

## CHAPTER 18

### INFORMAL HEARINGS

#### I. INTRODUCTION

Informal administrative hearings are one of the types of hearing authorized by the Florida Administrative Procedure Act. They are available for disciplinary cases, licensure cases and other types of cases.

Many health professionals believe that since it is called an "informal" hearing, there will be less technical procedure, fewer legal technicalities, and that they will be able to argue the merits of their case before their peers, their professional colleague, who will surely understand, and will give them a fairer hearing than they could get from a formal hearing in front of an administrative law judge. **NOTHING COULD BE FURTHER FROM THE TRUTH.**

In order to obtain an informal hearing, the person requesting it must state that there are no issues of material fact to be determined. What this means is that you agree with all of the facts and conclusions stated by the Department of Health (or other administrative agency). In a licensing case or disciplinary case, you are agreeing that everything stated in the complaint is true and correct.

What this means is that you are, in effect, pleading guilty. At an informal hearing, you are not allowed to introduce evidence showing you are innocent of the charges. You are not allowed to argue you are not guilty. The only issue at an informal hearing is the amount and type of discipline you should be given by your professional board, in this case, the Board of Nursing.

This is one of the main reasons we recommend to nurse and other health professionals that they always request a formal hearing, at least initially, so that they do not waive their rights, and then attend a Board of Nursing meeting so that they can observe what occurs during informal hearings.

Informal hearings are discussed further below.

#### II. WHEN AM I ENTITLED TO AN INFORMAL HEARING?

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

In most cases in Florida, a nurse will become involved in the hearing process because of a complaint against her care as a nurse and a resulting Department of Health investigation. When this is reviewed by the Probable Cause Panel of the Board of Nursing and the Probable Cause Panel recommends disciplinary action against the nurse, an administrative complaint is prepared and served on the nurse, along with an election of rights (EOR) form. One of the options that a nurse may elect on the election of rights form is that of an informal hearing. For a sample of an election of rights form, please see the appendix to the separate chapter in this manual on Formal Administrative 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 may be 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.

### **III. INFORMAL HEARING AUTHORITY AND PROCEDURES**

The legal authority for and procedures governing an informal hearing are set forth in the Florida Administrative Procedure Act, at Section 120.569 and 120.57(2), Florida Statutes.

Pursuant to Section 120.569, Florida Statutes, you are entitled to all of your rights to be notified in advance of the time, date and place of the informal hearing and you are allowed to appear, with counsel, if desired. Pursuant to Section 120.569(2)(a), Florida Statutes, you must be provided:

1. Advance notice of the hearing of at least 14 days;
2. A statement of the time, place, and nature of the hearing; and
3. A statement of the legal authority and jurisdiction under which the hearing is to be held.

If you do not receive these, you should immediately file a written objection, as these may be waived.

In addition, Pursuant to Section 120.57(2), Florida Statutes, you also have the following rights at an informal hearing:

The agency is required to:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.
2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.
3. If the objections of the parties are overruled, provide a written explanation within seven days.
4. The record shall only consist of:
  - a. The notice and summary of grounds.
  - b. Evidence received.
  - c. All written statements submitted.
  - d. Any decision overruling objections.
  - e. All matters placed on the record after an ex parte communication.
  - f. The official transcript.
  - g. Any decision, opinion, order, or report by the presiding officer.

We recommend that if you do decide an informal hearing is in your own best interest, knowing that

you are in effect going to be pleading guilty, then you submit any and all motions and objections you might have as early as possible and that you submit any evidence you would like considered in writing and as early as possible.

If you attend a Board of Nursing meeting ahead of time, you will have an idea of why informal hearings are usually undesirable. Not only have you, in effect, pleaded guilty, but then you will find yourself appearing in front of an audience that may include hundreds of other nurses, nursing students, and even the media. Many nursing schools send their nursing classes to Board of Nursing meetings. We have attended Board of Nursing meetings where there have been over 500 attendees.

Furthermore, at such informal hearings, every member of the Board of Nursing is then allowed to ask you questions about the case and why you did what you did. This can be very stressful, intimidating, and embarrassing. We like to say that in informal hearings, instead of one judge and one prosecutor, you have ten judges and ten prosecutors.

#### **IV. WHAT TO DO IF YOU INCORRECTLY ELECT AN INFORMAL HEARING**

If you find out that you have incorrectly elected an informal hearing when you desire a formal one, it may not be too late. We recommend that you take the following action as early as possible.

If it is prior to the hearing, we suggest that you file a petition for a formal hearing, complying with the requirements set forth in the DOAH Uniform Rules, specifically, Rules 28-106.2015 or 28-106.201(b), Florida Administrative Code. At the same time, file a motion with the informal hearing officer or the Board stating that you have discovered that you have material facts that are in dispute and that you desire to withdraw your prior election of an informal hearing and that you desire a formal hearing.

