled on various issues in the past. The DOAH website is (www.doah.state.fl.us). Go to case search, put in ALJ's name and agency name (for example DOH) to obtain Recommended Orders on similar cases.

6. On the day of the hearing, get to the room at the final hearing site early to organize and re-set the room if necessary, to choose where you want to sit. Rearrange the room, if necessary to have a proper hearing setting to create one large conference table in the middle, as most administrative law judges seem to prefer this.
7. Investigation reports are inadmissible as hearsay. You must object to them if the DOH attorney attempts to introduce one.
8. Also, settlement negotiations (including the transcript or minutes of Board meeting at which a settlement stipulation was considered, and any statements made by the respondent or anyone else in support of it are inadmissible, per Rule 90.408 (civil) and Rule 90.410 (criminal) of the Rules of Evidence.
9. Affidavits are considered hearsay evidence, but since this is an administrative hearing the ALJ may allow one or more into evidence, if it is being used to corroborate previously admitted evidence.
10. If you want to introduce an affidavit at hearing and you have the witness who made the affidavit available, have the witness present, have the witness take the stand and testify from the affidavit.
11. Bring a copy of the most recent DOAH court docket for case, to be able to prove that a document was or was not filed.

Although not directly applicable to a formal administrative hearing involving a nursing license case, the following checklist, which we use for formal hearings involving Medicaid benefits, may also be useful to you.

CHECKLIST FOR HEARINGS INVOLVING MEDICAID BENEFICIARIES

1. Treat the case like you would a civil trial in Circuit Court.
2. Prepare and file a "List of Issues."
 - a. Update it as your discovery progresses or issues are added/eliminated
 - b. Include a request for attorney's fees and costs; specify the statutes or cases pursuant to which you are requesting these.
3. Coordinate ahead of time and visit the agency's local office for the purpose of reviewing the official agency file on your client. Get copies of relevant documents at that time. Find

out what you can about the case coordinator, the file and anyone else involved while you are there.

4. Talk to agency officials, case worker, etc., about the case any time you get the chance.
5. Remember that the Florida Administrative Procedures Act, Chapter 120, Florida Statutes, applies to all hearings held by state agencies pursuant to Section 120.57(1), Florida Statutes. These are such hearings and Chapter 120 applies to them. Review, in detail Sections 120.569 and 120.57, Florida Statutes.
6. Remember also that Chapter 28-106, Florida Administrative Code (F.A.C.) also applies to such hearings (except for those few rules for which the agency may have adopted certain different rules). These are your rules of procedure. Know them!
7. Remember that many of the Florida Rules of Civil Procedure (Fla. R.C.P.) apply (Rule 28-106.206, F.A.C.). Consider serving discovery, especially requests for admissions, on the agency or department.
8. At the earliest possible time, get updated physicians' reports, addressing relevant issues. Have them sent into the agency with a copy to the Medicaid beneficiary.
9. File requests for "official recognition" (the same as judicial notice) to request the hearing officer to accept as fact:
 - a. Any facts that are not subject to dispute;
 - b. Statutes and regulations that are favorable to your position; and
 - c. Other cases that are favorable to your position.

Use these to educate the hearing officer and to make sure that basic facts required to prove the case are in the record as well as legal authority supporting your position. For those statutes, regulations, and cases that support you, underline the sections that support your position.

10. Obtain administrative subpoenas from the hearing officer and subpoena any witnesses you need for the hearing.
11. Get an expert or experts on the key issues in the case, including attorney's fees.
12. Bring the Medicaid beneficiary to the hearing - get him/her to testify.
13. Bring any other family members who are familiar with any of the facts to the hearing and get them to testify.

14. Prepare well in advance to have one or more of the Medicaid beneficiary's treating physicians testify, by telephone, if necessary. Be sure to serve a subpoena on each one.
 - a. Call and coordinate the date and time for his/her testimony with the physician; then write a follow up letter to confirm.
 - b. Serve a subpoena on the physician and file the return (or a certificate of service) in the record.
 - c. Honor the doctor's time.
15. Take the video depositions of any witnesses who will not be available to testify at the hearing. Play these in the hearing.
16. In other words, get as many witnesses as you can. Do not expect to rely solely on the agency file and physician's reports.
17. Remember, in many cases the date that a notice was given by the agency or received by the beneficiary is crucial. Obtain and introduce as exhibits the envelopes in which notices by the agency were mailed (showing the postmark or meter date) and for tracked mail (certified mail, registered mail, express mail) or notices sent by couriers, go onto the appropriate website and print out the tracking information to show when it was sent and received. Introduce this as an exhibit at the hearing.
18. Be sure to obtain a court reporter and have the hearing(s) reported.
19. Be prepared to appeal. Make a record for the appeal (e.g., object to objectionable material and testimony; move to exclude it or have it stricken, use motion practice, etc.).
20. For the most part, the Florida Rules of Evidence apply. But review and be familiar with Rule 28-106.213, Florida Administrative Code.
21. Remember, as a general rule, hearsay is not admissible in an administrative hearing; except, hearsay may be admitted for the limited purpose of helping corroborate a fact upon which there has previously been admissible evidence introduced. (Rule 28-106.213(3), F.A.C.). As a general rule, always object to hearsay evidence.
22. Get copies of all prior agency manuals, forms, publications, guidelines, brochures, pamphlets, books, training materials, etc. that have been sent to the beneficiary or his/her family, from workshops or educational sessions, off of internet, etc.
 - a. Excerpt the relevant portions of them.
 - b. Underline supportive parts.
 - c. Do formal "Notices of Filing" and file ahead of time.

- d. Introduce as exhibits at hearing.
23. Bring copies of the Florida Rules of Civil Procedure, Florida Rules of Evidence, and any cases explaining them that are helpful to your case. The hearing officer may not be an attorney and may not be aware of these.
 24. At the hearing, introduce evidence on attorney's fees and the basis for your request for attorney's fees at the hearing. Be sure to include failure to make admissions that are later proven at the hearing (Rule 1.380, Fla. R.C.P.) as a ground for this, if applicable.
 25. You may request that the hearing officer make a finding regarding entitlement to attorney's fees and reserve jurisdiction to determine the amount of attorney's fees at a later date. (Note: this is an alternate position; see below.)
 26. If you are successful and your hearing officer was not an administrative law judge, file a Petition for Attorney's Fees and Costs with the agency and request that it be forwarded to the Division of Administrative Hearings (DOAH) for the appointment of an administrative law judge (ALJ) to hear the petition.
 27. If you lose, and you may appeal to a different District Court of Appeal, consider its prior rulings and compare them to those of the First District Court of Appeal. Decide what Court of Appeal would be more favorable inclined to your client's position and select the one you feel would be more likely to rule in his/her favor.