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PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT

Presented by
William J. Cea, Esq.

2019 Construction Certification Review Course
The Florida Bar

Florida Statutes, Chapter 120

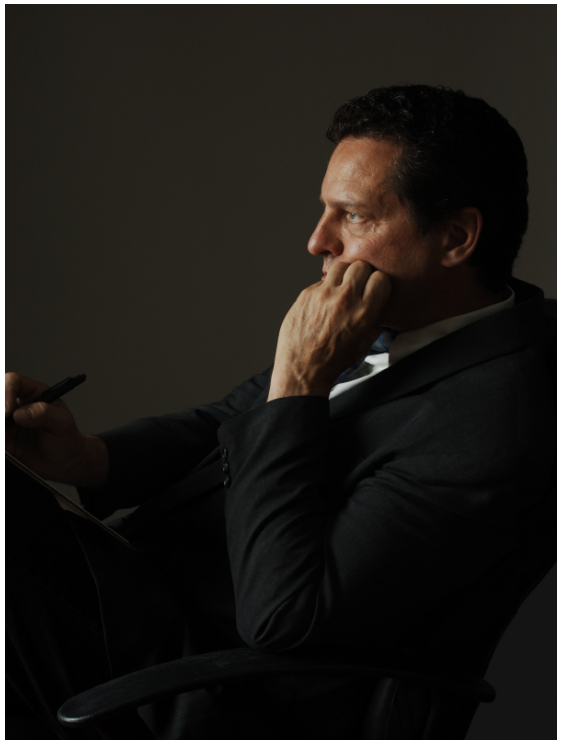
- Known as the Administrative Procedure Act.
- Applies to public agencies as defined by F.S. 120.52(1).
- For example:
  - State Departments.
  - Board of Governors of the State University System.
  - A regional water supply authority.
  - The Governor.
  - State Officers.
  - The Dept. of Business and Professional Regulation (DBPR)

"Agency" does not include local governments – i.e. Cities and Counties.
Local construction regulation boards are covered by F.S., Section 489.113.

Applicability to Bid Protests and Disciplinary Proceedings

Bid Protests:

- As to the advertised terms of the solicitation (IFB, RFP, ITN).
- As to intended decisions to award or reject bidders.
- Proceedings are conducted pursuant to F.S., Section 120.57, and Chapter 28 of the Florida Administrative Code ("FAC")



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Applicability to Bid Protests and Disciplinary Proceedings

Disciplinary Proceedings:

- DBPR, and boards within its jurisdiction, may initiate disciplinary proceedings pursuant to F.S., Section 455.225.
- Proceedings are conducted pursuant to F.S., Sections 120.57(1) or (2) and Chapter 28 of the FAC.



Applicability to Bid Protests and Disciplinary Proceedings

Hearings Conducted by DOAH:

- Where there are disputed issues of material fact, the Division of Administrative Hearings (DOAH) conducts the proceedings.
- In such cases, DOAH has authority to issue *recommended orders,* and the agency retains the authority to enter final orders.



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Bid Protests

What is a Bid Protest?

- Specification Challenges: to the terms, conditions, and specifications in an Invitation for Bids, Request for Proposals or Invitation to Negotiate.
- Such challenges may include protests as to the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, modifying or amending any contract.
- Intended Decisions: to award a contract or reject the bidders.

Bid Protests

Who can file a Bid Protest?

- A bidder or proposer must be “adversely affected” to have standing.
- A protesting party must demonstrate that its substantial interest will be affected by the proposed agency action.
- For example, the second ranked bidder would have standing to challenge an intended award to the top ranked bidder.

