

CHAPTER 17

REPRESENTING YOURSELF BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS (DOAH)

I. INTRODUCTION

We do not recommend that you attempt to represent yourself in a formal hearing before the Division of Administrative Hearings. You will be involved in litigation that is similar to litigation in a state civil court trial. The other side will be represented by an experienced litigation attorney who will have probably participated in a large number of similar administrative hearings in the past, many of which may have been before this same administrative law judge (ALJ). The Florida Rules of Evidence will apply for the most part (with certain exceptions). The Florida Rules of Civil Procedure concerning discovery will apply. The Uniform Rules for Administrative Hearings will apply. Chapter 120, Florida Statutes, the Florida Administrative Procedure Act, will apply. If you are not familiar with these and how they are used at hearings, you will be at a tremendous disadvantage and may find yourself unable to properly put on your defense or to present your evidence. This is one of the primary reasons we recommend that all nurses carry nursing liability insurance that provides coverage for licensing and administrative cases.

However, as we have emphasized in other chapters of this Manual, the only forum in which to contest your guilt or innocence of the charges against you is a formal administrative hearing. In an informal hearing, you admit that all of the facts and allegations made against you in the administrative complaint are true. The only argument is over the amount of discipline and type of discipline you will receive. Therefore, in any case where you desire to introduce evidence to show you are not guilty of the offenses you are charged with, you must request a formal administrative hearing.

Regardless, many individuals find that because of financial constraints and lack of insurance, they are unable to afford to hire an attorney to represent themselves. In this unfortunate event, the nurse may find herself in the position of having to represent herself in such a hearing. If so, you should read the other chapters in this Manual, especially the ones on administrative law and the Administrative Procedure Act and the one on Formal Administrative Hearings. This chapter discusses defending one's self in a hearing before the Division of Administrative Hearings (DOAH). It is taken mostly from guidance put out by DOAH itself to unrepresented individuals.

It is important to remember that the information presented in this chapter is general in nature and is intended to cover the usual situation. The explanations do not cover all of the possible situations which may arise in a case. You should also consult the rules of DOAH (Chapter 28-106, Florida Administrative Code (F.A.C.), Parts I and II), which are available on the DOAH website: www.doah.fl.state.us.

II. WHAT IS THE DIVISION OF ADMINISTRATIVE HEARINGS?

DOAH is a state agency that employs full-time administrative law judges (ALJs) to conduct hearings in most cases in which the substantial interests of a person are determined by an agency and which involve a disputed issue of material fact. When a state agency proposes to take some action that is adverse to a person, the affected person is normally entitled to request an administrative hearing to determine the

matter. Requests for hearings are initially made to the appropriate state agency. If the case does not involve disputed facts, the agency itself will conduct a proceeding and subsequently render a decision. If the request for hearing indicates that the affected person disputes facts upon which the proposed action is based, the agency ordinarily refers the case to DOAH for a hearing.

DOAH provides a hearing conducted by an independent and neutral administrative law judge who thereafter writes a decision, either a recommended order (RO) or a final order (FO), which is provided to the state agency and the parties in the case. In the case of a professional licensure case for the Board of Nursing, this will always be a recommended order (RO).

In the case of a recommended order, the agency later reviews the RO and issues a final decision which usually adopts the ALJ's factual findings, but may under certain circumstances, reject or modify certain legal conclusions of the ALJ or the recommended penalty, if any. If the final decision is adverse to the non-agency party (that is, you, the respondent), an appeal may be taken within a limited time to a District Court of Appeal.

III. HOW WILL I KNOW IF MY CASE HAS BEEN SENT TO DOAH?

If a case is sent to DOAH for a hearing, the state agency ordinarily sends a copy of the transmittal letter or order to the affected parties. In addition, as soon as DOAH has assigned an ALJ to the case, you will be notified of his or her name and the DOAH case number. If your address changes, be sure to notify DOAH in writing so that you can be properly notified about the hearing date, receive copies of anything filed, and receive your copy of the recommended order.

Once the case has been sent to DOAH, any original pleadings and other documents must be filed with the ALJ and a copy served on all other parties at the same time as you send to the ALJ.

IV. WILL I RECEIVE OTHER NOTICES FROM DOAH?

In most cases, you will receive an Initial Order which will provide procedural instructions concerning the proceeding and ask you to advise the ALJ within 10 days as to your preference for the date and place of hearing, and your estimate of the time necessary to conduct the hearing. Normally, the hearing will be held within 120 days after the case is referred to DOAH, and it usually will be held in your county. If you do not advise the ALJ of your preferences, the hearing may be held on a date that fits the ALJ's schedule in Tallahassee.