If you are actually at the informal hearings and you discover this, immediately state on the record:

1. There are material facts that you dispute;
2. You object to any further matters being considered at the informal hearing; and
3. You are hereby requesting a formal hearing.

Remember, at a disciplinary hearing against your license, you may dispute all material facts and the state's ability to prove them. You may also contest your actual guilt or innocence. Since such proceedings are considered to be penal in nature, the state has the burden of proving them against you, similar to a criminal proceeding.

There is case law which states that if, during the course of an informal hearing you discover that there are material facts in dispute, you have the right to then request formal hearing. However, you must make this clear and unequivocal on the record and you must specifically object and state you are now requesting a formal hearing. Then, even if the hearing officer or the Board continues at the formal hearing (which it should not), it is reversible error, and it will be easy to have the results reversed on appeal.

#### **V. DISCIPLINARY GUIDELINES**

The Board of Nursing has, by rule, adopted certain guidelines as to the types and amounts of punishment it will give a respondent. These guidelines take into account the seriousness of the offenses and certain aggravating factors (such as number of prior offenses, amount of harm to patients), and any mitigating factors.

You should review these disciplinary guidelines that are contained in Rule 64B9-8.006, F.A.C. (available online at: <http://www.flrules.org>) prior to accepting an informal administrative hearing.

In addition, you should also review the minutes of prior Board of Nursing meetings (available online at: [http://www.doh.state.fl.us/mqa/nursing/nur\\_minutes.html](http://www.doh.state.fl.us/mqa/nursing/nur_minutes.html)) to get a feeling for the types of cases that are considered at a Board of Nursing meeting and the types and amounts of punishments that are routinely given.

### **VI. MITIGATION EVIDENCE**

Even if you plead guilty, enter into a settlement stipulation, or agree to an informal hearing, you still have the right to introduce and have the hearing officer, presiding officer or Board of Nursing consider evidence in mitigation of the offenses you have committed. Mitigating evidence is evidence that tends to show that the discipline to be given you should be less than it normally would be. Evidence that shows there was no harm to a patient, no financial gain to a nurse, that a nurse has a long, distinguished, unblemished record, and other facts similar to these may be classified as mitigating evidence.

Mitigating factors that the Board of Nursing (or a hearing officer) should consider in a nursing case are set forth in Rule 64B9-8.006, F.A.C., which states:

(5)(a) The Board shall be entitled to deviate from the foregoing guidelines upon a showing of aggravating or mitigating circumstances by clear and convincing evidence, presented to the Board prior to the imposition of a final penalty at informal hearing. If a formal hearing is held, any aggravating or mitigating factors must be submitted to the hearing officer at formal hearing. At the final hearing following a formal hearing, the Board will not hear additional aggravating or mitigating evidence.

(b) Circumstances which may be considered for purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:

1. The danger to the public.
2. Previous disciplinary action against the licensee in this or any other jurisdiction.
3. The length of time the licensee has practiced.
4. The actual damage, physical or otherwise, caused by the violation.
5. The deterrent effect of the penalty imposed.
6. Any efforts at rehabilitation.

7. Attempts by the licensee to correct or stop violations, or refusal by the licensee to correct or stop violations.
8. Cost of treatment.
9. Financial hardship.
10. Cost of disciplinary proceedings.

Additionally, there are court cases that state that there are other factors in mitigation that can and should be considered by a professional board in making such decisions.

A nurse who intends to produce mitigating evidence at an informal hearing should:

1. Get as much documentation of that evidence as possible.
2. File the evidence as far ahead of time before the scheduled board meeting or hearing at which the case will be considered as possible.
3. If the nurse herself intends to testify in mitigation, we recommend that you either file a notice that you intend to do so or, better yet, since most nurse are nervous and tend to forget key points, reduce it all to an affidavit and file that affidavit with the Board before-hand. When it is your turn to testify, take the witness oath and then read your affidavit to the board or into the record. This will avoid having the affidavit excluded as evidence and also will avoid having key points overlooked as you testify.
4. You may also bring witnesses to the Board meeting or hearing and those witnesses may testify as to mitigating evidence. However, you should also be aware that such witnesses will be subject to cross-examination by the DOH attorney and by the individual board members should this happen.

Witnesses such as nursing professors or instructors of yours, nursing supervisors, administrators and executives of facilities where you have worked, employers, patients, preachers/priests, those who can testify as to volunteer services, etc., may make good witnesses in mitigation.

## **VII. CONCLUSION**

We do not recommend that nurses agree to informal hearings as a general rule. If you think you might, please read the other chapters of this Manual. There are circumstances where it may be in the nurse's best interest to elect an informal hearing. However, you should consult with an attorney experienced in board of nursing cases before making any such decision.

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