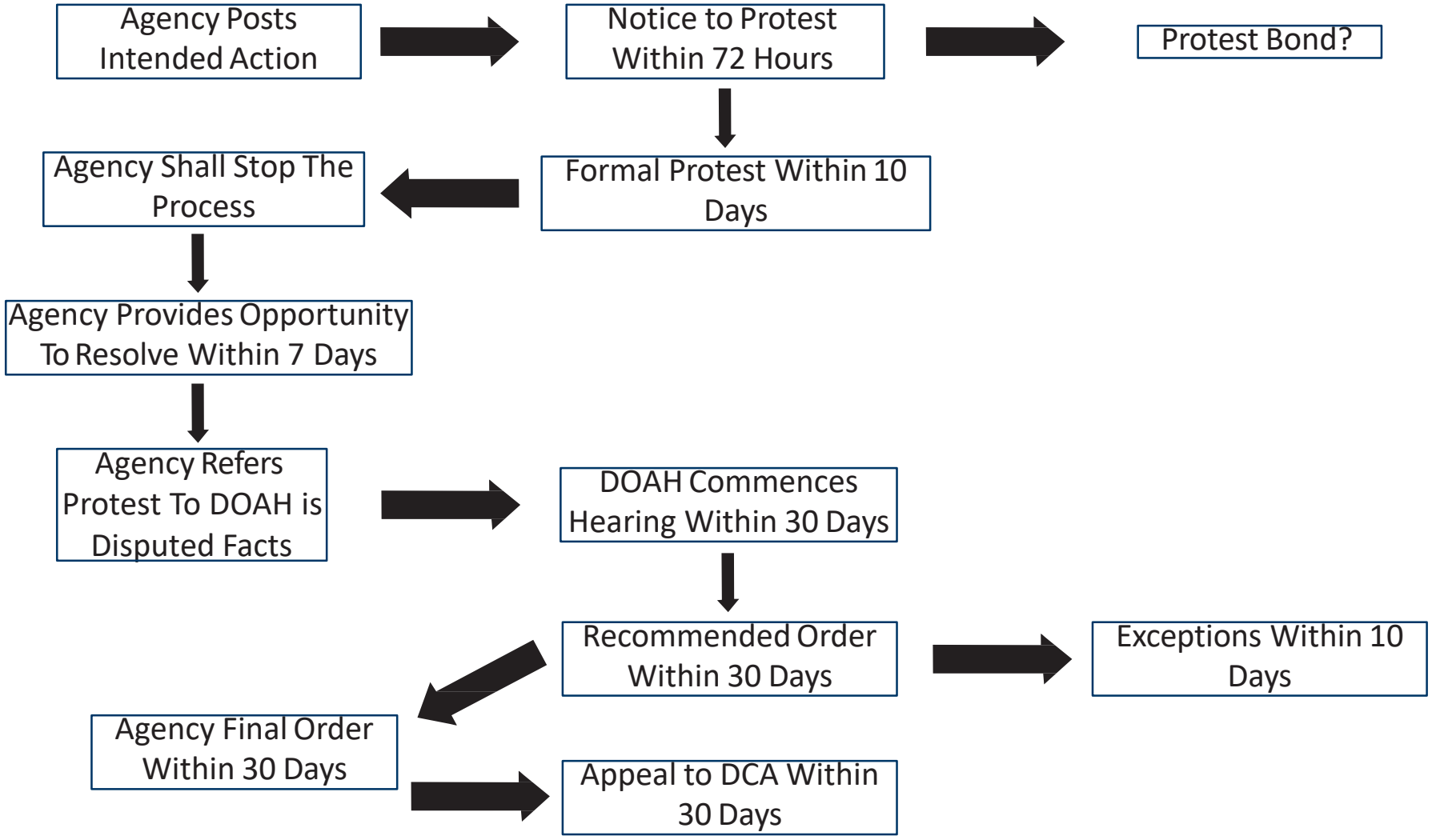
The Bid Protest Process

The Process may be explained in parts:

- Initiation of the Process
- Bid Protest Hearings
- Bid Protest Standards
- Post-Hearing Procedure



PROTEST PROCEEDINGS



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Initiation of the Process

Strict Filing Deadlines Must be Adhered to!

a) A Notice of Protest due within 72 hours of:

- Posting of the solicitation for a specification challenge.
- Posting of the notice of decision or intended decision.
- The Notice of Protest is filed with the agency and is a short and plain statement.
- Sending by mail does not extend the 72 hour period.
- Saturdays, Sundays or state holidays not included in the computation.
- Note – *hours* not days

Initiation of the Process

b) The formal written Protest must be filed with the agency within 10 days of the filing of the Notice of Protest.