In all cases, you will receive a Notice of Hearing. In most cases, it will be sent at least 14 days prior to the date of hearing. The Notice of Hearing will advise you of the time and place of the hearing and some basic information about the issues to be considered and hearing procedures.

V. WHAT IF THE HEARING IS SCHEDULED FOR A TIME WHEN I AM NOT AVAILABLE?

If it is impossible for you to attend the hearing at the scheduled time, you must immediately request a continuance, in writing. You should be aware that your case will not be postponed or continued unless you have a good reason for your request.

If a conflict arises that prevents you from attending the hearing on the date(s) originally set for it, we recommend that you advise the ALJ of this as soon as possible in writing, providing any additional documentation that is available. You should also send a copy to the DOH attorney and make sure that a copy is sent to the Clerk of DOAH to be filed in the record on your case. You should provide later dates over the course of the next 45 days or so as to when you would be available for a hearing. You should specifically ask the ALJ to grant you a continuance.

Except for an extreme emergency, the request must be made at least 5 days prior to the hearing date. However, do not delay. Make your request as soon as you know about it. You should contact the other parties or their lawyers to see if they will agree to a continuance and to possible alternate dates for hearing before you contact the ALJ. If time is short before the scheduled hearing, you may make your request by telephone to the ALJ who normally will schedule a telephone conference call with the other parties to see if they have any objection and whether you have good cause for a continuance.

VI. DO I HAVE THE RIGHT TO SEE INFORMATION HELD BY THE OTHER PARTIES TO MY CASE?

The right to find out about the other party's case is called "discovery." Discovery in DOAH hearings is governed by the Florida Rules of Civil Procedure which can be found in any law library or at the website listed in other chapters in this Manual. However, the rules are highly technical and you may require assistance from an attorney in properly preparing your discovery request. In general, the rules permit you to inquire into the contentions of other parties by asking them written questions, called "interrogatories"; by questioning them and prospective witnesses before the hearing by taking their deposition; or by requiring them to produce pertinent documents. You can require witnesses to appear for the taking of a deposition in the county in which they reside by a subpoena issued by the ALJ upon request.

Ordinarily, you can receive most of the information you need simply by requesting the attorney for the involved state agency to provide you with relevant documents concerning your case. Usually, you can also review the agency's file on the matter at the agency's office and obtain copies of documents in the file. If a party refuses to provide information after you have made a proper discovery request, or if you receive a request for discovery from the other party that you believe is unfair, you may apply to the ALJ in writing to determine the appropriateness of the discovery request.

Remember that there are time limits to responding to discovery requests under the Rules of Civil Procedure and if you do not receive a response to your request within the applicable time periods, you must notify the ALJ by a Motion to Compel. The ALJ will make a ruling in the matter after the other party has responded in writing to the motion. If a hearing is held on the motion, it will generally be by telephone conference call.

VII. HOW DO I SUBPOENA A WITNESS OR OBJECT TO A SUBPOENA?

If you need the testimony of a person who has knowledge of matters concerning your case, you should ask that person to attend the hearing and testify. If the witness will not attend voluntarily, you should call the Deputy Clerk to request a subpoena at (850) 488-9675, or request your subpoenas by mail. A subpoena is a legal document which orders a person to appear at the hearing and to give testimony. You should find out as soon as possible whether you will need to subpoena anyone. If so, call the telephone number listed on the Notice of Hearing. You will be sent subpoena forms signed by the ALJ which show the name and number of the case, but otherwise are in blank. Fill out each form as instructed and then have the subpoenas served either by a disinterested person or by the Sheriff's Office. The subpoena should be served immediately in order to give the witness time to get ready for the hearing. You must include a witness fee with the subpoena. If the witness lives in the county where the hearing will be held, the fee is \$5 per day plus six cents a mile for actual mileage. Additional fees must be tendered if the witness is required to travel to the hearing in a county other than where the witness resides. Expert witnesses generally require payment of an expert witness fee. No fees need be tendered to subpoenaed witnesses who are employees of the state. Read the instructions on the back of the subpoena and make sure that the person who serves the subpoena executes the affidavit on the reverse side. Be sure to file copies of the subpoenas with the affidavits showing they were served properly completed, with the Clerk of the Division of Administrative Hearings.

