

Practicing Before DOAH Frederick L. Aschauer, Jr.

Pre-hearing practice

November 3, 2017



LLW

**LEWIS
LONGMAN
WALKER**

Follow the Yellow Brick Road



Prepare your case

Private practitioner

- Gather facts
- Gather law
- Pick experts
- Prepare petition/
outline case

Agency lawyer

- Gather facts
- Gather law
- Pick experts
- Prepare administrative
complaint/outline case



The petition

“Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b).” 120.569(2)(c), Florida Statutes.

Rules 28-106.201, Florida Administrative Code states:

(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency’s file or identification number, if known;

(b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner’s representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner’s substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency’s proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency’s proposed action.



The administrative complaint*

(4) The agency's administrative complaint shall contain:

(a) The name of the agency, the respondent or respondents against whom disciplinary action is sought and a file number.

(b) The statutory section(s), rule(s) of the Florida Administrative Code, or the agency order alleged to have been violated.

(c) The facts or conduct relied on to establish the violation.

(d) A statement that the respondent has the right to request a hearing to be conducted in accordance with Sections 120.569 and 120.57, F.S., and to be represented by counsel or other qualified representative.

(5) Requests for hearing filed by the respondent in accordance with this rule shall include:

(a) The name, address, any e-mail address, telephone number, and facsimile number, if any, of the respondent, if the respondent is not represented by an attorney or qualified representative.

(b) The name, address, e-mail address, telephone number, and facsimile number of the attorney or qualified representative of the respondent, if any, upon whom service of pleadings and other papers shall be made.

(c) A statement requesting an administrative hearing identifying those material facts that are in dispute. If there are none, the petition must so indicate.

(d) A statement of when the respondent received notice of the administrative complaint.

(e) A statement including the file number to the administrative complaint.

28-106.2015, Florida Administrative Code

*There's too much information on this slide.



Don't be a Scarecrow – use your brain and avoid dismissal

- “Upon the receipt of a petition or request for hearing, the agency *shall carefully* review the petition to determine if it contains all of the required information. A petition *shall be dismissed* if it is not in substantial compliance with these requirements or it has been untimely filed.”

120.569(2)(c), Florida Statutes



How to avoid being the Scarecrow

Answer the following question correctly to avoiding being the Scarecrow.

If I only had a

- A. a brain
- B. a dime for every time some said “if I only had a brain” while walking by me
- C. properly pled petition

Follow the Yellow Brick Road



The simple things

(a) The name and address of each agency affected and each agency's file or identification number, if known;

...

(c) A statement of when and how the petitioner received notice of the agency decision;



Standing

(b) The [contact information] of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the [contact information] of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and **an explanation of how the petitioner's substantial interests will be affected by the agency determination;**



Are you a party?

“Party” is defined in section 120.52, Florida Statutes:

(13)(a) You’ve been named.

(13)(b) It’s my constitutional right!

(13)(c) Because I said so.

(13)(d) Local group.



Are you a third party?

“We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.”

Guess the case



Me and my friends like to party!

“To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are ‘substantially affected’ by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.”

GUESS THE CASE



Rule challenge

“To establish standing under the ‘substantially affected’ test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated.”

Office of Ins. Reg. and Fin. Serv. Comm’n v. Secure Enterprises, LLC, 124 So. 3d 332 (Fla. 1st DCA 2013)



Just the facts (yes, I know that's not a Wizard of Oz reference)

- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

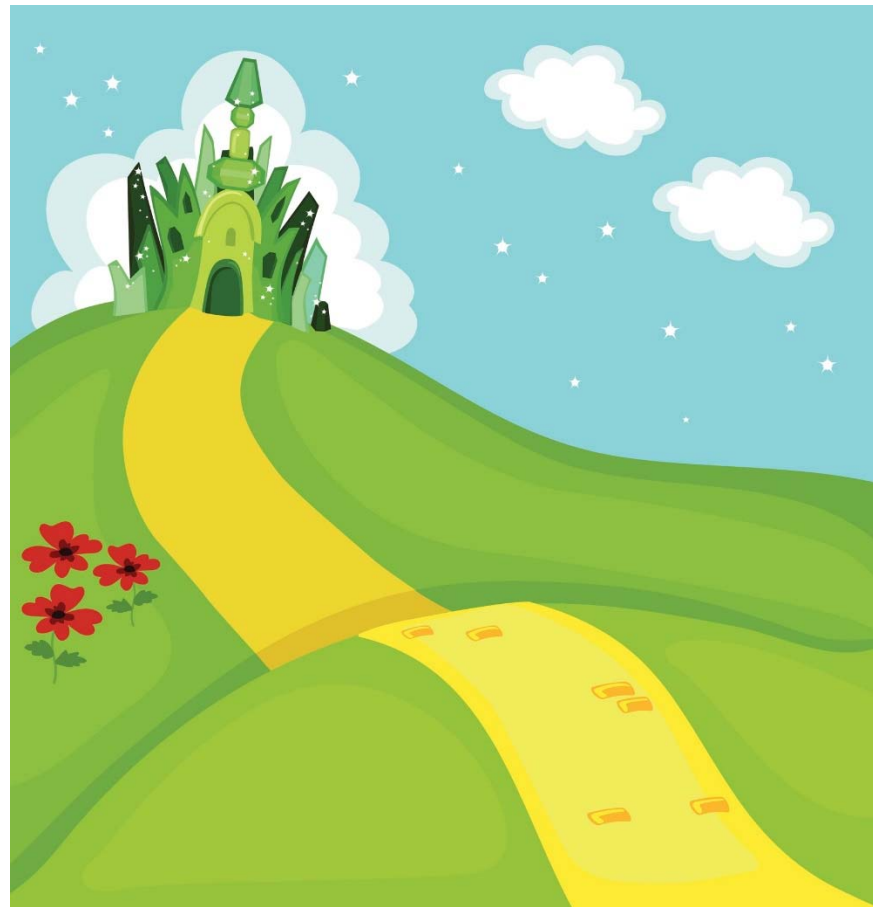


What are the rules?