- The formal written Protest or Petition must state with particularity the facts and law upon which the protest is based.
- Section 28-110.004, FAC provides a form Petition.
- Section 120.54(5)(b)4, F.S. and 28-106.201(2) FAC set forth the required information in detail.
- For example, the information includes: how the substantial interests are affected, disputed material facts, if any, legal grounds for the challenge, and the relief sought.

Initiation of the Process

c) A Protest Bond may be required.

- Petitioner must determine whether the particular agency statutes or rules require a Protest Bond.
- Section 28-110.005, FAC sets forth the requirements and form for a Protest Bond.
- If a Protest Bond is required, must confirm when it is due (i.e. with the Notice of Protest or the formal Protest Petition)



Agency Action Upon Receipt of Protest

Upon Receipt of the Formal Protest:

- The agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action.

- Unless the agency head sets forth written facts and circumstances which require continuance of the solicitation contract award process in order to avoid an immediate and serious danger to the public health, safety, or welfare.

Agency Action Upon Receipt of Protest

Upon Receipt of the Formal Protest:

- The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays and state holidays.
- If the Protest is not resolved by mutual agreement, and if there is a disputed issue of material fact, the agency shall refer the protest to DOAH.
- If there is no disputed issue of material fact, then an informal proceeding is conducted by the agency pursuant to Section 120.57(2), Florida Statutes.



Bid Protest Hearings

Once the Protest is referred to DOAH, it shall:

- Assign an administrative law judge (ALJ).
- Within 30 days of the referral, the ALJ shall commence a hearing.
- Other bidders may intervene in the protest.
- Motions to Intervene must be filed at least 20 days before the final hearing.



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Bid Protest Hearings (Cont.)

- Section 28-106.206, FAC permits the parties to obtain discovery as provided by the Florida Rules of Civil Procedure.
- Section 28-106.204, FAC permits parties to engage in motion practice.
- Hearings are less formal than Court proceedings, however, Section 120.57 and the FAC do provide guidelines and requirements.
- Proceedings are considered *de novo*, but not in the same sense as trial court actions.

Bid Protest Hearings (Cont.)

In the context of a Bid Protest Hearing, *de novo* has been interpreted to mean:

- The process by which an agency action is "evaluated, or a hybrid proceeding in which evidence is received, factual disputes are settled, legal conclusions made and prior agency action is reviewed for correctness".

Bid Protest Hearings (Cont.)

The Protesting Party maintains the burden of proof by a preponderance of the evidence.

Section 120.57(1)(b), F.S. affords parties the opportunity to:

- Present evidence.
- Argue and rebut all issues.
- Conduct cross-examination.
- Submit proposed findings of fact and orders.

Bid Protest Hearings (Cont.)

- In a Protest concerning an Invitation to Bid or Request for Proposals, submissions made after the proposal or bid opening which amend or supplement the bid or proposal will not be considered.

- In a Protest concerning an Invitation to Negotiate, submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall not be considered.

Bid Protest Hearings (Cont.)

- The formal Rules of Evidence do not apply, and hearsay evidence may be presented.

- Hearsay evidence, however, may not be used by itself to support a finding unless it would be considered admissible in Court.

Bid Protest Standards

- The ALJ must determine whether the agency's proposed action is "contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications."

- The legal standard is whether the proposed agency action was "clearly erroneous, contrary to competition, arbitrary or capricious."

Bid Protest Standards (Cont.)

- In proceedings challenging an agency's decision to reject all bids, proposals or replies, the standard is whether the agency's intended action is "illegal, arbitrary, dishonest or fraudulent."

