

Safeguarding the Professional's Right to Due Process Before the Department of Business and Professional Regulation

By Rosemary H. Hayes

Florida's Administrative Procedure Act includes a panorama of process designed to protect professionals subject to regulation. 1 Administrative proceedings relating to disciplinary matters and licensure are under the auspices of 11 boards within the jurisdiction of the Department of Business and Professional Regulation ("DBPR") and include proceedings conducted by the state Department of Administrative Hearings ("DOAH"). The purpose of this article is to explain the basics of state law applicable to those governed by the DBPR in regulatory proceedings and to encourage the protection of civil liberties through procedural due process.

Most business and civil trial attorneys have little familiarity with the detailed mechanism of Florida's Administrative Procedure Act ("APA"). A working knowledge of the APA is critical in any DBPR proceeding, whether seeking licensure or representing a professional in discipline or post-discipline probationary proceedings, which are popular with boards, but often wreak havoc for the licensee.² The APA is the skeleton for the flesh of the professional's practice act, for example, Chapter 489, Part I, governs state certified contractors. The statutory provisions are refined by board rules promulgated within the authority delegated by the legislature.³

Unchecked, the informal nature of the proceedings, combined with the prohibitive time and expense associated with enforcement of a licensee's rights, allows boards and the DBPR to proceed virtually unfettered by the constraints of the law. The results can be disastrous for the regulated individual or business entity.⁴ It is essential to chart the course of an administrative proceeding, mindful of the procedural protections in the APA.

The bulk of the author's cases arise from contractor licensing before the Construction Industry Licensing board (CILB) or the Electrical Contractor's Licensing board (ECLB), some including DOAH proceedings before an Administrative Law Judge ("ALJ"). However, having been involved in cases against realtors and accountants, with minor differences in board rules and technical trade considerations, the process is designed to take place within the limits of the regulated party's constitutional rights.

I. DISCIPLINARY CASES.

Disciplinary cases are usually the result of a consumer complaint filed with DBPR. The following basic rules apply:

- All boards are to be contacted through the DBPR by law in order to avoid a breach of the licensee's right to privacy.⁵
- The licensee is entitled to receipt of a copy of the licensing complaint against him or her within a reasonable time.⁶
- A response is due within 20-days after receipt of a copy of the consumer complaint; the response must be considered by the probable cause panel within 30-days of the conclusion of the DBPR investigation.⁷
- All information obtained by DBPR in the investigation and the licensee's response to the consumer complaint is confidential until 10-days after a finding of probable cause. The confidentiality requirement is intended to protect the licensee from the repercussions associated with unfounded complaints as well as to insure that the board, as ultimate "jury," is shielded from unsubstantiated charges and allegations that do not result in a finding of probable cause.⁸
- The probable cause panel consists of 2 or more individuals, at least one of whom is a current board member if the profession is subject to board regulation. The member that sits on the

probable cause panel is precluded from participation and voting when the case is ultimately determined on the merits by the full board.⁹

- The prosecutor may not also act as counsel for the board nor may board counsel act as the prosecutor in the case.¹⁰
- After probable cause is found, personal service of an administrative complaint that definitively sets forth *all* charges is a prerequisite to any further proceedings.¹¹
- Upon service with the administrative complaint, the licensee has 21-days to seek a formal or informal proceeding on the charges by filing his or her "election of rights" letter.¹²
- Formal proceedings are for cases where there exists an issue of fact and are conducted before DOAH.¹³
- Following a formal hearing, the ALJ is furnished with proposed orders by the parties. The ALJ prepares and submits an order and the subject has 15-days within which to register any exceptions.¹⁴
- The board, which enters a final order on the case, considers the ALJ order and any exceptions filed by the licensee; the final order is appealed directly to the District Court of Appeal in the district in which the board office is located.
- Informal proceedings are before the board and result in a final order, appealed to the District Court of Appeal.¹⁵
- If the licensee seeks a formal proceeding concerning an issue of fact, the board must forward the petition to DOAH for an administrative hearing.
- Following a formal hearing, the board may not reject the DOAH recommendation as long as there is competent evidence of record to support the ALJ's findings.
- The prosecutor before DOAH may not act as counsel to the board at the hearing to consider the ALJ's recommended order.¹⁶
- No license may be revoked or suspended in Florida in the absence of notice and hearing to the licensee; even emergency proceedings undertaken by the Secretary of DBPR must be conducted within constitutional limits.¹⁷
- In the event of violations of constitutional rights or Florida Statutes that are particularly egregious, the law provides a procedure for appeal of non-final agency action to the District Court of Appeal.¹⁸
- Beware that rights to privacy are for the benefit of the licensee and should not be used by DBPR or the board to deny the subject of a complaint information unless the emergency procedure invoked by the Secretary of the DBPR is determined to be appropriate.¹⁹
- Boards and the DBPR are notorious for exceeding the time limits for prosecution, i.e., 1-year within which to prosecute a consumer complaint, issuance of an order within 30-days after a probable cause hearing.
- A board or DBPR's tardiness can only furnish a real benefit to a licensee when actual prejudice can be established; the deadlines are not jurisdictional.²⁰
- The Florida Constitution precludes any penalty in excess of an agency's delegated authority.²¹