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes



We can see Oz from here



You have to ask the All Powerful Oz

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.



You need to get the witch's broom



What if my petition has been dismissed?

- “Dismissal of a petition shall, at least once, be *without prejudice* ... unless it *conclusively appears* from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable.”

120.569(2)(c), Florida Statutes



Caselaw on dismissal

“[I]t is fair to narrow the factual matters in dispute and alert the agency to the undisputed aspects of the charges at issue.”

Brookwood Extended Care Ctr. v. Agency for Healthcare, 870 So. 2d 834 (Fla. 3d DCA 2003)



Caselaw on dismissal cont'd

- Court upheld DEP's decision to dismiss petition because petitioner failed to demonstrate standing.
- At issue was whether the type of action was subject to APA challenge.

Herbits v. Bd. Of Trustees of Internal Improvement Trust Fund, 195 So.3d 1149 (Fla. 1st DCA)



Caselaw on dismissal cont'd

- Agency dismissed without “second bite of the apple”
- Contractual rights were not enough to demonstrate an injury-in-fact in a challenge to an environmental resource permit.

Village of Key Biscayne v. Dep't of Env'tl. Prot., 206 So.3d 788 (Fla. 3d DCA 2016)



Caselaw on dismissal cont'd

“There is no stated authority for an agency to dismiss some, but not all, of a petition based on the agency's view of the merits of the items or information in the petition. An agency's disagreement with items and information in a petition is not grounds to dismiss parts of a petition before it is referred to the Division.”

Martin County et al. v. All Aboard Fla. et al., Case Nos. 16-5718 & 17-2566 (DOAH May 24, 2017)



Caselaw on dismissal cont'd

“Florida Administrative Code Rule 28-106.201(2) requires a petition for hearing to include ‘specific facts’ and ‘an explanation of how the alleged facts relate’ to the rules and statutes the petitioner contends require reversal of the agency action. These requirements are not satisfied by an allegation such as ‘the proposed project will adversely affect endangered species and rule ‘x’ prohibits activities that adversely affect endangered species.’ Rule 28-106.201(2) requires, in this example, that the petition identify the endangered species and explain how they will be adversely affected.”

Dimare Fresh, Inc. v. Mosaic Fertilizer, LLC and Dep’t of Env’tl. Prot., Case Nos. 17-0671 & 17-0672 (DOAH Feb. 9, 2017)



Discovery

“After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure.” Rule 28-106.206, Florida Administrative Code

“[M]atters admitted during discovery in administrative litigation can furnish the basis for a finding of fact.” Twin City Roofing Const. Specialists, Inc. v. State, Dep't of Fin. Servs., 969 So. 2d 563, 565 (Fla. 1st DCA 2007)

“Trial by ambush is distant history” Northup v. Acken, 865 So.2d 1267 (Fla. 2004)



Speaking with the witness during a break

- “There is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition. If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected.” Haskell Co. v. Georgia Pac. Corp., 684 So. 2d 297 (Fla. 5th DCA 1996)
- “[W]e also explicitly hold that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery.” Northup v. Acken, 865 So.2d 1267 (Fla. 2004)



You might get a second bite at the apple

“As a matter of law, a party is not limited to ‘one chance’ to take a deposition.” Beekie v. Morgan, 751 So. 2d 694 (Fla. 5th DCA 2000)

“Nothing in the Florida Rules of Civil Procedure forbids a second discovery deposition.” Medina v. Yoder Auto Sales, Inc., 743 So.2d 621 (Fla. 2d DCA 1999)



Non-testifying experts

“Additionally, if an expert has been hired to conduct an investigation in anticipation of litigation, his reports and memoranda constitute materials compiled in preparation for trial. Therefore, he cannot properly be required to reveal the findings relevant to his investigation, absent proof of the adverse party's need and inability to obtain the materials without undue hardship.” Wackenhut Corp. v. Crant-Heinsz Enterprises, Inc., 451 So.2d 900 (Fla. 2d DCA 1984)

Quoting Morgan v. Tracy, 604 So.2d 15 (Fla. 4th DCA 1992), the court states: “We also conclude that petitioners’ initial listing of the expert on their trial witness list did not constitute a waiver of the work product privilege. Now that petitioners have withdrawn the expert’s name from their trial witness list, respondent cannot depose the expert absent a showing of exceptional circumstances.” Bailey v. Miami-Dade County, 186 So.3d 1044 (Fla. 3rd DCA 2015)



Pre-hearing preparation is awesome

- Things not discussed –
 - Motion to Exclude Dr. Heknowstoomuch
 - The Battle of Those are Unacceptable Objections
 - To home rule or not
 - Preserving testimony
 - Etc.
- The presentation of your case depends on your diligence during the time leading up to the hearing
- 50% v 100% rule



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