- Florida law provides that public agency's are afforded wide discretion in the interpretation of its own rules, and those statutes which the agency is responsible for administrating.

Bid Protest Standards (Cont.)

- Such discretion, however, must be exercised based on clearly defined criteria in the bid specifications, rules or statutes.



Post-Hearing Procedure

- Following the hearing, the ALJ has 30 days in which to enter a recommended order.
- Once the written order is entered, the parties have 10 days to submit written exceptions to the order.
- Once the agency has received the recommended order, it has 30 days to enter a final order.
- The agency is not bound by the recommended order.

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Post-Hearing Procedure (Cont.)

- If the agency rejects the ALJ's findings, it must state with particularity that the findings of fact were not based upon "competent substantial evidence" or that they did not comply with the essential requirements of law.

- Judicial review of the final order is permitted pursuant to Florida Statutes, Section 120.68.

Post-Hearing Procedure (Cont.)

- Review can be sought in the district court of appeal, and pursuant to the Florida Rules of Appellate Procedure.

- An appeal does not automatically stay enforcement of the agency's decision.

Post-Hearing Procedure (Cont.)

- Pursuant to Section 120.68, the court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the form of the petition.

- Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief, it shall affirm the agency's decision.

Disciplinary Proceedings: Preliminary Process

- Florida Statutes, Section 455.225 provides the DBPR, and Boards within its jurisdiction, with the authority to conduct disciplinary proceedings.

- Pursuant to Chapter 455, the DBPR shall cause to be investigated, any complaint made in writing, signed by the complainant, and legally sufficient.

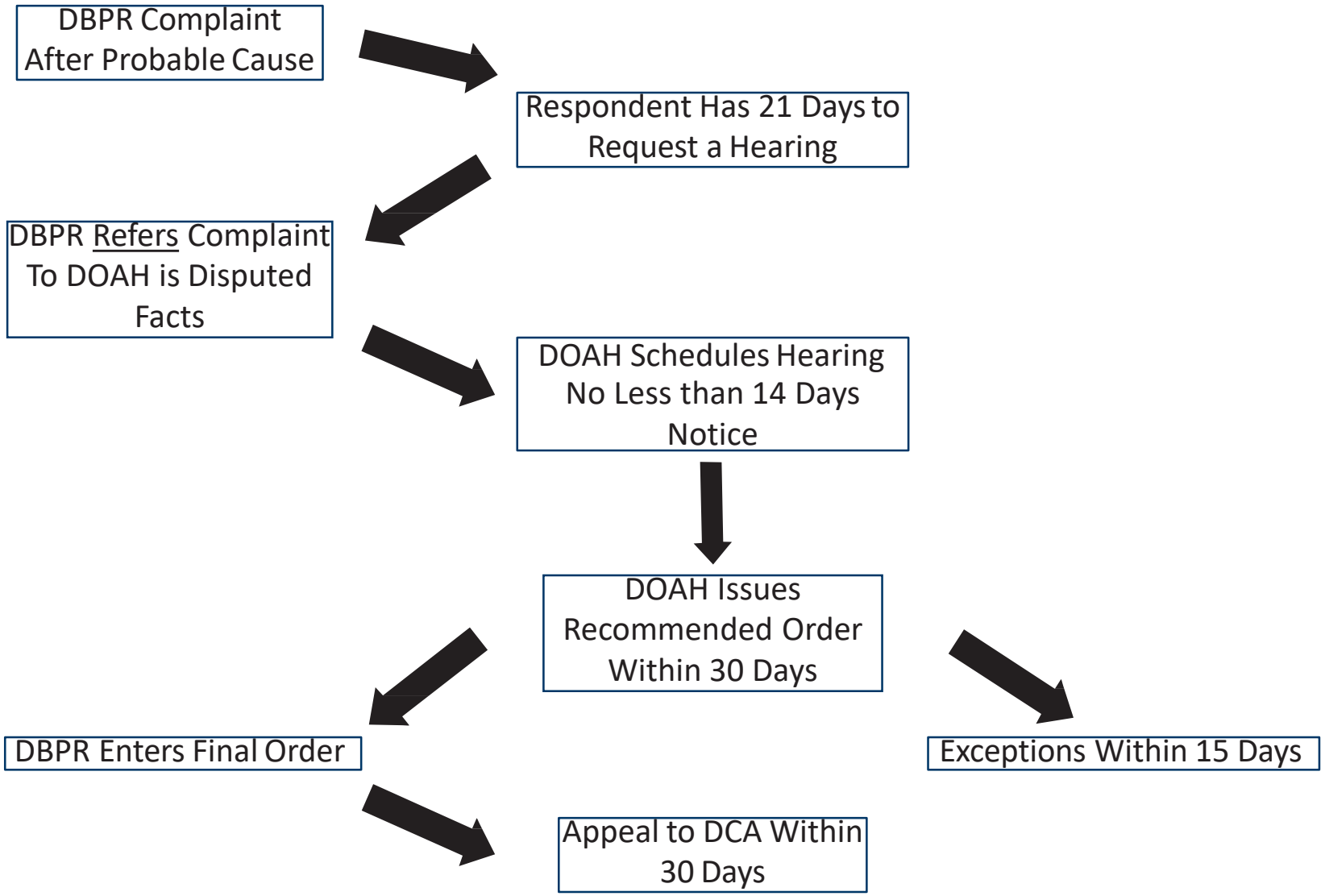
Disciplinary Proceedings: Preliminary Process (Cont.)