Finally, it is important to check the Florida Administrative Code for board rules before proceeding. If a board lacks its own rules or a rule in a particular area, there is a general set in the Florida Administrative Code, Chapter 28.

II. LICENSURE PROCEEDINGS.

Boards and the DBPR are supposed to promulgate rules that permit applicants to know and understand the requirements for licensure, published in the Florida Administrative Code.²² Indeed, even application forms must be examined before they are adopted by reference in rules. The proposed rules and forms cited therein are submitted to another state agency known as "JAPC" or Joint Administrative Procedures Committee. JAPC monitors board rulemaking to assure that it is within the legislatively delegated authority.²³

Like most of the mandates governing administrative proceedings, the rulemaking requirement is rooted in the fundamental constitutional precept of the separation of powers doctrine. The executive branch may only make law in the form of rules within the strict confines of what the legislative branch has allowed.²⁴ One of the biggest hurdles in dealing with state regulatory agencies under the DBPR umbrella is that rulemaking is often overlooked, little understood and seldom enforced for three reasons:

1. Board members are typically non-lawyers that have not been advised that the board cannot impose requirements beyond the rules (although lawyers lacking in the fundamentals of administrative procedure have been known to commit similar errors in board service);
2. Expense and concern over raising board ire result in an applicant complying with unrealistic demands out of fear of otherwise being denied licensure; and,
3. Some boards seem to view membership as a "private club" and demand applicants to furnish information and overcome hurdles while rejecting what the unambiguous law requires for the license.

Board counsel often elects to enforce non-rule "policy" to the detriment of the applicants who may or may not be licensed based on the board's whim or caprice as opposed to an analysis of legitimate qualifications.²⁵ Unfortunately, the end result of the arbitrary and capricious standards utilized by some boards in regard to applications for licensure is the defiance of the legislature's intent in crafting the DBPR and board scheme in the first instance, i.e., unfair, uncertain and illogical demands as a precursor to licensure discourage businesses and individuals from becoming properly licensed and the concomitant protection to the public by regulation of license holders.²⁶

A few important rules to remember that benefit the applicant for a professional license are as follows:

- A license may not be denied based on information that the agency did not request within 30-days of receipt of the application.²⁷
- An application for licensure must be approved or denied within 90-days after all information requested within 30-days of its filing is received by the board or within 15-days after a public hearing on the license, whichever is later.²⁸
- Once the time limit for approval or denial has passed without board action, the licensure is deemed approved by default, placing the applicant in the same position had the application been approved on the merits.²⁹
- Attorney's fees are recoverable by the licensee under a number of circumstances in proceedings with the DBPR and/or a board.³⁰

A board's universal application of rules disguised as "policy" should be subject to question.³¹ The rule may often implicate constitutional or statutory rights; the likely reason that the board has not undertaken rulemaking.³²

For example, an impermissible assertion of "policy" that occurs continuously and is demonstrated upon even a cursory review of the monthly meeting minutes and agenda of the CILB and ECLB application committees, boards seek to deny applications from otherwise qualified applicants who have filed bankruptcy. Such a policy cannot and would not pass JAPC scrutiny as it exceeds the authority delegated by the legislature and it impermissibly frustrates the federal congressional policy of a "fresh start" for a debtor.³³

III. CONCLUSION.

It is important to recognize that applicants and licensees have rights before DBPR and boards within its jurisdiction. Better understanding of the limits of permissible conduct by regulatory agencies will diminish the impermissible regulation alluded to in this article, the result of which is to discourage licensure and the

benefit to the public welfare that is supposed to go with it. Sadly and often, reputable firms minimize or forego doing business in this state or operate outside of the watchful eye of the regulation. The time is right for improvement that will result in better business and regulation for Florida.