A person who is subpoenaed and who feels that his or her presence at the hearing is unnecessary, unfair, or untimely can object to the ALJ by filing a motion to quash the subpoena. The ALJ will consider the objection and decide whether that person must obey the subpoena. Other questions about the subpoena, such as whether you have to be there exactly at the time specified, should be directed to the person who requested the subpoena (his/her name and telephone number are on the subpoena in the bottom left corner).

VIII. DO I HAVE TO BE REPRESENTED BY AN ATTORNEY AT THE HEARING?

No, you may be represented by an attorney if you so choose, at your expense, or you may present the case yourself. Additionally, you may be represented at the hearing by a non-lawyer who is determined by the ALJ to be qualified to protect your rights. (We do not recommend that you use non-lawyers, ever.) However, this generally requires a pre-hearing conference or affidavit filed by the individual representing you showing that he or she is conversant with the law and procedures involved in your case and can protect your right to appeal. DOAH's requirements for qualification of a representative are contained in Florida Administrative Code Rule 28-106.106.

IX. HOW SHOULD I PREPARE FOR THE HEARING?

In preparing for the hearing, it may be helpful to make a list of all the information which relates to your case and which you may want to present. Bring the originals and enough copies of all documents to the hearing so that you can give one to each of the other parties and one to the ALJ.

Persons who have knowledge of your case should be asked to attend the hearing and testify on your

behalf. Subpoenas should be issued for such individuals if you believe it to be necessary. If you need the testimony of a person who is an expert, such as a doctor, you may also ask that person to attend the hearing and testify. However, you may have to pay the expert a fee.

X. WHERE WILL THE HEARING BE HELD?

In a professional licensure case, remember that you have the right to have the case heard in the city or a location near to where you reside. You will probably want to request this as this is generally where any witnesses to the events may also be located. Additionally, if you have any character witnesses, or any other witnesses in mitigation for your case, they will probably be in a location near where you reside. You should always request a hearing near to where you reside, if you feel it will be more helpful to your case than not. In your response to the ALJ's initial order, be sure to request where you want the hearing to be held and why.

If the hearing is held in Tallahassee, DOAH has hearing rooms at its main location at 1230 Apalachee Parkway, Tallahassee. In other cities, DOAH uses courtrooms, city or county commission chambers, conference rooms in state office buildings, or similar facilities. The notice of hearing will tell you where the hearing will be held. The ALJ may be present at the hearing or may conduct the hearing by video conferencing.

XI. WHAT WILL HAPPEN AT THE HEARING?

In each case the ALJ will decide who will present evidence first and how the hearing will proceed. This decision will be based on which party is requesting the action and on what would be the most practical and orderly way to develop the issues in the case. In a professional license case or a case involving discipline against a nurse's license, it is the Department of Health (DOH) which is requesting the action (denial of the license or other disciplinary action). Therefore, the DOH is called the "petitioner" and the DOH should go first in putting on its evidence. It is the DOH which has the burden of proof and the DOH which has the burden of going forward and proving a case.

Before the actual presentation of the evidence begins, the ALJ will explain the procedures which will be followed. If you are confused about the procedures or other matters, you should let the ALJ know. You may ask procedural questions at any appropriate time during the hearing.

The ALJ will allow each party to present witnesses and other evidence. He or she will also permit each party to question the other party's witnesses. This is called "cross-examination." All relevant evidence may be presented, including hearsay, which is, generally, statements repeated by witnesses that were made by another person. However, the ALJ cannot base a finding of fact on hearsay alone. The ALJ may limit presentation of evidence if it is repetitive or irrelevant.

A record of everything that is said will be made at the hearing, so it is important that you speak in an audible, clear voice. The record will be preserved by a tape recording or videotape or by a court reporter. In a professional licensure case, this will usually be by a court reporter.

The ALJ is an impartial, independent person who is not employed by the state agency involved in the case and who does not have any personal interest in the outcome of the matter. The ALJ will attempt to determine the truth and to understand and fairly evaluate the position of each party. In doing so, the ALJ may ask questions of you, the agency representative, or any witness at the hearing.

XII. WILL THE ALJ ASK FOR ADDITIONAL INFORMATION AFTER THE HEARING?

In some cases, the ALJ may ask for or permit any of the parties to submit additional documents after the hearing. You have a right to submit a proposed decision (also called a proposed recommended order or "PRO") after the hearing within a time period fixed by the ALJ at the close of the hearing.

XIII. WHEN WILL I RECEIVE THE ALJ'S ORDER?

If the ALJ does not permit additional documents or other matters to be submitted after the hearing, the case ends on the last day of the hearing. Normally, the ALJ will issue a written decision within 30 days after the hearing, or 30 days after receipt of the hearing transcript or videotape, whichever is later. If the parties indicate that they will submit proposed decisions to the ALJ, the ALJ normally will render the decision within 30 days after their receipt.