Provided that probable cause is found pursuant to Section 455.225(4), and the probable cause panel directs DBPR to file a formal complaint, it shall then do so pursuant to the APA.

Similar to Bid Protests, the process can be broken out into phases:

- Initiation of the Process
- Pre-Hearing Phase
- Hearing Phase
- Post Hearing Phase

DICIPLINARY PROCEEDINGS



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Initiation of the Process

- Provided probable cause was found DBPR will issue an administrative complaint.
- Pursuant to Section 120.60(5), the administrative complaint must be served by personal service or certified mail on the licensee.
- The administrative complaint must afford reasonable notice of the facts or conduct which warrant the intended action, and an adequate opportunity to request a proceeding pursuant to F.S., Sections 120.569 and 120.57.



Initiation of the Process (Cont.)

- If personal service cannot be effectuated, then service by publication is permitted.

- Section 28-106.111, FAC provides that the licensee must file a written request for a hearing within 21 days, or the right to request a hearing is waived.

Initiation of the Process (Cont.)

- If there are disputed issues of material fact, the proceeding is referred to DOAH pursuant to F.S., Section 120.57(1).

- If there are no disputed issues of material fact, the agency will handle the hearing pursuant to F.S., Section 120.57(2), in which case DBPR may hear the matter and take final action.

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Pre-Hearing Phase

- The pre-hearing phase is delineated at Section 28-106, FAC.
- If a hearing is requested and there are disputed issues of material fact, the matter will be referred to DOAH.
- DOAH will designate an ALJ, who shall rule on the request for a hearing within 15 days.

Pre-Hearing Phase (Cont.)

- On the request of DBPR, DOAH shall assign an ALJ with due regard to the expertise required for the particular matter.

- Upon referral of the administrative complaint to DOAH, DBPR shall take no further action with respect to the administrative complaint, except as a party litigant, and as long as DOAH retains jurisdiction.

Pre-Hearing Phase (Cont.)

- A licensee is not required to file an answer.

- The licensee may be represented by legal counsel, including a member of The Florida Bar or a law student certified pursuant to Chapter 11 of the rules regulating The Florida Bar, or a “qualified representative.”

Pre-Hearing Phase (Cont.)

- The ALJ shall decide whether a person is a “qualified representative”, and in accordance with factors set forth at Section 28-106.106, FAC.

- The ALJ may also consider motions for intervention, which must be filed at least 20 days prior to the final hearing.

Pre-Hearing Phase (Cont.)