1 Ch. 120, Fla. Stat.

2 "Profession" means any activity, occupation, profession, or vocation regulated by the department in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation. § 455.01, Fla. Stat.

3 For example, the CILB is governed by the practice at § 498.101, et. seq., Fla. Stat. The authority to promulgate rules is found in § 489.108, Fla. Stat. The board's rules are codified at Fla. Admin. Code 61G4-15.001, et. seq.

4 Go to myflorida.com and log on to DBPR's website by clicking on the "find an agency tab." By selecting professions and the Construction Industry Licensing board you can view the board's meeting minutes that demonstrate the vast number of individuals who are subject to license revocation. It is this author's opinion that very few meet the criteria for license revocation; however, they lack the resources to fight state government.

5 Art. I, §23, Fla. Cons; §§ 455.205, 455.225, Fla. Stat.

6 § 455.225, Fla. Stat.

7 *Id.*

8 *Id.*

9 §§ 455.221, 455.225, Fla. Stat.

10 § 455.221, Fla. Stat.; *Beckum v. State, Dept. of Prof'l Reg., Bd. of Optometry*, 427 So. 2d 276 (1983).

11 § 455.221, Fla. Stat.

12 §§ 120.57, 455.225, Fla. Stat.

13 §§ 120.57(1), 455.225(5), Fla. Stat.

14 § 455.213, Fla. Stat.

15 § 120.57(2), Fla. Stat.

16 § 455.221, Fla. Stat.

17 §§ 120.60, 455.225, Fla. Stat.

18 § 120.68, Fla. Stat.

19 § 120.60, Fla. Stat.

20 *Carter v. Dept. of Prof'l Reg., Bd. of Optometry*, 613 So. 2d 78 (Fla. 1st DCA 1993), review granted, 621 So. 2d 431, *approved*, 633 So. 2d 3. (DBPR's noncompliance with time limits for filing and prosecuting charges against optometrist did not require dismissal absent showing that delay prejudiced his defense.)

21 Art. I, § 18, Fla. Const. expressly limits the authority of state agency's to that granted by statute.

22 § 455.203, Fla. Stat. *See, e.g.*, 489.108, Fla. Stat.

23 Art. I, § 3, Fla. Const.; *SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 598 (Fla. 1st DCA 2000).

24 § 120.54, Fla. Stat.

25 For one example, the Construction Industry Licensing board publishes forms on its website that have never been subject to JAPC review. The applications request information that far exceeds what is permissible by Florida Statutes and the forms contravene requirements set forth in the CILB's promulgated rules, e.g., the rules permit a line of credit to establish net worth, the application forms demand 3-months bank statements showing a cash balance of \$20,000.00. The CILB circumvents the watchful eye of JAPC, where the forms would never be approved as an exercise of delegated legislative authority, by not submitting the forms for consideration and refusing to accept the legally permissible forms cited in the board's adopted rules.

26 Using the regulation of the construction industry as an example: The Legislature deems it necessary in the interest of the public health, safety, and welfare to regulate the construction industry. § 489.101, Fla. Stat. It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established in law. Fines and other penalties are provided in order to ensure

compliance; however, the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with state laws and local jurisdiction ordinances. A notice of noncompliance should not be accompanied with a fine or other disciplinary penalty. It should identify the specific ordinance that is being violated, provide information on how to comply with the ordinance, and specify a reasonable time for the violator to comply with the ordinance. § 489.113, Fla. Stat. This regulation seeks to enable qualified persons to obtain licensure, while ensuring that applicants have sufficient technical experience in the applicable trade prior to licensure, are tested on technical and business matters, and upon licensure are made subject to disciplinary procedures and effective policing of the profession. § 489.501, Fla. Stat.

27§ 120.60, Fla. Stat.

28*Id.*

29 *World Bank v. Lewis*, 425 So. 2d 77 (Fla. 1st DCA 1982).

30§§ 57.111, 120.595, Fla. Stat.; See *Security Mut. Life Ins. Co. of Lincoln, Neb. v. Dept. of Ins.*, 707 So. 2d 929 (Fla. 1st DCA 1998) (attorney's fees awarded in rule challenge proceeding.)

31§ 120.54, Fla. Stat.

32"Neither the department nor any board may create unreasonably restrictive and extraordinary standards that deter qualified persons from entering the various professions." § 455.201, Fla. Stat.

33 11 U.S.C. § 525 See Op. Att'y Gen., 1982 WL 174203, at *1.