XIV. WHAT IF I DECIDE THAT I DO NOT WISH TO PROCEED WITH MY HEARING?

If you decide, at any time, that you do not want to proceed with your hearing, write to the ALJ that you are withdrawing your request for hearing, and he or she will close the Division's file and return the case to the referring agency for final action. You should understand that if you withdraw your hearing request, the agency may proceed with its proposed action.

XV. WHAT WILL HAPPEN IF I DO NOT APPEAR AT THE HEARING?

If you do not appear at the time and place of the hearing, you must call the ALJ immediately to explain why. If you do not contact the ALJ, or if you do not have an adequate explanation for not attending the hearing, the ALJ may decide against you in the case.

If a conflict arises that prevents you from attending the hearing on the date(s) originally set for it, we recommend that you advise the ALJ of this as soon as possible in writing, providing any additional documentation that is available. You should also send a copy to the DOH attorney and make sure that a copy is sent to the Clerk of DOAh to be filed in the record on your case. You should provide later dates over the course of the next 45 days or so as to when you would be available for a hearing. You should specifically ask the ALJ to grant you a continuance.

If an emergency arises on your hearing date and you will be late for the hearing, you should attempt to telephone the ALJ at the hearing location and explain the problem. If you cannot reach the ALJ at that location, call the ALJ's secretary in Tallahassee and explain the problem.

XVI. MAY I GET A TRANSCRIPT (WRITTEN RECORD) OF THE HEARING?

Yes, but you must pay the cost of preparing the transcript. If the hearing was videotaped or tape-recorded, you must write to the agency concerned and request a transcript. If the hearing was recorded by a court reporter and the agency ordered a transcript, you must contact the agency or DOAH and arrange for a transcript. If the agency did not order a transcript, you must contact the court reporting firm and you will be sent a copy upon payment.

XVII. MAY I OBJECT TO THE MATTERS CONTAINED IN A RECOMMENDED ORDER?

Yes, such objections are called "exceptions" and must be sent to the agency head (not DOAH or the ALJ) normally within 15 days after the date of a Recommended Order. The objections may be in a letter and should explain the particular portions of the Recommended Order with which you disagree and the specific reasons for your disagreement. If you believe that the ALJ made a mistake concerning the facts in your case, you should point out those parts of the transcript which support your argument. If you cannot meet the deadline for submitting exceptions, you should write to the agency head and ask for an extension before the deadline.

XVIII. WHEN MUST A FINAL DECISION BE MADE?

Generally, the agency head must render a Final Order in the case within 90 days from the date the Recommended Order is filed with the agency clerk.

XIX. IS THERE ANY FURTHER APPEAL FROM THE AGENCY'S FINAL DECISION?

If the final decision is not in your favor, you have the right to appeal to an appropriate District Court of Appeal within 30 days of the date of the Final Order. The Florida Rules of Appellate Procedure provide the procedures for filing the appeal. In general, you are usually allowed to appeal either to the First District Court of Appeal in Tallahassee (where the agency resides) or to the Court of Appeal that covers the area in which you reside. We recommend that you retain the services of an appellate attorney if you decide to appeal. Since an appeal will basically be examining the record of the underlying hearing, it is important that the record be complete and that it contains all of the evidence and all of the arguments made. This is another reason you should always be represented by an experienced attorney at such a hearing. An appeal will only examine legal mistakes that may have been made by the ALJ at the hearing and will not be an opportunity for you to retry the case or to make arguments that you did not make during the hearing, but should have.

XX. ADDRESS OF DOAH

The official address and telephone number of DOAH and, therefore, of the ALJ is as follows:

Clerk:
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
Telephone: (850) 488-9675
SUNCOM 278-9675
Telefax: (850) 921-6847
website: www.doah.fl.state.us

XXI. CONCLUSION

A formal administrative hearing is a serious matter. It is similar to a trial in a civil court. It should not be taken lightly. Because of the application of various procedural rules and rules of evidence, unless you are familiar with litigation and with court or administrative proceedings, we always recommend that you obtain representation by qualified legal counsel.

You probably spent years of time and thousands of dollars in obtaining your license. This is not the time to jeopardize it if you can possibly obtain financial assistance from any source to hire an attorney. It is only in the event that there is absolutely no way that you can afford to hire an attorney that you should proceed on your own. Even then you should at least consult with an attorney before making the decision.

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