Motion practice is permitted per Section 28-106.204, FAC, which provides:

- Motions shall be in writing unless made on the record during a hearing.
- Shall fully state the action requested and grounds relied upon.
- The original motion shall be filed with the ALJ.
- When time allows, other parties may respond to a motion within 7 days.

Pre-Hearing Phase (Cont.)

- Motions for Summary Final Order are not appropriate in disciplinary proceedings.

- Since DOAH only has authority to issue recommended orders in disciplinary proceedings, a party may file a motion for DOAH to relinquish jurisdiction whenever there is no genuine issue of material fact.

Pre-Hearing Phase (Cont.)

- Parties may also obtain discovery in the same manner as provided by The Florida Rules of Civil Procedure.

- The ALJ may issue orders to effectuate discovery and to prevent delay, including the imposition of sanctions except for contempt.

Pre-Hearing Phase (Cont.)

- The ALJ will determine the location of the hearing, and may direct the parties to confer for the purpose of clarifying and simplifying issues, discussing the possibilities of settlement, examining documents and other exhibits, exchanging the names and addresses of witnesses, resolving other procedural matters, and entering into a pre-hearing stipulation.

Pre-Hearing Phase (Cont.)

- Upon the request of any party, the ALJ may also enter an initial scheduling order.

- The ALJ may issue subpoenas for purposes of discovery as well as attendance of witnesses at the hearing.

Hearing Phase

- The requirements for the hearing are generally set forth at Sections 120.569(2) and 120.57(1), Florida Statutes, as well as Chapter 28-106, FAC.

- The ALJ shall set the time and place for the hearing, and shall serve written notice of at least 14 days, unless otherwise agreed by the parties or provided by law.

- Hearings are considered de novo proceedings.

Hearing Phase (Cont.)

- The DBPR has the obligation to preserve the testimony at hearings, which shall be recorded by a certified court reporter or by recording instruments.

- Any party may, at its own expense, provide a certified court reporter if the DBPR does not.

- The ALJ may grant a continuance of a hearing for good cause shown, which except for cases of emergency must be filed at least 5 days prior to the date of the hearing.

Hearing Phase (Cont.)

- The formal Rules of Evidence do not apply, and evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible.

- Hearsay may be used for the purpose of supplementing or explaining other evidence, but it shall not be admissible in itself to support a finding unless it would be admissible in a civil action.

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Hearing Phase (Cont.)

Similar to Bid Protest hearings, parties have the right to:

- Respond, to present evidence and argument on all issues involved.
- Conduct cross-examination.
- Submit rebuttal evidence.
- Submit proposed findings of facts and orders.
- File exceptions to the ALJ's recommended order.

Hearing Phase (Cont.)

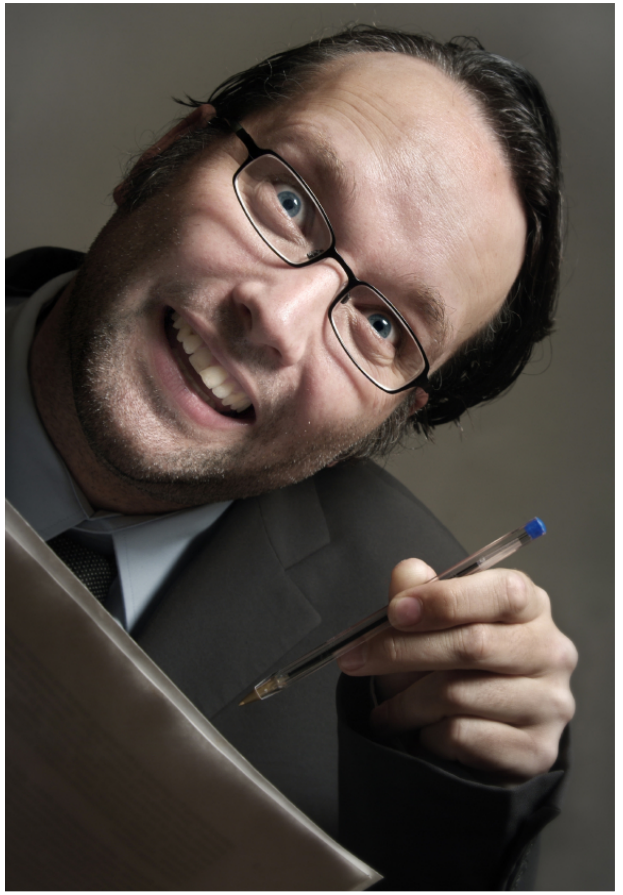
- When appropriate, the general public may be given an opportunity to present oral or written communications.

- If DBPR proposes to use such material, then all parties shall be given an opportunity to cross-examine, challenge or rebut the material.

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Hearing Phase cont.

- Similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact and issue, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.



Hearing Phase cont.

- When DBPR intends to offer evidence of other acts or offense, it must furnish notice to the licensee no fewer than 10 days before commencement of the proceeding, including a statement of the acts or offenses it intends to offer, describing them and the evidence it intends to offer with particularity.

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Hearing Phase cont.

- No such notice is required if the evidence is to be used for impeachment or rebuttal.
- The DBPR has the burden of proof by a “clear and convincing” standard.
- Attorneys fees may be imposed as a sanction pursuant to Section 120.569, F.S.

Post-Hearing Phase

- Upon completion of the hearing, the parties may submit proposed findings of fact, conclusions of law, orders, and memoranda within a time designated by the ALJ.

- Proposed orders shall be limited to 40 pages, unless authorized by the ALJ.

- The ALJ shall issue a recommended order within 30 days after the hearing or the receipt of the hearing transcript, whichever is later.

Post-Hearing Phase (Cont.)

- The recommended order shall include a statement of the issues, findings of fact and conclusions of law, and a recommendation for final agency action.

- The parties may file exceptions to the recommended order with the DBPR and within 15 days of the entry of the recommended order.

Post-Hearing Phase (Cont.)

- Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

Post-Hearing Phase (Cont.)

- Note that the failure to file exceptions may be considered a failure to preserve a legal ground for appeal.

- Responses to the exceptions may be filed by the parties within 10 days from the date the exceptions were filed with DBPR.

Post-Hearing Phase (Cont.)

- DBPR may adopt the recommended order as the final order.
- Alternatively, it may reject or modify the conclusions of law over which it has substantive jurisdiction.
- If such conclusions are rejected, DBPR must state with particularity its reasons for doing so.

Post-Hearing Phase (Cont.)

- DBPR may not reject a finding of fact unless it determines that the factual finding was not based upon competent substantial evidence or that the proceedings did not comply with the essential requirements of law.

- DBPR may also reduce or increase a recommended penalty if it states its reasons with particularity.

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Post-Hearing Phase (Cont.)

- Final orders may be appealed in accordance with Florida Statutes, Section 120.68 and pursuant to the Florida Rules of Appellate Procedure.

- Note that preliminary, procedural or intermediate orders of the DBPR or ALJ are immediately reviewable if review of the final agency decision would not provide an adequate remedy.

- The filing of an appeal does not automatically stay enforcement.

Post-Hearing Phase (Cont.)

- The court shall grant a stay as a matter of right if the final order has the effect of suspending or revoking a license, unless the court determines that a stay would constitute a probable danger to health, safety, or welfare of the state.

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Post-Hearing Phase (Cont.)

- The DBPR may also grant a stay.
- The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and shall provide whatever relief is appropriate, similar to Bid Protest appeals.

Conclusion and Questions and Answers

- The APA process is akin to truncated litigation, with strict time deadlines.

- Careful consideration must be given to the requirements of Chapter 120, as well as the regulations set forth at Chapter 28 of the Florida Administrative Code.

- Failure to file a Bid Protest or request an administrative hearing in the context of disciplinary proceedings may constitute a waiver of rights, and preclude further court intervention or review.